Arrow Automotive Industries *and* South Carolina State Local 352, International Molders & Allied Workers Union, AFL-CIO. Cases 11-CA-7990 and 11-CA-8032

September 30, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 31, 1981, Administrative Law Judge Russell M. King, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

Respondent excepts to the Administrative Law Judge's finding that it violated the Act through the conduct of its supervisors and/or agents[4] who admittedly observed the handbilling at the various entrances to Respondent's facility. We find no merit in this exception. "The Board has often held that management officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary."[5] The record in this case shows quite clearly that, when Respondent discovered that union handbilling was occurring just outside its gates, it took action which was quite "out of the ordinary." Soon after the the handbilling began on 2 of the 3 days here in question,[6] 11 of Respondent's supervisors lined up in varying numbers near each of the three gates, observing the employees as they drove past the the union handbillers.[7] The testimony is unequivocal that the presence of the supervisors was highly unusual, and we agree with the Administrative Law Judge's conclusion that the supervisors' presence was "deliberately calculated . . . to show and demonstrate obser-

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

In examining the Administrative Law Judge's credibility resolutions, we notice what we can only conclude is an inadvertent error. Sec. II,D, of the Administrative Law Judge's Decision is devoted to a discussion of Respondent's unlawful conduct regarding employee Charles Smith. The record evidence reveals no connection between the incidents involving Smith and the testimony of employee Kenneth E. Biggs. Yet in sec. II,D, par. 4, of his Decision, the Administrative Law Judge makes the following statement: "As in the case of employee Biggs, I credit the testimony of Smith over the significant portions of O'Bryant's testimony. Also where in conflict, I credit Biggs' testimony over that of Group Leader Don Johnson." In light of the lack of relationship between Biggs' testimony and the incidents involving Smith, we find that the Administrative Law Judge inadvertently erred in making the second reference to Biggs and that the reference should be one to Smith. (In so concluding, we note that the Administrative Law Judge specifically discredits Johnson on a particular point in sec. II,D, par. 5, of his Decision.)

[2] In sec. II,C, par. 2, of his Decision, the Administrative Law Judge found that Respondent violated the Act by telling employee Biggs that Biggs was not to keep union literature in the truck or on company property. The evidence indicates that this violation occurred on October 8, 1978. However, Conclusion of Law 7 states that this violation occurred on October 9, 1978. Conclusion of Law 7 will be amended accordingly.

In sec. II,E,3, par. 2, of his Decision, the Administrative Law Judge found that Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Gary Dean Wilkie on November 28, 1978, because of his protected activity. However, Conclusion of Law 12 fails to state that Wilkie's discharge violated Sec. 8(a)(3) and (1) of the Act. Conclusion of Law 12 will be amended accordingly.

[3] The General Counsel excepts to the Administrative Law Judge's failure to require Respondent to rescind and expunge the warnings given to Gary Dean Wilkie on September 5 and 7, 1978. In sec. II,E,3, of his Decision, the Administrative Law Judge found that the warnings issued to Wilkie on those dates violated Sec. 8(a)(3) and (1) of the Act. Accordingly, we will modify the Order to require that Respondent rescind and expunge these documents from its records.

The General Counsel also excepts to the Administrative Law Judge's failure to require that Respondent rescind and expunge the warning notices issued to Kenneth E. Biggs on August 15 and 29, 1978, and on September 12 and 26, 1978, and to provide a backpay remedy for the two 3-day suspensions issued to Biggs on August 29 and September 26, 1978, and for the 1-day suspension given to Biggs on September 12, 1978. In sec. II,C,3, of his Decision, the Administrative Law Judge found that "the company's stated reason for Biggs' discharge, his so-called failure to communicate, was pretextual and that the actual motivating cause was Biggs' protected union activities and support." The warning notices of August 15 and 29, 1978, and the suspension of August 29, 1978, were each given to Biggs for his "failure to communicate," the precise reason found by the Administrative Law Judge to be a pretext for Biggs' discharge. Inasmuch as we agree with the Administrative Law Judge's conclusion that the so-called failure to communicate was a pretext for Biggs' unlawful discharge, we find merit in the General Counsel's exceptions concerning the warning notices of August 15 and 29, 1978, and the suspension of August 29, 1978. We shall modify the recommended Order to require Respondent to expunge these warnings from its records, and we hereby modify the remedy to require Respondent to make Biggs whole for any losses incurred due to the August 29, 1978, suspension, with interest. However, we are unable to conclude that the General Counsel has demonstrated a sufficient connection between the warning notices and suspensions of September 12 and 26, 1978, and the unlawful nature of Biggs' discharge. Accordingly, we reject the General Counsel's exceptions concerning them.

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

[4] At the hearing, the parties stipulated that the individuals listed in par. 7 of the amended complaint were supervisors, with the exception of Jim Corn who was stipulated to be an agent. For the sake of discussion in this case, we will hereinafter refer to these individuals collectively as supervisors.

[5] *Metal Industries, Inc.*, 251 NLRB 1523 (1980). Member Jenkins dissented in that case and places no reliance on the principles set forth therein.

[6] The parties stipulated that, on the third day of the handbilling, only four supervisors observed the activity.

[7] None of the handbillers was an employee of Respondent.

vation, in numbers and force . . . ." While we also agree with the Respondent that it has a legitimate interest in preserving the integrity of its property, we find that its actions went far beyond what was necessary to accomplish this end. As noted by the Administrative Law Judge, the union official in charge of the handbilling ascertained at the outset the location of the company property line, and there is no evidence that the handbillers showed any intention of encroaching on Respondent's property. Accordingly, we agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act by engaging in unlawful surveillance of its employees' protected activities.

AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 7 and 12 and substitute the following in the appropriate order:

"7. That the company, on October 8, by and through its supervisor, Jack O'Bryant, unlawfully interfered with the protected rights of employee Kenneth E. Biggs to possess union authorization cards or other union literature on company property, in violation of Section 8(a)(1) of the Act."

"12. That, on November 28, Respondent discriminatorily discharged employee Gary Dean Wilkie because of his union and protected concerted activity, in violation of Section 8(a)(3) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Arrow Automotive Industries, Spartanburg, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(j):

"(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act to organize and bargain collectively or to refrain from such activities."

2. Substitute the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Expunge from all its records the warning notices issued to employee Gary Dean Wilkie on September 5 and 7, 1978, and to employee Kenneth E. Biggs on August 15 and 29, 1978."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate our employees concerning their union activities or support.

WE WILL NOT keep a close surveillance of the lawful union activities of our employees.

WE WILL NOT create the impression of surveillance of our employees while engaged in protected union activities.

WE WILL NOT interfere with the lawful distribution of union literature and union authorization cards to our employees.

WE WILL NOT threaten our employees with reprisals for engaging in protected union activities.

WE WILL NOT interfere with the rights of our employees to lawfully possess union authorization cards or union literature on company property.

WE WILL NOT promise our employees benefits if they cease their lawful support for a union or engage in other protected union activities.

WE WILL NOT issue written warnings to our employees because of their lawful union or other protected activities.

WE WILL NOT unlawfully discharge or suspend employees because they engage in protected union activities.

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

WE WILL offer Kenneth E. Biggs and Gary Dean Wilkie immediate and full reinstatement to their former jobs or, if said jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights or privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss

of earnings they may have suffered as a result of their discharge.

WE WILL make whole Charles Smith, with interest, for any loss of earnings, seniority, or other rights or privileges suffered as a result of his suspension from employment.

WE WILL expunge from all our records the warning notices unlawfully issued to Gary Dean Wilkie.

WE WILL expunge from all our records the warning notices issued to Kenneth E. Biggs on August 15 and 29, 1978.

WE WILL make whole Kenneth E. Biggs for any loss of pay suffered as a result of his suspension from employment on August 29, 1978, with interest.

ARROW AUTOMOTIVE INDUSTRIES

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING, JR., Administrative Law Judge: These consolidated cases were heard by me in Spartanburg, South Carolina, on April 9, 10, and 11, 1979. The charge in Case 11-CA-7990 was filed by South Carolina State Local 352, International Molders & Allied Workers Union, AFL-CIO (the Union), on November 20, 1978. The charge in Case 11-CA-8032 was filed by the Union on December 13, 1978. On January 17, 1979, a consolidated complaint regarding both charges was filed by the Regional Director for Region 11 of the National Labor Relations Board (the Board), on behalf of the General Counsel. The complaint alleges various violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act), during a union organizing campaign in the fall and early winter of 1978.[1] These alleged violations on the part of the Respondent (the Employer or the Company) include improper threats, interrogation, and surveillance, the discriminatory discharge of two employees, and the discriminatory suspension of one other employee. Respondent denies the improper threats, interrogation, and surveillance, and alleges that discharges and suspension were for good cause, unrelated to the union support and activities of the employees involved.

Upon the entire record,[2] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel and the Company, I make the following:

FINDINGS OF FACT[3]

I. JURISDICTION

The pleadings and admissions herein establish the following jurisdictional facts. The Company is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the State of South Carolina, where it is engaged in the manufacture of automobile parts at its Spartanburg, South Carolina, plant. During the 12-month period prior to the issuance of the consolidated complaint herein, the Company in the course and conduct of its business operations purchased or received goods valued in excess of $50,000 directly from points located outside the State of South Carolina or, during this same period, the Company shipped goods or products valued in excess of $50,000 to points outside the State of South Carolina. Thus, and as admitted, I find and conclude that the Company is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find and conclude, as alleged and admitted, that the Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company's facility or plant is located in three separate but adjacent buildings, surrounded by a parking lot which is fenced in completely from the street with the exception of four exit gates. The Company employs approximately 600 production and maintenance employees all of whom work a basic 7 a.m. to 3:30 p.m. shift. The Company also maintains a facility known as the "Daniel Morgan" building which is located approximately 2 miles from the main plant complex. The employees parked their private automobiles within the fenced-in area and in the parking lots adjacent to the plant buildings.

In mid- or late July several employees contacted the Union regarding organizing and representing the plant. Thereafter, the Union held a series of organizational

[1] All dates hereafter are in 1978 unless otherwise indicated. The pertinent parts of the Act provide as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .
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> * * * * *
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> Sec. 8(a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

[2] The General Counsel has moved to correct the official transcript in the case in certain respects. The motion was unopposed and I find that it merits granting. The record is corrected accordingly.

[3] The facts found herein are based on the record as a whole and upon my observation of the witnesses. The findings herein are in part based upon credibility resolutions which have been derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in light of the entire record.

meetings commencing on August 9. During these meetings union authorization cards were signed and also distributed for later solicitation and signature at the plant. On September 22, October 13, and December 1, the Union handbilled the plant, and on December 5 the Union filed a representation petition with the Board with the unit including the Company's production and maintenance employees (Case 11-RC-4627). Pursuant to a Stipulation for Certification Upon Consent Election, a Board-conducted election was held at the plant on January 18, 1979, and the Union failed to receive a majority of those votes cast. No objections were filed after the election, and it is undisputed that the Company vigorously opposed the Union from beginning to end. The discrimination alleged in this case involves employees Charles Smith, Kenneth E. Biggs, and Gary Deane Wilkie. These employees actively supported the Union and the Company admits that they had knowledge of this support as of early September.

B. *Handbilling*

In its campaign, the Union handbilled the plant on September 22, October 13, and December 1. The complaint alleges that the Company's response and actions regarding this handbilling constituted unlawful surveillance and interference. The Company has stipulated herein that, on the September 22 and October 13 dates of the handbilling, some 11 supervisors or agents were out in the parking lot and observing the procedure as the employees left through the exit gates in their vehicles.[4] It was further stipulated that four of the supervisors were in the parking lot and observing on December 1.[5]

Thomas R. Sherbert testified as the business representative for Local 353. He participated in the union organization and in the campaign, and was present on behalf of the Union during the 3 days on which handbilling occurred. Generally, a number of union "volunteers" appeared at the plant at approximately 3:20 p.m. and prepared to hand out union literature at each exit.[6] Several union volunteers were posted at each exit gate outside the company property. Inside the fence, and on company property, approximately four supervisors would gather in a line near each exit gate where they would remain standing and observing until the last employee vehicle left their particular exit. On the first date, September 22, Sherbert indicated that he had a conversation with Assistant Production Manager Jim Harrell regarding exactly where the Company's property line was. Sherbert further testified that on the dates involved, and as the employees' vehicles would pass by the supervisors and through the gates, there was much "hollering" from the supervisor groups at the employees who were exiting, including remarks such as "don't take the garbage," "it will make you a union member" and "bring that card to me." Sherbert further related that several employees questioned whether or not they should take the union literature because their "bossman" was looking. Sherbert did concede that, over and above such remarks, management did nothing further actually to physically, or otherwise, to interfere with the distribution procedures at the gates. Henry H. Key also testified, as an International staff representative of the Union, that he participated in the handbilling on September 22 and October 13. According to Key, on September 22 he had given out three handbills to members of a management group, and was approached by one of such members whereupon he (Key) indicated that the Company "could possibly be in violation of the National Labor Relations Act for observing his employees." According to Key, the individual replied that the management groups were all on company property, whereupon the conversation ended. Key further testified that at the September 22 handbilling he heard one of the management observers yell "don't sign anything, you can end up in court." According to Key, at the October 13 handbilling he overheard employees say, "I am afraid to take one . . . I am being watched . . . My boss is standing there watching me."[7] Supervisor Jack O'Bryant denied ever observing at the gates or telling employees not to take the handbills.[8] Group Leader Harold Brown testified that he did participate as an observer, as stipulated, and that once he asked for a copy of a handbill. Brown also testified that he did talk to employees in their cars as they were leaving the parking lot, but denied any further interference with the proceedings, or telling them not to take the handbills. Assistant Production Manager Henry Jossie also testified that he participated in observing the handbilling. He denied making any threatening remarks to any of the employees and he related that the management group was out in the parking lot "just to keep the union people off of Arrow Automotive property, that's all." Assistant Production Manager Jim Harrell also testified that the purpose of the management group during the handbilling was "To see that no union people that were passing out the handbills got on company property." Harrell also conceded that he did speak to some of the employees but denied that he threatened them in any way.

The Company's actions and responses to the handbilling was far from casual. I find that it was a deliberately calculated plan to show and demonstrate observation, in numbers and force, and its cause and effect was the surveillance of the employees. I find that there was no legitimate business consideration for the Company's conduct. The Company had no cause or reason to believe that the union volunteers participating in the handbilling would encroach, or had any intentions of encroaching, on company property. Union Business Representative

[4] Those supervisors were stipulated as follows: Jim Harrell, assistant production manager; Mike Murphy, personnel manager; Jim Corn, agent; Neil Lancaster, production, planning, and control manager; Harold Brown, group leader; Henry Jossie, assistant production manager; Johnnie Hicks, supervisor; Jack O'Bryant, supervisor; Charlotte Stevens, supervisor; Carl Rodgers, group leader; and Jim Hayes, group leader. Personnel Manager Mike Murphy left the Company in January 1979.

[5] Those four were O'Bryant, Stevens, Rodgers, and Hayes.

[6] None of these "volunteers" were employees. During the campaign Wilkie and Biggs were terminated and after their terminations they participated in the December 1 handbilling.

[7] Union secretary Joyce Jones participated in the September 22 handbilling, and also testified that she overheard an employee say, "No, thanks, the boss [is] looking."

[8] This testimony is in part inconsistent with the Company's stipulation in the case that the management group was in the parking lot and was observing the proceedings.

Sherbert made it clear on the first day of handbilling that the Union was interested in ascertaining where the Company's property line ended so as not to engage in the activities on company property. The employees had the protected right freely to receive or to reject the handbills as they exited the Company's property, free from intimidation or blatant surveillance. Such was not the case here. I thus find that the Company's actions during the dates involved in handbilling were destructive of employee rights through surveillance and interference, as alleged in paragraphs 8(a) and (b) of the complaint, and thus in violation of Section 8(a)(1) of the Act.

C. *The Violations and Discharge of Kenneth E. Biggs*

1. Testimony of Biggs

Employee Kenneth E. Biggs commenced his employment with the Company on November 4, 1975 and was terminated November 14, 1978. For 3 years Biggs was the shuttle truckdriver and his supervisor was Jack O'Bryant. The shuttle truck was a 3-ton 1969 Chevrolet truck used to move material and parts to and from several docks at the main plant complex, and also to and from the Company's satellite facility 2 miles away (Daniel Morgan). Biggs testified that throughout his employment prior to August 9 he had received no written warnings and that he had only been "criticized" once when Assistant Production Manager Harrell spoke to him about performing too many extra jobs for other supervisors. Biggs further related that he was absent once, he was late to work once, but that he had received two merit raises, one in June 1977 and one in October 1977.

Biggs testified that on April 10 he met with O'Bryant and Harrell and the three worked out a written schedule which he was to try and follow thereafter. But Biggs indicated that thereafter production at the plant doubled and often the loading docks would be full and would be unable to accept a delivery. He was also given unscheduled jobs and runs, and after the schedule went into effect he would often eat his lunch while driving and was frequently behind in his schedule. According to Biggs, O'Bryant and Harrell subsequently learned about this and amended the schedule to include an break and a lunch period. Biggs testified that thereafter he would contact either O'Bryant or Harrell, but if he was only 30 minutes to a hour behind and thought he could catch up, he would not call in to either. Biggs readily admitted that on occasion he was definitely behind schedule, as was the case even before the schedule went into effect. He also indicated that there were production delays, as was the case previous to the schedule. Biggs testified that on August 10 or 11 he had a conversation with O'Bryant during which O'Bryant asked him if he heard anything about the Union and how he felt about the Union. Biggs replied he was in favor of the Union "for a working man." Also around August 9, Biggs indicated that O'Bryant and Harrell informed him that his work was unacceptable, whereupon he was surprised and said that he would consider quitting. According to Biggs, the following morning he was called into the office and asked whether he decided to quit; he replied that he had not. O'Bryant or Harrell then remarked that he had "told [them] a lie," further stating, "Do you mean that you are going to work for a company that don't think you are worth a darn?" Biggs maintained that he was not quitting and left the office.

Biggs testified that he received his first written warning on August 15. This warning was for "failure to follow instructions," in that he was behind in his schedule and failed to so notify either O'Bryant or Harrell, as instructed. Biggs indicated that he fell behind on the date in question because dock 4 was blocked with a "stock truck" and he was thus unable to move the shuttle truck up to the dock. Biggs testified that he was called into the office on August 15 and handed the written warning. Both O'Bryant or Harrell were present. He conceded that they both asked him what they could do to keep him on schedule and in contact with them. It was at this time, according to Biggs, that one or the other asked him if he had signed a union card, to which he replied that he did.[9]

Biggs testified that he supported the Union from the very beginning and attended all of the union meetings, relating that near the end of August he commenced to hand out union literature and union authorization cards at the plant. He estimated that he handed out approximately 75 cards. Biggs further related that in late August O'Bryant started "following" him in that at "numerous times" O'Bryant would show up at dock 1 and stand there and watch him until he was finished loading or unloading. On August 29 he received his second written warning for failure to follow instructions in not calling in when he was late. With this warning came a 3-day suspension. Biggs testified that on September 11 he talked to O'Bryant about getting 2 hours off the following day to sign "some closing papers on a house." According to Biggs, O'Bryant said that he would have to wait until the following day to see how things were going. When he arrived the following morning, September 12, he was given his third written warning, again for failure to follow instructions, and was immediately sent home for a 1-day suspension.[10] Biggs related that on September 29 he received his fourth written warning from O'Bryant and Harrell for not "checking" or "scotching" the wheels on his shuttle truck.[11] Biggs admitted fault in this and received a 3-day suspension. Biggs testified that on October 8 he was called into the office by O'Bryant, whereupon O'Bryant displayed some union literature that he had found in the shuttle truck. According to Biggs, O'Bryant advised him that he did not want the material in the truck or on company property. The material included union authorization cards.

Biggs testified that, on the afternoon of November 13, O'Bryant instructed him to pick up some generators at

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[9] Biggs later indicated that he was not certain if this question about the Union was asked on August 15 during his first warning, or during a later and second warning on August 29.

[10] Although this warning was for failure to follow instructions, it involved working unauthorized overtime, and not the failure to communicate when behind in the schedule.

[11] "Checking" or "scotching" the wheels refers to a procedure whereby, when the truck is stopped at a dock, a rubber stop is placed behind one of the wheels on the truck to prevent it from rolling during the unloading or loading process.

the Daniel Morgan site (dock 5) the following day, if he had room in the shuttle truck. The following morning (November 14) when he arrived at dock 5, Biggs loaded up various items including the generators, as instructed the previous day. According to Biggs, the generators were to go to dock 2, as opposed to dock 1 which was the next stop on his schedule. Thus he went to dock 2 and started unloading the generators and was approached by a supervisor on that particular dock who further instructed him that in addition to unloading the generators they would have to be specially stacked. Biggs indicated that he went ahead and stacked the generators and then proceeded to dock 1, at which point he was approximately 45 minutes to a hour behind schedule because of the extra stacking. Upon arrival at dock 1, Biggs related that O'Bryant approached him and remarked that he was behind schedule and asked why he had been to dock 2. Biggs replied by mentioning the extra generators, whereupon O'Bryant left but soon reappeared and told him to come to the office. At the office, O'Bryant and Harrell talked to him approximately a half hour, during which time they asked him what they could do to get him to "communicate" with them and stay on schedule. According to Biggs, he "defended" himself and at one point pulled a union pamphlet out and indicated to O'Bryant and Harrell that he knew "what his rights [were]." According to Biggs, at the end of this conversation he was told to go home and call in later in the afternoon to find out "how long the suspension would be." At 4 p.m. Biggs indicated that he called and spoke with Harrell, who informed him that he was "terminated." At Harrell's request, Biggs returned to the plant at or about 4:30 p.m. to turn in his electronic "beeper," and that at that time he asked Harrell why he was terminated and Harrell replied he would have to talk to Personnel Manager Mike Murphy about the matter. Biggs testified that he then left the office, walked out into the plant, and that, while talking to three or four employees, O'Bryant again approached him and told him to leave the premises, whereupon they both started walking toward the door. Biggs related that Harrell then commented that he did not think the Union would come in, and asked him if he felt it would, to which he replied that he felt the Union would come in. Biggs further indicated that on two subsequent dates he went to the plant and asked Murphy for his termination papers, but never received them. Biggs conceded that the information in the written warnings (conference reports) was actually true and that in fact he was frequently behind schedule. He further conceded that he did not like reporting in when he was behind, but that he did report in and was not always able to reach O'Bryant. On these occasions, he would alternatively report to Harrell or Group Leader Don Johnson.

2. Testimony of O'Bryant and Harrell

O'Bryant was the supervisor over four group leaders, he testified that Biggs, as the shuttle truckdriver, answered directly to him. O'Bryant characterized Biggs as a very "energetic" employee. He further indicated that Biggs "did a good job" and "was a good worker," but he always added that he was "average," and not an "excellent" employee. O'Bryant further conceded that Biggs was a "devoted" employee and when he did "a real good job" he would commend him. O'Bryant conceded that the plant had parts shortages "for many years." On April 10 he and his supervisor, Harrell, got together with Biggs and formulated a shuttle truck schedule. According to O'Bryant, the original schedule Biggs was using did not provide for lunch and breaks and when he learned that Biggs was working through lunch on occasions they came together and formulated the new schedule. O'Bryant conceded that he knew there would be some deviations from the schedule and that Biggs would be unavoidably interrupted on occasion. However, O'Bryant testified that when Biggs was off schedule he was instructed to call him and let him know, and that Biggs' failure to do this caused the series of written warnings beginning on August 9. O'Bryant testified that on August 9 he learned that Biggs was having trouble with the schedule and he asked Biggs if he could help him, whereupon Biggs became mad, "jumped up" and threatened to quit, stating "he knew the reason why he was in there." According to O'Bryant, he then asked Biggs if he was giving his notice and Biggs replied that he was not, but that he wanted to think about it overnight. The following day, Biggs indicated that he was not going to quit. O'Bryant indicated that the first written warning for "failure to follow instructions" in not reporting delays to him came on August 15, although O'Bryant claimed that he had "gotten on" Biggs previously for doing extra jobs for other supervisors.[12] The second and final written warning for "failure to follow instructions" came on August 29, O'Bryant again indicating that "sometimes" Biggs just failed to let him know that he was not on schedule. O'Bryant conceded that Biggs communicated with him sometimes but added that on "several occasions . . . [he] would not communicate with me." O'Bryant further added that he "never could get [Biggs] to communicate with me the way he should have." O'Bryant further commented that there were phones throughout the plant, in addition to a public paging system. The third in the series of written warnings came on September 12 but did not deal with the failure to follow instructions. This warning involved the "working on an unauthorized hour of overtime" which O'Bryant indicated caused Biggs to be an hour behind on his schedule.[13] This overtime was apparently worked by Biggs on September 11, with the request in mind that he had made that day regarding some time off the following day (September 12). O'Bryant further conceded that Biggs worked this overtime on September 11 "to get ahead" and O'Bryant consented.[14] O'Bryant did concede that Biggs had discussed some time off on September 11 for personal business and that his reply was that they would have to wait until the day in question to see how

[12] In earlier testimony O'Bryant denied ever telling Biggs that he "just couldn't say no" to other supervisors.

[13] The contrary would appear to be the normal result of overtime work. This confusing testimony is not resolved in the later testimony of O'Bryant, or by the warning itself, which was admitted into evidence.

[14] O'Bryant was asked if he "agreed with it" (the overtime work) and he replied, "Yes, sir, he was trying to get ahead." The actual issuance of the warning is inconsistent with O'Bryant's consent, but this inconsistency was never explained in O'Bryant's testimony.

the workload was. The final written warning came on September 26 and also did not involve the failure to follow instructions but pertained to Biggs' failure to "check" the wheels on his shuttle truck with a rubber safety device. Although O'Bryant could not remember Biggs having received any other warnings for this reason, Biggs received a 3-day suspension. Regarding the "union papers" that fell out of Biggs' truck, O'Bryant testified that he picked them up and reported the incident to Harrell. According to O'Bryant, Biggs was then called to the office whereupon he was told to keep such material out of the truck and that they did not want such material littering up the dock.[15] O'Bryant denied any and all interrogation of Biggs regarding his union activities although he admitted freely that he occasionally talked with Biggs about the Union and that he learned in mid-August that Biggs was sympathetic to the Union. He also conceded that on one occasion he asked Biggs for a union handbill. Regarding Biggs' actual termination, O'Bryant testified that on November 13 he instructed Biggs to pick up some "generator cores" from the Daniel Morgan facility the following morning. According to O'Bryant, on November 14 Biggs was again behind schedule and when Biggs arrived at dock 1 he asked him the reason for being behind and Biggs "didn't answer," but to the contrary O'Bryant later added and conceded that Biggs did say he was late because of a delay at dock 5 in picking up the generator cores, and another delay in delivering them and stacking them at dock 2. O'Bryant contended that when Biggs arrived at dock 1 he was approximately 1-1/2 hours off schedule; O'Bryant further contended that had Biggs come directly to dock 1 that he (O'Bryant) could have had the generator cores unloaded at dock 1 and then later transferred to dock 2. According to O'Bryant, Biggs' delay on November 14 caused a production delay so he and Harrell "called [Biggs] up" and again accused him of failure to follow instructions, resulting in his termination on that date.

3. Concluding analysis of the Biggs matter

In this case I credit completely the testimony of Biggs over that of O'Bryant.[16] I find that Harrell's testimony adds little to the Biggs' matter. Biggs had been a loyal and faithful employee for 3 years with an almost spotless record. For most of that period he had been the shuttle truckdriver without any significant complaints. The new schedule had been discussed and formulated on April 10 and I find that there were no significant complaints or discussions about Biggs' failure to meet the schedule until after the union activity commenced on August 9. O'Bryant himself conceded that it was difficult always to stay on schedule and that delays were unavoidable.[17] Although Biggs conceded that he did not like to report constantly to O'Bryant, there is no evidence in the record that he was anything other than conscientious in the performance of his job, which he had been performing adequately for over 2-1/2 years. The thrust of the Company's contentions regarding Biggs is that he was discharged for failure to communicate the fact that he was behind schedule. There is in fact little if any evidence in the record to indicate that the delays were avoidable or that the constant reporting by Biggs would have in any significant measure alleviated the delays.[18] Biggs himself does not dispute the accuracy of the written warnings themselves, but it is significant that the last warning regarding failure to communicate schedule delays and prior to the November 14 termination came on August 29. In the interim, and on October 8, O'Bryant had discovered the union literature in Biggs' shuttle truck. To say the least, this discovery disturbed O'Bryant greatly and I find that it caused O'Bryant to conclude that Biggs was irrevocably lost to the union cause and that this was additionally an adverse influence on other employees. As a result, I find that O'Bryant, in conjunction with Harrell, embarked upon a subtle but definite harassment campaign against Biggs, which concluded with his termination. Accordingly, I find that the Company's stated reason for Biggs' discharge, his so-called failure to communicate, was pretextual and that the actual motivating cause was Biggs' protected union activities and support. The discharge I thus find and conclude was in violation of Section 8(a)(3) and (1) of the Act as alleged in paragraph 9 of the complaint.

Regarding the union literature that was found by O'Bryant in Biggs' truck on October 8, I further find that O'Bryant's subsequent admonition to Biggs that he did not want such material in the truck or on company property was contrary to the rights of Biggs' to possess such materials, and thus was violative of Section 8(a)(1) of the Act as alleged in paragraph 8(d) of the complaint. The complaint further alleges the improper interrogation of Biggs by O'Bryant on August 11. Biggs testified that on August 10 or 11 he and O'Bryant had a conversation regarding the Union and O'Bryant asked him if he had heard anything about the Union and how he felt about the Union. Biggs indicated that he replied that he was in favor of the Union. O'Bryant denied any such interrogation but readily conceded occasional conversations with Biggs about the Union. As indicated previously, I credit Biggs over O'Bryant in this instance. Such questions or inquiries constitute unlawful probing into the sentiments of employees and I find in this instance that O'Bryant's questions were coercive, even in the absence of threats of reprisals or promises of benefits. I thus find that O'Bryant's interrogation of Biggs on August 10 or 11

[15] O'Bryant was asked if he told Biggs that he did not want union cards on company property, and O'Bryant replied, "I don't remember saying that."

[16] O'Bryant's demeanor was nonchalant and lackadaisical. His testimony in many instances was inconsistent, contradictory, and vague. Biggs, on the other hand, presented a serious and honest demeanor. He was concerned and came off as a conscientious and good employee.

[17] Employee Charles Smith testified that he occasionally drove the shuttle truck in Biggs' absence. According to Smith, prior to April there were delays "sometimes," but in April the plant "started growing" and Daniel Morgan (dock 5) was added. Smith further testified that after April 10 he also occasionally drove the truck and experienced delays and could "never" follow the schedule. Smith indicated that he was never told to contact O'Bryant or anyone else when he got behind, and he was never disciplined for getting behind and not reporting.

[18] Many of the delays were caused by other supervisors at the various docks imposing on Biggs to perform various jobs. This placed Biggs in an awkward position, and I find that O'Bryant knew this. It was not Biggs' place or responsibility to remedy this on his own. The responsibility was the Company's internally.

was violative of Section 8(a)(1) of the Act as alleged in paragraph 8(c) of the complaint. Paragraph 8(c) of the complaint also alleges the unlawful interrogation of Biggs on August 29 by Assistant Production Manager Jim Harrell. Biggs testified that he asked if he had signed a union card on either August 15 or August 29, the dates of the "failure to communicate" written warnings. He further could not remember whether the question was asked by O'Bryant, or by Harrell as charged in the complaint. Both O'Bryant and Harrell denied such interrogation. Although I have credited Biggs in this case, and credit him here, Biggs' testimony regarding this allegation in my opinion is so uncertain as to specifics that it fails to meet the required burden of proof. I shall thus recommend that the alleged unlawful interrogation in violation of Section 8(a)(1) of the Act, and found in paragraph 8(c) of the complaint, be dismissed.[19]

D. *The Violations and Discharge of Employee Charles Smith*

Employee Charles Smith testified as a present employee of the Company. He started his employment on August 19, 1970. His group leader was Don Johnson and his immediate supervisor was Jack O'Bryant. Smith testified that he was a union supporter, attended the union meetings, and that between August and early November he passed out some 35 to 40 cards at the plant and received approximately 20 back which had been signed. According to Smith, on October 26 O'Bryant came to him and asked him if he was in favor of the Union. Smith asked O'Bryant what he meant and O'Bryant replied that he could "help [him] out." Smith then related that O'Bryant asked him to go and "withdraw" his union authorization card and bring it back to him, and by that action he (O'Bryant) would know that Smith was on his side. O'Bryant added that if he did not retrieve the card, that he would not be eligible for a "truck driver's job if one became open." Smith indicated that he had asked for such a job earlier if one became open. Smith testified that on the following day (October 27) O'Bryant asked him to report to "Gene High's" office, the manager of the shipping department. Smith did so and upon his arrival O'Bryant introduced him to High and left, whereupon High informed him that he had a truckdriver's job available, but that O'Bryant would not "sign for [him] to go." Smith never received the truckdriver's job, although he had a heavy equipment operator's license and had previously operated trucks for the Company, making trips to neighboring towns. He made no more such trips and was "cut back" after he became involved with the Union. On November 11 Smith received a 3-day suspension for failure to work overtime. Smith testified that there was no definite policy regarding overtime but that "if you were asked and refused, you would lose your job."[20] Smith indicated that he averaged 5 hours of overtime a week and that his group leader would inform the employees of overtime work on a "day-by-day" basis. According to Smith, on Saturday, November 11, he had a conversation with his group leader, Don Johnson, who informed him that they would probably work some overtime the following week. Smith indicated that such a remark on a Saturday was not unusual, and the procedure was that the specific days were assigned the following week, again on a day-to-day basis. On November 13 (Monday) Smith related that he worked the regular hours of 7 a.m. to 3:30 p.m., and was not requested to work overtime that day. Upon reporting for work on November 14 as usual, he discovered his timecard missing and he went to Group Leader Johnson, who told him that O'Bryant wanted to see him. He went to O'Bryant's office and Group Leader Johnson soon arrived. O'Bryant asked him why he did not "work over," and Smith replied that Johnson had not asked him to work over. O'Bryant then stated that Johnson had conceded that he (Johnson) "must have forgot to tell him [Smith] that day," but O'Byrant added that Smith had been informed to "work over" the previous Saturday. O'Bryant then suspended Smith for the day and was told to call in later at 3 p.m. Smith called in at 3 p.m. and O'Bryant then told him that he was suspended for 3 days. According to Smith, when he returned to work on Friday, November 17, O'Bryant gave him a written warning for failure to work overtime.[21]

Supervisor O'Bryant testified regarding Smith's truck-driving job that he knew Smith wanted such a job and told Smith that he was in a position to recommend him, but when one such job came open, he did not recommend him.[22] O'Bryant further denied taking Smith to a "Gene High," but indicated that he made Smith an appointment with one "Fowler" about such a job. Regarding Smith's suspension for failure to work overtime, O'Bryant testified that he knew Smith supported the Union and further conceded that Smith had never refused to work overtime prior to the alleged incident on November 14. O'Bryant further conceded that he had talked to Smith about the Union before the 3-day suspension on November 14, and that one such conversation was on the dock sometime between July and September when Smith approached him and said that he needed "some advice." According to O'Bryant, on this occasion Smith complained about the lack of a merit increase and about the fact that he did not get the truckdriver's job, adding that if he could not obtain any help or satisfaction from him, that he could get some help from "this union

[19] One reason, among many, for crediting Biggs in this case is what I considered to be his honest attempt to be as accurate as possible and not to stretch or surmiss if he was uncertain. I have no doubt that the question was asked, but since the evidence does not reflect with any certainty who asked the question and on what date the question was asked, I simply feel the allegation lacks sufficient evidentiary support for finding a formal violation.

[20] The fact that there was no written company policy regarding overtime was stipulated in the case.

[21] It was stipulated by all parties in this case that employee Smith frequently worked overtime a number of hours each week for 5 or 6 months prior to his November 14 suspension. Smith went on to add in his testimony that Monday was normally his day off although he had worked overtime frequently on other Mondays but always after being requested to do so by Group Leader Johnson. Smith maintained that on Saturday, November 11, Johnson did not request him to work overtime Monday although two coworkers were told on Monday that they would be working overtime that day. Smith further conceded that he had worked overtime on Monday, July 31, and Monday, August 7.

[22] O'Bryant gave no reason for this failure in his testimony.

that is going on." According to O'Bryant, Smith then commented that he had not yet signed a union card, and O'Bryant replied to Smith that he knew where Smith stood regarding the Union and that he would not make Smith any promises. O'Bryant additionally testified that on several other occasions Smith would ask him for "some advice" and they would "talk" about the Union. O'Bryant denied instructing Smith to get his union authorization card back but he conceded that Smith did approach him in January 1979 and asked him how he could get the card back. In response to this request, O'Bryant testified that he took Smith back to his office and on a "strictly volunteer" basis he instructed Smith as to how to retrieve the card and he additionally had Smith sign a document revoking the card. Further regarding Smith's suspension, O'Bryant added that he was present when Group Leader Johnson told Smith on Saturday to work overtime the following Monday. According to O'Bryant, when he confronted Smith with this fact, Smith admitted it.

Group Leader Don Johnson testified that on Saturday, November 12, he had instructed Smith to work overtime the following Monday (November 14). According to Johnson, he and O'Bryant, together with Smith, discussed the matter on Monday (November 15) whereupon Smith admitted that he had been told on Saturday to work overtime Monday, but that Smith added that he thought the overtime request was for Tuesday. Johnson conceded that on Monday he had told two other employees to work overtime that afternoon but that he did not so remind Smith that he was to work overtime that day. Johnson also testified that the two employees who did work overtime often worked overtime on Mondays but that Smith seldom worked overtime on Mondays.

As in the case of employee Biggs, I credit the testimony of Smith over the significant portions of O'Bryant's testimony. Also where in conflict, I credit Biggs' testimony over that of Group Leader Don Johnson. Regarding Smith's request for a truckdriver's job, Smith had the proper license, had driven a large truck before for the Company, and his driving time was "cut back" commencing with his union support. In their conversation of October 26, I find that O'Bryant made it clear to Smith that if he revoked his union card the likelihood would be that he would receive the truckdriver's job. O'Bryant himself conceded that his recommendation would have had much weight but that he did not recommend Smith. Smith learned on the following day (October 27) that he needed O'Bryant's recommendation in order to get the job. O'Bryant's actions I find to be clearly coercive. It was made clear to Smith that, if he wanted to obtain a better job and the job of his choice, it was necessary for him to revoke his union authorization card, thus his union support. This coercion I find was violative of Section 8(a)(1) of the Act as alleged in paragraph 8(e) of the complaint. I further find that O'Bryant's questions of Smith regarding his union support during the October 26 incident constituted improper interrogation in violation of Section 8(a)(1) of the Act, and as alleged in paragraph 8(c) of the complaint.

Prior to Smith's 3-day suspension on November 14, he had never received any written warnings or suspensions and over his more than 3 years of employment he had been praised by both O'Bryant and Harrell. Smith indicated that he was not specifically told to work overtime on Monday, November 14. According to Johnson, Smith infrequently worked overtime on Mondays and Johnson conceded that he failed to request or remind Smith that he was to work overtime that day. He did so inform the other two employees who worked overtime that day. Although it is uncontroverted that Johnson did inform Smith and others that there would be overtime next week, I discredit the testimony of both O'Bryant and Johnson who indicated that on Saturday, and in the presence of each other, Smith was informed by Johnson to work overtime specifically on Monday.[23] I find that Smith's 3-day suspension was unwarranted and discriminatory. The period of overtime involved is a matter of approximately 1-1/2 hours (from 3:30 until 5 p.m.). The Company had no written policy regarding overtime and approached the matter in a loose and informal manner. Over the preceding period of many months, Smith had displayed absolutely no proclivity towards avoiding overtime. His record was clear and he was a good and loyal employee. I find and conclude that the failure to work the short overtime period on Monday, November 14, was a pretext and that the true motivating factor in the 3-day suspension was Smith's known and admitted union support. I thus find that the suspension was a violation of Section 8(a)(1) of the Act as alleged in paragraph 9 of the complaint.[24]

E. *The Violations and Discharge of Employee Gary Dean Wilkie*

1. The testimony of Wilkie

Employee Guy Dean Wilkie began his employment with the Company in March of either 1969 or 1970, and was terminated on November 28, 1978. Wilkie was a lathe operator. His supervisors were Group Leader Harold Brown and James Holloway. Dean testified that he became involved with the union campaign on August 22 and attended union meetings and handed out union authorization cards at the plant up until the time he was terminated. According to Wilkie, prior to his union involvement and throughout his employment he had no prior warnings or disciplinary actions except two warnings in the early 1970's for absenteeism.

Dean testified that on September 4 he was called to Group Leader Brown's office whereupon Brown informed him that he had missed 7 or 8 days over the past several months and that, if he continued that pattern, disciplinary action would be taken against him. Wilkie, in his testimony, conceded these absences and related that they were due to an illness of his wife which resulted in an operation. Wilkie went on to testify that at the September 4 meeting Brown had asked him if he had been

[23] Smith testified that Monday normally was his day off. However, the record appears conclusive that Smith did work the normal hours on Monday, from 7 a.m. to 3:30 p.m.

[24] It could be argued that either Smith made a mistake as to the overtime date, or there was misunderstanding between Smith and Johnson. Although I have not so concluded, my findings of illegal motive and discrimination would not change.

to any union meetings, and he replied that he had. Brown then asked him if he could talk about the Union, to which he answered yes. Brown asked him if he wanted to talk about the Union, and Wilkie answered that he did not. According to Wilkie, Brown then said, "Well, I guess that you know that you will probably pay for it," whereupon Brown left. Wilkie further testified that the following day (September 5) Brown approached him and asked if they were going to have a union meeting that night, to which he answered that they were. According to Wilkie, soon after this conversation on September 5 Brown again called him to the office and gave him a written warning for missing the 8 or 9 days when his wife was sick. That night Wilkie attended a union meeting and the following day (September 6) Wilkie indicated that Brown approached him and asked him how the union meeting went, to which he replied that it went fine. According to Wilkie, Brown then requested that he come to the office and in the office Brown informed him that he going to put the lathe operators "on production" and raise his production from 250 to 275 armatures a day. Wilkie went on to testify that the following day (September 7) Brown called him in the office and, in the presence of Supervisor Holloway, Brown remarked that he had been "off [his] job" five times that day for a total of approximately 64 minutes. Wilkie related that Brown further remarked that he had been "watching" him and he had been in the "bathroom" talking about the Union and passing out union cards. At this point Wilkie was given another written warning.

On September 22, when Wilkie was getting ready to leave the plant for the day, he indicated that he was approached by Brown who had obtained a union handbill from outside the plant. According to Wilkie, he then asked Brown if he could see the handbill and Brown remarked, "[I]t is just a bunch of damn lies, and you don't need to take one." Wilkie then related that Brown went back outside and as he was leaving Brown stated, "I will be watching you." Wilkie testified that in mid-October Brown approached him and asked him if he had any union cards, to which he answered that he "had a truck load." Brown then asked him for some of the cards and he refused. Later on that day, Wilkie indicated that he saw Assistant Production Manager Henry Jossie, who was Brown's supervisor, and he asked Jossie if there was any way to keep Brown "off of [his] back about the union," and Jossie replied that he would talk to Brown about it.

Wilkie testified that on November 27 Brown approached him and asked him if he had a union meeting "that weekend," to which he answered yes. Wilkie then related that later Brown called him back to his office and that Holloway was also present. According to Wilkie, Brown said that he was going to give the "varnish pits or ovens" back to him to maintain. Wilkie indicated that Brown and Holloway knew the varnish pits made him sick, but simply replied "what had to be, had to be," and he then left the office. Wilkie testified that he had complained about the varnish pits in the past, and about the fact that they were not only filthy but that the varnish made him sick. Wilkie conceded that he had worked on the varnish pits or ovens before and for some 3 years but at the same time had complained about the job. Wilkie related that Brown took over the job of working on the varnish pits early in the year (1978) and he had been taken off the job at that time. Although he indicated that the varnish pits made him sick he further conceded that he had never gone to the plant medical facility after getting sick from working on the ovens or pits. Wilkie testified that the following day (November 28) upon reporting for work in the morning Brown approached him and stated that a hose had broken on one of the ovens and he instructed him to replace it. Wilkie then requested to talk to Brown in Brown's office and subsequently they met in Brown's office, again in the presence of Holloway. Wilkie related that he then asked Brown why he had assigned him the additional job of working on the varnish pits or ovens when he knew it made him sick, and, according to Wilkie, Brown replied that he (Wilkie) was the only one he could depend on at that time. Wilkie further related that Brown stated that he could either accept or resume the job, or he would be terminated. According to Wilkie, he again maintained that the varnish made him sick, but Wilkie conceded that he "might" have told Brown to "go ahead and do what he had to do," but that he really did not remember such a remark. Wilkie then related that Brown told him he was terminated and to leave the plant and return at 3 p.m. According to Wilkie, as he was leaving the plant, Brown remarked, "[N]ow go work for the union." Wilkie indicated he returned at 3 p.m. and went to the office. Both Jossie and Holloway were present, along with Brown, and, according to Wilkie, Brown asked him if he had "cooled off," to which he replied yes. Brown then stated, "I will go one step further, I will offer you an apron and a respirator." Wilkie testified that he then reminded Brown, as he had in the past, that he could not stand to use a respirator because he could not tolerate anything to be over his nose and mouth, further adding that he could not breathe with a respirator on. According to Wilkie, Brown then told him to go home and call in the following morning at 9 a.m., adding that he was going to "take further steps to have [him] terminated." Wilkie testified that the following morning (November 27) he called in and talked to Jossie, who stated that they had decided to terminate him. Wilkie concluded his testimony by adding that there were two or three other employees, in addition to himself, that could have worked on the varnish pits.

2. The testimony of Supervisors Brown and Holloway

Group Leader Harold Brown testified that he knew Wilkie had been a union supporter since early September and further conceded that he had discussed the Union with Wilkie "during daily conversations," mentioning that he did not think the Company needed a union. Brown also conceded that he discussed the union handbills and union letters with Wilkie and the "legalities" of the handbills and letters. However, Brown also testified that Wilkie never said he was actually in favor of the Union and that Wilkie had stated that he had attended union meetings because he "had nothing to lose," adding

that "listening was cheap." Brown denied ever interrogating Wilkie about union meetings, about the fact that he had attended union meetings, or whether Wilkie had signed a union card. He further denied that he ever asked Wilkie for a union card. Brown conceded in his testimony that he had been watching Wilkie and his production, but that he also had been watching the production of others. Brown also conceded that he did warn Wilkie on September 7, indicating to Wilkie that he had been off the job for 64 minutes that day.[25]

Brown testified that he was employed by the Company in early February 1976, and that since that date for periods of time he would take over various jobs in the plant for training purposes. According to Brown, in February 1978 he did take over the varnish pits from Wilkie, who had been performing the job at least from the time he was hired by the Company in 1976. Brown related that during the time he handled the oven pits (between February and November) that Wilkie also had occasionally assisted him, and that the number of hours per week required for this particular job was between 2 and 5 hours depending upon the production rate. Brown testified that the varnish did "give off some fumes" and he knew Wilkie did not like the job, but Brown denied that on November 27 Wilkie indicated that the job made him sick. In later testimony, Brown did concede that Wilkie had complained on several occasions that the varnish made him sick. Brown testified that on the afternoon of November 27 he did explain to Wilkie that he was turning the ovens back over to him and that Wilkie replied, "[W]hatever will be, will be." Brown conceded however that Wilkie did complain and he then offered Wilkie the use of an apron and respirator. Brown testified that the following day (November 28) and early in the morning a hose broke on an oven, which usually took approximately 15 minutes to replace. He then instructed Wilkie to fix the hose and Wilkie replied that he had thought about it and decided that he was not going to work on the ovens. Brown related that he then met with Wilkie in the office, together with Holloway, and Wilkie again refused to change the hose or work on the ovens. Brown then "suspended" Wilkie and conceded that he walked Wilkie to the door but denied that he remarked, "Now go work for the union." Brown related that he asked Wilkie to call the plant later that day at 3 p.m., but that Wilkie actually came to the plant later that day at 3 p.m., and again maintained that he would not reconsider his refusal, indicating that neither an apron nor a respirator "would help." According to Brown, he then told Wilkie that he was going to recommend his termination and that he should call in the following morning at 9 a.m. to ascertain the status of his employment. He then again escorted Wilkie to the plant exit.

Brown testified that in early September he gave Wilkie an oral warning about his attendance for the 3 previous months, and further conceded that he talked to Wilkie sometime in September regarding his production, informing him that his production would have to be increased from 250 to 275 armatures. Brown also related that additionally he gave Wilkie a written warning in September involving "excessive time in the restroom," but related that he had previously warned Wilkie about this orally. Regarding Wilkie's overall abilities, Brown testified that he had a "good mechanical aptitude" and "a lot of job knowledge," but that his performance was "marginal" and that he did only "enough to get by."

James Holloway was Brown's supervisor and, on occasion, he would also directly supervise Wilkie. Holloway testified that he was present at the November 27 meeting when Brown informed Wilkie that he would be again taking over the ovens. According to Holloway, Wilkie simply replied, "[W]hat will be, will be." Holloway further testified that at the November 27 meeting Wilkie did complain that the varnish made him sick and that the job was dirty.[26] Holloway also testified that they offered Wilkie the use of an apron and a respirator at the November 27 meeting and that the whole conversation simply ended by Wilkie again stating, "What will be, will be." Holloway denied that Wilkie ever thought up the fact that he could not breathe with the respirator.

3. Concluding analysis—Wilkie

I credit the testimony of Wilkie over that of Brown in all significant respects in this case. On September 4, Brown questioned Wilkie as to whether or not he attended a union meeting and when Wilkie replied that he had, Brown replied, "[W]ell, I guess that you know that you will probably pay for it." I find that Brown's question was unlawful interrogation and that his comment constituted a threatened reprisal, both in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 8(c) and (g) of the complaint. On September 5, Brown met with Wilkie and asked Wilkie if he was going to the union meeting that night. At the [illegible] meeting, Brown issued Wilkie a written warning [illegible] 7 or 8 days at work on some previous occasion. Wilkie conceded in testimony that he did miss this time from work because of an illness of his wife, but there is nothing in the record to indicate when the absences occurred.[27] Brown's only mention of the subject matter of the warning is found in his testimony where he indicated that he gave Wilkie an oral warning in early September about his attendance for the 3 previous months. The fact that the written warning was given is unrebutted and its contents, in relation to time, is unknown. Under the facts and circumstances in this case, I find that the written warning was motivated solely by Wilkie's union activities. Whether Brown first orally warned Wilkie and then decided on the written warning later would be pure conjecture in this case. The warning simply came "from nowhere," so to speak, and in my opinion is unexplainable in any way other than it was discriminatory on the part of Brown. I thus find that the September 5 written warning was violative of Sec-

[25] Brown never specifically denied that he mentioned Wilkie's union activities in this warning.

[26] Brown testified that, although Wilkie had complained that the ovens and the varnish made him sick on occasions prior to the November 27 meeting, he denied that Wilkie made this complaint at the November 27 meeting. The termination notice of Wilkie, prepared and signed by Brown, did indicate that at the November 27 meeting Wilkie complained that the fumes made him sick.

[27] Most "written warnings" were introduced into evidence in this case, but this particular one on September 5 was not.

tion 8(a)(3) and (1) of the Act as alleged in paragraph 10 of the complaint. I further find that Brown's question about his attendance at a union meeting that night was also unlawful interrogation in violation of Section 8(a)(1) of the Act, as alleged in paragraph 8(c) of the complaint. On September 6, Brown again questioned Wilkie about whether or not he attended a union meeting. In mid-October Brown asked Wilkie if he had any union authorization cards, and again on November 27 Brown asked Wilkie if he was going to attend an upcoming union meeting. I find all these incidents to be coercive interrogation in violation of Section 8(a)(1) of the Act, and as further alleged in paragraph 8(c) of the complaint. On September 7, Brown had been "watching" Wilkie during which time Wilkie had passed out some union cards in the restroom. Brown so informed Wilkie of this and issued him his second written warning for spending too much time off his job. I find that the surveillance was prompted and motivated by Wilkie's union support and activities, and the fact that union cards were involved. I find this prompted Brown to issue the written warning to discourage or to prohibit further union authorization card activities on the part of Wilkie. On September 22, Brown also made reference to union literature to Wilkie and indicated that he would be "watching him." The pronounced surveillance of Wilkie by Brown on September 7, and his statement on September 22, I find constituted improper and coercive surveillance of Wilkie in violation of Section 8(a)(1) of the Act and as alleged in paragraph 8(f) of the complaint. Having found that the written warning on September 7 was wrongfully motivated, I further find that it was discriminatory and violative of Section 8(a)(3) and (1) of the Act, as alleged in paragraph 10 of the complaint.

The actual discharge of Wilkie on November 28 is a more complex matter. I am convinced from the testimony and record in this case that Wilkie had performed the job of maintenance on the varnish pits or ovens for some 2 to 3 years prior to February 1978. During that period I am convinced that he had voiced complaints about the fumes and about the fact that the job was dirty. I am also convinced that Wilkie voiced these complaints up until the time he was terminated. Although Wilkie had complained, there is no medical or clinical evidence in the record to indicate that Wilkie's complaints were medically legitimate, other than his own testimony. Wilkie himself conceded that he had never visited the Company's medical facility after becoming sick because of the fumes connected with the oven.[28] Wilkie never indicated that his release from work on the ovens in February was to be permanent, although he appeared to assume the same. Wilkie clearly did not like the job, a job which the record reflects took between 2 to 5 hours per week on various days. I also find that Brown knew Wilkie's dislike for the job and that he could have expected Wilkie's hesitancy in resuming the maintenance of the ovens. Wilkie further refused to resume the job after the offer of an apron and a respirator, which he claimed he could not use. Timing in this case is extremely significant. Brown chose November 27 as the date for relinquishing his involvement with the ovens and turning their maintenance back to Wilkie. This was 3 months into the campaign, after obvious knowledge of Wilkie's union involvement and support, and on the heels of a series of coercive interrogations and surveillance of Wilkie. Prior to the union campaign, Wilkie had been at least an adequate employee and had received no prior warnings or disciplinary actions except several in the beginning of his employment for absenteeism. This employment record ran for some 7 or 8 years. I find that the General Counsel has established a *prima facie* case that Wilkie's union activities were a motivating factor for his ultimate discharge. However, I cannot summarily conclude that Wilkie's refusal to resume the oven job did not furnish the Company with some merit in its defense that Wilkie was discharged for his refusal. I am mindful of the fact that any employee who refuses a legitimately assigned task of his employer is treading on dangerous ground. Not only have I discredited the testimony of Brown in this case, the record is completely void of any evidence that Brown's sudden relinquishment of the responsibility over maintenance of the ovens was based on legitimate business or production reasons. The Company in this case is obligated to show that Wilkie's union activities either played no role in its actions, or that Wilkie's refusal alone, regardless of his union activities, would have caused the discharge. In my opinion the Company has not fulfilled its obligation in this regard. I find that Brown chose November 27 as the day to turn the ovens back over to Wilkie because of Wilkie's union involvement, knowing full well that Wilkie would at least resist. Whether Brown got more than he bargained for in Wilkie's flat refusal is only the subject of conjecture in this case. I find that Brown intentionally set the scene because of Wilkie's union involvement, and having done so Brown seized upon Wilkie's not unpredictable refusal as a pretext to discharge him. In these findings I have considered the entire course of the union campaign and the Company's strong and admitted antiunion position. Wilkie was one of several union activists in the plant who, on a daily basis, was actively soliciting signatures to union authorization cards. Having considered the merits of the Company's defense in discharging Wilkie and having found that the entire confrontation over the ovens at the time (November 27–28) was discriminatorily arranged, I find that discharge was in violation of Section 8(a)(3) and (1) of the Act, as alleged in paragraph 11 of the complaint.[29]

Upon the foregoing findings of fact and initial conclusions, and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

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

[28] The records of Wilkie's visits to the clinic at the Company were admitted into evidence and also confirmed his lack of specific visits because of sickness resulting from the fumes.

[29] In these findings regarding Wilkie, as well as those regarding the discharge of Biggs and the suspension of Smith, I have given full consideration to the criteria established in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

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

3. The Company, by unlawful interrogation of its employees, violated Section 8(a)(1) of the Act, by and through its supervisors on the following dates:

(a) By Jack O'Bryant on August 11, by virtue of his interrogation of employee Kenneth E. Biggs, and, on October 26, by virtue of his interrogation of Charles Smith.

(b) By Harold Brown on September 4, 5, and 6 in mid-October, and on November 27, by virtue of his interrogation of employee Gary Dean Wilkie.

4. The Company, by and through its supervisors and agents and on September 22, October 13, and December 1, engaged in the unlawful surveillance of the protected distribution of union literature to its employees, and further unlawfully interfered with said distribution on said dates, in violation of Section 8(a)(1) of the Act.

5. The Company, by and through its supervisor, Harold Brown, unlawfully created the impression of surveillance on September 7 by "watching" employee Gary Dean Wilkie, and so informing him, and on September 22 by informing employee Gary Dean Wilkie that he would be watched, in violation of Section 8(a)(1) of the Act.

6. The Company, by and through its supervisor, Harold Brown, unlawfully threatened reprisals against employee Gary Dean Wilkie on September 4 and because he engaged in union and protected concerted activity, in violation of Section 8(a)(1) of the Act.

7. The Company, on October 9 and by and through its supervisor, Jack O'Bryant, unlawfully interfered with protected rights of employee Kenneth E. Biggs to possess union authorization cards or other union literature on company property, in violation of Section 8(a)(1) of the Act.

8. The Company, on October 26 and by and through its supervisor, Jack O'Bryant, unlawfully promised employee Charles Smith better benefits in the form of a better job if he would revoke his union authorization card and thus cease his union and protected concerted activities, in violation of Section 8(a)(1) of the Act.

9. On September 5 and 7 the Company discriminatorily issued written warnings to employee Gary Dean Wilkie because of his union and protected concerted activity, in violation of Section 8(a)(3) and (1) of the Act.

10. On November 14 the Company discriminatorily suspended employee Charles Smith for 3 days because of his union and protected concerted activities, in violation of Section 8(a)(3) and (1) of the Act.

11. On November 14 the Company discriminatorily discharged employee Kenneth E. Biggs because of his union and protected concerted activity, in violation of Section 8(a)(3) and (1) of the Act.

12. On November 28 the Company discriminatorily discharged employee Gary Dean Wilkie because of his union and protected concerted activity.

13. Other than the misconduct concluded above, the Company has not otherwise violated the Act.

THE REMEDY

Having found that the Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom,[30] and that it take certain affirmative action as set forth below designed to effectuate the policies of the Act. I shall further recommend that Respondent post an appropriate notice.

Having found that Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully discharging employees Kenneth E. Biggs and Gary Dean Wilkie, I shall recommend that the Company offer them immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed.

I shall further recommend that Respondent make employees Kenneth E. Biggs, Gary Dean Wilkie, and Charles Smith whole for any loss of earnings they may have suffered as a result of the discrimination against them by payment of a sum of money equal to that which they normally would have earned from the date of discharge to the date of its offer of reinstatement in the case of employees Biggs and Wilkie, and for the time lost from work in the case of employee Smith, less net earnings, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[31]

It will also be recommended that Respondent preserve and make available to the Board, upon request, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful to determine the amount of backpay and all the rights of reinstatement under the terms of these recommendations.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[32]

The Respondent, Arrow Automotive Industries, Spartanburg, South Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees regarding their union support or activities.

(b) The surveillance of employees while participating in lawful union solicitation, support, or activities.

(c) Creating the impression of surveillance of employees while engaging in lawful union solicitation, support, or activities.

(d) Interfering with the lawful distribution of union literature and union authorization cards.

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[30] I shall also recommend that the additional "cease-and-desist" provisions of the Order be of the broad variety, which I feel to be more appropriate in this case. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[31] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[32] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Threatening employees with reprisals by virtue of their union support and activities.

(f) Interfering with employee rights to possess union authorization cards or literature on company property.

(g) Promising employees benefits if they cease to support a union or cease to engage in union activities.

(h) Discriminatorily issuing written warnings to employees because of their union support or activities.

(i) Suspending or discharging employees because of their union support or because they engage in union activities.

(j) In any other manner restraining or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act to organize and bargain collectively or to refrain from such activities.

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

(a) Offer Kenneth E. Biggs and Gary Dean Wilkie immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make whole Kenneth E. Biggs, Gary Dean Wilkie, and Charles Smith for any losses of pay or benefits they may have suffered by reason of Respondent's discrimination against them in the manner provided in the remedy section of this Decision.

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

(d) Post at its plant and facility in Spartanburg, South Carolina, the attached notice marked "Appendix."[33] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it or 60 consecutive days thereafter, in conspicuous places, in and about work areas and other areas as indicated above, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint against the Respondent be, and it hereby is, dismissed insofar as it alleged unfair labor practices not specifically found herein.

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