Champion Parts Rebuilders, Inc., Northeast Division *and* International Brotherhood of Electrical Workers, Local 1592, AFL-CIO *and* Leona J. Peters. Cases 6-CA-13048, 6-CA-13464, and 6-CA-13267

March 8, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 11, 1981, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed an answering brief to General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(3) and (1) of the Act by issuing warning notices to Barry Hill, Henry Longo, and Bertha Martin in order to discourage union activity. However, for the reasons set forth below, we find, contrary to the Administrative Law Judge, that Respondent also violated Section 8(a)(3) and (1) by discharging employee Leona Peters and violated Section 8(a)(1), (3), and (5) by altering certain established practices pertaining to telephone and photocopying practices.

1. The discharge of Leona J. Peters

The credited testimony establishes that from November 1978 to the time of her discharge on February 25, 1980, employee Peters filed five grievances under the contractual grievance procedure. More particularly, in November 1978, Peters filed a grievance alleging that her immediate supervisor, Calvin Allen, had directed abusive language at her. Peters' credited testimony establishes that within hours after settlement of this grievance, in a manner favorable to Peters, Allen informed her that "he would get me for reporting him." Within the following 2 months, Peters filed two additional grievances, one of which was also settled favorably for Peters and concerned Supervisor Allen's improper issuance of a warning notice. In March 1979, Peters filed another grievance, alleging that

[1] The Administrative Law Judge found that Respondent violated Sec. 8(a)(1) and (3) of the Act by issuing warning notices to employees Henry Longo and Bertha Martin on January 8, 1980, allegedly for talking during working time without performing work, but in actuality because of Longo's status and protected activities as union vice president. At the hearing, however, the Administrative Law Judge refused to permit Respondent to introduce evidence in the form of warning notices previously issued to other employees for engaging in similar misconduct during working time. While we find merit to Respondent's exception to the Administrative Law Judge's ruling, inasmuch as such notices are relevant to whether Respondent maintains an established, nondiscriminatory practice of issuing such warnings, we remain persuaded that the exclusion of these previously issued warning notices was not prejudicial and, therefore, we adopt the Administrative Law Judge's findings and conclusions that the notices issued to Longo and Martin violated the Act. Thus, even assuming that Respondent has maintained and enforced such a policy for valid nondiscriminatory reasons in the past and that the warnings issued to Longo and Martin thus were not unprecedented, we agree with the Administrative Law Judge that Respondent's prolonged observation of the conversation between Longo and Martin without instructing them to return to work, as well as Vice President Donald Savini's remark to Department Supervisor Calvin Allen, "shit, write them up anyway," following Allen's report of Longo and Martin's explanation for their conduct, is indicative that these employees would not have been disciplined in the absence of Longo's union status and activities. Accordingly, we adopt the Administrative Law Judge's finding that these warning notices violated the Act.

[2] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III,B, of his Decision, the Administrative Law Judge inadvertently referred to employee Martin as working at the Bobbie Brooks plant, whereas the record reflects that Martin worked at the Pennsylvania Avenue plant where the events in question occurred. This inadvertent error does not affect the outcome of our Decision.

[3] While we agree with the Administrative Law Judge's conclusion that Supervisor Calvin Allen's remarks to Henry Longo on January 11, 1980, did not violate the Act, we do not rely on the Administrative Law Judge's finding that Longo's grievance-filing activity was unprotected because it was "malicious and a decided abuse of the grievance procedure." Contrary to the Administrative Law Judge, we find no record evidence to support a finding that Longo's grievance was undertaken maliciously or in bad faith. Rather, in finding Longo's activity to be unprotected, we rely solely on the absence of evidence establishing that the matter raised in the grievances, the alleged failure of Respondent's vice president, Savini, to wear safety glasses in the plant, had any direct or reasonably foreseeable impact upon terms and conditions of employment of unit employees. Thus, any risk created by Savini's alleged failure to wear safety glasses apparently affected only himself and only remotely, if at all, unit employees. In view of these circumstances, and in the absence of record evidence warranting the inference of such an impact upon terms and conditions of employment, we find that Longo's grievance-filing activity in this regard was not protected. Accordingly, even assuming that Allen's remarks constituted a threat of discipline attributable to such grievance activity, we find that his remarks to Longo did not violate the Act.

Supervisor Donald D'Arco was performing bargaining unit work. According to Peters' credited testimony, Allen approached Peters shortly thereafter and informed her that he (Allen) could have gotten her in a lot of trouble, that everyone was now watching her, and that it was not right that she had filed a grievance against Supervisor D'Arco. Later that same month, Allen told Peters that the Union was using her for a "guinea pig" and that Peters would be "gone" if she did not "wake up." Further, in September 1979, Allen informed Union Vice President Longo that Respondent would not pay certain vacation benefits to Peters because Peters "had charges against the company with the Labor Board, and she was also suing them . . . . and that she could go to hell."

In October 1979, Peters returned to work following an authorized 5-month medical absence. Upon her return, Respondent and the Union reached an agreement wherein Peters was permitted to perform work while sitting down due to her medical condition. On January 29, 1980,[4] Peters requested that Supervisor Allen permit her to perform certain work while sitting down, at which time Allen stated to Peters that she should not have been hired in the first place, that she was not fit to work, and that, if it were up to Allen, Peters would not get workmen's compensation and would have been fired long ago. Thereafter, during the first week of February, the credited testimony establishes that Allen asked Peters, "when are you going to wake up and quit filing so many grievances—and wake up to what the company can do for you, instead of being so much for the Union." Peters replied, "probably never," to which Allen responded that Peters would end up getting fired if she did not. On February 8, Peters filed another grievance against Allen, alleging harassment.

On February 20, 21, and 22, Peters was absent from work because of illness. Peters telephoned Respondent on February 20 and 22 and stated that she would not be reporting for work. Peters also drove to the plant on February 22 on two occasions to secure a medical leave of absence and to pick up her paycheck, but was unsuccessful in locating the employee service clerk responsible for issuance of such leave. On Monday, February 25, Peters reported for work at her scheduled work shift, at which time Supervisor Allen immediately asked Peters if she had secured a medical leave of absence. Upon being informed that she had not, Allen initially stated to Peters that she would probably be terminated and took Peters to Plant Superintendent Ronald Rupert. Rupert stated to Peters and Allen, "she's all right Calvin, she called in," and instructed Peters to go back to work. However, later that day, Rupert informed Peters that she was being terminated and remarked to Union Vice President Longo that he (Rupert) and Allen had a "misunderstanding" concerning Peters' employment status.

The Administrative Law Judge concluded that, while Respondent had evinced hostility to the grievance-filing activities of Peters, her discharge was not attributable to such activities. The Administrative Law Judge based this finding primarily upon evidence of Respondent's purported uniform enforcement of a written, published rule that:

> On the employee's third day off work, he/she must call the employee service clerk and request a medical leave of absence . . . . Any employee not abiding by the above will be subject to disciplinary action, up to and including discharge.

The evidence is clear, however, that Respondent's application in the past of the foregoing rule concerned instances where the employee in question was absent for *more* than 3 days and, unlike Peters, needed to secure a medical leave of absence to cover the fourth day of absence. Moreover, the evidence establishes that the foregoing rule was promulgated pursuant to the following provision of the governing bargaining agreement:

> 1. Loss of seniority—an employee's seniority shall be lost and he will no longer be an employee of the Company for the following reasons:
>
> * * * * *
>
> (n) He is absent from work for *more than* three (3) consecutive work days without getting a written leave of absence. [Emphasis supplied.]

Accordingly, the Administrative Law Judge's reliance upon Respondent's enforcement of the rule to demonstrate that employees similarly situated to Peters have been discharged in the past for the same conduct is erroneous inasmuch as there is no evidence that the rule has ever been applied to discipline an employee who was not absent for "more than" 3 consecutive workdays.

Contrary to the Administrative Law Judge, we are persuaded that Respondent's discharge of Peters was discriminatory and violated the Act. Thus, the credited testimony clearly establishes that Respondent, and particularly Supervisor Allen, displayed considerable hostility toward Peters because of her filing of numerous grievances. Most

[4] All dates hereinafter are in 1980, unless noted otherwise.

recently, in early February 1980, Allen informed Peters that she would be fired if she did not "quit filing so many grievances." Shortly thereafter, Peters filed another grievance concerning Allen and, 2 weeks later, Peters was, in fact, discharged. In our view, the only reasonable inference to be drawn is that Respondent acted true to its word and that Peters' filing of grievances was a motivating factor in Respondent's decision to discharge her. In addition to Respondent's animus toward Peters' filing of grievances and the timing of the discharge in relation to Respondent's most recent expression of animus and Peters' filing of another grievance, we also find of significance Respondent's abrupt departure from Plant Superintendent Rupert's initial indication that Peters had done nothing improper because she had called in during her absence. Rupert's subsequent comment to Longo that he and Supervisor Allen had a "misunderstanding" is especially suspect in light of Allen's particular animus toward Peters' grievance filing and tends to demonstrate that Allen played a significant role in effectuating Rupert's change of mind and the ultimate decision to discharge Peters.[5] Further, inasmuch as no probative evidence was presented that employees similarly situated to Peters have been discharged in the past, we conclude that Respondent has failed to meet its burden of establishing that Peters would have been discharged even in the absence of her protected activities. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). Accordingly, we find that Respondent in discharging Peters violated Section 8(a)(3) and (1) of the Act.[6]

2. Changes in telephone and photocopying practices

The credited testimony establishes that Respondent has maintained a practice whereby Union Vice President Longo, as well as other union officials, has been permitted to use Respondent's interplant telephone system to contact the Union's president regarding grievances and emergencies. Pursuant to this policy, Longo may request a supervisor to call the supervisor of the union president, who will then permit the president to return the call as soon as possible. Respondent has also maintained a policy of permitting the Union, upon request, to photocopy documents, such as grievances, on plant premises. Pursuant to this policy, the Union may present such documents to a supervisor who, in turn, performs the photocopying and returns the documents to the union representative.

On January 10, Longo asked Supervisor Allen to telephone the union president regarding a grievance over payment of wages to two unit employees. Allen refused Longo's request and made apparent reference to Longo's causing "trouble" for Allen. Later that day, Union Steward Steve Workman, at Longo's instruction, asked Plant Superintendent Rupert to photocopy the Union's grievances concerning the warning notices issued to Longo and employee Martin on January 8. Just as Allen had denied Longo's request for telephone privileges, Rupert summarily denied Workman's request to photocopy the documents. In addition, commencing January 28, Respondent admittedly changed its photocopying procedure by requiring employees desiring to photocopy doctors' excuses to present such documents directly to their supervisors for photocopying, thereby bypassing the union steward who formerly had the role of receiving the document in the first instance and transmitting it to the supervisor for photocopying.

The Administrative Law Judge dismissed allegations that the foregoing conduct by Respondent was discriminatorily motivated in violation of Section 8(a)(3) and (1) and constituted unilateral changes in terms and conditions of employment in violation of Section 8(a)(5) and (1). The Administrative Law Judge did so on the basis that the single refusals of Allen and Rupert regarding telephone and photocopying practices, respectively, were insufficient to constitute violations of the Act and that, with respect to the admitted change in photocopying of doctors' excuses, the Union failed to object to the change and thereby presumably waived its right to bargain. We disagree. We note that the January 10 refusals on the part of Allen and Rupert occurred only 2 days following Allen's discriminatory issuance of warning notices to Longo and employee Martin. Moreover, the record reveals no credible business justification for the refusals of January 10.[7] Accordingly, we find that the refusals on that date were discriminatory and in violation of Section 8(a)(3) and (1) of the Act. In addition, we find that the refusals violated Section 8(a)(5) and (1) inasmuch as Respondent's conduct constituted changes in established conditions of employment without affording the Union an opportu-

[5] For this reason, we reject the Administrative Law Judge's explanation for the "confusion" between Rupert and Allen as to the proper action to be taken.

[6] In view of our finding that the discharge of Peters was unlawful, we find it unnecessary to pass on the General Counsel's exception to the Administrative Law Judge's dismissal of the 8(a)(4) allegation pertaining to Peters.

[7] We specifically reject the Administrative Law Judge's characterizations of the Union's requests as "baiting a trap" and "a tactic in a campaign of vindictiveness" toward Respondent insofar as such characterizations may have been relied upon to justify Respondent's conduct.

nity to bargain.[8] Finally, we find that the admitted change in bypassing the steward in the photocopying of doctors' excuses also violated Section 8(a)(5) and (1). Unlike our holding in *Citizens National Bank of Willmar*, 245 NLRB 389 (1979), relied upon by the Administrative Law Judge to support his finding herein, there is no record evidence that the Union had sufficient notice of an intended change in the photocopying practice prior to its implementation to place upon it the burden of demanding bargaining. See *M. A. Harrison Manufacturing Company, Inc.*, 253 NLRB 675 (1980).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing warning notices to Henry Longo and Bertha Martin on January 8, 1980, in order to discourage their union activity or in order to interfere with, restrain, or coerce those employees in the exercise of their Section 7 rights, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By issuing warning notices to employee Barry Hill on April 29 and 30, 1980, in order to interfere with, restrain, or coerce Hill in the exercise of his rights guaranteed by Section 7 of the Act and in order to discourage his union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By discharging Leona J. Peters because she engaged in union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By discriminatorily implementing changes in its established practices pertaining to telephone use and photocopying by union representatives, on January 10, 1980, in order to discourage the exercise of union and protected concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By unilaterally implementing changes in its established practices pertaining to telephone use and photocopying by union representatives on January 10, 1980, and in its photocopying practice on January 28, 1980, without bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The General Counsel has failed to establish by a preponderance of the evidence that Respondent has otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act.

We shall order that Respondent offer Leona J. Peters immediate and full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed. Moreover, we shall order that Respondent make her whole for any loss of earnings she may have suffered as a consequence of the discrimination against her by payment to her of a sum equal to what she would have earned, less net earnings, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950). Interest on the backpay shall be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Champion Parts Rebuilders, Inc., Northeast Division, Lock Haven, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Issuing warning notices to employees in order to interfere with their exercise of the rights guaranteed by Section 7 of the Act or in order to discourage activity on behalf of the Union.

(b) Discharging or otherwise discriminating against employees for engaging in union activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(c) Implementing changes in established practices pertaining to telephone and photocopying by union representatives in order to discourage the exercise of union and other concerted activities for the purpose of collective bargaining or other mutual aid or

[8] While the Administrative Law Judge credited testimony proffered by Respondent that the Union has continued to utilize the previously existing telephone and photocopying practices subsequent to January 10, such a finding has no bearing upon the lawfulness of Respondent's abandonment of those conditions of employment on that date.

[9] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

protection, and without affording the Union an opportunity to bargain over such changes.

(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 action designed to effectuate the policies of the Act:

(a) Expunge from their respective personnel and all other files the warning notices issued to employees Bertha Martin and Henry Longo on January 10, 1980, and the warning notices issued to employee Barry Hill on April 29 and 30, 1980.

(b) Offer Leona J. Peters immediate and full reinstatement to her former position or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered as a result of the discrimination against her in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Revoke any unilateral change pertaining to photocopying of doctors' excuses discontinued on January 28, 1980, until such time as Respondent negotiates with the Union in good faith until agreement or an impasse in negotiations is reached.[10]

(e) Post at its plants in Lock Haven and Mill Hall, Pennsylvania, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[10] In view of our adoption of the Administrative Law Judge's finding that Respondent's other telephone and photocopying practices have not been discontinued subsequent to January 10, 1980, we will not order Respondent to take any other affirmative action in this regard.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

WE WILL NOT issue warning notices to employees because they have engaged in activities protected by Section 7 of the Act and/or in order to discourage their membership in or activity on behalf of International Brotherhood of Electrical Workers, Local 1592, AFL-CIO.

WE WILL NOT discharge or otherwise discriminate against employees because they have engaged in activities protected by Section 7 of the Act and/or in order to discourage their membership in or activity on behalf of International Brotherhood of Electrical Workers, Local 1592, AFL-CIO.

WE WILL NOT discriminatorily implement changes in established practices pertaining to telephone use and photocopying by union representatives in order to discourage membership in or activity on behalf of International Brotherhood of Electrical Workers, Local 1592, AFL-CIO, and/or the exercise of activities protected by Section 7 of the Act.

WE WILL NOT unilaterally implement changes in established practices pertaining to telephone use and photocopying by union representatives without bargaining with International Brotherhood of Electrical Workers, Local 1592, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL expunge from their respective personnel files, and all other files, the warning notices issued to Henry Longo and Bertha Martin on January 8 and the warning notices issued to Barry Hill on April 29 and 30, 1980.

WE WILL offer Leona J. Peters full and immediate reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and WE WILL make her whole for any loss of earnings she may have suffered as a result of our discrimination against her, with interest thereon.

WE WILL, upon request by the above-named Union, revoke any unilateral change pertaining

to photocopying of doctors' excuses until such time as we negotiate with the Union in good faith until agreement or an impasse in negotiations is reached.

CHAMPION PARTS REBUILDERS, INC., NORTHEAST DIVISION

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: Upon charges filed by International Brotherhood of Electrical Workers, Local 1592, AFL-CIO (herein called the Union), and Leona J. Peters, an individual, against Champion Parts Rebuilders, Inc., Northeast Division (herein called Respondent), the General Counsel issued a complaint alleging violations of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer to the complaint denying commission of any unfair labor practices. Hearing was held before me on July 17 and 18, 1980.[1] The General Counsel and Respondent have filed briefs which have been carefully considered.

Upon the entire record and from my observation of the demeanor of the witnesses and the inherent probabilities and improbabilities of the testimony of each witness, I make the following findings and conclusions:

I. THE OPERATIONS OF RESPONDENT

Respondent is and has been at all times material herein engaged in the manufacture and repair and wholesale distribution of automobile parts. Solely involved in this proceeding are Respondent's plants in Lock Haven and Mill Hall, Pennsylvania. During the 12-month period immediately preceding the issuance of the complaint herein, in the course and conduct of said operations, Respondent shipped goods and materials valued in excess of $50,000 directly from said Pennsylvania facilities to points located outside the Commonwealth of Pennsylvania. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is engaged in the remanufacture of automotive parts for nonretail distribution. Although it has many plants throughout the country, solely involved in this proceeding are Respondent's three plants of its northeast division. Two of these plants are located in Mill Hall, Pennsylvania; one on Water Street and one on Pennsylvania Avenue. The third is located in Lock Haven, Pennsylvania, and is often referred to as the Bobbie Brooks plant. Division manager is James Cameron; reporting immediately to Cameron is Operations Manager Charles Bowers. Under Cameron and Bowers are the respective plant managers, James Cottel at the Bobbie Brooks plant, Bruce Williams at Water Street, and Ron Rupert at the Pennsylvania Avenue plant. Cameron reports to Vice President of Manufacturing Donald Savini and Company President Charles Schwartz, both of whom are headquartered in Respondent's main office in Chicago. There are approximately 325 production employees in the northeast division all of whom have been represented by the Union for the past 30 years.

In April 1977, through internal union procedures, the president and apparently several other officers of the Union were ousted from office. They were replaced by other individuals including Michael Smith and Henry Longo, president and vice president, respectively. Smith testified that the ousted officers were rejected by the employees because they were "company men." Whatever the reason, it is undisputed that the new officials were far more militant than their predecessors. From the first of 1969 through April 28, 1977, there were 53 grievances and no unfair labor practice charges filed. However, from that date until the hearing date, 210 grievances and 18 Board charges were filed by individuals and/or the Union, principally by Longo.

Whether these grievances and charges have had any bases or not, it is clear that they have engendered animosity on the part of Respondent's management as is undisputed and/or found herein. For example: (1) Cameron stated simply that he hates Henry Longo; (2) Cottel has asked Smith at least four times to get rid of union steward Barry Hill; (3) on January 11, Savini told Smith that Longo was the "number one problem" in the plant and if Longo were removed so would the problems at the plant; and (4) as found herein, Savini ordered the issuance of a warning notice for Longo simply because of his status and activities as vice president of the Union. The General Counsel attempted to adduce other evidence of animosity on the part of Respondent, but I rejected such proof as it preceded the date of, and was within the purview of, a settlement agreement which had been approved by the Regional Director, and that agreement had not been set aside.

On the other hand the Union has made clear that it, in turn, holds hostility toward management. For example: (1) Smith has told Cameron to his face and in writing that he is an "ignorant ass hole of a plant manager"; that he is the "biggest fool of them all"; that "it would be so beautiful making a big ass out of you"; that he had "told them at the union meeting that you are out of your goddamn mind"; that he could not believe that Champion was wasting millions of dollars on a plant run by Cameron; that "its tough shit if you can't handle your job"; and that "I guess you just want these employees to work for your grateful nigger wages." (2) When invited to participate in the ground breaking ceremony of a new plant which Respondent is building to replace the two Mill Hall plants, the Union not only refused to participate but

[1] All dates are in 1980 unless otherwise specified.

also issued press releases vilifying the management to the public stating: "We will not be used as a public relations tool by the company to promote the false impression to the general public and our members that the current relationship between the company and the IBEW is friendly and cooperative. We also do not want the company to distort this refusal to attend their ceremony and create a negative public impression of organized labor." The press release was circulated to the local newspaper and radio station. (3) Cottel, who is a native of North Carolina, has been referred to by Longo to his face as a "rebel scab," and, as found herein, chief steward Hill has referred to Cottel as a "rebel scab mother fucker" when talking to his supervisor. (4) As a remedy for an alleged contract violation, discussed herein, the Union asked that the offending supervisor be discharged. (5) As many as eight grievances were solicited by Longo for one alleged violation, as discussed herein.

This is all to say that, at the time of the events herein described, labor relations at Respondent's northeast division were conducted in a hostile atmosphere.

B. *Issuance of Warning Notices to Longo and Martin on January 8*

On January 8 Savini (who did not testify) toured the Pennsylvania plants during a trip from his office in Chicago. Savini was accompanied on the tour by Cameron. On that date, employee Bertha Martin was working in the armature department on the fiber machine at the Bobbie Brooks plant. While she had worked in that department since the previous September, and worked on the fiber machine "about 2 weeks off and on," according to Martin, when Savini and Cameron passed by her work station, she was engaged in an "end fiber" operation which she had performed for only "45 minutes to an hour," according to the uncontradicted testimony of Martin. Assigned to the machine next to Martin was Longo who is married to the niece of Martin's husband.

Cameron testified that, as he and Savini walked by the Longo-Martin work area, they observed the two employees doing nothing. Cameron specifically described Longo as leaning on a press and Martin leaning on a cart containing armatures. According to Cameron, he and Savini stopped and watched Longo and Martin; and "they were conversing for 5 to 8 minutes"; and neither had anything in their hands. After "observing [Longo and Martin for] 5 to 8 minutes," Cameron and Savini went to the desk of Department Supervisor Calvin Allen. Cameron told Allen to go "ask Mr. Longo what he was doing."

Allen testified that Cameron and Savini approached him and asked if he knew what Longo and Martin were doing and he volunteered to go find out. Allen testified that, when he approached them, Longo was leaning on his press and Martin was standing beside the cart next to Longo's press which was 8 to 10 feet from Martin's machine. Martin was turned facing Longo and his press, her back to the fiber machine. Allen asked Longo and Martin what they were talking about and Longo replied that Martin was asking him questions about putting on end fibers. When asked on direct examination if Longo or Martin elaborated on the problem, Allen testified that they did not; he was not asked if he asked the employees what the problem was. When further asked on direct examination if Longo had anything in his hands, Allen stated, "[N]o, he didn't"; when asked if Martin had anything in her hands, he replied, "[N]ot to my knowledge." When asked what he did then, Allen replied that he returned to Savini and Cameron and reported that Longo and Martin had replied that they were talking about end fibers.

Cameron and Allen testified that neither of them (nor Savini) believed there was any problem which could take 5 to 8 minutes (presumably plus whatever time had elasped between the report of Savini and Cameron to Allen and Allen's walk to and inquiry of Longo and Martin). When asked on direct examination why he did not believe it, Allen replied: "If there was a problem there—you know, with the machine that was putting on end fibers, then they woulda probably told me . . . ." Cameron testified that he did not believe the explanation since neither employee had an armature (or anything else) in hand during the 5 to 8 minutes he and Savini had observed them. Cameron testified: "I told Calvin Allen to write 'em up."' Allen, when asked if either Savini or Cameron told him to issue a written warning notice replied that: "We all decided that."

Martin and Longo testified that the subject of their conversation in question was Martin's inability to line up end fibers as they were being inserted into armatures, that he stayed at her machine and he at his, and that the conversation lasted only 1 to 2 minutes, and then they went back to work. Both testified that after they returned to work Allen approached the area and spoke only to Martin. Martin testified that Allen stated to the employees that Savini had sent him to see what they were talking about. Martin testified that she replied, "work" and Allen replied, "okay" and walked away.

Later that day, according to Longo and Martin, Allen instructed the two employees to escort him to the office of Plant Manager Rupert. Present in the office were Longo, Martin, Allen, and a shop steward Steve Workman. (The current contract requires the presence of shop steward when discipline is being dispensed.) Longo and Workman placed Rupert there; Martin did not mention Rupert. Longo, Martin, and Workman testified that Allen announced that he was being required to "write-up" Longo and Martin because Savini had watched them talking for 5 minutes. Longo, Martin, and Workman further testified that Longo protested and asked what Savini had said when Allen told Savini that Martin had explained that they were talking about work. According to all three of the General Counsel's witnesses, Allen replied that Savini had replied to him: "Shit, write them up anyway."

Rupert testified, but was not asked if he was present when the warning notices were issued to Longo and Martin. Allen testified that he gave the warning notices to Longo and Martin at their machines, not in Rupert's office; that the only mention of Savini was that it was he who had seen Longo and Martin standing around and Longo and Martin acknowledged to him (Allen) that they had seen Savini; and that Longo's only response

was: "Jam it up [your] ass; its another NLRB case." Allen was asked on direct examination and testified:

> Q. What was the substance of your reply to Longo when he rasied the point that he had an excuse for standing there for 5 minutes?
> A. That it wasn't a—yeah—a satisfactory reason.
> Q. To who [sic]?
> A. To any of us.

Martin testified that on January 9, on an occasion when she and Allen were walking to the first aid room, Allen said: "You know I didn't want to write you up," and that he further said then "that he had to, Savini said to do it." Allen was not asked about this alleged admission on direct examination. Allen was asked on cross-examination and testified:

> Q. After you wrote up Longo and Martin, do you remember walking with Martin to the first-aid station the next day or so?
> A. Yes I do.
> Q. And isn't it true that you really didn't want to write—
> A. —I don't like to write anybody up.
> Q. But you said you didn't want to write her up?
> A. If it came—I don't like to write anybody up because I didn't see this incident. I actually did not.
>
> * * * * *
>
> Q. (By Mr. Olcrest) What did you say to her wherever you were going?
> A. I told her I don't like to write anybody up.

Allen could not remember any employees ever having received a disciplinary warning notice for standing around talking, and Respondent produced no evidence of such discipline having been imposed before.

My credibility resolutions are as follows: Martin was over at Longo's press not to receive instruction on the end fiber operation which was to be conducted 10 feet away from her, but to gossip. Savini and Cameron saw them talking, but the two executives did not waste 5 to 8 minutes of executive time, or any time, just because any two employees were not working. I do not know how long it was that Savini and Cameron observed Longo and Martin; but, whatever amount of time it was, only because one of the employees was Henry Longo, union vice president who personally was the source of so many grievances. Whether the warning notice was issued on the production floor or in Rupert's office, I believe, and find, that Allen told Workman, Longo, and Martin that he had relayed their explanation to Savini but Savini had replied: "Shit write them up anyway." I further find that, as Martin testified, Allen told her the next day that he had not wanted to write Longo and her up, but that Savini made him do it.

The virtually certain commonality of the alleged employee misconduct undoubtedly prompted the expression of regret by Allen to Martin the day after the warning notices were issued. Not that Longo and Martin were not wasting at least some time; they were. But they could not have been the first employees in the 30-year history of the plant to have been guilty of wasting time. Although Respondent has preserved all warning notices (even those which were issued years before), no similar notices were produced.

Stopping the waste of time upon its discovery was not Respondent's objective. Had it been, Savini and/or Cameron and/or Allen would simply have told the employees to "get to work." None did; not even after Allen was sought out and dispatched to investigate and found the employees still talking. The only conceivable reason for the failure to issue the clearly justifiable imperative to get to work was that Respondent's primary objective was not to spur production, but to impose discipline.

I find and conclude that the notices were ordered by Savini to seize upon the indisputably not unprecedented dereliction of Longo and Martin to mete out unprecedented discipline. The reason for Savini's unprecedented action was Longo's status as union vice president and his grievance and unfair practice filing activities, all of which has made him a thorn in Respondent's side since the change of union leadership in 1977. This was retribution caused by protected activity and, as such, the January 8 issuance of the warning notices to Longo and Martin constituted violations of Section 8(a)(1) and (3) of the Act, and I so find and conclude.

C. *The Alleged Threat to Longo by Allen on January 11*

The complaint alleges that on January 11 Allen threatened Longo with discipline because he was taking time to clean his safety glasses.

To give this contention its due consideration certain background is necessary: Although its literal wording was not placed in evidence, it is undisputed that Respondent has a rule that all persons in certain working areas must wear safety glasses. On January 9 Longo filed a grievance alleging that the day before Savini had failed to wear safety glasses in an area where they were required. On January 10 he filed another grievance against Savini alleging the same violation on January 9. Longo also toured the plant soliciting[2] the same grievance from other employees and was successful in seven cases. The grievances were answered by Rupert's stating that "the company will abide by the safety glasses rule." Longo (and Workman) rejected the answers as "unsatisfactory." When asked on cross-examination if he had expected Respondent to do anything more, Longo answered: "No. I expected them to abide by it."

To the substance of the threat allegation: Longo testified that on January 11 he was cleaning his safety glasses as was his usual practice and:

> Calvin Allen hollered at me: he says, "Hey, Longo, put those glasses on." I looked at him and I said, "I'm cleaning them—they're dirty." He said, I don't care—you don't take those glasses off after 7

[2] As Longo himself testified: "As I was talking to different people about it, they said they also seen Mr. Savini the following—the previous day without them, plus on the 9th . . . . I said, 'would you people sign a grievance?'—And they all agreed to it."

> o'clock starting time anymore." I said, "Well, anytime they are dirty we always take them off and clean them." He says, "Well, I'm going to see about if I can write you up."

Workman testified that he saw Allen after the exchange and Allen told him also that he was going to investigate the possibility of writing up Longo for cleaning his glasses. Employee Ruth Phillips was also called by the General Counsel to corroborate Longo. She testified that she was 2 feet away from Longo and Allen, that she did hear Allen, "holler" to Longo to tell him to get his glasses on, and that Longo replied, "I'm cleaning."

Allen testified that Longo was leisurely cleaning his glasses, that he told Longo that he was going to wear the glasses out if he continued wiping them, that Longo laughed but did not move until he told Longo to "go back to work," and that Longo "just laugh[ed] and finally he start[ed] moseying back to his job."

The General Counsel contends that he has proved by the testimony of Longo, Phillips, and Workman that a threat to discipline Longo was made and that the threat was made because Longo had filed, or caused to be filed, the several grievances over Savini's not wearing his glasses earlier in the week, that the grievance activity was protected, and that therefore the threat violated Section 8(a)(1) of the Act.

I disagree. While I credit the testimony of Longo (which was corroborated by Workman) that Allen stated that he would see if he could write up Longo, I also credit Allen's testimony that Longo was dallying in cleaning his glasses.[3]

I believe that Allen stated that he would investigate the feasibility or disciplining Longo because of the excessive time Longo took to clean the glasses. But whether the time was excessive, or whether the elasped time is what prompted the statement, the statement was not a "threat" to do anything other than investigate whether discilpine could be imposed. Longo was yelled at by Allen; but he was not threatened.

But assuming a threat was made, there was still no statutory violation. The General Counsel's theory is that the nine grievances filed because Savini was without safety glasses earlier in the week prompted the "threat." However, that grievance-filing activity was not protected. The good faith of the grievance filing is suspect at best since Savini's violation of Respondent's rule is something of a bizarre subject for a grievance where there was no apparent danger to employees. But the action of filing two grievances, the soliciting of seven more, and the rejection of the only answer that could have been given were all malicious and decided abuses of the grievance procedure, and, therefore, not protected concerted activity.

Accordingly, I shall recommend that this allegation of the complaint be dismissed.

D. *The Alleged Changes in Telephone and Photocopying Privileges*

The complaint alleges that, in violation of Section 8(a)(1), (3), and (5) on or about January 10, Respondent unilaterally and discriminatorily discontinued its prior practices with regard to allowing the Union to use its interplant telephone system and policy regarding the use of photocopying equipment. In bringing this contention before the Board, and possibly the courts, what the General Counsel does is rely on part of Respondent's conduct during the petty action-reaction cycle the parties engaged in after Savini ordered the discipline of Longo and Martin on January 8.

1. Telephone use

Regarding the telephones, the past practice had been that, for grievances and emergencies, the Union's chief steward at any of the three plants or the Union's vice president (Longo) could request his respective supervisor to call Union President Smith's supervisor. That supervisor allowed Smith to return the calls as soon as possible. This practice was involved in a settlement agreement executed by the parties and approved by the Regional Director on August 24, 1979.

During the morning of January 10 Longo took time out from his grievance-soliciting plant tour to ask Allen to call Union President Smith. According to Longo the request regarded a grievance which was "about two employees in here over pay for work which they performed." Just why Longo selected that hour of the ongoing embroilment to file a pay grievance was not asked.

In an act of obvious case building, before he asked to call Smith, Longo asked employees Martin and Phillips to stop working and witness his request. As he testified, Longo told Martin and Phillips that he was asking them to be witnesses because he knew Allen would refuse his request. There was no evidence of any such refusal having occurred since August 24, 1979, so how Longo knew he was baiting a trap is unknown.

At any rate, Allen fell for it; he refused that one request[4] and the General Counsel contends that a violation of Section 8(a)(1), (3), and (5) of the Act is accordingly established.

Not every breach of a contract, or even a settlement agreement,[5] is a violation of Section 8(a)(1), (3), and/or (5). The General Counsel produced no other nonhearsay examples of such refusals. Moreover, Respondent adduced credible evidence which demonstrated that the practice has not been disestablished.[6] Accordingly, I shall recommend that this allegation of the complaint be dismissed.

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[3] Specifically, I do not believe Longo's testimony that Allen, after he had only momentarily paused to clean the glasses, told him he could never again take his glasses off after 7 a.m. Allen, a seemingly sensible man, did not confront the prolific grievance-filer Longo after only a momentary pause, and no supervisor in possession of his faculties would tell an employee never to take safety glasses off while it is undisputed that there is a specific area and facility for cleaning those glasses. (Certainly Phillips, who was 2 feet away, did not testify to such a directive.)

[4] I discredit Allen's testimony that he agreed to have Smith called but simply forgot.

[5] Noteworthy is the fact that the settlement agreement was not set aside.

[6] It is not necessary to detail this evidence as it was not rebutted, nor was it questioned in the General Counsel's otherwise excellent brief.

2. Photocopying practice

Prior to January 10 Respondent had allowed the Union to have copied documents such as grievances and minutes of meetings upon request. The practice was for stewards to present the originals to a supervisor who had them copied and returned to the steward. No statement of need for particular copies had ever been required according to this record.

On January 10, apparently at some point after soliciting the Savini (safety glasses) grievances, and having made his case of a telephone use refusal, Longo, according to his testimony, told Workman to "go out to Ron Rupert's office and get a copy of the two grievances that we filed for both of Martin and myself pertaining to the 8th when Savini wrote us up . . . I'd like to have a copy of them—so in case they are lost, we'd have our copy." As was the case of the telephone, there is no evidence that Respondent had previously denied the Union the use of the photocopying machines. But the timing of the request (2 days after the grievances were filed and in a course of culminating confrontations), the gratuitous statement of need, the inexplicable fear of loss of the original, and a decidedly self-righteous mien in expressing that fear while testifying have all lead me to conclude that Longo knew that he was baiting another trap.

This time Rupert fell in. When Workman asked for copies of the Longo-Martin grievances Rupert said, according to the undisputed testimony of Workman: "No."

In addition to the single refusal, the General Counsel bases his contention on one admitted change in the photocopying procedure. Since January 28 Respondent has required employees to present doctor's excuses to supervisors for copying rather than allowing them to be routed through stewards. As Rupert credibly testified the change was made when Longo lost the doctor's excuse for an employee which caused delay of the holiday pay of the employee (Leona Peters) and caused another dispute between Respondent and the Union. There is no evidence that the Union ever objected to this single change in the procedure.

Finally, the General Counsel's contention that the photocopying policy was changed rests on answers to two questions posed during the course of the hearing. Smith was asked on direct examination and testified:

> Q. Okay. What had been the practice with regard to using company photocopying facilities since January 10, 1980?
>
> A. There hasn't been any. Do not get copies made of anything [sic].

On cross-examination Rupert was asked by counsel for the General Counsel and testified:

> Q. And isn't it a fact that you told [the Board agent investigating the charge] on February 5, 1980, that you discontinued making copies of documents for union officials because they were requiring too many copies? Isn't that a fact?
>
> A. I probably said that as far as them asking for any copies, yes.

Smith's answer is wholly conclusionary and, without supporting examples, unworthy of credit. Moreover, Respondent produced credible testimony (unnecessary to detail since it was not rebutted) that photocopies are still being made upon request. In view of that evidence I need not decide exactly what Rupert was admitting to, if anything, in his discussion with the Board agent. Specifically, the "admission" proves that the policy was "discontinued" for no particular period of time beyond Rupert's one refusal to Workman.

Therefore, the General Counsel's case rests only on the single refusal by Rupert on January 10 to make copies of the January 8 Longo-Martin grievance and the admitted change in the procedure for making copies of doctors' excuses. Again, not every failure to follow past practices, or even contracts, establishes a violation of Section 8(a)(5). As for the admitted change regarding doctors' excuses, the Union made no objection to the change although it indisputedly knew of it. *Citizens National Bank of Wilmar*, 245 NLRB 389 (1979). Nor does the single refusal to copy the Longo-Martin grievance constitute a change in the terms and conditions of employment of any of the unit employees upon which an 8(a)(3) violation can be predicated. Finally, it would ill serve the purposes and policies of the Act to issue any order on that single refusal where the request was plainly a tactic in the campaign of vindictiveness initiated by Longo after the (albeit unlawful) issuance of the January 8 warning notices to him and Martin.

Accordingly, I shall recommend that this allegation of the complaint be dismissed.

E. *The Warnings to Barry Hill*

Barry Hill was employed as a machine operator at the Bobbie Brooks plant. He was the chief shop steward of the production employees at that facillty, a position to which he was appointed sometime in January 1980. At all times material herein, and until shortly before the hearing, John Kennedy was a foreman at that facility and Hill's immediate supervisor. Before becoming a supervisor Kennedy was the chief shop steward. A bargaining unit member at the time of the hearing, Kennedy was clearly biased in favor of the Union's case herein, even to the degree to which he initially refused to testify at all when called by Respondent. The few concessions he made when questioned by Respondent's counsel were clearly given grudingly, and assessing his credibility has been a particularly tedious problem.

Plant Manager James Cottel has experienced a great deal of difficulty dealing with Hill as chief shop steward. Smith credibly testified that in the first 4 months that Hill served as chief shop steward Cottel asked Smith to replace Hill. Cottel admitted on cross-examination to making this request at least twice.

In mid-April the employees in Kennedy's department were placed on a 4-day workweek. On April 28, when he arrived at work, Hill observed Kennedy performing certain bargaining unit work. Hill credibly testified that he told Kennedy that Kennedy could not be doing that bargaining unit work and Kennedy replied: "If I can't be doing things like that, people aren't going to be getting

away with things they have been getting away with." Kennedy essentially admitted this response. One of the things employees had been "getting away with" was failing to punch in upon arrival at work. There was abundant credible evidence by the General Counsel's witnesses that, when employees had forgotten to punch in upon their arrival in the morning, the supervisors simply wrote in their time. This was true even though Respondent's plant rules specify as an offense: "5. Failure to punch timecard without legitimate excuse." The penalty for the first breach of this rule is a "verbal warning." Such verbal warnings are actually reduced to writing and therefore are considered here as "written warnings" (not to be confused with the written warnings which are the second step of a progressive disciplinary system).

The day after Hill chastised Kennedy for performing bargaining unit work, Hill did not punch in. Hill testified that he arrived at 6:35 a.m., 5 minutes before the earliest point at which employees are permitted to punch in for the shift starting at 7 a.m. Hill testified that he was immediately beseiged by employees and stewards with various problems about the plant which he immediately began to investigate. When the 6:58 a.m. warning buzzer sounded, Hill testified, he was in a location remote from both the timeclock and his work station. Hill testified that he decided to go directly to his work station to be there on time instead of punching in.

Hill testified that at 7:10 a.m. he was approached by Kennedy and shop steward Dana Confer. Further, according to Hill, Kennedy handed Hill a warning notice stating that Hill had "forgotten to punch in." The written warning notice states as the infraction: "Plant Rule Number 5. Failure to punch timecard with legitimate excuse." At that point, according to the undisputed testimony of Hill, Confer left; therefore, there were only two witnesses to Hill's response to Kennedy. According to Hill, his response was this:

> And, I said to John Kennedy—I says, "I guess Henry Longo was right what he said about Jim Cottel." And Kennedy says, "What's that?" And, I said, "He is a rebel scab." And, John Kennedy said, "Do you want me to tell him that?" I said, "I don't care." And he turned and left.

As noted, Cottel is a native of North Carolina. Kennedy, whose sympathies clearly lay with the Union, was evasive when asked by Respondent's counsel to testify to the full response made by Hill. However on April 30, Kennedy issued Hill a written warning notice (for use of abusive language) stating:

> During a disciplinary action yesterday, Mr. Hill requested I give Mr. James Cottel a message for him as follows: "You can tell that rebel scab mother fucker up front he go fuck his self."

Hill denied the embellishment; Kennedy would admit no more than that Hill stated that Cottel could "screw himself." Neither witness was credible. Hill first denied making any part of the above-quoted remark recorded by Hill on the warning notice; then, as he had done on direct examination, admitted stating that he had called Cottel a rebel scab. I do not believe Hill's denials and Kennedy's evasiveness betrayed him. I believe, and find, that Hill's response was precisely as recorded by Kennedy on the April 30 warning notice as quoted above.

Nothing was said to Hill about his vulgar response on April 29. Hill filed a grievance over the warning notice for failing to punch in which he was issued that date.

On April 30, Hill filed a grievance alleging that, on April 24, Supervisor Wayne Williams violated Respondent's written rule listed as an intolerable offense: "Stealing company property or personal property of employees." The grievance stated that Williams had violated this rule by: "Stealing Union property and confiscating and searching personal property on 4/24/80." As the "settlement requested" Hill asked: "To comply with the penalty set forth in the plant rules, established by the company under intolerable offenses of up to and including discharge." Although the subject of this grievance was not litigated herein, the allegation thereof generally was that Supervisor Wayne Williams had opened an envelope, addressed and identified as an interunion communication, which had been placed in the interplant mail. The envelope contained a pair of glasses, not just papers, and whether the glasses were personal property or company property or safety glasses or non safety glasses was not established and I need not decide the matter here.

Hill testified that he presented the mail-opening grievance to Cottel on the morning of Aprll 30 and Cottel replied that he was asking for a "pretty strict settlement request on it." Hill replied that if it had been an employee he would have been fired. As stated by Hill on direct examination: "We asked for the discharge of Wayne Williams." Nothing was then said to Hill by Cottel about his remark to Kennedy the previous day, although Cottel admitted that he knew of the remark the afternoon before the presentation of the mail-opening grievance.

At 10 a.m. on April 30, Cottel approached Hill at Hill's work station. According to Hill, and as admitted by Cottel, Cottel asked Hill to withdraw the mail-opening grievance and Hill refused. Further, according to Hill, Cottel stated: "If you want to play games like that we can play games too." This latter remark by Cottel is not denied, and I found Hill credible in that testimony.

About 2 hours later, according to the credible testimony of Hill: "John Kennedy, come up to my work station, and he asked me what I had said to Cottel to make him so mad? And I asked him what he was talking about? And he said that now he had to write me up for insubordination . . . ." Kennedy then presented Hill with a warning notice for abusive language, the gravamen of which is quoted above.

When it came to testifying about his own actions, Kennedy was all *non est mea culpa*. Kennedy attempted to defend his issuance of the first warning notice to Hill on the grounds that the occasion was the third time he knew of that Hill had failed to punch in. Hill described the "three-strikes" standard as his own, not necessarily Respondent's in general. As stated by Respondent's brief, page 5: "Respondent's rule wlth respect to punching in is not necessarily uniformly applied. Thus, certain supervisors will issue a warning after a first instance of failing to

punch in, while others, including Kennedy, allow employees three chances." This is another way of saying that there is no uniform application of the rules regarding failure to punch in on time and Hill's personal policy appeared to be nothing more than a self-serving justification created specifically for the situation at hand.

I do not accept Kennedy's or Respondent's rationalizations. The warning notice was issued the day after Kennedy warned Hill that employees were no longer going to get away with infractions which had theretofore been overlooked if supervisors were not going to be allowed to do bargaining unit work. I find, and conclude, that the April 29 warning notice was an implementation of Kennedy's retributive "get tough" policy which was instituted because Hill, in his protected activity as chief steward, objected to Kennedy's performing bargaining unit work. Accordingly, I find and conclude that the issuance of the notice to Hill on April 29 violated Section 8(a)(1) of the Act.

Hill's response to Kennedy was indisputably profane and abusive and at first blush would seemingly constitute just cause for some sort of discipline. However, the issuance of the warning notice was plainly an act of disparate treatment; Smith, as quoted above, has said worse directly, and in writing, to Cameron and nothing came of it.[7] Moreover Hill's action was in reaction to an unlawful imposition of discipline. *Blue Jeans Corporation and Whiteville Manufacturing Company*, 170 NLRB 1425 (1968). Finally, Hill's remarks were ignored until he filed and then refused to withdraw the grievance about Wayne Williams' opening of "Union" mail. I find that in this case the discipline was caused by what immediately preceded it, the indisputedly protected activity filing the mail-opening grievance, no matter what its merit. Accordingly, I find that the issuance of the April 20 warning notice to Hill likewise constituted a violation of Section 8(a)(1) and (3) of the Act.

F. *The Discharge of Leona Peters*

1. Background

Leona Peters was discharged by Respondent on February 25. The General Counsel contends that Peters was fired in violation of Section 8(a)(1), (3), and/or (4) of the Act because: (1) she filed grievances; (2) she filed unfair labor practice charges; (3) she filed workmen's compensation claims; and/or (4) Respondent wished to rid itself of Peters who, by virtue of an agreement negotiated through the processes of collective bargaining, had secured the privilege of being assigned "sit-down" duty. Respondent answers that Peters was fired solely because she violated its written, generally published rule that:

> On the employee's third day off work, he/she must call the employee service clerk and request a medical leave of absence . . . . Any employee not abiding by the above will be subject to disciplinary action, up to and including discharge.

Peters, an employee with an extensive record of medical leaves of absence, admits actual knowledge of this rule, and admits that she was absent on February 20, 21, and 22 without securing such leave from the employee service clerk, the clerk's supervisor, or Peters' supervisor. However, the General Counsel contends that application of the rule in Peters' case was discriminatory and/or unreasonable and that the real reason for Peters' discharge was her protected concerted activities toward which Respondent had specifically expressed animus.

Peters was first employed by Respondent in August 1977. Her tenure had been checkered with medical leaves of absence: She injured herself on the job in November 1977 and was absent for 5 months. She returned in March 1978 and was off for 2-1/2 weeks in August 1978 with a back injury. She then returned and worked until May 1979 when she had surgery. Walking into the plant on return from that leave, on June 14, 1979, she fell and was again off work until October 1979. When she returned, she was assigned light or sit-down duty pursuant to an agreement with the Union and continued working until February 20, when, according to Peters, she became sick with flu.

At all times material herein Peters' supervisor was Calvin Allen who reported to Plant Manager Ronald Rupert who, in turn, reported to Division Manager Cameron. In November 1978, Peters filed the first of five grievances. The topic was that Supervisor Allen had used abusive language toward her. The grievance was taken to Rupert who made Allen apologize. According to Peters, within hours after Allen apologized, "he told me that he would get me for reporting him." This testimony is not denied and I credit it. Further according to Peters, she was absent 2 days because of "nerves" immediately after this incident and when she returned Allen gave her a warning notice for excessive absenteeism even though she had presented a doctor's excuse. Peters filed a grievance over this warning notice and the notice was withdrawn. Peters' third grievance was filed in December 1978 or January 1979 over the failure to receive appropriate wages for work she had done. Peters did not know the disposition of this grievance and never received the money she sought.

On March 1, 1979, Allen sent Peters from her first floor work area to the second floor level on an errand. On the second floor Peters noticed Supervisor David D'Arco performing what she apparently considered to be bargaining unit work. She reported this to Union Vice President Henry Longo, but she did not file a grievance at that point. Peters testified that, on March 3, she was approached by Allen who, according to Peters, stated that it was not very smart to have reported D'Arco, and that "everybody" would be watching her and she should be careful or "be on my toes." On March 5, 1979, Peters filed a grievance over D'Arco's working, and on March 7, 1979, further according to Peters, she was again approached by Allen who told her that he could have gotten her in a lot of trouble for filing a grievance, that he could have lied and said she was on the second floor without permission, that everyone was now watching her, and that it was not right for her to have filed a

[7] That both Smith and Hill are union supporters or officials does not detract from the disparate nature of the treatment. *Texas Industries, Inc.*, 174 NLRB 563 (1969).

grievance against D'Arco. Peters testified that she replied: "I told him if he didn't get off my back I was going to file one against him." Further, according to Peters, on March 12, 1979, Allen "told me the Union was using me for a guinea pig; and he said Henry Longo and Mike Smith will have their jobs—and you'll be gone if I didn't wake up." Allen generally denied saying anything to Martin about the D'Arco grievance other than that he would never send her to D'Arco's department again. I find Peter's specific testimony more credible than Allen's general denial, and find that the exchanges occurred as described to by Peters.

In addition to the grievance over the warning for excessive absenteeism in November 1978, Peters also filed an unfair labor practice charge which she testified was withdrawn before the hearing, although there is no evidence that the Regional Director ever made a decision to issue a complaint. Peters filed a charge herself on September 27, 1979, regarding the failure to receive vacation pay which is mentioned above. The charge was withdrawn when she actually received the pay.

When Peters returned to work after surgery in October 1979 (and a 5-month absence), an agreement was reached between Respondent and the Union and, according to Peters, it was decided: "That I could work on my legs as long as I could stand it, and then I'd be getting a sitting down job for the remainder of the day." On January 29, 1980, she asked for a sitting down job and Allen told her that "I wasn't fit to work—that I shouldn't have been hired; and if it were up to him, I wouldn't get workmen's compensation . . . he told me that if it has [sic] been up to him I would have been fired long ago." Peters further testified that several times before that date Allen had told her that she was not fit to work and she should not be drawing compensation. Peters specifically testified that in early February 1980 Allen again told her that she would be fired if it were up to him.

Peters further testified that, in the first week of February 1980, Allen asked her: "When are you going to wake up and quit filing so many grievances—and wake up to what the company can do for you, instead of being so much for the Union?" Peters testified that she replied, "Probably never." And that Allen "told me that I would end up getting fired if I didn't." Allen denied this testimony but, again, I found Peters credible.

On February 8, Peters filed a grievance against Allen for harassment stating that he was "on my back all the time . . . ." The grievance was denied and its ultimate disposition was not disclosed during the hearing.

2. The discharge

Peters testified that she was ill the morning of February 20. The Employer has a rule that employees who are ill may be discharged if they fail to call in on two successive days of absence. Peters called into the plant switchboard to report that she would be absent that day. She was given a verification number (1953) by the switchboard operator. On February 21 she did not call in. On February 22 Peters called again to the switchboard operator to report her absence and receive the verification number 1959. This call was made before 8 a.m. Peters asked the switchboard operator to talk to Ann Getz, the employee service clerk, to secure the required medical leave of absence. According to Peters, the switchboard operator replied that Getz would not be in until 8 a.m. At 11 a.m. Peters drove to the plant and went to Getz' office to attempt to secure a medical leave of absence. No one was at Getz' office. Getz' office is next door to that of Plant Manager Cameron. Peters testified that Cameron's door was closed when she went by the offices; according to this record she did not knock on the door or indicate to any office clerical that she wished to speak to Cameron. On that visit to the plant she went from the office area to the production area where she left a note with employee Reggie Falls addressed to Allen asking Allen to give Falls her paycheck which was due that day. She did not leave any note requesting Allen to get her placed on a medical leave of absence and did not express any difficulty in contacting Getz.

Peters made a second trip to the plant on February 22 to pick up her check. She was asked on direct examination why she did not contact any member of management when she returned to the plant at 1 p.m. and she replied: "Because I was in a hurry to get to the doctor."

Peters further testified that she called again at 3:25 p.m. in an attempt to contact Getz and was again told, apparently by the switchboard operator, that Getz was not in. She did not attempt to contact any supervisor and when asked on direct examination why not she replied: "I didn't know who else to ask or it says on the board that you contact Ann Getz."

Peters further testified that when she arrived at work at 7 a.m. on February 25 she was asked by Allen if she had received a medical leave of absence. She replied negatively and Allen responded that he thought she would be terminated. Allen took her to Rupert's office where he reported the matter to Rupert. According to Peters, Rupert replied: "She's all right Calvin, she called in." Rupert and Allen told Peters to go back to work.

At 10:15, further according to Peters, Rupert called her into his office and stated: "I'm sorry Leona. When you were in here at 7 o'clock I made a mistake . . . I have to terminate you." Longo, who was present as the Union's representative at the discharge interview, asked why Rupert had changed his mind from earlier in the morning and, according to Peters, Rupert replied: "Because I did." Longo testified that Rupert's response was that: "Well, Calvin and me had a misunderstanding."

Longo further testified on behalf of the General Counsel in Peters' case that on September 14, 1979, when he had filed a complaint regarding the failure of Peters to receive vacation pay, Allen responded to him that it was Cameron's decision not to pay the money because: "Leona Peters had charges against the company with the Labor Board, and she was also suing them, and she wasn't going to get the goddamn money." And that she could "go to hell." Although he gave some testimony regarding his exchange with Longo about the delayed vacation pay of Peters, Rupert did not deny these statements, and I find that they occurred as related to by Longo.

In an attempt to show disparate treatment, the General Counsel points to the case of employee Peter Eyer who, on April 21, was reinstated despite the fact that he had been discharged for overstaying a leave of absence. It suffices to say that, in Eyer's case, the violation was overstaying a leave of absence which had been secured and not the failure to secure a leave of absence which is the case of Peters. Respondent adduced evidence through Getz that the following employees were discharged for failure to secure leaves of absence on the third day: Vincent Falls on April 9, 1979; B. Eisenhower on April 14, 1979; Ronald Fiedler on October 10, 1979; and Donald Wise on December 6, 1979.

The cases of Falls, Eisenhower, Wise, and Fiedler prove that not only did the rule exist (although that fact is not disputed), but also that it had been uniformly enforced; therefore, I find that the General Counsel has failed to show disparate treatment in regard to the discharge of Peters.

Thus, the General Counsel is left with the contention that the enforcement of the rule in Peters' case was arbitrary and the real motivation was the protected concerted activities of Peters and the animus directed toward her because of that activity.

It is true that the rule does not state literally whom an employee is to contact if the employee service clerk is not available, as was the case on February 22 when Getz was absent each time Peters attempted to contact her. However, it cannot be argued that, when an employee has a known responsibility which he or she cannot fulfill, the employee may simply shrug it off. Commonsense assuredly gained by anyone with any industrial experience mandates that the employee's supervisor, or any potentially concerned supervisor, is to be contacted. Peters made two trips to the plant on February 22 and at least two telephone calls, all the time knowing that, as well as reporting her absence, she needed to be placed on a medical leave of absence because it was the third consecutive day of her absence for medical reasons. She passed by Cameron's door but did not knock to determine whether he was present then or not.[8] She exercised enough presence of mind to know that a note to a supervisor was sufficient to receive her paycheck that day, but she did not leave a note with anyone to inform Respondent that she was attempting to be placed on a medical leave of absence but could not contact Getz. It was not arbitrary of Respondent to have expected the same minimal effort by Peters to contact some supervisor to explain that she was unsuccessfully attempting to comply with the known, and previously enforced, rule which was a condition of her continued employment.

[8] This factor renders moot Respondent's motion to strike Smith's rebuttal testimony that Cameron could not have been in his office.

Respondent evinced hostility to grievance-filings such as that of Peters, and this hostility had been directed specifically toward grievance-filing and other protected activity by Peters. However, there is no reason to believe that her discharge was an exercise in arbitrariness actually premised on unlawful animus, especially in view of the unrebutted evidence of uniform enforcement of the rule which she violated.[9]

Accordingly, I find and conclude that the General Counsel has failed to prove by a preponderance of the evidence that Peters was discharged in violation of the Act.

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing warning notices to Henry Longo and Bertha Martin on January 8, 1980, in order to discourage their union activity or in order to interfere with, restrain, or coerce those employees in the exercise of their Section 7 rights, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By issuing warning notices to employee Barry Hill on April 29 and 30, 1980, in order to interfere with, restrain, or coerce Hill in the exercise of his rights guaranteed by Section 7 the Act and in order to discourage his union activity, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The General Counsel has failed to establish by a preponderance of the evidence that Respondent has otherwise violated the Act.

THE REMEDY

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

[Recommended Order omitted from publication.]

[9] While there was initially some confusion between Rupert and Allen as to the proper action in Peters' case, this is adequately explained by the fact that the day production shift reports at 7 a.m., and employee service clerk Getz and Cameron did not report until 8 a.m. and were therefore unavailable for consultation and final decision.