American Crane Corp. *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO *and* Cleatus L. Brown. Cases 11–CA–16292, 11–CA–16583, 11–CA–16763, and 11–CA–17235

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The issues presented here are whether the administrative law judge correctly found that the Respondent committed several violations of Section 8(a)(1), (3), and (4) of the Act.[1] The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] except as discussed below.

We adopt the judge's conclusion that the Respondent unlawfully discharged employee Johnny Thompson and unlawfully took several adverse personnel actions (other than those discussed below) against employee Cleatus Brown. We do not, however, pass on whether Thompson violated company policy on "early-outs" on July 14, 1995. Because Thompson's supervisor remained silent when Thompson informed him that he was taking the remainder of July 14 as a personal or vacation day, we find that the supervisor impliedly gave Thompson permission to leave. In addition, we do not agree with the judge that the comment Brown made to Supervisor Inez Crisp after Brown had clocked out on September 23, 1996, was "appropriate." Neither do we find, however, that Brown's comment justified the discipline imposed.

In addition, the General Counsel has conceded the merit of the Respondent's exceptions to the judge's findings of 8(a)(3) violations for adverse employment actions taken against Cleatus Brown in February 1996. In accord with the General Counsel and the Respondent, we find that these actions took place outside the 10(b) limitations period for the relevant charge filed in Case 11–CA–17235. We reverse the judge's finding of the violations at issue, and we shall delete all references to them from the Order and notice.[4]

On March 24, 1998, the Board granted a joint motion from the Respondent and the Charging Party Union to withdraw the allegations of 8(a)(5) violations in this consolidated complaint proceeding. We shall therefore delete all references to 8(a)(5) violations from the Order and notice.[5]

ORDER

The National Labor Relations Board and orders that the Respondent, American Crane Corp., Wilmington, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities.

(b) Threatening employees with plant closure if the employees select the Union as their bargaining representative.

(c) More closely monitoring the work and movement of its employees because of their union activities.

(d) Disparately enforcing a no-solicitation, no-distribution rule in order to discourage the union activities of its employees.

(e) Threatening employees with denial of reinstatement from suspension because they filed unfair labor practice charges with the Board.

(f) Transferring employees to different job assignments in order to isolate them from other employees and discourage their support for the Union.

(g) Telling employees that the reason for a new $5 charge for lost I.D. cards was to keep "undesirables" out of the plant.

(h) Discouraging membership in the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmith, Forgers & Helpers, AFL–CIO or any other labor organization by discharging employees because of their union or other protected, concerted activity, or by discriminating against them in any other manner with respect to their wages, hours, tenure of employment, or any other terms and conditions of employment.

[1] On June 24, 1997, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed a brief in opposition. The General Counsel filed cross-exceptions and an answering brief.

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

[2] 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 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] There are no exceptions to the judge's unfair labor practice findings discussed in sec. II,A,3–7 and sec. III,B of his decision.

Member Hurtgen does not agree that Supervisor Frank Moelter unlawfully interrogated employee Clemmons. Moelter simply told Fred Clemmons that he had heard that Clemmons was going to organize a union. Although the statement may arguably have created an impression of surveillance, it did not constitute unlawful interrogation.

[4] We find merit in the General Counsel's cross-exceptions to the judge's failure to recommend remedial language for the 8(a)(4) violations that he found. We shall include appropriate language in our Order and notice.

Contrary to the judge and his colleagues, Member Hurtgen does not find that Supervisor Crisp's July 1996 statement to employee Cleatus Brown regarding a subpoena is sufficient to establish that discipline later imposed on Brown violates Sec. 8(a) (4). The statement is ambiguous and (at most) shows antiunion animus. It does not establish that Respondent was hostile to the giving of testimony in Board proceedings.

[5] The withdrawal of all 8(a)(5) allegations also moots the Respondent's exception to the judge's procedural ruling granting a motion to quash a subpoena duces tecum.

(i) Issuing discipline in retaliation for employees providing testimony to the Board.

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

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

(a) Within 14 days after service from the date of this Order, offer Fred Clemmons and Johnny Thompson reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, dismissing if necessary any employee hired to fill the positions.

(b) Make Fred Clemmons and Johnny Thompson for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Make Zachary Givens whole for any loss of earning he may have suffered by reason of our unlawful suspension of him on October 17, 1994.

(d) Within 14 days after service from the date of this Order, remove from its files any and all references to the unlawful discharges of Fred Clemmons and Johnny Thompson, the unlawful suspension of Zachary Givens, and the unlawful warnings to Clemmons, Thompson, and Cleatus Brown, and within 3 days thereafter notify them in writing that this has been done and that this action will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Wilmington, North Carolina facility, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] 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."

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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT threaten employees with plant closure if they select the Union as their collective-bargaining representative.

WE WILL NOT more closely monitor the work and movement of our employees because of their union activities.

WE WILL NOT disparately enforce a no-solicitation, no-distribution rule in order to discourage union activities of our employees.

WE WILL NOT threaten employees with denial of reinstatement from suspension because they filed unfair labor practice charges with the Board.

WE WILL NOT transfer employees to different job assignments in order to isolate them from other employees and discourage their support for the Union.

WE WILL NOT tell employees that the reason for a new $5 charge for lost I.D. cards is to keep "undesirables" out of the plant.

WE WILL NOT discourage membership in the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, & Helpers, AFL–CIO or any other labor organization, by discriminating against them in any way.

WE WILL NOT issue discipline to employees in retaliation for their providing testimony to the Board.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by the Act.

WE WILL offer Fred Clemmons and Johnny Thompson reinstatement to their former jobs.

WE WILL make Fred Clemmons and Johnny Thompson whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make Zachary Givens whole, with interest, for any loss of earning he may have suffered by reason of our unlawful suspension of him on October 17, 1994.

WE WILL remove from our records all references to our discharges of Fred Clemmons and Johnny Thompson, our suspension and transfer of Zachary Givens, and our unlawful warnings to Clemmons, Thompson, and Cleatus Brown, and inform them in writing that this has been done and that these actions will not be used as the basis of any future discipline of them.

AMERICAN CRANE CORP.

Jane P. North, Esq., for the General Counsel.

Spencer Youell, Esq., James S. Mowery, Esq., and Gary Reeve, Esq. (Mowery & Youell), of Columbus, Ohio, for the Respondent.

Dana K. Apple, Esq. (Blake & Uhlig), of Kansas City, Kansas*, Mr. Thomas W. Chastain,* International Representative, of Copperhill, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. American Crane Corporation (Respondent or the Company) has denied knowledge of the filing and service of the charges herein. These denials mandate a recital of the evidence on these issues.

The record includes an original charge in Case 11–CA–16292 filed by on November 18, 1994,[1] by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO (the Union) and an amended charge on December 28, 1994, alleging that Respondent committed substantially all of the unfair labor practices litigated in this proceeding. Included with the original charge is a transmittal letter, and an affidavit of service of the charge by certified mail addressed to Respondent, dated November 18. Attached to the original charge is a postal receipt card showing delivery to Respondent on November 21, 1994.[2]

Included with the amended charge is a transmittal letter and an affidavit of service of the amended charge by certified mail to Respondent, dated December 28. Attached to the amended charge is a postal receipt card showing delivery to Respondent on December 30, 1994.[3]

The record includes copies of the original charge and an amended charge in Case 11–CA–16583 filed on June 16 and September 26, 1995, respectively. Included with the original charge is a transmittal and an affidavit of service of the original charge on Respondent by certified mail on June 16, 1995. Also attached is a postal receipt card showing delivery to Respondent on June 19, 1995.[4] Attached to the amended charge is an affidavit of service dated September 26, 1995, affirming that a copy of the amended charge was served on Respondent by certified mail on September 26, 1995.[5] The original and amended charges in Case 11–CA–16583 allege additional unfair labor practices which were litigated in this proceeding.

The record includes a copy of the original and amended charges in Case 11–CA–16763, filed on November 6, 1995, and April 2, 1996, respectively.[6] Included with the original charge is an affidavit of service by certified mail on the Respondent on November 6, 1995, and a transmittal letter. Also attached is a postal receipt card showing delivery to Respondent on November 10, 1995.[7] Included with the amended charge is an affidavit of service by certified mail on Respondent, dated April 2, 1996.[8] The charges allege unfair labor practice litigated at the hearing.

The original and amended charges in Case 11–CA–17235 were filed on October 23 and November 26, 1996, respectively.[9] The record includes affidavits of service of the charges upon Respondent by certified mail on the same dates as the filing.[10]

Various complaints and consolidated complaints issued pursuant to these charges, in particular a second consolidated complaint in the first three cases cited above, on April 4, 1996, and, on November 29, 1996, a complaint in Case 11–CA–17235. These complaints allege some of the unfair labor practices asserted in the charges. Respondent appeared and litigated these allegations. I conclude that the charges were filed and served on Respondent on the various dates indicated.

On December 16, 1996, the General Counsel moved to consolidate Case 11–CA–17235 with the first three cases during a hearing then in progress. The motion was granted.

The pleadings establish that the Union was certified by the Board as the representative of the employees pursuant to an election on October 12, 1994. The complaint alleges that Respondent committed various unfair labor practices. I held a hearing on these matters on July 16–18, September 17–20, and December 16 and 17, 1996, in Wilmington, North Carolina. Thereafter the General Counsel, Respondent, and the Charging Union filed briefs.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a North Carolina corporation with a manufacturing facility at Wilmington, North Carolina, where it is engaged in the manufacturing of cranes and parts used in the construction of cranes. During both of the 12-month periods preceding issuance of the second amended complaint in the first three cases cited above and Case 11–CA–17235, Respondent purchased and received at its Wilmington, North Carolina facility goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina, and sold and shipped from the facility goods and materials of the same valuation during the same period to points outside the State of

[1] All dates are in 1994 unless otherwise indicated.
[2] G.C. Exh. 1(a).
[3] G.C. Exh. 1(c).
[4] G.C. Exh. 1(l).
[5] G.C. Exh. 1(n).
[6] G.C. Exhs. 1(w), 1(y).
[7] G.C. Exh 1(x).
[8] G.C. Exh.1(z).
[9] G.C. Exhs 1(a), 1(c) (Case 11–CA–17235).
[10] G.C. Exhs. 1(b), 1(d) (Case 11–CA–17235).

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

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

II. ALLEGED VIOLATIONS OF SECTION 8(A)(1)

A. The Alleged Unlawful Interrogation

1. Background—the 1994 union campaign

The complaints allege that Respondent unlawfully interrogated its employees concerning their Union activities. In mid-August 1994, the employees designated toolroom employee Freddie Clemmons to contact the Union on their behalf. Clemmons did so, and received union cards, literature, and stickers. On the Tuesday following Labor Day, Clemmons secured 40 to 50 signed cards from employees, some in the presence of supervisors. Clemmons wore a large union button, the only button of comparable size, until his discharge.

2. The alleged interrogation

a. The evidence

Clemmons testified without contradiction that, in the week before Labor Day, prior to his activities described above, Frank Moelter approached him in the toolroom and said that he had heard that Clemmons was going to organize the Union. Moelter was an admitted supervisor. Clemmons replied that he had not yet decided. Clemmons was a credible witness, and I accept his testimony.

Employee Cleatus Brown testified without contradiction that, during the union campaign, Jack Yow asked him in the bathroom where his union button was. Brown, who had not yet worn a union button, replied that this was none of Yow's business. Brown was credible and I accept his testimony. Respondent's answer denies that Yow was a supervisor. Nonetheless, Respondent stipulated at the hearing that Yow had been a supervisor prior to the union campaign, but during the campaign supervised only one employee. However, a finding of supervisory status may be based on supervision of only one employee. *Jack Holland & Son, Inc*., 237 NLRB 263, 265 (1978). Respondent's records show that Yow approved employee absence of work requests, with a designated title as "supervisor,"[11] and signed performance reviews and evaluations of employees with the same title.[12] Cleatus Brown testified that Yow told him to correct his bills of lading at times, and employee William Bryant testified that Yow told employees how to load trucks. I conclude that Yow was a supervisor.

b. Legal conclusions

In an early statement of the principles to be applied in such cases, the Board stated:

> In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees—a purpose which was legitimate in nature—to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent. [*Blue Flash Express*, 109 NLRB 591, 593 (1954).]

The Board distinguished its decision in *Blue Flash* from a contrary holding, in which the interrogation took place a week before a Board election, and the employer failed to give the employees any legitimate reason for the interrogation or assurances against reprisal (id.).

The Board reiterated this standard in *Rossmore House*, 269 NLRB 1176 (1984), where it rejected a per se approach to interrogation of open union adherents and concluded that the test was whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce, employees in the exercise of rights guaranteed by the Act (id., 269 at 1177). The Board stated some of the factors to be considered:

> Some factors which may be considered in analyzing interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner, and (4) the place and method of interrogation. See *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be applied in applying the Blue Flash test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. [Id., 269 NLRB at 1178 fn. 20.]

The Board has concluded that interrogation of a known union adherent's union sympathies was coercive. *Baptist Medical System*, 288 NLRB 882 (1988). In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board applied the same test to interrogation of employees who were not open union adherents. The Court of Appeals for the Fifth Circuit recently affirmed a Board finding of coercive interrogation because of the employer's promulgation of an illegal rule, and a history of attempting to engage in the same practice in the past. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), enfd. in part 294 NLRB 462 (1989).[13]

Respondent argues that the actions of Moelter and Yow did not constitute unlawful interrogation. In both cases, the employee did not testify that he felt compelled to answer the supervisor and the latter failed to ask the employee's "stance" on the Union. The interrogation did not take place in an intimidating setting, and no other employee was shown to have heard it.[14]

These arguments are not persuasive. There is nothing in the criteria cited about requiring a compulsory answer from the

[11] G.C. Exhs. 46–49.

[12] G.C. Exhs. 51, 52.

[13] Citing *Bourne,* supra, the court listed eight factors to be considered in determing whether interrogation has been coercive: (1) the history of the employer's attitude toward its employees; (2) the nature of the information sought or related; (3) the rank of the questioner in the employer's hierachy; (4) the place and manner of the conversation; (5) the truthfulness of the employee's response; (6) whether the employer had a valid purpose in obtaining the information sought; and (7) whether a valid purpose, if existent, was communicated to the employee that no reprisals would be forthcoming. Although some of these factors were not satisfied, the court in *NLRB v. Brookshire Grocery*, supra, agreed with the Board that the interrogation had been coercive.

[14] R. Br. 6, 7.

employee. The test is the nature and timing of the interrogation. It took place just before the beginning of a union campaign in Moelter's case, and during the campaign in Yow's. As set forth hereinafter, the Company committed numerous unfair labor practices. These included discrimination against both Clemmons and Brown, and, in Clemmons' case, his unlawful discharge. No reason was given for the questions, and there was no assurance of a lack of reprisal.

The Board has recently considered a case with similarities to the case at bar. In *Stoody Co*., 320 NLRB 18 (1995), as here, the employer committed numerous unfair labor practices. There was no apparent purpose for the questions, nor were any assurances given that the employee did not have to answer or that his job was not endangered. The questioning was done by the employer's production manager, a higher ranking supervisor than the supervisors in this case, and took place in his office. On the other hand, the violations in Stoody consisted only of transgressions of Section 8(a)(1), whereas here the Respondent committed a wider variety of unlawful acts, including discrimination against the employees who were interrogated.

I conclude that the circumstances in this case were at least as coercive as they were in *Stoody*, and that they meet the criteria set out in *Rossmore House* and *Bourne*. Accordingly, I conclude that Respondent, by the questions of Moelter and Yow, violated Section 8(a)(1).

3. The threat of plant closure

a. The evidence

The complaint alleges that Respondent threatened its employees with closure of its Wilmington facility if they selected the union as their bargaining representative.

Fred Clemmons testified that, subsequent to the time he engaged in union activity, on September 6, Supervisor Moelter came to him and said that he had to sell his boat for $10,000. The reason, Moelter stated, was that if the Union came in the plant would shut down, and Moelter would need the money. Moelter was on vacation at the time, according to Clemmons.

Moelter agreed that he had a conversation about his boat with Clemmons. It took place in late August or early September. Moelter and Clemmons were in the toolroom "to look up a tool." Moelter asked Clemmons if he knew anybody that wanted to buy a boat. Clemmons asked the reason. Moelter replied that he had arrangements to be married, and that his intended wife did not like the water. Accordingly, there was no reason to leave the boat in the yard, and he might as well sell it and put the money in the bank. Moelter further affirmed that he did get married. Moelter denied that he ever threatened any employee with closure of Respondent's facility.

b. Factual and legal conclusions

Clemmons' demeanor throughout his testimony in this case indicates that he was a more truthful witness than Moelter. The latter's statements during these events manifest antiunion animus. Moelter's testimony corroborates Clemmons' to the extent that Moelter admits there was a conversation about a boat. I credit Clemmons' averments as to the nature of that conversation.

Respondent argues that the statement was not coercive, because no other employees were present.[15] This argument has no merit, as numerous Board cases attest. Moelter's statement that the plant would shut down if the Union came in was coercive under established Board law. I conclude that Respondent thereby violated Section 8(a)(1).

4. The increased monitoring of union activities

a. The evidence

The complaint alleges that Respondent more closely monitored the work and movement of its employees because of their union activities.

Clemmons' assigned work area was the toolroom. Employees would come there and request tools. He testified that, prior to his distribution of union literature on September 6, Moelter spent about 95 percent of his time in the boring mill, more than 100 yards from the toolroom. After Clemmons' distribution of union literature, Moelter would be at the door of the toolroom as employees approached, and stand there "with a stiff jaw just glaring" at Clemmons. He was there 95 percent of the time until Clemmons was discharged. David Porter, a former employee, testified that, during the union campaign, Moelter was near the toolroom twice as many times as he was previously.

Moelter testified that he moved throughout the plant, and passed the toolroom in doing so. In September, he observed employees talking with attendants in the toolroom. He approached these employees, and asked them what they were waiting for. In 99 percent of the cases, the employees would disperse without saying anything. Moelter estimated that his supervision of the toolroom was about the same in September as it had been previously. "The only thing was that when I would see more people standing up there than normal, I would walk up and see what was going on. My job is to keep the people at their machines, not standing at the tool crib window."

b. Factual and legal conclusions

The testimony of Clemmons, corroborated by Porter, and partially admitted by Moelter, establishes that the latter was at Clemmons' work station a significantly greater amount of time after the union campaign began. He stood and watched employees at the toolroom, and even approached them to ask them what they wanted. Moelter knew that there was a union campaign, and that Clemmons wore a union button.

In *Stoughton Trailers, Inc*., 234 NLRB 1203 (1978), the plant manager ordered supervisors to ascertain whether employees were talking about the union on company time, and to direct them not to engage in such activity. In addition, the plant manager was in the prounion employee's work area more often than he had been prior to his knowledge of the employee's organizational activities. The Board affirmed the administrative law judge's conclusion that this constituted unlawful surveillance. The Board reached a similar conclusion regarding surveillance of union activity in the workplace in *Lyman Steel Co*., 249 NLRB 296, 302–303 (1980), and in *Intermedics, Inc*., 262 NLRB 1407 (1982), enfd. 715 F.2d 1022 (5th Cir. 1983). In the latter case the administrative law judge found that supervisors engaged in "spying on employees during their breaks, (closely) watching employees while they were working" (id., 262 NLRB at 1414). He noted that the supervisors "commenced to engage in a typical behavior, characterized by intensive and highly conspicuous surveillance of employees' activity immediately upon learning of the organizational campaign" (id. at 1515). The Board concurred that this was unlawful, and the Court of Appeals for the Fifth Circuit specifically agreed (715

[15] R. Br. 8.

F.2d at 1025). The Board reached a similar conclusion in *K-Mart Corp.*, 255 NLRB 922, 924 (1981).

Respondent argues that "enhanced surveillance of employees at the workplace that happens to coincide with union organizing activity is not unlawful if it is for legitimate business reasons concerning productivity," citing *Lechmere*, 295 NLRB 92 (1989).[16] In that case the employer installed rooftop cameras. There was conflicting testimony regarding the purpose of the cameras, including testimony that it was to enable security people to follow a shoplifter. The administrative law judge, "although not free from doubt," and relying on the employer's testimony that the cameras were not out of the ordinary compared with its use of cameras in its other stores, decided that the installation did not violate Section 8(a)(1).

There is no security reason advanced in this case for Moelter's increased surveillance of Clemmons. After acquiring knowledge of Clemmons' union activities, Moelter simply engaged in watching Clemmons as in the cases cited above. I conclude that he engaged in increased monitoring of Clemmons' union activities, and violated Section 8(a)(1).

5. The disparate enforcement of a no-solicitation, no-distribution rule

a. The evidence

Respondent had a rule reading as follows:

> Employees are not permitted to engage in solicitation of any kind or the distribution of literature during his/her working time or the working time of any other employee. Distribution of literature is not permitted in the working areas of the plant at any time. The only exception is the annual solicitation for the United Way. For purpose [sic] of this rule, working time does not include break periods, meal times, or other specified periods during the day when employees are properly not engaged in performing their work tasks. Violations of this rule subjects [sic] the employee to discharge.[17]

Despite this rule, the employees engaged in a wide variety of activities which violated its provisions, both before and during the union campaign. These activities included sales of lunches, candy bars, and raffles of tickets to various events. These activities went on openly, during both worktime and breaktime. Employees discussed a wide variety of subjects during working time. Although Human Resource Manager Carol Davis told employee David Porter to take down a flyer advertising the sale of a church dinner, Supervisor Moelter testified that the sale of lunches continued in September and October. Porter was not given any discipline for his actions.

Cleatus Brown and William Bryant testified that Inez Crisp, an admitted supervisor, told a group of employees that nobody was supposed to solicit votes for the Union on company time. Brown averred that this took place 1 week before the election, and that Crisp said that any employee talking about the Union on company time would be suspended. I credit this testimony. On September 30 Zachary Givens was given a "counseling action" by Supervisor Crisp for discussing the Union on company time. Further violations would lead to more stringent discipline. Givens wrote a denial of the discipline stating that it was a result of the Company's position on the Union, and delivered it to Human Resource Manager Carol Davis.[18]

b. Factual and legal conclusions

The complaint alleges disparate enforcement of the rule, not its facial validity or invalidity. Accordingly, I need not pass on the latter issue. Crisp's statement to the employees and the discipline administered to Givens, coupled with Respondent's failure to deter other violations of the rule, show that it was disparately enforced so as to apply only to union activities. As such, it violated Section 8(a)(1) of the Act. *Our Way*, 268 NLRB 394 (1983).[19]

6. The threat of denial of reinstatement following suspension because the filing of unfair labor practices charges

a. The evidence

Fred Clemmons was discharged over an altercation which took place with another employee on September 28. On September 30, Clemmons was given a counseling action and was suspended pending investigation of the incident.[20] On the same day, September 30, the Union filed an unfair labor practice charge alleging that the suspension was unlawful. The date stamp shows that it was received by Respondent on October 4.[21]

Clemmons testified that he called Human Resources Manager Carol Davis the next day, October 5. Davis is an admitted supervisor. Clemmons asked whether he could return to work. Davis replied that since Clemmons had filed charges against the Company, he could not come back to work until after the election (on October 12) if at all.

Davis testified that she did not threaten Clemmons on October 5 with a denial of reinstatement. She neither affirmed nor denied that she had a conversation with him.

b. Factual and legal conclusions

Respondent argues that it would have been "illogical" for Davis to have made the statement attributed to her, since an investigation was pending on whether Clemmons would be discharged. However, although Davis denied threatening Clemmons, she did not deny having a conversation with him. Accordingly, Clemmons' testimony that a conversation took place is unrebutted. Clemmons' demeanor was that of a more truthful witness than Davis. I credit his testimony attributing to Davis the statement that because he had filed a charge, he could not be reinstated until after the election, if at all. I further conclude that this statement was coercive and violated Section 8(a)(1).

7. The alleged transfer of employees in order to isolate them and discourage their support for the Union

a. The evidence

Zachary Givens testified that his job prior to early October was to deliver and retrieve parts all over the plant. On October 7, about a week before the election, Supervisor Inez Crisp

[16] R. Br. 9.

[17] Jt. Exh. 1, pp. 19–20.

[18] G.C. Exh. 11.

[19] The discriminatory aspect of the rule as applied to Givens is considered, infra.

[20] G.C. Exhs. 2, 3. Although the documents indicate that they were executed on October 3, I credit Clemmons' testimony that this took place on September 30, 2 days after the incident.

[21] G.C. Exh. 56.

transferred him to the shipping department. He remained there until he was laid off on November 3. Givens affirmed that his contact with other employees was minimal in the shipping department, compared to his prior job.

Givens stated that William Bryant used to be a group leader in the shipping department. Other employees who worked in the department with more experience than Givens were Cleatus Brown, Pat Rhodes, and Patricia Pearson. Another employee, Willie Armstrong, was sick, but was there some of the time after Givens' transfer. Crisp told Givens that somebody else would take of care of his prior duties, and that there was no reason for him to leave the shipping area. Givens affirmed that he was not given any reason for the transfer.

Crisp testified that the Company was building a "prototype machine," and that her supervisor asked her for one employee to assist in this work. She selected William Bryant. Crisp testified initially that this left her with Willie Armstrong, who was sick and ultimately died of cancer. Crisp contended that she selected Givens to replace Bryant because he was "the person she would pull when she needed help for Willie." On cross-examination, Crisp testified that, subsequent to Bryant's transfer, she had "different people constantly" (in shipping). I might have one person . . . today and I might have another person the next day."

Asked to compare Givens' pretransfer and posttransfer jobs, Crisp testified initially that when Givens was in shipping, he had little need to go other places, except in a few specific instances. However, Crisp also contended that there was not much difference between the jobs in terms of the areas to be visited.

b. Factual and legal conclusions

Givens' testimony that various people worked in the shipping department was confirmed by Crisp on cross-examination. Her contradictory testimony on this issue does not inspire confidence in her assertion, contradicted by Givens, that he was the one she would "pull" to help Armstrong. I credit Givens' testimony that he had done less work in the shipping department than the other individuals named. I also credit his unrebutted testimony that Crisp gave him no reason for the transfer.

These factors undercut Crisp's asserted reasons for the transfer, i.e., the need to assist the ailing Armstrong. On Crisp's own testimony she could have selected somebody else.

I also credit Givens' testimony that his contact with other employees while in the shipping job was minimal compared to the prior job. Here again Crisp's testimony was contradictory—a statement substantially agreeing with Givens was coupled with an equivocation.

Givens' transfer took place a few days after Crisp gave him a warning for talking about the Union, and a few days before the Union election. He was given no reason for the transfer. In similar circumstances the Board has concluded that the employer was "seeking to take (the employee) out of circulation and to isolate him from other employees because of his union activities." *Montgomery Ward*, 290 NLRB 981 (1988).

Based on the timing of the transfer, the failure to give Givens any reason for it, Givens' known support of the Union and his prior warning, the vagaries of Crisp's asserted business reasons, and the fact that Givens' demeanor was that of a more credible witness than Crisp, I conclude that the transfer was to isolate Givens from other employees because of his union activities. Respondent thereby violated Section 8(a)(1).[22]

B. The Alleged Restriction on Employees Entering the Plant in Order to Discourage Union Activities

This alleged violation of Section 8(a)(1) is contained in Section 8(g) of the complaint. Section 8(e) alleges violation of Section 8(a)(5) and (1) by the Respondent's imposition of a fine for employee loss of identification badges, together with a comment by Supervisor Moelter. I shall consider these allegations together in a discussion of alleged 8(a)(5) violations.

III. THE ALLEGED DISCRIMINATION

A. Fred Clemmons

1. The allegation and Clemmons' union activities

The complaint alleges that Respondent gave Clemmons a warning on October 7, 1994, a suspension on September 30, and discharged him on October 7, 1994, because of his union and other protected activities, in violation of Section 8(a)(3) and (1).

Clemmons was hired in October 1987, suspended on October 3, 1994, and discharged on October 7, for "verbal threats towards another employee–late afternoon on 9–28–94."[23]

As set forth above, Clemmons was the employees' designated representative for contacting the Union, and obtained signatures on numerous authorization cards. He wore a large union button, and was unlawfully interrogated.

2. Clemmons altercation with Russel Luhm

a. The incidents in the bathroom

Clemmons testified that he entered the bathroom on September 28. As he was doing so, Russell Luhm was leaving the bathroom.[24]

Clemmons testified that the bathroom was customarily dirty and that he went to the "end stall." The seat was down and covered with urine. Clemmons did not attempt to raise it, and urinated. When he emerged from the stall, Luhm had returned to the bathroom. As Clemmons approached the sink, Luhm came up to him to the point where Luhm's chest was touching Clemmons. Clemmons had to move his head back. Luhm said, "Didn't your mother teach you any manners and to be polite about putting up the toilet seat?" According to Clemmons, Luhm was gritting his teeth and leaning on Clemmons. Clemmons replied, "Get the fuck out of my face." Luhm backed up, looked at Clemmons' union button, and said, "Bull."

Clemmons and Luhm then left the bathroom. At the snack machines, Luhm turned and said, "You better watch your back, boy." Clemmons replied, "What the hell did you say?" Luhm repeated: "You better watch it, buddy, because the Company's got ways of dealing with people like you." Clemmons replied, "You're trying to attempt me to kick your ass [sic], but I'm not." The two then "walked off."

Luhm testified that he entered the bathroom to wash his hands. The seats were normally dirty, and Luhm had to clean them up before use. Clemmons was in a stall urinating, and the

[22] The complaint alleges only that Sec. 8(a)(1) was violated.

[23] G.C. Exhs. 2, 3, and 6.

[24] Luhm testified that he "was in charge of scheduling in the machine shop, supervisor." On cross-examination he denied he supervised other employees.

seat was down. When Clemmons came out, Luhm said, "Fred, in the future we would appreciate it if you'd lift up the toilet seat as others don't care to wipe up after you and it's very unhealthy." Clemmons replied that "somebody else" did it. Luhm said that he was sure Clemmons' mother taught him better. This "irritated" Clemmons.

They left the bathroom, and Luhm turned to go to his office. Clemmons "hollered" at him: "You bastard, I'm going to take care of you." Luhm replied, according to his testimony, "Fred, the Company will take care of people like you."

Luhm testified that he then went to his office, and remained for 10 or 15 minutes. He did not relate any of these events to a supervisor.

b. The incident by the railroad track

A railroad track runs through the plant, and Clemmons had to cross it to get back to his work area. Clemmons was crossing the track when Luhm appeared and "picked up speed." Clemmons slowed down, and Luhm went past him so rapidly that Clemmons could "feel the wind off" Luhm. Clemmons asked: "What the hell is your problem."

Luhm stated that he left his office to go to the inspection area about 10 to 15 minutes after returning from the bathroom. He did not know where Clemmons was during this period, but saw him crossing the track. Their paths converged, and Clemmons said, "Don't ever say anything about my mother again." Luhm replied that the point was to lift the toilet seat. Clemmons then started "hollering and swearing" at him. Supervisor Moelter asked Luhm to prepare a statement about 5 days later. Luhm agreed that this statement does not contain anything about Clemmons hollering or swearing.[25] Nonetheless, Luhm testified that it took place.

c. The incident by the toolroom

Clemmons returned to the toolroom, where tool cutter John Hewitt was present. Luhm came back toward the railroad track, paused, had a clenched fist and started "mouthing" something which Clemmons could not hear because of the noise the machines made. Hewitt testified and corroborated Clemmons. The latter said to Luhm, "Man, if you keep on, you're going to cause me to kick your ass."

Luhm asserted that, as he was returning to his office and passed the toolroom, Clemmons was standing on a chair in the toolroom flashing a light at Luhm. When Clemmons got Luhm's attention, he started "hollering and swearing" at Luhm. The latter put Clemmons' statements "out of his mind." Luhm's statement prepared at Supervisor Moelter's request states that Clemmons was hollering at him from the toolroom, but says nothing about a flashing light.[26] Clemmons testified that the only light in the toolroom was a hanging light which he did not touch. There was no flashlight or lantern. Luhm returned to his office, and Supervisor Moelter came there later.

3. Clemmons' complaint to Supervisor Moelter and the latters actions

Clemmons told Hewitt that he was going to report these matters to Supervisor Moelter, "to get that man off my ass." He found Moelter a short distance from the toolroom, talking with employees Alan Kelly and Gerald Ballard. Clemmons told Moelter: "If you don't get Russ off my back, I'm going to have to knock him on his ass." Moelter gave slightly different versions of this statement. Moelter told Clemmons that there was nothing that he, Moelter, could do about it, and advised Clemmons to see Luhm's supervisor, whom Moelter identified as Steve Green. Steve Carney was actually Luhm's supervisor. Alan Kelly corroborated Clemmons as to Moelter's response. Clemmons tried to reach Steve Green on the telephone, without success.

Moelter, however contended that he told Clemmons that he, Moelter, would contact Luhm's supervisor, not Clemmons. There is no evidence that he ever did so. Instead, he first went to Luhm's office and asked the latter what had taken place. According to Moelter, Luhm said only that Clemmons did not lift the toilet seat, and that Luhm told him that he thought Clemmons' mother taught him better than that. Moelter, was asked whether Luhm said anything more than what Moelter related. Moelter answered that Luhm did not do so. There is no evidence that Moelter told Luhm about Clemmons' statement to Moelter.

Luhm was asked whether Moelter initiated the conversation. "You could say it that way," he replied. Moelter came in and asked whether an altercation had taken place. Luhm testified repeatedly on cross-examination that he could not remember the details of his conversation with Moelter. Five days later, on October 3, at Moelter's request, Luhm wrote a statement for him. He contended there that he complained about the toilet seat to Clemmons, and that the latter replied, "You bastard, I'll take care of you" (pointing at Luhm). Luhm replied, according to the statement, "The Company knows how to handle people like you. Later, at the railroad track, Clemmons started hollering" at him.[27]

After this September 28 conversation with Luhm, Moelter went to the office of his supervisor, Production Manager Richard O'Reilly. The latter directed Moelter to secure additional information, and statements were obtained from Luhm, Alan Kelly, and Gerald Ballard. None was secured from Fred Clemmons or John Hewitt. O'Reilly testified that he was probably the individual who decided that Clemmons should be terminated. He based this principally on a comment in Kelly's statement that Clemmons should calm down.[28]

4. Clemmons' suspension and discharge

a. The suspension

The next day, September 29, was a day off for Clemmons. He heard that somebody had been talking about this matter with Company Vice President Steve Becker. Clemmons went to the plant and attempted to tell Becker about the incidents, but the latter said that he was suspended and had to see Human Resource Manager Carol Davis. Clemmons asked whether Luhm had been disciplined in any manner, and Becker replied that there had been no discipline. Clemmons looked at Becker and said: "I know every bit of this is union related."

According to Davis, Moelter came in first and said Clemmons had threatened Luhm and should be suspended. Clemmons arrived and failed to deny the allegations against him. Clemmons said that Luhm had talked about Clemmons' mother, and Clemmons was very upset. Davis asserted that Clemmons admitted "threatening" Luhm. However, Davis could not specify the nature of the threat. It took place in the

[25] R. Exh. 21.
[26] R. Exh. 21.
[27] R. Exh. 21.
[28] R. Exh. 3.

bathroom, not later. Asked whether Clemmons stated that he told Moelter that the latter had better get Luhm off Clemmons' back or he would kick his ass, Davis denied that this was discussed. Clemmons presented his version of the incident. He was "mad, and didn't want anybody to talk about his mother. Asked whether this statement warranted a suspension, Davis replied, "Yeah, because he was upset then." Davis denied that Clemmons gave as many details as were related in Clemmons' statement.[29] He was suspended for "verbal threats towards another employee on the late afternoon of September 28."[30]

b. The warning to and discharge of Clemmons

As previously indicated, Clemmons was suspended on October 3 and discharged on October 7[31] Human Resources Manager Davis testified that the suspension was pursuant to the Company's policy of investigating the matter.

Supervisor Moelter went with Clemmons to his locker on the day of the discharge. Clemmons had kept union cards in his locker. When they arrived at the locker the lock was gone and the union material was missing.

With respect to the investigation, Davis acknowledged that she read Clemmons' and Luhm's statements, and that both refer to incidents which took place subsequent to the bathroom incident. Further, Clemmons' statement places John Hewitt in the toolroom during the toolroom incident. Nonetheless, Davis testified that she was investigating only the bathroom incident. Accordingly, she did not interview Hewitt.

Davis asserted that Respondent had administered discipline in comparable cases. She discussed a case where the employee threw a sharp wedge at a supervisor, and was terminated. In another, the employee held a knife to another employee, threatened him, and was discharged. In another, an employee interfered with another employee's work performance, also threatened him with bodily harm, and was discharged.

Moelter also issued a warning to Clemmons on October 3, for exceeding his quota of four "early outs" or "late-ins."[32] Clemmons credibly testified that his son was ill in a hospital and that Moelter had previously allowed him to go to the hospital whenever needed.

5. Factual and legal conclusions

The record shows that it was Clemmons who complained about Luhm. Although Luhm assertedly spent 10 to 15 minutes in his office after the bathroom incident, he did not call a supervisor to complain of a threat from Clemmons. After Clemmons complained to Moelter about Luhm and the latter asked Luhm for an account of the incident, Luhm recited only his conversation with Clemmons about the toilet seat and Clemmons' mother—he did not recite any threat on the afternoon of September 28. In fact, he could remember very little about the conversation. It was not until 5 days later that Luhm gave Moelter a solicited statement alleging that Clemmons said he would "take care of" Luhm. Luhm's admitted response was that the Company knew how to take care of people like Clemmons. It was on these facts alone that Respondent made its decision to suspend and then terminate Clemmons.

Luhm was an evasive and unresponsive witness. His testimony about remaining in his office for 10 to 15 minutes after the bathroom incident, yet meeting with Clemmons (returning to his work station) near the railroad track, is unlikely. His testimony about the incidents near the toolroom is opposed not only by Clemmons but also by Hewitt. Clemmons was more truthful in demeanor, and I credit his account of the bathroom, railroad track, and toolroom incidents.

I credit Clemmons and Kelly that Moelter advised Clemmons to speak to Luhm's supervisor. Moelter nonetheless went immediately to Luhm. He obtained no evidence of a threat from Luhm, but went to Production Manager O'Reilly who directed an investigation. Moelter did not attempt to get a statement from Clemmons, who supplied it on his own, and no statement was secured from Hewitt. This was an unfair investigation and thus evidence of discriminatory motivation.

According to the testimony of O'Reilly and Davis, the Company's final reason for suspending and then terminating Clemmons was that he was "upset" about Luhm's reference to Clemmons' mother. This is far from a threat of bodily injury. The Company actually seized on Clemmons' protest to Moelter, and twisted it into an investigation of Clemmons. Although the investigation revealed nothing whatever until Luhm's solicited statement, and little there, Respondent relied on these wisps of evidence to justify the suspension and termination of Clemmons. The allegedly similar cases cited by Respondent involved actual employee misconduct more heinous than Clemmons'—if he was guilty of anything.

Clemmons visiting his son in the hospital was pursuant to Moelter's permission. Accordingly, there was no valid reason for the warning issued to Clemmons.

Clemmons' leading role in the union campaign warrants an inference that his protected activity was a factor in Respondent's decision to discipline him. Respondent has not shown that it would have done so absent his protected activity.[33] Accordingly, Respondent violated Section 8(a)(3) and (1) by suspending and warning Clemmons on October 3, and by discharging him on October 7, 1994.

B. Zachary Givens

1. Givens' employment history

Givens was hired in June 1989. In 1990, he began working in the stores department. Givens received several evaluations during his employment. He testified that employees were rated in various categories from 1 to 6, with 6 being the highest rating. In October 1991, Givens received five "6s," three "5s," and one "3," the latter in the attendance category. In the spring of 1992, he received laudatory comments from his supervisor.[34]

[29] G.C. Exh. 4.

[30] G.C. Exh. 3.

[31] G.C. Exhs. 2 and 6.

[32] G.C. Exh. 5.

[33] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Manno Electric Inc.,* 321 NLRB 278, 280 fn. 12 (1996)

[34] The supervisor's comments read as follows:

> Zack always aspires to do the best that he possibly can. As the depart. safety rep, he (illegible) with the appropriate personel, with depart. safety in mind. He continues to take the initiative to work in other areas when the work load is slow without being asked. Zack has persevered even though all of the (illegible) conspirarcy over the last several months. Good job!
>
> Zack is an asset to our team. He's always willing to do whatever it takes to meet the needs of the department/company. He often makes suggestions (illegible) benefit the dept and takes great pride in his job. He is always trying to make it better and easier for someone in the future, whether it is cleaning trash, get-

In April 1993, Givens received eight "6s" and one "5," the latter in the attendance category.[35] In October 1993, Supervisor Inez Crisp gave Givens one rating of "6," six ratings of "5," and one rating of "4–5." In April 1994 Crisp gave Givens two ratings of "6," six ratings of "5," and one rating of "4–5."[36]

2. Givens' union activities, subsequent ratings and suspension

a. The union activities and complaint allegations

After the union campaign began on September 6, 1994, Givens attended union meetings and wore a union button. His supervisor, Inez Crisp, saw the button and commented on it.

I have previously relied on Givens' testimony in finding that Respondent violated Section 8(a)(1) by disparately applying a no-solicitation rule. That evidence included a verbal warning to Givens on September 30 for discussing the Union during company time.[37] The complaint alleges that this warning was given because of Givens' union activities and thus violated Section 8(a)(3).

The complaint also alleges that Givens received two verbal warnings on September 29, for poor work performance and another for discussing union business on company time. Respondent's records indicate these warnings.[38] Givens denied receiving the latter warning on September 29.

The complaint also alleges that Givens received a warning on October 6, 1994. On that date Supervisor Crisp issued a "counseling action" to Givens asserting that he was observed not working for 10 minutes, and that future conduct of like nature could lead to more severe discipline including discharge. Givens refused to sign the counseling action.[39]

The complaint alleges that Respondent issued an unlawful warning to Givens on October 17, 1994, and suspended him on October 20. On October 17, Respondent issued a counseling action for poor work performance in that Givens deliberately put parts in the wrong locations and wrote down erroneous part numbers, thus preventing an emergency order from being shipped. He was also observed doing nothing for 10 minutes, and was given a 3-day suspension and a "final warning."[40]

Finally, the complaint alleges that Respondent discriminatorily issued an unsatisfactory employee evaluation of Givens in November. The record shows that on October 3, Supervisor Crisp issued an evaluation of Givens with ratings ranging from "3" to "5," and a "2" for attitude, because an employee complained that Givens was "harassing" him about the Union.[41] Givens initialed the document then attempted to get Supervisor Crisp to remove his initials, but she stated she had already turned it over to personnel. Givens then went to Human Resource Manager Carol Davis, who refused to remove Givens' signature. She told him to submit a rebuttal, and he did so.[42]

b. Factual and legal conclusions

The warning issued to Givens on September 30 regarding solicitation was occasioned by another supervisor telling Supervisor Crisp that one of the former's employees had protested Givens' solicitation for the Union. Crisp admitted that she did not question either Givens or the other employee before preparing the writeup. Her failure to conduct an impartial investigation is evidence of discriminatory motivation, and warrants a conclusion that the warning violated Section 8(a)(3).

Supervisor Crisp's warning on October 6 alleges that Givens did nothing for 10 minutes, and admitted that he was watching other employees.[43] Givens testified and denied that he made any such admission. He averred that he told Crisp he was stacking pallets and moving metal "trees" used for transport. Based on Givens' truthful demeanor, and his work ethic manifested by the Company's early evaluations of him, I credit his testimony.

Crisp testified that Givens mislocated parts and made erroneous entries on their location. This testimony is contradicted by a prior evaluation of Givens stating that he made "few errors."[44] Group Leader William Bryant testified that mistakes of this nature are common, and that Supervisor Crisp was lenient about them and gave the employee an opportunity to find the parts. Crisp admitted that she had never before disciplined an employee for mislocating parts. Although Crisp alleged that Givens made many errors over a period of weeks, the Company's documentary evidence shows only two erroneous part numbers and a mislocated part on September 28.[45]

A host of Board decisions has relied on an employee's prior good work history as evidence of discriminatory motivation in subsequent discipline. Respondent's treatment of Givens is an example of this. Prior to his union activity he was praised as an exemplary employee.

Crisp herself gave high ratings to Givens in October 1993 and slightly higher ones in April 1994—just 7 months before her low ratings in October 1994. Once Givens' union sympathies became known, his ratings went down.

I conclude that discriminatory motivation was a factor in Respondent's warnings to Givens on September 30 for discussing the Union, for alleged poor work performance on September 9, and for not working on October 6, for alleged mislocated and misnumbered parts on October 17, for low scores on his October 1994 evaluation, and for his 3-day suspension on October 17. I therefore find that Respondent violated Section 8(a)(3) by these actions.

C. Cleatus Brown

1. Summary of the evidence—the 1994 incidents

Cleatus Brown was an 8-year employee who was worked in the receiving department at the time of the 1994 election. He placed parts in their bins and was under the supervision of Inez Crisp.

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ting boxes, consolidating, etc., and pointing out unsafe conditions. He is very safety and quality concientious and knows what his job is about . . . with few errors. When he completes his regular duties, he is willing to help out somewhere else without being told. He manages his time very well. Very seldom do I have to ask him to update me on a job. He is very informative about what he is doing and where he is at all times. He accepts correcting as a learning tool and not as negative criticism. We need more "Zack's" in this company. [G.C. Exh. 15.]

[35] Ibid.

[36] G.C. Exh. 16. The October 1993 and April 1994 ratings have the initials "I.C." at the bottom, and Givens testified that the ratings were by Inez Crisp.

[37] G.C. Exh. 10.

[38] R. Exh. 31(a); G.C. Exh. 10.

[39] G.C. Exh. 12.

[40] G.C. Exh. 13.

[41] G.C. Exh. 16.

[42] G.C. Exh. 17.

[43] G.C. Exh. 12.

[44] G.C. Exh. 15.

[45] G.C. Exh. 21.

I have found that Brown was unlawfully interrogated during the union campaign by Supervisor Jack Yow, who questioned him about his union button. Brown did not wear a union button until the day of the election. He testified that Supervisors Crisp and Yow saw the button, because they worked with him all day in the same storeroom. Yow came to Brown to pick up paperwork on parts that had been received.[46]

The complaint alleges that Respondent issued discriminatory warnings to Brown on October 10 and 17, 1994. The record shows that Crisp issued Brown a "final warning" on October 17 for putting parts in wrong locations, and alleged that Crisp had to spend time locating them. It was "apparently deliberate," according to Crisp.[47]

Brown testified that Crisp gave him the warning on October 19. It indicated that this was Brown's second warning. He asked Crisp about this, and she told him that she had previously given him a warning on October 10. Crisp testified that she gave Brown a verbal warning on October 10 for the same alleged infraction. Brown denied any prior warning. He told Crisp on October 19 that he could not have made all the mistakes she alleged and asked why she did not ask him to find the parts. "It's all here right on the paper. The proof is on the location sheets," Crisp replied. The warning itself does not have any "location sheets." Brown agreed that "locator sheets" were attached to the warning when Crisp showed it to him, but none is attached to the exhibit in evidence,[48] and Respondent did not submit any.

Human Resource Manager Carol Davis was asked whether any other employees had been disciplined for the same reasons as in case of Brown (and Givens). She responded with three examples. In the first, the employee was discharged after causing $4500 of damage in parts fabrication and failing to call in for 2 days.[49] In other instances the employees received warnings for attendance infractions, faulty workmanship, and damage products.[50]

2. The 1996 incidents

The complaint[51] also alleges that Respondent issued a poor performance rating of Cleatus Brown on August 19, 1996, and a warning on September 25, 1996, both of which were discriminatorily motivated. Brown was laid off on November 3, 1994,[52] and was recalled on August 25, 1995, through a temporary service.

Brown received various evaluations. In an evaluation in May 1993, which predated his participation in the 1994 Union campaign, Crisp gave him one "6," one "5," one "4–5," one "3–4," three "3s," and two "2s."[53] On February 5, 1996, after Brown's return from layoff, Crisp have him a "third final" counseling for "poor work performance." The counseling reads:

> Employee's amount of work does not meet Company's requirements. Cleatus has a bad attitude towards supervisor, talking back and questioning what is he told to do. Is not cooperative or helpful to any other employees, refuses to even answer a question pertaining to work.[54]

About 2 weeks later, on February 17, Crisp gave him an evaluation with one "4–5," one "3–4," one "3," four "2s," and two "1s."[55]

Brown received a subpoena to testify in this proceeding in July 1996. Prior to doing so, he showed the subpoena to Crisp and asked for a day off. Crisp replied: "I don't know if I can let you go. I've got to see what I can do about this." Brown responded: "Well, Inez, I'm not going to jail for you or American Crane." Crisp's rejoiner: "Well, it's your fault anyway." Brown testified pursuant to the subpoena.

On August 19, 1996, Brown's ratings were further reduced in another evaluation to one "4–5," one "3–4," one "3," three "2s," and three "1s."[56] On September 24, Crisp gave him a "final counseling," stating that his amount of work did not meet Company requirements. On the back of the counseling Crisp stated:

> Cleatus did not pass the last supervisor's evaluation.[57] The employee has made no effort at all to improve. He has become worse about being a team player. He is disrespectful to supervisor constantly. Example on 9–23–96 I was talking to Cleatus and he walked away and turned his back on me. Cleatus works very inefficiently he does things the slowest way possible. He goes to the water fountain and bathroom approximately 20 times a day. The amount of work Cleatus does each day is about 50% compared to the average employee. I cannot continue to get 50% production from this employee.[58]

The next day, September 25, 1996, Crisp issued another final counseling, alleging that Brown worked very inefficiently, was always insubordinate, and did not have a good attitude toward fellow employees.[59]

Crisp testified that she anticipated she would require evidence to support her conclusions that Brown worked slowly. She selected August 28, 1996, as a date to examine Brown's work. This consisted of six pages of orders which, Crisp estimated, would have required only 4 hours of work.[60] However, Brown had retained copies of his work for that day, and the General Counsel presented Crisp with another series of documents for Brown's work consisting of nine pages.[61] Crisp contended that her original estimate was based on nine pages of orders, and that she sent them forward through personnel. Respondent's counsel agreed at the hearing that three pages may have been "lost in transmission."

Crisp asserted that Brown was working with a trainee packing separate orders. Although the trainee "knew nothing," he was doing three times as much work as Brown. Crisp agreed that the Company had production records for the trainee and Brown. The General Counsel stated that the Company had

[46] Case 11–CA–16292.
[47] G.C. Exh. 24.
[48] Ibid.
[49] R. Exh. 39.
[50] R. Exhs. 40, 41.
[51] Case 11–CA–17235.
[52] Other employees were laid off on November 3, 1994, and the complaint in Case 11–CA–16292, et al., alleges that it was an unlawful unilateral layoff in violation of Sec. 8(a)(5). This issue is considered hereinafter.
[53] G.C. Exh. 73. Crisp's identity as the evaluator is indicate by the initials "I.C." at the bottom of the evaluation.
[54] G.C. Exh. 72.
[55] G.C. Exh. 73.
[56] Ibid.
[57] The "last supervisor" was Crisp herself.
[58] G.C. Exh. 73.
[59] G.C. Exh. 74.
[60] G.C. Exh. 76.
[61] G.C. Exh. 77.

provided the record of one day of work (September 19) for the trainee and another employee, but had not provided data comparing Brown's work with another employee. Respondent's counsel argued that the Board investigator never asked for this information. Respondent was invited to produce the comparative data at the hearing. None was produced.

Brown denied that he had ever been given a time for packing orders, nor was the time for a particular order recorded. He disputed Crisp's time estimates on the packing of various parts, with detailed explanations. Crisp directed him to train an employee from time to time, including the fall of 1996. He was required to drive a forklift for the trainee during that time period, because the trainee did not have a forklift license. This took time from Brown's packing orders.

In support of the September 25 insubordination charge, Crisp stated that she spoke to Brown on September 23 after he had clocked out, and told him that she had a something to tell him. Brown replied that he had already clocked out, and had something to do. Crisp could tell him in the morning.

Crisp repeated her written charge that Brown went to the bathroom or water fountain about 20 times a day. Brown testified that he went to the bathroom three or four times during his shift, and carried a water bottle with him at work.

3. Factual and legal conclusions

I conclude that Respondent's supervisors saw Brown's union button on the day of the election, and thus knew of his union sympathies.

The prior evidence establishes Crisp's animus against the Union. With respect to Brown's alleged mislocation of parts, William Bryant testified that Crisp was lenient with respect to errors, and gave the employee an opportunity to find the part. When Brown asked her why she did not give him a similar opportunity, Crisp replied merely that she had the "proof" in the locator sheets. This "proof" is not in evidence, and, because of Crisp's animus and demeanor, I do not credit her testimony as to what the "proof" shows. Her refusal to allow Brown to find the allegedly mislocated parts, contrary to her existing policy, further manifests her discriminatory motivation.

The examples of other discipline proffered by Human Resource Manager Davis involved more significant employee infractions compared to Brown's alleged mislocation of parts.

Crisp's discipline of Brown in 1996 is not supported by credible evidence. Her allegation that he only produced half of what an "average" employee produced is not supported by any documentary evidence, although Crisp admits that such evidence does exist. I infer that, if produced, this evidence would not support Crisp's allegations. Her estimates of the amount of time required for Brown to pack orders were general in nature, whereas Brown provided detailed descriptions of the packing requirement as to each part. Crisp's testimony is further impugned by Respondent's submission of an incomplete record of the parts which Brown packed. Brown's duties in driving a forklift for a trainee cast further doubt on his allegedly inadequate production.

Crisp's allegation of insubordination has no merit. Brown had already clocked out when Crisp wished to speak to him, and he appropriately told her that she could give him the instruction the next morning. Crisp's allegation that Brown went to the bathroom or water fountain 20 times a day is exaggerated and was credibly denied by Brown.

Brown was calm and truthful in demeanor, and I credit his version of these various disputes. Respondent has not shown that his discipline was justified. The steady decline in Brown's evaluations without any credible evidence to support it, is further evidence of Crisp's animus which, I conclude, was intense in nature. Respondent has not shown that it would have given Brown this discipline absent his sympathy for the Union, and, accordingly, has not rebutted the General Counsel's strong prima facie case. Accordingly, Respondent violated Section 8(a)(3) and (1) of the Act.

Although the complaint alleges discriminatory warnings on October 10 and 17, 1994, Brown credibly denied that he received any warning on October 10, and I find that only the October 17 warning occurred. Although the complaint as consolidated alleges a poor performance rating on August 19, 1996, and a warning on September 25, 1996, the evidence shows a warning on February 5, 1996, an evaluation on February 17, and a warning on September 24, as well as the discipline alleged in the complaint on August 19 and September 25. All these matters were thoroughly litigated, and unless expunged from Brown's record would leave him without an adequate remedy.

Crisp's statement to Brown that she did not know whether she could permit Brown to honor a Board subpoena, and that it was his "fault," demonstrates that her discipline of Brown was also motivated by his testimony at the hearing. Accordingly, Respondent also violated Section 8(a)(4) of the Act.

D. Johnny Thompson

1. Thompson's employment history and union activities

The complaint alleges that Johnny Thompson was unlawfully discharged on July 19, 1995. Thompson began work at the Company in February 1985. He worked in the assembly department, where the cranes were built "from the ground up," assembled, tested, and loaded. He received high ratings on evaluations in 1994, and was made a "group leader." His supervisor stated that he had improved in this position, and helped run the assembly department when the supervisor was on vacation.[62]

During a prior election campaign, in 1989, Thompson was one of the principal employees bringing the Union to the plant, and was an observer at the election. During the 1994 campaign he attended a union meeting and wore a union button before the election, and for about 3 weeks thereafter.

Tompson testified that the supervisors "started watching the men a little closer" in mid-1995. Accordingly, about the beginning of July, Thompson started wearing a union button again, as did other employees.

2. Thompson's leaving the plant on July 14

Jerry Strickland, who had been employed in 1985, was made supervisor of the assembly department on July 5, 1995. On July 13, Strickland had to leave the plant to test a crane, and left Thompson, as group leader, in charge. According to Strickland, he instructed Thompson in writing to extend the "lube line" on a crane. This instruction was on a "bug sheet," i.e., a list of defects. Thompson assigned 3 hours to his work as group leader on that day. The next day, according to Thompson, Strickland asked him about the 3 hours in an "accusatory tone." A short time later, Strickland asked Thompson why he

[62] G.C. Exh. 42.

had marked off a "bug" (defect) which he had not in fact worked on. Thompson explained that he had extended an air piping line rather than a grease line, because "it was marked on there," and that it was a miscommunication. Strickland said, "O.K."

Thompson testified that he was upset by what he considered to be Strickland's "insinuation" that Thompson had been lying to him. He said to Strickland that he was pushing the employees too hard, that they were getting the work done, and that if this did not stop it would turn around on Strickland and "bite him in the ass."

Thompson testified that he could not concentrate as a result of these events, and that this inability would be dangerous when working on a crane. Accordingly, he told Strickland that he needed to go home, and that Strickland could put it down as a personal day or a vacation day.

According to Thompson, he had previously told supervisors that he wanted a "personal day," and that employees were entitled to four of these per year. "Even if they were in a bind where they needed you, if you needed to leave you could leave." James Millis, a current employee, testified that employees were entitled to four "early outs" and four "late ins" per year. He simply "told" a supervisor that he was taking an early out, and the supervisor would say "okay." Or an employee could call in prior to the beginning of his shift, and inform a guard that he was taking a personal day. Millis was not questioned by Human Resources Manager Davis until after Thompson's discharge.

Supervisor Strickland contended that an "early out" was an excused absence, and had to be "worked out" with the supervisor. Human resource manager Carol Davis, interpreting the employee handbook,[63] first testified that "all absences are unauthorized with the exception of available personal time, which is a maximum of 4 full days and four late-in's and or early out's" during a calendar year. Later, however, Davis testified that if an employee left the plant without supervisory permission, this would be an "unauthorized absence." The discipline for this offense was progressive–three warnings for successive violations followed by discharge. Manufacturing manager O'Reilly was asked whether employees simply told supervisors that the were going to take an "early out," and replied, "That has happened."

According to Strickland, Thompson told him on July 14 that Strickland expected too much out of the employees, and that Strickland could "mark him down excused, unexcused which if they go home early is . . . they've got personal time." In his pretrial affidavit, Strickland stated that Thompson said Strickland could mark him as a "personal" or "early out" and that it did not make any difference to Thompson.[64]

Strickland did not respond to Thompson's statement. The latter went to his locker, obtained some personal effects and walked out. He passed within 75 feet of Strickland, who looked at him but said nothing.

Thompson returned to work the following Monday, July 17, and was told by the guard that Manufacturing Manager Richard O'Reilly wanted to see him. O'Reilly gave him a form stating that he was suspended pending an investigation.[65] He told Thompson to arrange an appointment with Human Resource Manager Carol Davis. This took place with O'Reilly and Davis on July 20. David Reilly was the union representative for Thompson. The latter read a statement to O'Reilly and Davis. He asked Davis whether she had talked with his witness, Rufus Randolph. Davis said that she had done so. Randolph, however, testified that he did not discuss Thompson's discharge with Davis until after it had already taken place. Accordingly, Thompson told Davis on July 20 that she had not in fact talked with Randolph,[66] and Davis replied that she was not there to discuss the investigation. She shuffled papers and did not appear interested in what Thompson had to say. O'Reilly told Thompson that he was discharged for walking off the job and for insubordination.

Thompson arranged a meeting with Company President Dave Lewis, and read a statement. Lewis called him a few days later and said it was best to let things remain the way they were.

Union Representative David Reilly later asked Human Resource Manager Davis for the reason for Thompson's discharge. She refused to give him this information.

3. Factual and legal conclusions

It is undisputed that employees were entitled to four "early outs" per year. The only issue is whether the employee had to secure prior agreement from a supervisor to exercise this right. Human Resource Manager Davis' testimony on this issue was ambiguous. Her original testimony—that all absences are unauthorized "with the exception of available personal time"—suggests that an employee's taking "personal time" was not an unauthorized absence. On the other hand, Davis later contended that an employee's leaving the plant without supervisory permission was an "unauthorized absence." Although this latter testimony was corroborated by Strickland it was contested by Thompson and Millis, the latter a current employee unlikely to testify untruthfully. Thompson's and Millis' testimony was corroborated by Manufacturing Manager O'Reilly, who admitted that some "early outs" had simply been announced to the supervisor by employees. It is also undisputed, according to Davis, that the penalty for a first unauthorized absence was a warning, and that discharge did not take place until three such violations had occurred.

Coming to the facts in the case, Thompson told Strickland that he needed to go home, and that Strickland could mark it as a personal day or a vacation day. Strickland said nothing, either in response to Thompson's statement, or when he saw Thompson leave the plant.

I credit the testimony of Thompson and Millis, corroborated by Plant Manufacturing Manager O'Reilly, that the Company's practice was to allow an "early out" by an employee's announcement of same to a supervisor, provided the employee had the available time to his credit. I do not credit Human Resource Manager Davis' contradictory testimony on this subject, nor the statements of Strickland, a supervisor by only a matter of a few days. It follows that Thompson's departure on July 14 was in accordance with company practice.

Even if supervisory approval of a personal day had been required, Thompson would have been warranted in interpreting Strickland's silence when Thompson made his statement, and

[63] Jt. Exh. 1, pp. 13–14.
[64] R. Exh. 49.
[65] G.C. Exh. 27.

[66] On July 18, Davis wrote a memo to the file asserting that she had talked with Rufus Randolph. R. Exh. 52. I credit Randolph's denial of this statement.

again when Strickland saw him leaving the plant, as acquiescence in the request.

Finally, even if Thompson's departure were deemed an unauthorized absence, the penalty for this first offense was a warning, not discharge, according to Human Resource Manager Davis.

Thompson had been a supporter of the Union beginning in 1989, when he was active in bringing the Union to the Company and was a union observer in the election that year. He wore a union button before the 1994 election, and for several weeks thereafter. When the employees perceived that they were being watched more closely by supervisors in mid-1995, Thompson and other employees started wearing their union buttons again. Finally, on July 14, Thompson complained to supervisor Strickland that he was pushing the employees too hard—clearly protected activity on behalf of the employees.

Respondent's animus against protected activity has already been established. It did not conduct a fair and complete investigation of Thompson's alleged misconduct. Davis did not speak with either Millis or Randolph—the latter designated by Thompson as a witness for him—until after Thompson had been discharged. Indeed, Davis falsely told Thompson during the exit interview that she had already spoken with Randolph. Davis admitted that when an employee is interviewed after a 3-day suspension, the decision on discipline had already been made. Yet this was Thompson's first opportunity to present his case. Failure to conduct an impartial investigation is evidence of discriminatory motivation.

One of the asserted reasons for Thompson's discharge was "insubordination." There is no evidence that Thompson refused to obey an order from Strickland. In fact, Strickland said nothing whatever. The Board, citing a prior case,[67] has held that "discharge of an excellent worker for minimal insubordination is evidence of discriminatory motivation." *Vincent M. Ippolito, Inc.*, 313 NLRB 715, 724 (1994). This rationale applies with greater force herein, where Thompson did not violate any company practice, and was discharged rather than warned, contrary to the Company's own practice, for an offense which it erroneously asserted Thompson had committed.

Respondent has not met its *Wright Line* obligation[68] in rebuttal of the General Counsel's prima facie case. Accordingly, I conclude that its discharge of Thompson on July 20, 1995, violated Section 8(a)(3) and (1) of the Act. Respondent's refusal to give Union Representative David Reilly the reason for Thompson discharge was a violation of Section 8(a)(5).

IV. THE ALLEGED REFUSAL TO BARGAIN

A. The Alleged Unilateral Layoff and Transfer of Employees

1. Summary of the evidence

The pleadings establish that the Board certified the Union as the collective-bargaining representative of Respondent's production and maintenance employees on October 21, 1994, and that the Union thereafter requested bargaining. The complaint alleges that on November 3, 1994, Respondent unilaterally and without notification to or consultation with the Union, laid off certain employees and granted bargaining unit positions to six nonbargaining unit employees through its bumping procedures.[69]

On October 24, 1994, Union International Representative Thomas Chastain sent Company President David Lewis a bargaining demand and information request.[70]

Lewis contended that parts sales began to decline in the summer and early fall of 1994, caused a cash flow shortage, and caused problems with a big order. Lewis considered various ways to save costs, including a layoff of employees. On October 24, 1994, the Company comptroller gave him a proposed "headcount reduction" of 41 employees identified by job but not by name.[71] There was no bankruptcy filing, and Lewis was in contact with the Company's bank on a regular basis with respect to the cash flow forecast. The bank imposed no deadlines.

The deadline was imposed by Lewis himself. The departmental managers were told to prepare lists of employees to be laid off, and Lewis testified that he made the decision to layoff employees. In the late morning or early afternoon of November 2, according to Lewis, he called Human Resource Manager Carol Davis, and told her there was going to be a layoff on November 3. Lewis instructed her to call the departmental managers, get the names of the employees, and prepare the layoff documents. Davis testified that she received this call, got the names of the employees to be terminated on November 3 from the departmental managers, and wrote down the names of the employees and other data concerning them, in about 2 hours. These names were written by Davis on a document of 6 pages. Each page has the heading, "Terminations." Numerous employees are listed with various termination dates, 39 of them with the date "11/3/94." Respondent's counsel described this exhibit as "the worksheet prepared by Carol Davis during the period of time employees were being selected for layoff which ultimately occurred on November 3, 1994.[72]

In the margin of each page of Respondent's Exhibit 61 appears the notation "Nov. 2, '94, 8:03 a.m." and a fax number "910–395–8553." Davis identified the latter as the fax number of the purchasing department, and agreed that it indicated that the document was faxed somewhere at 8:03 a.m. on November 2. Davis was unable to explain how the document could have been faxed at this time if it was not prepared until later in the day. In a prior layoff, a document similar to Respondent's Exhibit 61 was prepared about 3 weeks prior to the layoff date.[73]

Lewis testified that, on about mid-day on November 2, he instructed his attorney to contact the Union about the layoff. This was the first such request Lewis had made. The attorney did

[67] *Hinky Dinky Super Markets*, 247 NLRB 1176 (1980).

[68] Supra, fn. 33.

[69] G.C. Exh. 1(aa), pars. 18 (a), (b).

[70] G.C. Exh. 37.

[71] Lewis contended that only 11 of these positions were in the bargaining unit, and 33 were not in the bargaining unit. However, the "headcount reduction" list includes 22 positions under the heading "Mfg O/H" (id., p.3), which Lewis identified as the "manufacturing" employees, including those in the bargaining unit, and 11 in the "SGA O/H" category, which Lewis identified as "sales, general, and administrative."

Counsel for the General Counsel introduced a list of 41 names which she asserted were the names of bargaining unit employees terminated on November 3 (G.C. Exh. 41). Respondent's counsel contended that only 11 of them were bargaining unit employees.

[72] R. Exh. 61. The names of the employees are handwritten, and not all are legible.

[73] R. Exh. 63; testimony of Davis.

not get a call back until 2 or 3 days later. International Representative Chastain testified that he first learned of the layoff from an employee the day after it occurred. He called Company President Lewis and told him that the Company had no right to layoff employees without bargaining, and that the Union wished to bargain about the matter. Lewis referred Chastain to the Company's attorney.

2. Factual and legal conclusions

I do not credit Respondent's evidence to the effect that its decision to layoff employees was made on November 2. This contention is contradicted by the time, early in the morning on November 2, when a six-page fax containing the names of the employees to be terminated was transmitted. Further, it is unlikely that Human Resource Manager Davis could have obtained the names of the employees from the departmental managers, and could have written the data concerning them in the limited time which she described. I conclude that the decision to layoff these employees was made some time prior to November 2.

Taking at face value Respondent's contention that the layoffs were required because of a shortage in cash flow, the most that can be said about the decision is that it was motivated by economic considerations. As such, it was a mandatory subject of bargaining. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). The record establishes that Respondent laid off certain employees without giving the Union an opportunity to bargain over the layoff, and perhaps explore other avenues to solve the Company's asserted financial problems.

Respondent argues that it did not ascertain the nature of its cash-flow shortage until "October's month-end figures were determined," and that these were "even worse" than Lewis had contemplated.[74] As described above, Respondent's alleged cash flow shortage was first noted by Lewis in the early summer of 1994. Nonetheless, no ultimatum was given Respondent by its bank, and the deadline was established by Lewis himself. As I do not credit Respondent's position that it decided on November 2 to effect the layoffs on November 3, it is obvious that the decision was made sometime before that date. Whether the decision was occasioned by the Union's certification on October 21 and the Union's demand letter 3 days later is a matter of speculation as to which I express no opinion. In any event, I conclude that Respondent had time to notify the Union of its alleged financial difficulties, and to give it an opportunity to bargain concerning them, prior to the November 3 layoff. The Board concluded in Lapeer that although compelling economic circumstances may excuse an employer's failure to bargain over a layoff decision, this will apply in only "extraordinary situations" (289 NLRB at 954). This record does not establish such an extraordinary situation.

Respondent also argues that its transfer of other employees into the vacancies created by the layoff were made pursuant to its established bumping procedures, and, accordingly, were not unlawful, citing *Ideal Macaroni Co*., 301 NLRB 507 (1991). However, in that case the Board concluded that the employer had adequate business justification for the discharges. There was no issue as to whether a labor organization should have been given a prior opportunity to bargain over the discharges. Accordingly, Ideal Macaroni is inapposite.

[74] R. Br. 53.

I therefore find that Respondent's failure to give the Union herein an opportunity to bargain over the layoff, and its transfer of non-bargaining unit employees into the resulting vacancies violated Section 8(a)(5) and (1) of the Act.

The record is unclear as to the identities of the bargaining unit employees adversely affected by the layoff. However, I need not make this decision now, and will defer it to a supplementary compliance proceeding.

B. The Alleged Refusal to Grant Access for Health and Safety Inspections

1. Summary of the evidence

The complaint alleges that Respondent unlawfully refused to allow the Union's representative access to the plant to conduct health and safety inspections and to conduct tests to determine the presence of hazardous conditions and toxic fumes and gases.

Joe Stevens was a welder who was a member of the Company's safety committee for 3 or 4 years ending in January 1996. Stevens made safety inspections every other month in several areas of the plant, while other committee members made other inspections. Stevens identified the following safety problems which he observed: (1) a "dead spot" which cut off power to an overhead crane and caused the crane to stop; (2) a water line that could trip employees; (3) a torch that leaked gas; (4) a fire extinguisher that was not hung up on a wall; (5) an "elbow" that needed to be screwed back to cover electrical wires; (6) carbon dioxide lines that needed to be plugged; (7) the hiding of chains prior to outside inspection of them; (8) the use of methyline choride, a cancer-causing agent, to facilitate the removal of "spatter" from the floor; (9) a gas line explosion that blew the cap off a line and caused employees to be evacuated; and (10) another explosion which blew the cap off a gas line.

Stevens testified that he turned in work orders to correct these matters. Prior to the union election, according to Stevens, "nothing would get fixed," but after the election, deficiencies were corrected more expeditiously. Stevens attended union meetings during the campaign, where safety was one of the issues. International Representative Chastain was present at some of these meetings.

Employee Fred Clemmons testified about a conversation he had during the Union campaign with Robert Cumming, whom Clemmons identified Respondent's owner.[75] During this conversation, Clemmons voiced concerns about "chains that was breaking, gas leaks in the building . . . ."

On October 28, 1994, Union Representative Thomas Chastain sent a letter to Company President David Lewis, in which he stated that various employees had voiced concerns about health and safety hazards and wanted the Union to investigate the hazards and work with the Company to correct them.[76] Chastain proposed that the Company allow Union Health and Safety Specialist Milan Racic "to enter your plant and study

[75] The complaint alleges and the answer denies that Cumming was a supervisor. I credit Clemmons' testimony that Cumming was Respondent's owner, and conclude that he was a supervisor.

[76] The concerns listed in Chastain's letter were gas leaks, machining of cast iron, coolant and dust exposure, overhead cranes, machine guarding, noise, chemical exposures, guarding of grinders, inadequate ventalation, safety of welding machines, lack of hearing protection, and inspections of hoists, chains, cables and slings. G.C. Exh. 38.

and study operations in question so that we can properly represent these employees and address their concerns in full."[77]

By letter dated October 28, 1994, Company Attorney Spencer M. Youell, "declined" this request, stating that it was a matter "appropriate for collective bargaining, and would be addressed at the appropriate time."[78]

Chastain testified that the first bargaining session took place in December 1994. Chastain was the principal spokesman for the Union, while Attorney Youell was the spokesman for Respondent. The Union requested access to the plant in order to be able to develop safety proposals. The Company refused, and said that they would permit this only if the Union obtained a contract.

According to Company President Lewis, Respondent had previously allowed an outside source to prepare a promotional video for the promotional purposes.

2. Factual and legal conclusions

The record clearly establishes that the Union requested access to the plant in order to conduct a health and safety inspection, and that the Company refused to permit this unless the Union was successful in obtaining a contract with the Company.

The Board recently stated the law on this subject as follows:

> It is well settled that the information the Union seeks to obtain from direct observation of the plant premises and processes is presumptively relevant to and necessary for its role as the employees' collective bargaining representative. In upholding a union's need for access to gather information about the relative position of a particular job within the overall "hierarchy of the job classifications," the Board has held that "there is no adequate substitute for actual on-the-job observation of the work performed for the purpose of ascertaining what skills are actually utilized" (authority cited). Likewise, in this case, there can be no adequate substitute for the Union representative's direct observation of the plant equipment and working conditions, in order to evaluate matters such as job classifications, safety concerns, work rules, relative skills, and other matters necessary to develop an informed and reasonable negotiating strategy. This is particularly true in the circumstances of this case where parties were bargaining for an initial contract.
>
> [T]he Union and the Respondent have been engaged in negotiations for an initial contract and the relationship is still in the fledgling stage. It is readily apparent that the Respondent's denial of access to the Union's international representative prevents the experienced official from gaining a complete understanding of the Respondent's operation and thus prevents the employees from getting the representation they voted for in the certification election. Furthermore, without a collective-bargaining agreement, the Union has no other avenue, such as a grievance procedure or arbitration, for obtaining the desired information. The denial of access at this crucial phase of the parties' bargaining relationship can serve only to undermine the Union's status as bargaining representative. [*C.C.E., Inc.,* 318 NLRB 977, 978 (1995).]

The Board noted that the employer had previously provided access to its facility to other individuals and groups, including a video production crew. Balancing the conflicting rights of the employer and the union, the Board concluded that the former was "weak" and the latter "substantial." Accordingly, the employer's denial of access violated Section 8(a)(5) and (1) (id.).

Respondent herein argues that it "offered to bargain over the terms of Union access."[79] Nonetheless, its position in bargaining was continued rejection of the request for access unless the Union obtained a contract. However, as the quotation above from *C.C.E.* shows, this was a beginning relationship and without a contract the Union had no way of getting the needed information; without the information it could not bargain. As the Charging Party stated, Respondent put the cart before the horse.

Respondent argues that the Union did not state the nature of the access it required. On the contrary, Chastain's letter requested permission for Racic "to enter the plant and study operations." Although the complaint alleges that Respondent refused to allow access and tests, all the union letter stated as its objective was to work with the Company in correcting the hazards, and to allow Racic to enter the plant. Respondent's arguments are without merit, and I find that, by denying access Respondent violated Section 8(a)(5) and (1).

C. The Alleged Unilateral Change in Payroll Deductions for Employee Purchases

The complaint alleges that Respondent unilaterally changed its policy regarding payroll deductions for employee purchases of safety equipment. Employees purchased items from the Company, and paid for the purchases by deductions from their paychecks. Human Resource Manager Carol Davis testified about two memoranda issued by Company Comptroller Connie McGuiness.[80] According to Davis, these memoranda establish that at some time in the past, the deductions increased as the amount owed increased. However, as of August 1994, the deduction was fixed at $15 per paycheck. On October 19, 1994, the deduction would again be increased as the amount owed increased. International Union Representative Chastain testified that he did not receive any notice from Respondent regarding this change.

I conclude that this was a unilateral change in the employees' working conditions and was violative of Section 8(a)(5).

D. The Alleged Charge for Employee Loss of an Identification Badge

The complaint alleges that Respondent unilaterally imposed a $5 charge on employees for loss of an identification badge. On October 17, 1994, Respondent issued a memorandum requiring all employees to show their picture identification badge before entering the plant. Although the first I.D. badge was issued without charge, any reissuance of a card lost by the employee would result in a charge of $5 to the employee.[81] Supervisor Frank Moelter agreed that he told employees of this requirement. In addition, employee John Hewett testified that

[77] Ibid. Racic testified about his experience, which included work as an industrial hygienist for the City of Milwaukee, and for the Occupational Safety and Health Administration (OSHA) for whom he conducted over 500 inspections of health and safety in various plants. He was later promoted to be OSHA's Assistant Regional Administrator for Safety and Health in Chicago, where he provided technical support for health enforcement officials in six States.

[78] G.C. Exh. 39.

[79] R. Br. 67.

[80] G.C. Exhs. 33, 34.

[81] G.C. Exh. 23.

Moelter told him that the purpose of this requirement was "to keep undesirables out." Union Representative Chastain testified that he did not receive notice of this new requirement prior to its implementation.

Respondent appeared to contend at the hearing that the reason for the new requirement was the hiring of new guards. However, Respondent's records show that the most recent guard hired prior to October 1994, the date of the new I.D. requirement, was in March 1994.[82] I conclude that the new requirement was not related to the hiring of a guard who had already been on the job more than 6 months.

As noted previously, the complaint alleges that Moelter's comment that the new requirement was designed to keep out "undesirables" constituted an independent violation of Section 8(a)(1), while its unilateral imposition violated Section 8(a)(5). I have already found that Respondent unlawfully denied safety inspector Racic access to the plant. I further conclude that Moelter's comment to Hewett that the new I.D. requirement was intended to keep out "undesirables" conveyed Respondent's intention to exclude from the plant any individual sympathetic to the Union. As such, it was coercive within the meaning of Section 8(a)(1). The unilateral imposition of the new requirement of a $5 charge for lost I.D. cards violated Section 8(a)(5). *Millard Processing Services*, 310 NLRB 421, 425 (1993).

E. The Alleged Alteration in Distribution of Payroll Checks

The complaint alleges that Respondent unilaterally altered its payroll policy by denying distribution of payroll checks until 2 p.m on Thursday.

For some time, the Company had been working a 4-day week, 10 hours daily from Monday through Thursday. On August 25, 1994, Comptroller Connie McGuiness issued a memorandum stating that checks were distributed on Thursday as a convenience to employees not scheduled to work on Fridays. First-shift employees were paid before the end of that shift, and second shift employees during the shift.[83] On October 19, 1994, McGuiness issued a memorandum stating that paychecks were distributed each Thursday at 2 p.m.[84] Human Resource Manager Davis testified that some employees cashed their checks before Friday, and caused temporary overdraft problems for the Company.

Employee Scott Rhodes, chairman of the Union's negotiating committee, testified without contradiction that an employee leaving early on Thursday morning, or taking a half day of vacation, could formerly get his check by 11 a.m. on Thursday. He did this by making the request to his supervisor, who would call the payroll department. This practice changed, however. Under the new procedure the employee had to notify his supervisor a week in advance in order to get an early paycheck on Thursday. Union Representative Chastain testified that he received no notice of this change prior to its implementation.

I conclude that this change affected the employees' working conditions, and that its unilateral implementation violated Section 8(a)(5).

[82] C.P. Exh. 5.
[83] G.C. Exh. 35.
[84] G.C. Exh. 33.

F. The Alleged Unilateral Change From a 4-Day 10-Hour Work Schedule to a 5-Day 8-Hour Schedule

1. Summary of the evidence

Respondent's employee handbook provides that a workweek consists of 40 hours, usually divided into 5 consecutive days of 8 hours each, or 4 consecutive days of 10 hours each, between Monday and Saturday. The Company could provide different work schedules for a department or individual employees "due to business considerations."[85] Prior to May 1995, the Company had utilized a 4-day 10-hour workweek for 4 or 5 years.[86]

At the parties' first bargaining session, in December 1994, the Union offered a contract proposal which provided that the workweek would consist of 4 consecutive 10-hour days, Monday through Thursday. The Company could schedule employees to work outside their regular shifts to meet production demands or emergencies, with reasonable notice to the employees and mutual agreement between the Company and the Union.[87] There was minimal discussion of shift schedules prior to May 18, 1995.

Company President Lewis testified that, about 2 weeks before a bargaining session on May 18, 1995, Respondent decided to change to a 5-day 8-hour work schedule, and that it did not need the Union's agreement because the Company had "reserved that right." Lewis instructed his attorney to inform the Union of this change at the next bargaining session, "as a courtesy."

The May 18 bargaining session began at about 9 a.m., and continued to about 4:30 p.m. Employee Franklin Newton testified that he went on break at 3 p.m. that day, and saw a posted memorandum to all employees from Operations Manager Steve Becker. The memorandum was dated May 18, and provided that the Company had decided to discontinue the 4-day 10-hour work week and institute a 5-day 8-hour workweek, effective June 5, 1995.[88]

Union Representative Chastain testified that he did not learn of the posting until after the bargaining session. At about 4 p.m. during the session, Chastain and Attorney Youell were discussing a subject which Chastain described as the notice required to make any kind of change. He denied that a specific change to a 5-day 8-hour workweek was the subject of discussion. Production manager Richard O'Reilly testified on direct examination that Attorney Youell said that the Company was going to change to a 5-day 8-hour week. On cross-examination, O'Reilly denied that he had said this and in fact affirmed that he liked "four tens also" (4 10-hour days). There was no reaction from the Union, and O'Reilly could not say that they actually heard it. Scott Rhodes heard O'Reilly say that the Company was contemplating such a change, but the statement was not said to anybody in particular. Union Committee Member Russel Lewis said that he heard that the Company was contemplating going to a 5-day 8-hour week, but denied that the Union agreed to this.

Employee Scott Rhodes went to see Human Resource Manager Carol Davis on the day after this bargaining session. Davis told Rhodes that the Union had agreed to the change, because nobody made a "big stink" about it. Davis agreed that

[85] Jt. Exh. 1, p. 9.
[86] Testimony of Company President Lewis.
[87] G.C. Exh. 40; testimony of Union Representative Chastain.
[88] R. Exh. 2.

the posted notice says nothing about Union agreement with the new policy.

2. Factual and legal conclusions

Respondent argues that the Union was given notice of the change on May 18, and waived its rights by failing to demand bargaining.

The evidence shows that Company President Lewis decided to change to a 5-day 8-hour workweek about 2 weeks before the May 18 bargaining session. It also shows that the Company posted a notice to this effect on a bulletin board on or before 3 p.m. on May 18, before any discussion of the change had begun in the bargaining session. In light of these indisputable facts, the inconclusive testimony of what was said at 4 p.m. and thereafter in the bargaining session is of little importance. It is obvious that Respondent made the change on May 18, without notice to the Union.

A unilateral change in work schedules constitutes a violation of Section 8(a)(5). *Millard Processing Services*, 310 NLRB 421, 425 (1993). The Union did not waive its right to bargain over this change. Any such waiver must be clear and explicit. *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964). The evidence of the May 18 bargaining session fails to establish any such clear and explicit waiver. The employee handbook was not a contract between the parties. The Union did not agree to the change, and did not abandon its right to bargain over it. I conclude that Respondent unilaterally changed the employees' work schedule and violated Section 8(a)(5).

G. The Alleged Unilateral Change in Overtime Policy, and Warnings Issued to Employees for Violation of the New Policy

1. Summary of the evidence

The complaint alleges that Respondent, on about June 19, 1995, unilaterally changed its overtime policy, and thereafter issued warnings to two employees for violation of the new policy.

Three employees testified that overtime was voluntary. Supervisors would ask employees on Wednesday if they wanted to work overtime. There was no statement that work was mandatory, and there were times when the Company could not secure any overtime workers.[89]

Production President Lewis contended that overtime had always been mandatory. Although the Company first requested volunteers, it could require an employee to work overtime if the need arose. Lewis asserted that this requirement was set forth in the employee handbook. The relevant handbook provision states that overtime would normally be assigned to the employee doing the job during regular hours, and that the Company would attempt "to equalize overtime opportunities."[90]

Production Manager Richard O'Reilly stated that there was a past practice, in writing, whereby an employee with the least amount of overtime was required to come in if asked. However, Reilly immediately testified that this policy "never had to be used."

On a Wednesday in June 1995, according to employees Alan Kelly and David Porter, Supervisor Moelter asked them to work overtime on Saturday. Both had prior commitments, and declined. Moelter stated that the assignment was mandatory. The employees offered to work a double shift on Friday, but this was declined. They then said that they would take a "personal day" on Saturday. Neither showed up on Saturday, and both received a warning for "failure to show up for scheduled overtime."[91] Moelter testified that this was the first time he had ever required an employee to work overtime. Union Representative Chastain affirmed that the Union did not received any prior notification of this change.

2. Factual and legal conclusions

The employee handbook does not provide for mandatory overtime, as asserted by Company President Lewis. There is no mandatory provision; "equalizing overtime opportunities" does not constitute mandatory overtime. Production Manager O'Reilly's contradictory testimony on this subject, and Moelter's admission that the action taken against Kelly and Porter was the first occasion when overtime had been required, cast further doubt on Respondent's position. I credit the testimony of the General Counsel's witnesses that overtime had been voluntary up to the time of the discipline administered to Kelly and Porter.

I further conclude that this unilateral change in the method of assigning overtime violated Section 8(a)(5) of the Act, as did the warnings given to Kelly and Porter for their failure to obey the Company's unlawful new order pursuant to that rule. *Duke University*, 315 NLRB 1291 (1995).

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. American Crane Corp. is an employer engaged commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act:

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Coercively interrogating employees concerning their union activities.

(b) Threatening employees with plant closure if the employees selected the Union as their bargaining representative.

(c) More closely monitoring the work and movement of its employees because of their union activities.

(d) Disparately enforcing a no-solicitation, no-distribution rule in order to discourage union activities of its employees.

(e) Threatening employees with denial of reinstatement from suspension because they filed unfair labor practice charges with the Board.

(f) Transferring employees to different job assignments in order to isolate them from other employees and discourage their support for the Union.

(g) Telling employees that the reason for a new $5 charge for lost I.D. cards was to keep "undesirables" out of the plant.

4. Respondent violated Section 8(a)(3) and (1) by engaging in the following conduct:

(a) Warning Fred Clemmons on October 3, 1994, for allegedly excessive "early outs" and "late ins," by suspending him on that date, and by discharging him on October 7, 1994, because of his union activities;

(b) Warning Zachary Givens for discussing the Union, for alleged poor work performance and not working, for alleged mislocating and misnumbering parts, for suspending him for 3

[89] Testimony of Alan Kelly, David Porter, and Scott Rhodes.

[90] Jt. Exh. 1, p. 11.

[91] G.C. Exhs. 8 and 9.

days on October 17, 1994, and for giving him an unsatisfactory evaluation on November 2, all because of Givens' union activities.

(c) Warning Cleatus Brown on October 19, 1994, for mislocating parts, warning Brown on February 5, 1996, for "poor work performance," giving him an unsatisfactory evaluation on February 17, 1996, telling him that it did not know whether it could let allow him to testify pursuant to a Board subpoena[92] and giving him unsatisfactory evaluation on August 19, 1996, a warning for inefficiency and insubordination on September 25, 1996—all for union activity and, in the subpoena incident his intended compliance with a Board subpoena.

(d) Suspending Johnny Thompson on July 17, 1995, and discharging him on July 19, 1995, because of his union activities.

5. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its Wilmington, North Carolina, facility, excluding all technical employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

6. On October 12, 1994, a majority of the employees in the unit described above selected the Union as their collective-bargaining representative in a Board conducted election, and, since that time, the Union has been the exclusive representative of the employees for the purpose of collective bargaining. Commencing October 21, 1994, the Union has requested Respondent to bargain collectively with it concerning the rates of pay, wages, hours, and other terms of employment of the employees in the above-described unit.

7. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by engaging in the following conduct.

(a) Unilaterally laying off bargaining unit employees on November 3, 1994, without giving the Union an opportunity to bargain concerning the layoff, and transferring bargaining unit employees into the vacancies created by the layoffs.

(b) Refusing to grant the Union's safety expert access to the plant on about October 28, 1994, to study operations and investigate safety hazards.

(c) On about October 19, 1994, unilaterally changing its payroll deductions for employee purchases without giving the Union an opportunity to bargain.

(d) Unilaterally imposing a new requirement of a $5 charge to employees for loss of their employee I.D. cards.

(e) On about December 5, 1994, unilaterally altering its practice of distributing payroll checks, without giving the union notice and an opportunity to bargain.

(f) Unilaterally, about May 18, 1995, changing the work schedules of its employees without giving the union notice and an opportunity to bargain.

(g) Unilaterally, on about June 19, 1995, changing its overtime policy without giving the union notice and an opportunity to bargain.

(h) Issuing warnings to employees David Porter and Alan Kelly on about June 19, 1995, pursuant to its new overtime policy described above.

(i) Refusing to give the Union the reason for its discharge of Johnny Thompson.

I further conclude that Respondent has engaged in "such egregious or widespread misconduct so as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979). Accordingly, I shall recommend a broad order.

REMEDY

It having been found that the Respondent has engaged in certain 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.

It having been found that Respondent unlawfully suspended Fred Clemmons on October 3, 1994, and discharged him on October 7, 1994, and unlawfully suspended Johnny Thompson on July 17, 1995, and discharged him on July 19, 1995, I shall recommend that Respondent be required to offer them immediate reinstatement to their former positions, dismissing if necessary any employee hired to fill the position, and to make them whole for any loss of earnings they may have suffered by reason Respondent's unlawful conduct, by paying each of them a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net interim earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[93]

I shall also recommend that Respondent be ordered to make Zachery Givens whole for any earnings he may have lost because of Respondent's unlawful suspension on him on October 17, 1994, in the manner described above.

I shall further recommend that Respondent be required to expunge from its files all references to its discharges of Fred Clemmons and Johnny Thompson, its suspension of Zachary Givens, its warnings and other discipline listed above to Clemmons, Givens, Cleatus Brown, David Porter, and Alan Kelly, and inform each of them in writing that this has been done, and that the actions will not be used as the basis of any future discipline of them.

Additional remedies are required to restore the status quo ante and make all employees whole for any losses they may have suffered. *Duke University*, 315 NLRB 1291 (1995). I shall recommend that Respondent be required to reinstate all bargaining unit employees which it unlawfully laid off on October 3, 1994, to their former positions, to the extent that it has not already done so, and make whole all such employees for any loss of earnings they may have suffered in the manner described above. The names of such employees may be ascertained in a supplemental compliance proceeding.

I shall further recommend that Respondent be required to change its payroll deduction plan for employee payment of purchases back to the plan which it unlawfully changed on October 1994. On the authority of *Ogle Protection Services*, 183 NLRB 682 (1970), and the above-cited cases, Respondent shall remit to each employee the amount which it unlawfully

[92] This conduct also violates Sec. 8(a)(4).

[93] Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.,* 281 NLRB 651 (1977).

overcharged him since that time, and bargain with the Union over this issue.

I shall also recommend that Respondent be required upon request by the Union to return to its former policy of allowing an employee to leaving early on Thursday morning to get his paycheck by 11 a.m. that day, and to bargain with the Union over this issue.

I shall further recommend that Respondent be required to discontinue its unlawfully imposed rule of mandatory overtime, to return to its previous policy of voluntary overtime, and to bargain with the Union over this issue.

I shall also recommend that Respondent, upon request by the Union, allow a union-designated safety expert to enter the plant, and investigate any work hazards which may exist therein.

I shall also recommend that Respondent be required upon request by the Union to return to its former policy of scheduling 4 10-hour days of work per week, and to bargain with the Union over this issue.

I shall further recommend that Respondent, on request by the Union, give the latter the reason that it discharged Johnny Thompson.

[Recommended Order omitted from publication.]