Shane Felter Industries *and* United Mine Workers of America, AFL–CIO. Cases 6–CA–24185, 6–CA–24230, and 6–CA–24464

July 12, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On March 31, 1993, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions, and a response to the General Counsel's exceptions and a supporting brief, the General Counsel filed an answering brief and a cross-exception, and the Charging Party filed an answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order,[2] as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shane Felter Industries, Inc., Uniontown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

''(d) Offer to Franklin Hough and George Lesko immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for lost earnings in the manner set forth in the remedy section of the judge's decision.''

2. Substitute the attached notice for that of the administrative law judge.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees that we will close our business because they have selected United Mine Workers of America, AFL–CIO, or any other union, as their collective-bargaining representative.

WE WILL NOT tell employees it was futile to have selected the Union as their collective-bargaining representative because we will never sign a contract with the Union.

WE WILL NOT threaten employees with unspecified reprisals because they have selected the Union as their collective-bargaining representative or because the Union has filed unfair labor practice charges against us.

WE WILL NOT threaten employees with bodily harm because they have selected the Union as their collective-bargaining representative.

We will not discharge or otherwise discriminate against employees because they have selected the Union as their collective-bargaining representative.

WE WILL NOT refuse to bargain with the Union, as the exclusive collective-bargaining representative of our employees in the appropriate unit, by making unilateral changes in wages, hours, and other terms and conditions of employment.

WE WILL NOT lay off unit employees without first providing the Union with notice and an opportunity to bargain about the layoff decision and the effects of that decision.

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

WE WILL notify and, on request, bargain with the Union concerning any proposed changes in wages, hours, and other terms and conditions of employment of our employees.

WE WILL reinstate the rate of reimbursement under our health benefits plan for the prescription drug Ativan at 100 percent and WE WILL make whole Timothy Manchas for any loss suffered by our having unlawfully reduced that rate to 50 percent, effective November 1, 1991, with interest.

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

In adopting the judge's findings that the Respondent's layoff of George Lesko, without first bargaining with the collective-bargaining representative of its employees, was in violation of Sec. 8(a)(5) of the Act, we note that the Respondent does not except to the judge's finding that the layoff decision was a mandatory subject of bargaining.

[2] We have amended the judge's order to require reinstatement and backpay for George Lesko. See *Synergy Gas Corp.*, 309 NLRB 179 fn. 1 (1992).

WE WILL notify and, on request, bargain with the Union concerning any proposed decision to lay off unit employees and the effects of the decision on the employees.

WE WILL offer to Franklin Hough and George Lesko immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings suffered as a result of their termination and layoff respectively, with interest.

WE WILL remove from our records all references to our unlawful discharge of Franklin Hough and WE WILL inform him in writing that this is being done and that the discharge will not be used against him in any way.

SHANE FELTER INDUSTRIES, INC.

Robin F. Wiegand, Esq., for the General Counsel.
Kelvin C. Berens, Esq. and *Jerylyn R. Bridgeford, Esq.*, of Omaha, Nebraska, for the Respondent.
William Manion, Esq., of Washington, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon charges filed by United Mine Workers of America, AFL–CIO (the Union),[1] the Regional Director for Region 6 of the National Labor Relations Board (the Board), issued complaints on March 26 and May 22, 1992, alleging that Shane Felter Industries, Inc. (the Respondent), committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed timely answers denying that it had committed any violation of the Act.

A hearing was held in Uniontown, Pennsylvania, on September 1 and 2, 1992,[2] at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration.[3] On the entire record and from my observation of the demeanor of the witnesses, I make the following

[1] The charge in Case 6–CA–24185 was filed on January 6, 1992. The charge in Case 6–CA–24230 was filed on January 23, 1992, and amended charges were filed on January 29 and April 17, 1992. The charge in Case 6–CA–24464 was filed on April 10, 1992, and an amended charge was filed on May 20, 1992.

[2] Prior to the hearing, the parties entered into a settlement agreement which disposed of certain of the allegations in Cases 6–CA–24185 and 6–CA–24230.

[3] Counsel for the General Counsel's uncontested motion to correct errors in the hearing transcript is granted.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a Pennsylvania corporation with an office and place of business in Uniontown, Pennsylvania, engaged in the fabrication of structural steel and bridge components. During the 12-month period ending March 31, 1992, the Respondent, in the conduct of its business operations, sold and shipped from its Uniontown, Pennsylvania facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The 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.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union began an organizing drive among the the Respondent's production and maintenance employees during the early part of 1991 and filed a representation petition on February 15, 1991.[4] A stipulated election was held on April 26, which the Union won, and on May 6 it was certified by the Board as the exclusive collective-bargaining representative of the employees in a unit consisting of:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Route 51, Uniontown, Pennsylvania, facility, including painters, fitters, welders, burners, laborers, plant clericals, inspection employees, working foremen, draftspersons, property maintenance employees and utility employees; excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act.

The parties began negotiating for a collective-bargaining agreement in July, but as of the date of the hearing herein, no agreement had been reached.

B. *The 8(a)(1) Allegations*

Employee William Sellong testified that in August he had a conversation with his immediate supervisor, Ron Beckman, in which Beckman told him and employee Mark Ansel that Denny Shanefelter, the Company's founder and president, would never let the Union get in and would close the shop before that would happen. Beckman also began whipping a beam with a nylon strap and said that the employees ''should be beat down like dogs.'' Sellong testified to other conversations with Beckman between mid-July and November 18, in which Beckman told him that the Union would never get in and that Shanefelter would close the shop before that happened. Employee Stephen Workman testified that on as many as 10 occasions he discussed the subject of the Union with

[4] Hereinafter, all dates are in 1991 unless otherwise indicated.

Beckman. He described one conversation in mid-October in which Beckman said that Shanefelter had told him that the employees would never get a union there and that ''he would close the place down before he would let the Union enter into a contract.''

Employee Robert Greenwald testified that on August 26 he was told by Emery Stewart, the Respondent's production manager, ''Bob, keep your nose clean with this union crowd and everything will be okay'' and ''this union isn't going to go anywhere here.''

As is discussed below, in the latter part of 1991 the Respondent changed its health insurance claims processing agent. In February 1992, employee Timothy Manchas learned that the rate of reimbursement for the prescription drug Ativan, taken by his wife, had been reduced. Manchas who was a member of the employees' bargaining committee testified that the matter was discussed at bargaining sessions in February and March 1992. Manchas also testified that on April 13, 1992, he was approached by Joseph Hiznaneck, the Respondent's controller, who said that he understood that Manchas was having problems with his health insurance claims. When Manchas replied that he was, Hiznaneck said, ''[Y]ou are a fucking asshole.'' He repeated the same comment over and over getting louder and louder. When Manchas finally indicated he had heard enough, Hiznaneck said, ''[W]e will see what happens when we get before the man, you fucking asshole,'' and ''we will see how well I take care of your fucking claims from now on.''

At the hearing, counsel for the Respondent amended its answers to the complaints in these matters to admit the allegations that the foregoing incidents constituted violations of Section 8(a)(1) of the Act. The testimony concerning these incidents was credible and uncontradicted. It is clear that a supervisor's statements to unit employees, such as those of Beckman, that the employer would close its business rather than deal with the employees' chosen collective-bargaining representative and that the employees should be subjected to physical abuse because they have chosen that representative, constitute coercion, interfere with rights protected by Section 7 of the Act, and violate Section 8(a)(1). E.g., *Williamson Memorial Hospital*, 284 NLRB 37, 39 (1987); *Lord Jim's*, 259 NLRB 1162, 1164–1165 (1982). Likewise, Beckman's comments to unit employees, that the employer would never enter into a contract with the Union, implied that the employees' support for the Union was futile and violated Section 8(a)(1). *Rood Industries*, 278 NLRB 160, 164 (1986); *El Rancho Market*, 235 NLRB 468, 471–472 (1978). Stewart's comment to Greenwald, that he should avoid contact with the ''union crowd,'' threatened him with unspecified reprisals if he did not do so and unlawfully restricted the employee's protected activities in violation of Section 8(a)(1). *Lord Jim's*, supra at 1164. Hiznaneck's statement to Manchas implied that he would no longer process Manchas' health insurance claims in the same manner as before. This obviously resulted from the fact that Manchas had raised objections about his claims through the Union, which a few days before had filed an unfair labor practice charge with the Board over the reduction in health benefits. The statement threatened him with adverse consequences for seeking the help of the Union and invoking the Board's processes and violated Section 8(a)(1).

C. *The 8(a)(3) and (1) Allegations*

It is alleged that the Respondent violated Section 8(a)(3) by discharging employee Franklin Hough and by suspending employee Dan Tantlinger for a day because of their support for the Union. The Respondent contends that Hough was discharged after 1 week on the job because his job performance was unsatisfactory and that Tantlinger was properly disciplined for insubordinate conduct.

In cases such as these, where the employer's motivation for taking certain actions is in issue, those actions must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of protected conduct on the part of its employees.

The record contains clear evidence of union animus on the part of the Respondent. In addition to the violations of Section 8(a)(1) discussed above, Company President Shanefelter testified that he viewed representation of his employees by the Union as a threat to the success of the business, that he did not want the Union representing his employees, that he was very upset when he learned that the Union had won the election, and that he felt such representation took away his dignity and reduced him to ''a zero.'' Employees Manchas and James Yaugher credibly testified to a meeting Shanefelter held with employees in March 1991, after he learned of the Union's attempt to organize the Company. Shanefelter held up a stack of papers he said were employment applications and angrily said if the employees did not want to work there others did. He also held up a blank piece of paper and said that if they chose the Union to represent them, they would not start out with what they have now but would start out with what was on the paper—''nothing.'' While this meeting occurred more than 6 months prior to the first charge in this matter and Shanefelter's statements are not alleged as violations, they are relevant as background and demonstrate animus on the part of the Respondent. The Board has held that statements that imply that union supporters are unhappy with their jobs and should seek employment elsewhere are threatening and coercive. *Intertherm, Inc.*, 235 NLRB 22 (1978). Shanefelter's comments concerning the blank sheet of paper did not purport to be merely an explanation of the realities of the bargaining process, but unlawfully conveyed the threat that they would be deprived of existing benefits if they chose the Union to represent them. *Fountainview Place*, 281 NLRB 26, 29–30 (1986). Union International Representative Richard Barchiesi credibly testified that on October 24 he telephoned Shanefelter to introduce himself and discuss contract negotiations. He said that Shanefelter began screaming at him, said that the UMWA is nothing but a joke, that it would never get a contract, and that the Union had ''destroyed his dignity, his reputation and his family.''

1. The discharge of Franklin Hough

Franklin Hough began working for the Respondent as a laborer on October 21. On Friday, October 25, Hough wore a hat to work which had the Union's logo and the words ''strike lightning'' printed on it. He wore the hat in the presence of Shanefelter, Stewart, and his immediate supervisor, Ed Herring. There is evidence that all but about two of the employees on his shift wore similar hats that day. On Friday afternoon, Herring asked Hough if he would like to work on Saturday, normally a nonworkday. Hough said that he would like to talk to somebody before he made his decision about working. Herring asked what the matter was, couldn't he make up his own mind. Hough said that he could and said that he did not want to work on Saturday. On the following Monday, Hough went to work and after he had punched in he was taken to Steward's office where Herring and Tom Shanefelter were also present. Stewart told Hough that he was being let go because he did not live up to company expectations during his probationary period. Hough got his tools and went to the parking lot to wait for Acting Union President Tantlinger. He told Tantlinger what had happened and was told to go home.

The Respondent presented the testimony of Stewart and Herring who said that they had observed Hough's work performance during his first week on the job and that it was unsatisfactory. Stewart said that he observed Hough doing ''a lot of standing around away from his job, not performing.'' He said he spoke to Herring about it and told him to talk to Hough and ''get him busy.'' Herring testified that Hough was constantly talking to those around him and leaving his work area. He said that he spoke to Hough about his conduct a couple of times and told him ''to cut out the bullshit and get back to work.'' Stewart and Herring testified that on Thursday or Friday they discussed Hough's performance and decided to terminate him. According to Stewart, he did not tell Hough he was being terminated on Friday because he was in a meeting at quitting time for the day-shift and did not have a chance to talk to him.

Analysis and conclusions

I find there is sufficient evidence to support the inference that Hough was discharged because of his display of support for the Union by wearing the union hat and by refusing to work overtime on Saturday. There is ample evidence of the Respondent's animus toward the Union in the record as discussed above. The timing of an employer's action can be persuasive evidence of its motivation. *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). Hough's discharge followed immediately after he, for the first time, displayed his support for the Union by wearing the union hat and by joining with the majority of employees who refused to work overtime on Saturday, October 26, which in a position paper filed with the Board, the Respondent acknowledged was intended as a show of support for the Union by the employees. It was also only a matter of days after the telephone conversation in which Shanefelter told Union Representative Barchiesi, ''[F]uck all you sons of bitches.''

I do not credit the testimony of Stewart or Herring concerning the reason Hough was terminated. Although both claimed that he was constantly neglecting his duties and talking on the job, neither could identify a single individual that he had seen Hough talking with during the week. Both allegedly observed Hough's shortcomings throughout the week and Stewart said he told Herring to get him busy. However, Herring said he informally corrected Hough only twice during the week and while he said other employees were cautioned at the same time he could not say who they were. Hough credibly denied that Herring had ever spoken to him about talking on the job.[5] Neither Stewart nor Herring offered any explanation as to why, if they had already decided to discharge Hough on Thursday or Friday, at noon on Friday Hough was asked if he would work on Saturday.[6] It is difficult to understand why they would be willing to pay Hough overtime on Saturday when, according to their story, his work was so bad they had already decided he would not be back on Monday. Moreover, even if as it contends, the Respondent was ''somewhat casual in its approach to discipline,'' it would appear that sound business practice would dictate informing a new employee in his first week on the job that not only is he not meeting performance standards but that he is in danger of termination. Stewart testified that his duties include trying to ensure that employees perform to their full potential, that he has counseled employees who were not performing adequately in an effort to improve their work performance and that ''in a lot of cases'' employees were allowed to continue to work for some period of time in order for that improvement to come about. Here, however, even under the Respondent's version of the facts, Hough was discharged after 1 week on the job without counseling or disciplinary action beyond two informal cautions from a foreman.

I also do not credit the testimony of Stewart that, although he made his decision to terminate Hough no later than Friday, he was unable to tell him about it until Monday morning. I did not believe the self-serving explanation that he was tied-up at quitting time of Friday. If that were true, there was no reason given why Herring, Hough's immediate supervisor, or someone else could not have informed him. In at least two other instances, discussed below, Stewart informed employees that they were being terminated by calling them on the telephone. So there is no reason to believe that Stewart waited to tell Hough in person as a matter of courtesy. The evidence suggests that Stewart waited to inform Hough of his discharge until Monday, the first workday after the employees had refused to work overtime on Saturday in a show of

[5] The Respondent seeks to attack Hough's credibility by arguing that Hough testified during cross-examination that he had never spoken with Herring, his immediate superior. Taken in context, it appears that Hough was denying only that he had any conversations with Herring in which his talking too much or not doing his work was discussed. On direct, Hough had testified in detail to a conversation with Herring on Friday in which he was asked to work on Saturday. The testimony referenced by the Respondent does not detract from Hough's credibility or affect my conclusion, based on his overall testimony and demeanor, that Hough was a believable and convincing witness.

[6] In it posttrial brief the Respondent apparently seeks to counter the adverse inferences suggested by these facts by questioning whether Hough was asked to work on Saturday. It asserts (p. 18): ''Herring does not recall asking Hough to work that day.'' No citation to the record is given in support of this statement and I am unable to find any such testimony by Herring. Hough's testimony that he was asked by Herring to work on Saturday was credible and is uncontradicted.

union solidarity, in order to ensure that the employees knew about it and to impress upon them that their support for the Union could cost them their jobs. It is true that Hough, being a new employee, was not a particularly visible or leading supporter of the Union. However, given the almost unanimous (all but two bargaining unit employees) refusal to work on Saturday, it appears that Hough was selected because he was new and allegedly in a probationary period which made him more vulnerable than employees with more longevity.

I find that there is no credible evidence that Hough was discharged because his work performance was inadequate and that the Respondent's reliance on that purported reason was pretextual. Accordingly, I also find that the Respondent has not borne the burden of establishing that it would have discharged Hough in the absence of protected activity on the part of its employees. I find that the discharge of Franklin Hough was a violation of Section 8(a)(3) of the Act. *Wright Line*, supra.

2. The suspension of Daniel Tantlinger

On the same morning that Hough was discharged, the Respondent suspended employee Daniel Tantlinger for 1 day. After he was informed of his discharge on the morning of October 28, 1991, Hough waited outside the shop to speak with Tantlinger who was the acting union local president. While they were still outside, Stewart began speaking to the employees inside the shop. He said that management employees had worked during the weekend and had put out more work than the entire work force had during previous weeks. He asked them to give 100 percent while working, said that there would be ''no more bullshitting,'' and warned that anyone who did not wear his safety glasses would be sent home. At that point Tantlinger entered the plant and asked what was going on and what he was missing. Stewart responded that if he had been on time he would know what was going on. The foregoing facts are not in dispute.

Stewart testified that Tantlinger came in 5 to 10 minutes after he started speaking to the employees and interrupted him in a loud and angry manner. Stewart asked him to be quiet so that he could continue. Tantlinger persisted in asking why the meeting was being held and Stewart told him to be quiet or go home. At that point, Tantlinger thrust his arm forward and threw his lunch container toward Stewart. Stewart told him to leave the premises. Tantlinger asked if he was fired and Stewart told him he was not but should go home for the day. Tantlinger continued to ask if he was being fired or laid off and Stewart responded that if he would be quiet and let him continue the meeting they could forget about the incident. Tantlinger continued to interrupt, demanding to know if he had been fired. Stewart said, ''[N]o, just go home.'' Tantlinger told him he was ''fucking up'' and left the premises. Stewart spoke with Tantlinger on the telephone later in the day an informed him that he was suspended for 1 day and was expected to be at work the following day.

For reasons that have not been explained, Tantlinger was not called as a witness by the General Counsel. Timothy Manchas and James Yaugher testified about this incident. Their versions do not differ significantly from that of Stewart except that they said that Tantlinger told Stewart that he had ''dropped'' his lunch container. Both agreed that it landed about 3 or 4 feet from Stewart.

Analysis and conclusions

The evidence establishes that the Respondent knew that Tantlinger was a supporter of the Union. Manchas and Yaugher testified that during a meeting concerning the Union's organizing campaign, Denny Shanefelter had asked the employees to put the campaign behind them and bury the hatchet. After doing so, he singled out Tantlinger and said that he could see that he was not in agreement. Stewart testified that he had spoken with Tantlinger about his union sympathies and had known for several years that Tantlinger supported the Union. This, coupled with the Respondent's union animus and the proximity to the unlawful discharge of Hough on the same morning, is sufficient to make out a prima facie case that Tantlinger was disciplined because of his support for the Union.

I find that the Respondent has established that it would have taken the same action even in the absence of Tantlinger's support for the Union. Based on the credible testimony of Stewart about the incident, I find that Tantlinger arrived late and angrily interrupted the meeting Stewart was conducting with the employees. After being asked by Stewart to be quiet, Tantlinger continued disrupting the meeting and eventually threw his lunch container in Stewart's direction. While Tantlinger may have claimed he dropped the container, it went forward 5 or 6 feet and landed only a few feet from where Stewart was standing. After first telling Tantlinger to go home, Stewart offered to forget about the incident if Tantlinger would be quiet and let him finish the meeting. Tantlinger persisted in interrupting Stewart by demanding to know if he was being fired until Stewart finally ordered him out of the shop. Tantlinger may well have been upset over learning about Hough's discharge, but without his testimony this is just speculation. Moreover, even if that were true, it cannot justify his conduct. There is no evidence that Tantlinger made any reference to Hough or his discharge until his disruption had reached the point where Stewart told him to go home and, then, he asked only if he was being fired like Hough had been. Under the circumstances, I find that Stewart's action in suspending Tantlinger was a reasonable response to his insubordinate and disruptive conduct which was unprovoked and occurred in front of the entire shift. An employer has the right ''to maintain order and respect in the conduct of its business.'' *Postal Service*, 268 NLRB 274, 275 (1983). I find that the suspension of Tantlinger did not violate Section 8(a)(3).

3. Alleged reduction of health benefits

It is alleged that the Respondent violated Section 8(a)(3) by denying Timothy Manchas reimbursement for claims submitted pursuant to its health benefits plan for the prescription drug Ativan. Notwithstanding the fact that the Respondent has displayed animus toward the Union and its supporters, which included Manchas, I find the evidence does not establish that such a violation occurred. As is discussed below, the health benefits claims of certain employees, including Manchas, which were filed after the Respondent changed its claims processor in November 1991, were initially denied because they were for costs incurred prior to the time the new processor took over. When this occurred, the Respondent took the action necessary to insure that these claims were paid to the extent they were allowable under the terms of the

plan. I find no evidence that there was any discrimination against Manchas because of his support for the Union. While it does appear that the rate of reimbursement for Manchas' claims for Ativan were reduced from 100 to 50 percent, the evidence shows this occurred because of the independent action of the new claims processor, pursuant to its interpretation of the plan language, not because of any action of the Respondent. While it is true that the Respondent accepted the processor's interpretation calling for the reduced rate of reimbursement, I find no evidence that it did so in order to retaliate against Manchas.[7] I find that the evidence does not establish a prima facie case of discrimination against Manchas under *Wright Line*, supra. However, should that determination be found to be incorrect, I also find that the Respondent would have taken the same action even in the absence of protected activity on the part of Manchas and other employees. I shall recommend that this allegation be dismissed.

D. *The 8(a)(5) and (1) Allegations*

1. The alleged layoffs

It is alleged that the Respondent laid off George Lesko, William Sellong, and Stephen Workman without first giving the Union notice and the opportunity to bargain. The Respondent admits that it did not give the Union prior notice of these layoffs but contends that it was unnecessary because the three employees were in fact terminated for cause.

a. *George Lesko*

George Lesko testified that he began working for the Respondent in April 1991 and was certified in flux-core welding. His work performance was never evaluated and he was never disciplined while employed there. Sometime in August he spoke to his supervisor, Ron Beckman, about working 1 hour less per month because he was earning $5 too much to qualify for food stamps. Beckman said he would have to talk it over with his boss. Beckman never got back to him about his request. His hours were not reduced and from that time until he was laid off he averaged 50 hours a week. On November 11,[8] he was called to Stewart's office. Stewart told him that he understood that Lesko was unable to work the number of hours that the Respondent needed and asked if he would take a layoff. Lesko told Stewart that he was getting enough hours so that he no longer needed to qualify for food stamps. Stewart showed him some blueprints and talked about the type of work the Respondent had available which, he said, Lesko was not qualified to perform. Lesko asked if there was anything else and after Stewart said there was not, he agreed to take a layoff. Stewart said there might be more work in the future and that he should call in a couple of weeks. About 3 weeks later, he called the shop and asked for Stewart and was told he was busy. He spoke with a secretary and asked if there was going to be any work for him. She responded that she did not think he would ever work there again.

Stewart testified that Lesko had asked that his hours be cut because of something to do with food stamps and that he told Lesko that he needed all his hours. He ultimately made a determination to let Lesko go and in a meeting they had to discuss his decision he told Lesko that he was going to let him go because he was unable to work the hours that were needed. Beckman testified that he was not involved in the decision to terminate Lesko and did not know why Lesko was terminated. He said it was his understanding that Lesko was laid off due to a slowdown in the welding area. The Respondent introduced records indicating that Lesko missed work on October 28 for an ''unknown'' reason and that he was off due to illness from November 4 through 8. The record also contains documents the Respondent submitted to the state unemployment compensation and welfare agencies which indicate that Lesko was separated due to ''lack of work.''

Analysis and conclusions

In the event of an economically motivated layoff of bargaining unit employees, an employer has a statutory obligation to bargain over the layoff decision and its effect on the employees. *Stamping Specialty Co.*, 294 NLRB 703 (1989); *Lapeer Foundry & Machine*, 289 NLRB 289 (1988). The Respondent contends that it has a policy whereby, in some instances, when it discharges employees the terminations are designated as ''layoffs'' so that the employees will be eligible for unemployment compensation while they look for another job and that, in such instances, it has no obligation to bargain about the terminations. I find that there is no credible evidence that this policy was involved in Lesko's separation or that it was a disciplinary discharge rather than an economically motivated layoff.

Lesko's testimony about the meeting in which Stewart informed him he was being laid off was credible. I find that Stewart first told him he was being laid off because he could not work all the hours that Stewart needed, a reference to Lesko's previous request for a 1-hour-per-month reduction that had never been acted upon. When Lesko said that was no longer a problem because he was working enough hours to not need the food stamp eligibility, Stewart showed him the blueprints of the available work, said he was not qualified to perform it and told him there was nothing else. This is consistent with the reason the Respondent gave the state unemployment compensation agency, that he was laid off due to lack of work, and the understanding of Beckman, Lesko's immediate supervisor. Stewart did not contradict Lesko's testimony about showing him blueprints of the available work and telling him he was not qualified for that work. He also did not deny telling Lesko there might be work for him later and to call in a few weeks. I find that the credible evidence establishes that this was an economically motivated layoff.

Although the Respondent apparently contends that Lesko was discharged because of excessive absences, neither Lesko nor Stewart testified to that being mentioned as a reason during their meeting on November 12. It appears that the Respondent has seized on that reason after the fact because it had no other basis to support its contention that Lesko was fired rather than laid off. That reason cannot withstand scru-

[7] As is discussed above, there is evidence that Hiznaneck made a threat of unspecified retaliation to Manchas which arose in connection with his complaints about the reduction in the rate of reimbursement. However, the reduction in benefits had occurred before the threat was made and resulted from the actions of the claims processor not the Respondent.

[8] It appears that the date was actually November 12.

tiny. While both Beckman and Stewart testified that Lesko's attendance was very poor, the Respondent presented no evidence that he was ever absent prior to October 28 or that he was ever disciplined or cautioned because of poor attendance. The records it did produce show that Lesko was absent on October 28 and that he was off due to illness from November 4 through 11. He furnished a note from a doctor attesting to the fact that he was ill and unable to work. There is nothing to suggest that the Respondent had any reason to question the validity of the note or that it ever did so. There is nothing in the record to support the gratuitous assertion in the Respondent's brief that when it failed to accommodate Lesko's request for a reduction in his hours, he ''took matters into his own hands and was absent from work.'' As noted above, Lesko asked in August for a 1-hour-per-month reduction so that he would be eligible for food stamps. Thereafter, the 50 hours a week he was working meant he no longer needed to qualify for food stamps.

I find that the Respondent has not established that Lesko was terminated for cause. The evidence as a whole supports the finding that he was laid off for exactly the reason the Respondent gave Lesko at the time he was laid off and listed on the documents it submitted to the state unemployment compensation and welfare agencies following his layoff—lack of work. I find that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off George Lesko on November 12 without giving the Union notice or the opportunity to bargain concerning the layoff decision and the effects of that decision.

b. *William Sellong and Stephen Workman*

William Sellong and Stephen Workman were employed by the Respondent as welders on the afternoon shift which worked from 4:30 p.m. to 3 a.m. They both testified that on the shift that began on the afternoon of November 18 they finished the welding work they were working on together at about 10 a.m. and were given permission to leave work early by Foreman Ron Beckman. Workman testified that he had returned to the shop at the end of the shift on the morning of November 19 in order to catch his ride home and was told by another employee that Beckman had written on his timecard that he had refused to do a job. He asked about it and was told by Beckman that he had to put something down on the card, that it was not a big deal and that he was not going to get into any trouble over it. During the day on November 19 both were called at home by Emery Stewart and told there was no work for them to do and not to come to work. Thereafter, both made several calls to Stewart to ask when there would be work but neither has ever been called to return to work.

Beckman testified that he was the direct supervisor of Sellong and Workman and that on the occasions he assigned them work other than welding, such as drilling or grinding, they were reluctant to do it and their output was poor. On the night of November 18, there was welding work to be done for only about half of the 10-hour shift. He told Sellong and Workman this and that there would be another work assignment which would be drilling. During the shift he noticed that they seemed to be dragging the work out so that they would not have to do the drilling. At the lunchbreak about halfway through the shift, he told them that there was not enough welding to last the entire shift and he was not going to put up with their trying to make it last. They responded that they could make it last all night. He told them that he wanted them to finish the job and start drilling. They responded that they were welders not drillers. He came back to them when they had finished the job and told them there was a beam to be drilled and to start drilling. They again said they were welders not drillers. Beckman told them that the Company would not pay them for standing around so they should ''either drill or go home.'' They said they would go home and left. He noted ''[d]rill or go home'' on their timecards to indicate why they had not worked the entire shift. He said that he believed that he left a note for Stewart about the incident as he often did so to inform him what had occurred during the shift. He did not prepare a report about the incident and the note to Stewart was not produced. He said he did not know why Sellong and Workman were terminated and was not involved in the decision to do so.

Stewart testified that he determines the work that is to be done and Beckman assigns it to the employees on his shift. He always provides extra work to fill out the shift if needed. On November 19 he got information from Beckman, either in a note in the log or verbally, he did not recall how, about what had occurred during the shift and that he decided to terminate Sellong and Workman. He telephoned each and told him that he was laying him off.

Analysis and conclusions

As in the case of Lesko, the Respondent denominated the separations of Sellong and Workman as layoffs both when they were told not to report to work and in documents it filed with the state unemployment compensation agency. Unlike the case of Lesko, I find that it has provided credible and convincing evidence that Sellong and Workman were terminated rather than laid off for lack of work. Based on his demeanor and the content of his testimony, I found Beckman to be a credible and reliable witness. He made no effort to embellish his testimony or to go beyond what he actually did or observed. I credit his testimony as to what occurred during the November 18–19 shift over that of Sellong and Workman. According to their version of events, Beckman sought them out, offered to let them go home early when they finished welding, but then reported to Stewart that they had refused to work. It simply does not make sense for Beckman, who was responsible for getting the work out, to suggest that they leave early rather than perform the drilling work that was there to be done. I find it much more likely that, after Beckman told them he would not allow them to drag the welding job out to the end of the shift and directed them to begin drilling, it was their idea to leave early.[9] Apparently, they viewed Beckman's statement to ''drill or go home'' as permission to leave early while the Respondent viewed it as a refusal to do the work assigned to them. Under the circumstances, while it might be argued that the Respondent's action in discharging Sellong and Workman

[9] I did not believe Workman's testimony that Beckman told him at the end of the shift that he had to put something on the card, that it was no big deal, and that he would not get in trouble over it, even in the absence of a direct denial by Beckman. Beckman's credible testimony as to what had occurred during the shift convinces me that he gave Workman no such assurance.

over this incident was unduly harsh, I cannot conclude that it was unreasonable or incorrect.

It is often pointed out that an employer can discharge an employee for a good reason, a bad reason, or no reason, so long as it does not do so for an unlawful reason. There is no contention here that the termination of Sellong or Workman was discriminatory. The Respondent was operating within its rights when it discharged them. However, it appears that because it informed Sellong and Workman that they were being laid off rather than discharged and chose to classify them for unemployment compensation purposes, as laid off rather than terminated for cause, the Respondent stands accused of violating the Act. Where, as here, the Respondent has provided a plausible and credible reason for its actions, its choice of language should not be controlling nor cause it to be penalized.

I find that the evidence does not establish that the terminations of Sellong and Workman were economically motivated layoffs rather than disciplinary actions. It is obviously more than a coincidence that the only two employees who were laid off on November 19 were the only two who refused to do assigned work and left early during the previous shift. The only evidence bearing on the availability of work was testimony by Stewart that at the time of these layoffs there was not enough flux-core welding work available for all of the people qualified in that process. I do not find that that testimony establishes that there was no work available for Sellong and Workman. It is clear that they were assigned and expected to do work other than welding such as the drilling they had refused to do just prior to being terminated. I find that the Respondent was not required to bargain with the Union over these terminations and that it did not violate Section 8(a)(5) by failing to do so. I shall recommend that these allegations be dismissed.

2. Alleged unilateral changes

It is alleged that the Respondent violated Section 8(a)(5) of the Act by changing the time period during which employees can submit claims for reimbursement under its health and dental benefits plan and by changing the level of reimbursement for employee claims for the prescription drug Ativan under that plan.

Since at least 1987, the Respondent has provided its full-time employees with health and dental benefits under a self-funded welfare plan. Effective November 1, 1991, the Respondent changed plans from one for which the claims processing agent was Diversified Group Administrators, Inc. (DGA) to one for which the claims processing agent was Employee Benefit Claims, Inc. (EBC). Company Controller Hiznaneck testified that the two plans were intended to be identical, that there may have been some differences in wording, but that the actual plan and the benefit level is the same. In October, the Respondent issued a memorandum to all employees which stated that they should claim for reimbursement for all medical bills incurred on or prior to October 31, by that date. The brochures describing the plans state that claims for reimbursement should be submitted within 90 days of the date an expense was incurred. Counsel for the General Counsel contends that this had the effect of shortening the period during which claims for reimbursement could be filed and constituted a unilateral change in the employees' health benefits.

The evidence establishes that Timothy Manchas had been reimbursed under the plan for claims for the purchase of the drug Ativan, prescribed for his wife, at 100 percent of the cost after payment of an annual deductible, for purchases between April 1988 and November 1, 1991. Since that time, purchases of the drug have been reimbursed at the rate of 50 percent after payment of the deductible. Manchas testified that he attended a meeting on November 1, at which employees were informed of the change in processing agents for the health plan by Hiznaneck, who stated that the insurance coverage would remain the same and only the names of the processors were changing. Union Representatives Barchiesi and Edward Yankovich testified that the Union was not notified or given the opportunity for bargaining before these alleged changes went into effect and there was no evidence to the contrary.

The Respondent contends that there has been no change with respect to the time in which employees must file claims for benefits under the health plan. Hiznaneck testified that each year since he was employed by the Respondent in 1989, he has posted a notice requesting that employees get their claims in by October 31. The notice posted in 1990 was introduced and he testified that those for earlier years were similar. The evidence shows that several employees were unable to get all of their claims in by the October 31 deadline and that such claims were initially denied by EBC because they were incurred prior to the date it began processing claims for the Respondent. After it learned of these denials, the Respondent sent EBC a letter directing it to pay those claims if they were otherwise payable under the terms of the plan and the claims covered by the plan were paid.

With respect to the change in the rate of reimbursement on Manchas' claims for Ativan, the Respondent contends that its new claims processing agent has determined that, under the terms of the plan, 50 percent is the correct rate of reimbursement notwithstanding the fact that it had been reimbursed at 100 percent by DGA prior to November 1, 1991. Leslie Sullivan, a regional claims manager for EBC, testified that she was familiar with the Manchas claim for Ativan and that the Respondent's plan ''allowed out-patient mental nervous coverage at 50 percent, and this drug was for treatment of a mental nervous condition; therefore, it was eligible at 50 percent, and that does fit within industry standard.'' She testified that ''based on our interpretation of the prior carrier's plan, yes, we feel they [DGA] made a benefit payment that was not in keeping with the written plan document.'' Charles Davidson, general counsel of EBC, also testified that according to his interpretation of the document as written, Ativan should be reimbursed at the rate of 50 percent.

Analysis and conclusions

A health insurance plan is a benefit constituting a term and condition of employment whether established pursuant to a collective-bargaining agreement or not. *Beitler-McKee Optical Co.*, 287 NLRB 1311, 1312 (1988). An employer violates Section 8(a)(5) and (1) of the Act by making changes in the terms and conditions of employment without first giving its employees' statutory bargaining representative notice and an opportunity to bargain over such changes. *NLRB v. Katz*, 369 U.S. 736 (1962); *Pioneer Press*, 297 NLRB 972, 976 (1990).

I find the evidence fails to establish that the Respondent unilaterally changed the period during which employees

could file claims for reimbursement under its health benefits plan. It appears from the credible testimony of Hiznaneck that in October 1991 the employees were asked to get their claims in by October 31, as a matter of administrative convenience, as they had been asked to do in previous years. There is no evidence that this request was mandatory or resulted in employees being denied benefits to which they were entitled. On the contrary, there was evidence that those employees who did not get their claims in by October 31 had them paid to the extent allowable under the plan.[10] I find that the Respondent's request that claims be filed by October 31 did not change the period that employees had to seek reimbursement under the terms of the plan and was not a change from prior practice since the same request had been made in previous years. I shall recommend that this allegation be dismissed.

Try as it might, the Respondent cannot make a convincing argument that payment of claims for Ativan arising after October 31 at 50 percent instead of 100 percent is not a change in benefits under its health plan. The remaining question is whether or not it was obligated to bargain with the Union before making such a change. It apparently contends that it was not so obligated because the change in benefit level was simply a correction of an erroneous interpretation of a plan provision over which it had no control. The evidence does not support that contention. Although EBC representatives, Davidson and Sullivan, testified that there could be no dispute but that their interpretation of the plan that the claims were payable at 50 percent was the right one, based on ''very black and white information,'' the fact is that prior to October 31, 1991, similar claims were payable at 100 percent and they were reimbursed at that rate for over 3 years without any question being raised. Further, Davidson testified that, as claim administrator of the plan, the Respondent has unilateral authority to direct EBC on plan interpretation and could order it to reimburse claims for Ativan at 100 percent. I find that the Respondent, by having reimbursed claims for Ativan at the rate 100 percent for more than 3 years, had established an employee benefit which it could not change without first giving the Union notice and an opportunity for bargaining. Since it has ultimate authority to determine what benefits its health plan is to provide, it cannot avoid its bargaining obligation by relying on an interpretation of its plan by a new claims processor which conflicts with the longstanding previous interpretation of the plan. I find that by unilaterally changing the rate at which employees' claims for the prescription drug Ativan is reimbursed, from 100 to 50 percent, the Respondent violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondent, Shane Felter Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. All full-time and regular part-time production and maintenance employed by the employer at its Route 51, Uniontown, Pennsylvania, facility, including painters, fitters, welders, burners, laborers, plant clericals, inspection employees, working foremen, draftspersons, property maintenance employees and utility employees; excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by:

(a) Threatening employees that it would close its business because they had selected the Union as their collective-bargaining representative.

(b) Telling employees that it was futile to have selected the Union to represent them because it would never enter into a contract with the Union.

(c) Threatening employees with unspecified reprisals if they supported the Union and because the Union had filed unfair labor practice charges against it.

(d) Threatening employees with bodily harm because they had selected the Union to represent them.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging Franklin Hough in retaliation for his having engaged in protected activity and support for the Union.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by:

(a) Laying off George Lesko on November 12, 1991, without first giving the Union notice and the opportunity for bargaining.

(b) Changing the rate of reimbursement for employee claims pursuant to its health plan for the prescription drug Ativan from 100 to 50 percent without first giving the Union notice and the opportunity for bargaining.

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

8. The Respondent did not engaged in those unfair labor practices alleged in the complaints not specifically found herein.

The Remedy

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

Having found that the Respondent discriminatorily discharged Franklin Hough, it must offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent violated Section 8(a)(5) and (1) by laying off George Lesko without notice to the Union and affording it the opportunity to bargain over the layoff decision as well as the effects of that decision, it must make him whole for any loss of earnings suffered by reason of this unilateral layoff. Backpay shall be computed as outlined above and cover the period from the date of his layoff until he was recalled or the earliest date on which one of the

[10] There may have been a delay in payment of some of these claims but that was a result of the coincidental change in claims processors and is unlikely to recur.

following conditions is met: (1) mutual agreement with the Union is reached; (2) good-faith bargaining results in a bona fide impasse; (3) the Union fails to commence negotiations within 5 days of receiving notice of the employer's desire to bargain; or (4) the Union subsequently fails to bargain in good faith. *United Gilsonite Laboratories*, 291 NLRB 924, 925 (1988). The Respondent must also restore the status quo ante with respect to reimbursement for claims for the prescription drug Ativan under its health benefit plan by reimbursing such claims at the rate of 100 rather than 50 percent and make whole Timothy Manchas for any losses suffered as a result of reimbursement at a lower rate since November 1, 1991, plus interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Shane Felter Industries, Inc., Uniontown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to close its business because its employees have selected the Union as their collective-bargaining representative.

(b) Telling employees it is futile to have selected the Union as their collective-bargaining representative.

(c) Threatening employees with unspecified reprisals because they have selected the Union as their collective-bargaining representative and because the Union filed unfair labor practice charges against it.

(d) Threatening employees with bodily harm because they have selected the Union as their collective-bargaining representative.

(e) Discharging or otherwise discriminating against employees because they have engaged in support for the Union or other protected activity.

(f) Refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit by laying off unit employees without first providing the Union with notice and the opportunity to bargain about the layoff decision and the effects of that decision on the employees.

(g) Refusing to bargain with the Union by unilaterally changing the rate of reimbursement for the prescription drug Ativan under its heath benefits plan.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

(a) Notify the Union concerning all proposed changes in wages, hours and other terms and conditions of employment of employees in the appropriate unit and, upon request, bargain with the Union about such changes.

(b) Reinstate the rate of reimbursement under its health benefits plan for the prescription drug Ativan at 100 percent and make whole Timothy Manchas for any losses suffered as a result of reimbursement at the rate of 50 percent since November 1, 1991, plus interest.

(c) Notify and, on request, bargain with the Union concerning any proposed decision to lay off unit employees and the effects of that decision on the employees.

(d) Offer to Franklin Hough immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination against him, plus interest. Make whole George Lesko for any loss of earnings or other benefits suffered as a result of his unlawful layoff on November 12, 1991, plus interest. Backpay and interest due hereunder shall be computed in the manner described in the remedy section of this decision.

(e) Remove from its files any reference to the unlawful discharge of Franklin Hough and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) Preserve and, on 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.

(g) Post at its facility in Uniontown, Pennsylvania, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 6, 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.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints in this matter are dismissed insofar as they allege violations of the Act not specifically found herein.

[11] 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.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''