

**Livingston Pipe & Tube, Inc. and Local 483 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.** Case 14-CA-19769

July 24, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND RAUDABAUGH

On November 7, 1990, Administrative Law Judge Richard H. Beddow, Jr. issued the attached decision. The Respondent filed exceptions<sup>1</sup> and a supporting brief. The General Counsel filed a motion to strike the Respondent's exceptions<sup>2</sup> and the Respondent filed a response to the General Counsel's motion.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions and to adopt the recommended Order, as modified<sup>4</sup> and set forth in full below.

The Respondent has excepted, inter alia, to the judge's finding that the respondent seized on a minor incident occurring October 27, 1988 (namely the slight denting with a forklift of a doorframe to a dilapidated warehouse) to rid itself on November 2 of employee Daniel Sexton, a union adherent. The Respondent, although acknowledging the minor nature of the accident

<sup>1</sup>The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

<sup>2</sup>The General Counsel's motion to strike the Respondent's exceptions is denied.

<sup>3</sup>In finding that the Respondent's decision to discharge or suspend its employees was motivated by antiunion animus, and thus that the General Counsel had met its initial burden of making a prima facie showing of discriminatory discharge, the administrative law judge relied on the facts that: 1) the Respondent had refused to bargain with the Union, and 2) the Respondent had engaged in extensive conduct in violation of Sec. 8(a)(1) of the Act. The judge found that this conduct consisted of: the Respondent's interrogation of known union adherents, including the alleged discriminatees; the Respondent's creation of an impression among employees that their union activities were under surveillance; the Respondent's implication to employees that selection of the Union would be futile; the Respondent's promise of benefits to employees; and the Respondent's solicitation of an employee to get back the previously signed union authorization cards during the course of the union campaign. The Respondent presented no evidence to dispute these findings and has excepted only to the impression of surveillance finding. As to this finding, it offers no support for its exception.

The above-described 8(a)(1) conduct is alone sufficient to support an inference of antiunion animus, and we do not rely on the Respondent's refusal to bargain as a basis for finding animus.

<sup>4</sup>With respect to the Respondent's violation of Sec. 8(a)(5) and (1) through its unilateral implementation of a revised absenteeism and tardiness program, the judge's remedy and recommended Order is deficient in failing to provide a make-whole remedy for any employees who were discharged, disciplined, or otherwise denied work opportunities as a result of the institution of the new program. The identities of any such employees can be determined in compliance. *Boland Marine & Mfg. Co.*, 280 NLRB 454, 454-455 (1986). We have also included in the Order a description of the bargaining unit to which the bargaining obligation applies and changed the language of certain sections to conform to the violations found.

when viewed by itself, asserts that the judge failed to examine Sexton's employment as a whole, in considering the lawfulness of his discharge. Specifically, it cites certain factors (identified below) which it claims it relied on in discharging Sexton and which, it asserts, were not taken into consideration by the judge. As a result, it contends, the judge committed reversible error. For the following reasons, we find no merit in the Respondent's exceptions and therefore affirm the judge's findings and conclusions concerning Sexton's discharge.

One factor that the Respondent claims the judge did not consider in reviewing Sexton's employment record involves a forklift accident that occurred either in late 1986 or early 1987. According to Sexton's undisputed testimony, this accident, for which he was responsible and which cost the Respondent \$2000, did not result in his being reprimanded. Indeed, at the time of its occurrence the operations manager merely commented, "it looks like Yard 2 is bad luck to you [sic] . . . be more careful."<sup>5</sup> Of more significance, however, is that the 1986 or 1987 accident was not mentioned in either the May 24, 1988 warning notice issued to Sexton for his damaging a forklift in an accident on May 23, thereby closing Yard 2 for 90 minutes, or the November 2 discharge letter. Yet both of those documents were specific as to other incidents involving Sexton's purported negligent operation of a forklift. We therefore find that the Respondent's reliance on this accident as a reason for Sexton's discharge is an afterthought and thus does not establish that it would have discharged Sexton even absent his union activities.

Another factor the Respondent claims the judge ignored is the admonition to Sexton, contained in the May 24 warning notice, that any further acts of carelessness or recklessness on his part would result in "significant discipline up to and including termination." We note, however, that the Respondent has left out the qualifying language after "termination" that ends the quoted statement, to wit, "depending on the seriousness of the incident." Sexton's undisputed testimony establishes that the accident occurred because the brakes on the forklift failed, a fact Sexton made known to his supervisor on November 2 when he was questioned about the incident. Given the "seriousness" qualification in the warning notice, the Respondent has failed to establish that an accidental denting of a doorframe in a warehouse in need of substantial repair caused by a mechanical failure outside Sexton's control, would have resulted in Sexton's termination, had he not been a union adherent.

Similarly, we find no merit to the Respondent's contention that the judge failed to give proper weight to

<sup>5</sup>The judge mistakenly indicates, in the discussion section of his decision, that this comment was made to Sexton after the May 23 accident. Although Sexton at first so testified, he subsequently corrected that testimony.

the fact that, insofar as the October 27 accident is concerned, Sexton's discharge was as much based on his failure to report the accident as it was on the accident itself. Sexton's undisputed testimony, as noted by the judge, shows that, at the time of the accident, he did not report it because his supervisor was not around and he reasonably did not view it as consequential. When later questioned about it he readily admitted his responsibility.

Finally, we do not agree with the Respondent that the judge's failure to mention the 90-minute shutdown in Yard 2 following Sexton's accident with the forklift on May 23, warrants reversal of the judge's finding that the Respondent's asserted reasons for Sexton's discharge were pretextual. Both the accident and the shutdown were addressed, as previously noted, in the May 24 warning notice. The judge did discuss the notice and underlying accident, which he deemed to be minor owing to the small cost to the Respondent to repair the forklift. What is most significant, however, is that the Respondent itself judged the entire incident, and Sexton's record up to that point, as warranting only a warning notice that stated in effect that Sexton could be discharged in the future if he were involved in an act of serious carelessness or recklessness. As noted above, the Respondent failed to show circumstances that could plausibly bring the October 27 doorframe incident within the category of conduct for which the notice threatened discharge.

Accordingly, having found no merit to the Respondent's exceptions, we adopt the judge's finding that the Respondent seized on the October 27 incident as a pretext for discharging Sexton.

#### ORDER

The National Labor Relations Board orders that the Respondent, Livingston Pipe & Tube, Inc., Staunton, Illinois, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Interrogating employees about union activities, implying to employees that selection of a union would be futile, creating the impression that union activities are under surveillance, promising benefits during the course of a union campaign, and soliciting employees to get back union authorization cards.

(b) Suspending, discharging, or otherwise discriminating against employees for engaging in union activity.

(c) Refusing to bargain in good faith with Local 483 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, as the certified collective-bargaining representative of the employees at its Staunton, Illinois facilities.

(d) Unilaterally implementing an absenteeism and tardiness program without providing the Union with notice and an opportunity to bargain about the program.

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

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

(a) Offer Mike Jarman, Daniel Sexton, and Alberic Vancauwelaert immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them, as well as Jeffrey Hausman, whole 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.

(b) Remove from its files any reference to the unlawful discharges and suspension and notify the employees in writing that this has been done and that the discharges and suspension will not be used against them in any way.

(c) Rescind the unilaterally implemented absenteeism and tardiness program.

(d) Offer all unit employees discharged, suspended, or otherwise denied work opportunities as a result of the unilaterally implemented absenteeism and tardiness program immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make whole all unit employees for any losses they may have suffered as a result of the unlawful implementation of the absenteeism and tardiness program, with interest computed in the manner set forth in the remedy section of the decision. In addition, remove from its files any reference to any discipline imposed under the program, and notify the affected employees that this has been done and that the discipline will not be used against them in any way.

(f) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement:

All production and maintenance employees employed by the Employer at its Staunton, Illinois facilities, excluding office clericals and professional employees, guards, and supervisors as defined in the Act.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, its agents for examination and copy-

ing, all payroll records, social security payments records, timecards, personnel records reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(h) Post at its Staunton, Illinois facility copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>6</sup>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 interrogate employees about union activities or imply to employees that selection of a union would be futile and WE WILL NOT create the impression that union activities are under surveillance.

WE WILL NOT promise benefits during the course of a union campaign and WE WILL NOT solicit employees to get back union authorization cards.

WE WILL NOT suspend, discharge, or otherwise discriminate against employees for engaging in union activity.

WE WILL NOT refuse to bargain in good faith with Local 483 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helper, AFL-CIO, as the certified collective-bar-

gaining representative of our employees at our Staunton, Illinois facilities.

WE WILL NOT unilaterally implement an absenteeism and tardiness program without providing the Union with notice and an opportunity to bargain about the program.

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

WE WILL offer Mike Jarman, Daniel Sexton, and Alberic Vancauwelaert immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for the losses they incurred as a result of the discrimination against them, with interest.

WE WILL make Jeffrey Hausman whole for any loss of earnings he may have suffered because of the discrimination practiced against him, with interest.

WE WILL remove from our files any reference to Mike Jarman, Daniel Sexton, and Alberic Vancauwelaert's discharges and Jeffrey Hausman's unlawful warning and suspension and notify them in writing that this has been done and that evidence of the unlawful discharges, warning, and suspension will not be used as a basis for future personnel actions against them.

WE WILL rescind the unilaterally implemented absenteeism and tardiness program.

WE WILL offer all unit employees discharged, suspended, or otherwise denied work opportunities as a result of the unilaterally implemented absenteeism and tardiness program immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole all unit employees for any losses they may have suffered as a result of the unlawful implementation of the absenteeism and tardiness program, with interest. WE WILL also remove from our files any reference to any discipline imposed under this program, and notify the affected employees that this has been done and that the discipline will not be used against them in any way.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit and if an agreement is reached, embody that agreement in an executed written contract:

All production and maintenance employees employed by the Employer at its Staunton, Illinois facilities, excluding office clericals and professional

employees, guards, and supervisors as defined in the Act.

LIVINGSTON PIPE & TUBE, INC.

*Michael T. Jamison, Esq.*, for the General Counsel.  
*Rick Verticchio, Esq.*, of Gillespie, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in St. Louis, Missouri, on April 30, 1990. Subsequently, briefs were filed by Respondent and the General Counsel. The proceeding is based on a charge filed October 14, 1988,<sup>1</sup> as amended, by Local 483 of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO. The Regional Director's complaint dated March 2, 1990, alleges that Respondent, Livingston Pipe & Tube, Inc., of Staunton, Illinois, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by interrogating employees and otherwise interfering with employee's rights during a union campaign; discharging and suspending employees in retaliation for their union activities; and failing and refusing to recognize and bargain with the Union and by unilaterally implementing an absenteeism and tardiness program.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the distribution and sale of pipe at two facilities near Staunton, Illinois. It annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside Illinois and it admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

After a campaign that began in March 1988, an election on May 20, and the Regional Director's June 15 report on objection and recommendation that the Union be certified, the Union was certified as the collective-bargaining representative of all the approximately 14 to 18 production and maintenance employees at Respondent's two Staunton yards on February 23, 1990.

Employees Mike Jarman, Daniel Sexton, and Alberic Vancauwelaert, as well as Jeffrey Hausman, who subsequently were discharged and suspended, respectively, all signed authorization cards, attended union meetings, and displayed union buttons or stickers. Respondent does not contradict the testimony by each of these witnesses that during the union campaign, various representatives of the Employer,

including Foreman Stanley Pirok, Plant Manager Bill Dittmar, Supervisor Gary Buske, and President Mike Favre engaged in discussions with the employees inquiring as to whether they supported the Union and why they supported the Union as well as promising them benefits and tickets to a baseball game, indicating that they knew an employee had parked his car near a union meeting, soliciting an employee to get other employees to get back their signed authorization cards, and implying that selection of a union would be futile. The election was held on May 20 and the Union's selection was upheld by the Regional Director on June 15, and, as noted, upheld by the Board in February 1990.

Respondent agrees that it did not accept the decision of the Regional Director pertaining to certification of the May 20, 1988 election and did not recognize and bargain with the Union, however, its actions after the decision of the Board was rendered, indicated some recognition of its duty to recognize and bargain with the Union.<sup>2</sup>

On June 20, Operations Manager Dittmar handed employee Jarman a letter dated June 20 which said that he had been reprimanded previously for excessive absenteeism and tardiness, been given 2 days off during the last 12 months for excessive absenteeism, and that he was hereby terminated for cause. Jarman recalled that he had failed to work voluntary overtime on a Saturday sometime in 1987, and that on returning to work that Monday, was given 2 days off by Foreman Pirok. Otherwise, Jarman testified that he had never received any verbal or other written warnings for absenteeism or tardiness and knew of no absenteeism or tardiness program in effect by Respondent. The latter testimony was confirmed by other employees who likewise had not been informed of any program.

Foreman Pirok testified that the procedure used by the Company for employees not reporting to work included advance notification to the supervisor or the operational manager of an employee's unavailability for work, or in the alternative, that the employee contact the employer in the early morning of each day prior to the commencement of the 7 a.m. workday if an employee was required to be absent.

He also testified that the longstanding policy of the Company provided that supervisory personnel, on receiving reports of employees' absenteeism, were to maintain information in the employees' personnel file and that when supervisory personnel determined that an employee has engaged in excessive absenteeism, a verbal warning would then have to be given to the employee that any further absenteeism would result in a suspension or would result in disciplinary action including suspension or termination.

He also said, however, that they didn't have any certain number of days that could be taken off before a warning or discipline and said he just would "keep it in my head" to know when someone had an excessive amount of absenteeism. He would give verbal warnings but go to President Favre for "the last call" on suspensions or terminations.

Pirok said he participated in hiring Vancauwelaert and admitted that: "probably the only thing I told him was that if he was going to be absent, to let me know as much a head of time as he possible could." He admitted that he didn't give any such instructions to Jarman or Sexton but said he

<sup>1</sup> All following dates will be in 1988 unless otherwise indicated.

<sup>2</sup> An additional charge alleging Respondent's failure to supply information to the Union was settled prior to the hearing and withdrawn.

spoke to Jarman about being late (if someone is more than 5 minutes late it would be reflected by the timeclock and his pay would be adjusted accordingly).

Jarman called in on June 20 and said he would be absent. Pirok did not take the call but later learned that Jarman was absent. Pirok said he knew of the 2 days' suspension in 1987 and a verbal warning so he went directly to Favre and, after reviewing the matter, decided to let Jarman go.

On September 16, Respondent discharged Alberic Vancauwelaert after Vancauwelaert called in about 6:45 (prior to his 7 a.m. starting time) and advised Supervisor Buske that his wife was sick and needed to be looked at and couldn't be left by herself, Buske said he would tell Pirok.

When Vancauwelaert later went to work about 4 p.m. that same day to pick up his paycheck, he was told to see Foreman Pirok who then gave him a letter dated September 19 that stated Vancauwelaert had been previously reprimanded for excessive absenteeism, had been given two disciplinary days off without pay within the last 12 months for excessive absenteeism and that he was terminated for cause. Vancauwelaert testified he had never been advised of any absenteeism or tardiness policy. Vancauwelaert testified that in the past when he had been late or tardy he would call in and advise Pirok that he would not be in that day or he would be late and he had not been reprimanded or told the time off would be held against him until July 18 when he was given a letter which said he had been absent a total of 15-1/2 working days in the past 12-month period, was assessed a 2-day suspension without pay and warned that the next unexcused absence or pattern of absences excused or unexcused would result in termination. Vancauwelaert explained that 2 of those days were excused for his father-in-law's death and the other days off were the result of protracted court proceedings against him by his ex-wife and that he notified Pirok both a week and a day before each occasion and each time was told it was okay and not otherwise told it would be charged against him.

On September 29, Respondent suspended Jeff Hausman for 30 days. Hausman was scheduled to start work at 7 a.m. but did not arrive until 7:45 (because his young daughter had tampered with his alarm clock). After arriving Hausman was told to go about his regular work, however, at 3:30 p.m. Pirok and Buske handed him a letter which stated that he was suspended for 30 days without pay for being late and tardy. The letter said that he previously had been suspended for 2 days in September 1987 for attendance infractions and told he would be subjected to added discipline for further infractions, that he had been absent from work 5-1/2 days during 1988 and tardy twice. Hausman explained that the 5-1/2 days mentioned included days on which Hausman was undergoing hospital tests and had been in the hospital for 3 days. Hausman testified that otherwise he was orally reprimanded for being late in 1987 by Pirok. He also explained that the 2-day suspension was for failing to appear as volunteer on a Saturday after he had not volunteered when asked the previous day but had told Dittmar he would be there if he could, if he didn't have something else to do, and received no other comment from Dittmar.

On November 2, Respondent terminated Daniel Sexton for repeated irresponsible behavior because he caused damage to a building on October 27 that he failed to report and that previously, on May 24, he had received a warning for care-

lessness with equipment and added that he was not subject to rehire. Sexton acknowledged that he had received a disciplinary letter from Operations Manager Bill Dittmar on the May 24th incident, which involved Sexton's accidental bumping of his forklift against a scrap tub that knocked off a couple of steel nipples. He recalled that the forklift was repaired that same day at a small cost to the Company.

Sexton testified that the incident on Thursday, October 27, occurred when his brakes failed as he was exiting the building in Yard 2 via a slight incline and he hit the side of the doorframe, bending it back a little. Testimony about and photographs of the building show that the structure is in a state of substantial disrepair, with holes in the roof, broken windows, doors hanging off hinges, and holes in the walls. Sexton did not think the slight bend to the doorframe was of any consequence and as Foreman Pirok was on vacation at the time, and Supervisor Buske was not around, Sexton did not think it necessary to report the incident. Nothing else happened or was said until the following Wednesday, November 2, when Buske asked Sexton if he had hit the doorframe and Sexton admitted that he had when the brakes on the forklift failed. Buske asked why Sexton had not reported the incident to him and Sexton replied that Buske was nowhere to be found. At about 3 that afternoon, Pirok handed Sexton the already prepared discharge letter which said he was terminated for irresponsible behavior. Sexton explained what had happened but Pirok shook his head and said that was the way it was going to be.

#### Discussion

On brief, the Respondent admits that it did not recognize and bargain with the Union following the election and Regional Director's June 15, 1988 recommendation that the Union be certified until after the Board's ultimate Certification of Representation on February 23, 1990, and that it offered no evidence to dispute the testimony regarding its alleged interrogation of the employees and related 8(a)(1) violations and states that it would agree that an appropriate finding should be made and an order entered by the Board directing Respondent to defer from any future improper questioning or discussion with the employees concerning their union affiliation and that it would further agree to post necessary notices within its place of business that acknowledge the employees' rights for union affiliation. It also states that it would agree to a recommendation and order directing Respondent to continue to recognize and bargain with the Union.

The record contains sufficient and suitable evidence to support the allegations in the above matters and, accordingly, I find that Respondent is shown to have interrogated employees about union activities, implied to employees that selection of a union would be futile, created the impression that union activities were under surveillance, promised benefits, and solicited employees to get back union authorization cards during the course of a union campaign, all in violation of Section 8(a)(1) of the Act as alleged.

The principal remaining issue is the matter of the discharge and suspension of several employees and, in a case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' union or other protected, concerted activities were a motivating factor in the

employer's decision to terminate or suspend the employees. Here, the record shows that the Respondent engaged in illegal interrogations regarding the Union with each of the alleged discriminatees, who each had engaged in overt union activities, and it admittedly did not recognize and bargain with the Union when it was requested to do so after the election and the Regional Director's recommendation of June 15 that the Union be certified.

Under these circumstances, the record contains sufficient and suitable evidence to persuasively support an inference of antiunion animus and I find that the General Counsel has met his initial burden and made a prima facie showing that the employees' union activities were a motivating factor in Respondent's subsequent decision to terminate or suspend the alleged discriminatees. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980); see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent's defense is based on its contention that its termination or suspension of the alleged discriminatees was justified based on its right to maintain discipline and in accordance with its absenteeism and tardiness program.

On brief Respondent admits that its discipline policies arguably could be viewed as not uniform and its absenteeism and tardiness program as nonspecific and not uniform in its application. In fact, the evidence clearly supports such a view and clearly shows that Respondent had no written policies, had only communicated to employees a generalized verbal policy that they give advanced notice (unencumbered by any standards for consideration of excessive absences), and that it had no objective criteria or past application of objective standards or discipline.<sup>3</sup>

Otherwise, the Respondent mistakenly asserts that it is the General Counsel's burden to show that the discipline was discriminatory and in retaliation against union activities. As noted above, the General Counsel met its initial burden of showing that union activities were a motivating factor and the burden thereafter shifted to the Respondent under the *Wright Line* criteria, supra.

Here, I find that Respondent's extreme reaction to Sexton's extremely minor bumping of the warehouse doorframe and its characterization as "repeated irresponsible behavior" is illustrative of the pretextual nature of Respondent's asserted reasons. First, although Sexton also had received a written warning 4 days after the election for carelessness which caused some minor damage to a forklift, this otherwise was treated as a minor incident with a comment from Manager Dittmar that it was bad luck and to just be more careful. The alleged damage on October 27, however, was nothing more than a scrap or small dent in the side frame of the open entrance to a decrepitated building, with no apparent damage to the forklift. This building otherwise was in

<sup>3</sup>In the last 2 years, Respondent disciplined or terminated 11 employees and 7 of the 11 disciplinary actions were against the alleged discriminatees; 1 other suspension and discharge was for threatening another employee; 1 was of a probationary employee; and 1 was for dangerous horseplay on a forklift; there were no written reprimands issued in 1987; and the reprimands issued in 1988 to Jarman, Vancauwelaert, Sexton, and Hausman all occurred after the May 20 vote in support of union representation.

a complete state of disrepair with well worn paint, glassless windows, an open, wall-less corner, two sections of missing roof, and displaced window frames and trim. After Foreman Pirok belatedly learned that Sexton was involved, he immediately prepared a written discharge and without investigation elevated this occurrence (or even the failure to report it) to a dischargeable offense described as "repeated irresponsible behavior," and he further embellish the discharge with an admonition that Sexton was "not subject to rehire." Pirok thereafter refused to listen to Sexton's attempted explanation and the totality of his conduct clearly support an inferences that Respondent's asserted reasons for Sexton's discharge are pretextual.

I am persuaded that Respondent seized on this minor incident as an opportunity to rid itself of a union supporter at a time when it had pursued similar opportunities with Jarman, and Vancauwelaert, and was contemporaneously refusing to acknowledge the Union's victory in the election.

The terminations of Jarman and Vancauwelaert, as well as the suspension of Hausman, within a few month of the election and after they each were subjected to illegal interrogation, likewise are unsupported by objective reasons<sup>4</sup> that could be consistent with any existing or discernible attendance or disciplinary policies or standards. I find in each instance, that the stated reasons are pretextual and, accordingly, I conclude that the Respondent has failed to show that these employees would have been subjected to such extreme discipline absent their recent protected union activities and the success of the Union in winning the election.

Accordingly, I find that the General Counsel otherwise has met his overall burden of proof and I further conclude that by terminating employees Jarman, Vancauwelaert, and Sexton on June 20, September 16, and November 2, respectively, and by suspending employee Hausman on September 29, Respondent is shown to have violated Section 8(a)(1) and (3) of the Act, as alleged.

Turning to the alleged violations of Section 8(a)(5) of the Act, Respondent now expresses its willingness to recognize and bargain with the Union, however, it argues that it had no obligation to recognize and bargain with the Union until the Board ruled on Respondent's exceptions to the Regional Director's Report on Objections and that it therefore was not obligated in 1988 to bargain about alleged changes in its absenteeism/tardiness program, a program that it asserts has always been in effect.

As noted by the General Counsel, the Board consistently has held that an employer acts at its own peril by refusing to recognize and bargain with the union and by making uni-

<sup>4</sup>Although the Respondent had "some" attendance related reasons, I find that each disciplined employee had provided timely notice for his absence and had no reasonable notice from management that prior excused absences would count against him. Jarman's prior warning appears to have been of questionable merit, for not working a "voluntary" Saturday; Vancauwelaert's warning occurred shortly after the election for excused absences regarding mostly required court appearances and stated that an *unexcused absence* or *pattern* of excused or unexcused absences would result in termination. Hausman past record showed a 2-day suspension for not working a "voluntary" Saturday he had not volunteered for, that 3 of 5 days of excused absences was for a hospitalization, that he had not been verbally warned for any of his several past tardiness and nothing was said when he was 45 minutes late until the end of the day when he then was suspended for 30 days. Also, there was no showing that the work done or the Respondent's production needs were such that the absence of any of these employees caused the Employer any particular inconvenience or problem.

lateral changes during the period between the election and the Board's certification. When the Board certifies the union, the bargaining obligation goes back to the date of the election and therefore the employer acts at its peril in making changes in mandatory terms and conditions of employment without notice to and without bargaining with the union; see, for example, *Valley Oil Co.*, 210 NLRB 370, 379 (1974); and *Fleming Mfg. Co.*, 119 NLRB 452 (1957).

Here, the testimony of the employee witnesses persuasively demonstrated that they had not been informed of any objective absenteeism/tardiness policy prior to the Employer's de facto and unilateral implementation of such a program beginning shortly after the Union won the election on May 20, through means of the termination notice given to Jarman on June 20. The record otherwise shows that Respondent did not discipline or terminate anyone prior to the election on May 20, 1988, solely for absenteeism, except for two separate occasions where employees were given a short suspension for allegedly failing to work so-called "voluntary" Saturday overtime and that its only real standard for absenteeism was a request that the employee give prior notification. No standard existed for the "quality" of the purpose of an absence (i.e., hospitalization, court subpoenas, family illnesses), and no standard existed for the number of permissible absences, excused or unexcused.

Respondent admittedly failed to recognize and bargain with the Union after receiving the Union's letter of June 21, 1988, which requested bargaining and it never bargained with the Union or notified the Union regarding its unilateral implementation of its significantly more strict absenteeism/tardiness program (a program which otherwise was used as a pretext to give a 30-day suspension to one union supporter and to terminate two other union activists). I concluded that Respondent's actions in this regard show an improper and unilateral implementation of new terms and conditions of employment, as well as a failure to recognize and bargain with the Union in any respect during the period of time between the election of May 20, 1988, and the subsequent decision and certification by the Board, and I therefore find that this conduct is shown to be a violation of Section 8(a)(5) of the Act, as alleged.

#### CONCLUSIONS OF LAW

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

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

3. By interrogating employees concerning their union sympathies and activities and those of other employees, by creating the impression that union activities are under surveillance, by offering baseball tickets and other implied benefits during the course of a union campaign, by implying that selection of a union would be futile, and by soliciting an employee to get other employees to get back their signed union authorization cards, Respondent has interfered with, restrained, and coerced its employees in the exercise of their

rights guaranteed in Section 7 of the Act and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By discharging employees Mike Jarman, Daniel Sexton, and Alberic Vancauwelaert on June 20, November 2, and September 16, 1988, respectively, and by suspending employee Jeffrey Hausman on September 29, 1988, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

5. By failing and refusing to bargain in good faith with the Union and by unilaterally implementing a change in terms and conditions of employment without notice to or without bargaining with the Union, Respondent has violated Section 8(a)(5) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to bargain with the Union and to reinstate Mike Jarman, Daniel Sexton, and Alberic Vancauwelaert to their former jobs or a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them a sum of money equal to that which they normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),<sup>5</sup> and that Respondent expunge from its files any reference to their discharge and notify them in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel action against them.

It also is recommended that Respondent be ordered to make Jeffrey Hausman whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him a sum of money equal to that which he normally would have earned on the days he was suspended in accordance with the method set forth above and that Respondent expunge from its files any reference to Hausman's unlawful warning and suspension and notify him in writing that this has been done and that evidence of this unlawful discipline will not be retained in its files or disseminated in any manner.

Otherwise, it is not considered to be necessary that a broad order be issued.

[Recommended Order omitted from publication.]

<sup>5</sup> 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.