Multi-Ad Services, Inc. *and* Graphic Communications Union, Local 68C, Graphic Communications International Union, AFL–CIO, CLC. Case 33–CA–11945

August 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On December 2, 1997, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

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,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Ted Steele, and violated Section 8(a)(1) by coercively interrogating Steele about his union sympathies, by impliedly promising to help improve his employment situation without the need for union representation, and by threatening to close the bindery department should its employees become represented by a union. The Respondent has excepted, inter alia, to the judge's findings that it violated the Act by coercively interrogating and making an unlawful implied promise to Steele on August 16, 1996. For the reasons that follow, we find no merit in the Respondent's exceptions and disagree with our dissenting colleague.

Since June 1989, Steele had been employed as a bindery worker for the Respondent. At a meeting of bindery, press, and finishing department employees convened by Plant Manager Jerry Ireland on July 29, 1996,[3] Steele loudly and persistently argued with the Respondent's president, Larry Clore, about its drug policy. In a meeting of just bindery department employees later that day, Clore told Steele "[I]f you don't like the policies, why don't you think about leaving the Company?" Steele replied that he would not give Clore "the pleasure of quitting." After Clore left the bindery department meeting, Steele announced that he was on his own time now and that he was leaving the meeting. The meeting ended shortly thereafter. The next day, Clore apologized to Steele for "the way things went in our meeting," and Steele in turn apologized to Clore for his comments.

The following day, July 31, Steele met alone with Ireland in the latter's office at Steele's request. After apologizing to Ireland for his behavior at the July 29 meeting, Steele told Ireland that the hourly shop workers were not satisfied with the way company policy was being handed out, or with raises, and that "management needed to just sit down with the hourly employees and work some things out." Ireland replied that, "at that time that could not be done." Steele then told Ireland that "if we could not sit down and work things over and talk things out, that I was going to organize a union." Ireland asked Steele to wait until Ireland got back from vacation in August to discuss this further, and Steele agreed not to "do anything" while Ireland was gone. Ireland returned from vacation around August 11.

On August 16, Steele met with Ireland and Bindery Department Manager Martin (Marty) Heathcoat in the latter's office. During this meeting, the managers focused on the topic of union representation and probed the reasons for Steele's union interest. According to Steele's credited testimony, the managers asked why he would want to bring a union into the Company. Steele responded that "it would be nice to have seniority rights, better working conditions, raises when it was possible and so on." Then, towards the end of the meeting, Ireland asked him "[W]hat it would take to satisfy [Steele]," and Steele replied that it would satisfy him if management would sit down with the hourly employees and work something out. When Ireland replied that they could not do that, Steele said that he was leaving the meeting and was going to attempt to organize a union.

In the midst of this talk about unionization, Ireland introduced the subject of career opportunities for Steele. Ireland said, "Ted, let's talk about what you can do to improve your situation here at [the Respondent]. What can you do to help yourself work your way up the ladder, make more money and that type of thing." When Ireland pointed out to Steele that the Respondent posts jobs, Steele replied, "Jerry, there is only two things that I have ever gotten out of this Company, bad arms and a bad attitude." Yet, when Steele nevertheless then expressed interest in an assignment to a maintenance job,[4] Ireland told him that he would have Maintenance Supervisor Bill Wolfram "interview [him] about a maintenance position, although at the time we did not have an opening." The following day, Wolfram interviewed Steele, at Ireland's direction, but the interview revealed that Steele lacked the necessary qualifications for the job and was not really interested in the position.

We adopt the judge's findings that Ireland's remarks violated Section 8(a)(1) of the Act. We agree with the judge that Ireland impliedly promised benefits to Steele on August 16 in "an obvious effort to ascertain what

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

[2] We shall modify the judge's recommended Order in accordance with our decision in *Excel Container*, 325 NLRB 17 (1997).

[3] All dates are in 1996 unless otherwise noted.

[4] We note that the judge sometimes characterizes this maintenance position as a "mechanic's job."

could be done to diminish, if not eliminate altogether, [Steele's] desire for representation." Notwithstanding its arguments to the contrary, the topic of job promotion had never before been raised with Steele during his many years of employment with the Respondent. In fact, Steele's July 31 announced union support prompted the August 16 meeting. During that meeting, Ireland brought up job advancement for Steele not long after he probed the reasons for Steele's union support and shortly before he questioned Steele about what would personally satisfy him. In context, Ireland's remarks were clearly linked to Steele's union support, and that linkage could not have escaped Steele's notice that day. Ireland quickly reinforced the union connection by promptly arranging the maintenance job interview the next day although there was no opening for a maintenance position at the time.[5] While Steele never actually received the job promotion, and the Respondent did not rectify Steele's other complaints, the fact that Ireland immediately acted to accommodate Steele upon learning that Steele intended to initiate union organizing clearly supports the judge's finding that the Respondent unlawfully promised benefits to Steele to discourage his union activity.

Even if, as our colleague urges, the Respondent did not make a *commitment* to Steele about a maintenance job, or raise false hopes about one, Ireland's statements to Steele were unlawful. In the meeting between Steele and Ireland and Department Manager Heathcoat, in the latter's office, Ireland asked Steele, why he "would want to bring a union into the Company." Steele's answer, focusing on the work force, suggested seniority rights, improved working conditions, and raises for employees. Ireland replied with, "Ted, let's talk about *you* and what *you* can do to improve *your* situation here at [the Respondent]. What can *you* do to help *yourself* work *your* way up the ladder, make more money and that type of thing." (Emphasis added.) Ireland's message left little to the imagination: Forget about improving terms and conditions of employment for the workforce, concentrate instead on your own career advancement, and the company will help you get ahead. It is immaterial, as our colleague asserts, that Ireland did not expressly condition the maintenance job on Steele's abandoning his union interest. Ireland did not need to literally spell that out. His point was plainly made.[6]

We also agree with the judge that Ireland coercively interrogated Steele on August 16. Steele, an open union supporter, was questioned in his department manager's office, by both the department and the plant managers. Steele was not informed of any legitimate purpose for being asked why he wanted a union; and he was given no assurances that he need not answer such a question, or that no reprisals would be taken against him regardless of his answers. Indeed, this is the same conversation in which Ireland implicitly promised career advancement benefits to Steele in an effort to discourage, if not completely kill, Steele's desire for union representation. We agree with the judge that "[q]uestioning of an employee about his union attitude in such circumstances would naturally cause that employee to become apprehensive and, consequently, the questioning would be inherently coercive" under the Board's standard set forth in *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).[7]

We cannot agree with our dissenting colleague's view that this exchange between Plant Manager Ireland, Department Manager Heathcoat, and Steele was simply a benign quest by the Respondent to learn more about Steele's views on unionization. The exchange was both accompanied and followed by other unlawful conduct, which aggravated the coercive context of this questioning.[8] As stated, the interrogation of Steele was coupled with an unlawful implied promise of benefits. Just 9 days later, it was followed by a meeting of bindery department employees conducted by Heathcoat and Department Supervisor Ted DeRossett, at which the latter unlawfully threatened the bindery employees that if the Union got in, the bindery department would be "the first to go." Steele said that DeRossett's statement was against the law and a heated argument between them ensued, bringing the meeting to an abrupt end. Further, contrary to our dissenting colleague, the judge's finding that Steele did not appear to actually have been intimidated by the questioning does not support a finding that the interrogation was not unlawful. It is well settled (and the judge himself quickly pointed out) that the basic test for evaluating whether there has been a violation of Sec-

[5] See *Noah's New York Bagels*, 324 NLRB 266, 270 (1997) (an employer violated Sec. 8(a)(1) when its president impliedly promised a possible job transfer in the future to discourage an employee's union support).

[6] See *NLRB v. Cable Vision, Inc.*, 660 F.2d 1, 6 (1st Cir. 1981), enfg. 249 NLRB 412 (1980) (employer's implied promise to remedy employee grievances or provide other employee benefits if the union was abandoned held violative of the Act).

[7] See *Reliable Mfg. Corp.*, 240 NLRB 90, 99 (1979) (interrogation of open union supporter in plant manager's office was coercive and violative of the Act); *Borg Wagner Corp.*, 229 NLRB 1149, 1151 (1977) (supervisors unlawfully interrogated employees wearing union buttons, including Delores Jarvis who was also told that she was being considered for the team leader job only after she had voiced complaints about unfair treatment by the incumbent team leader).

[8] See *U.S. Web, Inc.*, 327 NLRB 132 (1998) (employee witnesses to interrogation were not likely to miss the Respondent's message that it would retaliate against employees suspected of union activities, in light of subsequent unlawful discharge of interrogated employee a month later); *Thore, Inc.*, 296 NLRB 859, 860 (1989) (questioning open union supporter about what he had to do with "this union stuff," unlawful, in light of company's vigorous opposition to union and subsequent unlawful mass discharge of open union supporters a month later); *Florida Steel Corp.*, 215 NLRB 97, 97–98 (1974), enfd. in relevant part 529 F.2d 1225 (5th Cir. 1976) (questioning employee about whether he knew anything about union organizing campaign, unlawful, in light of subsequent unfair labor practices a month later).

tion 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*.[9]

AMENDED CONCLUSIONS OF LAW

1. By coercively interrogating an employee concerning his union sympathies, by impliedly promising to help an employee improve his employment situation without the need for representation, and by threatening to close the bindery department should its employees become represented by a union, the Respondent has violated Section 8(a)(1) of the Act.

2. By discharging employee Ted Steele on September 4, 1996, because of a belief that Steele might contact a union to initiate efforts to organize its Peoria employees, the Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By the above conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Multi-Ad Services, Inc., Peoria, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Peoria, Illinois place of business copies of the attached notice marked Appendix.[3] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the Peoria facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 1996."

MEMBER BRAME, concurring in part and dissenting in part.

I agree with my colleagues that the judge properly found that the Respondent unlawfully discharged bindery department employee Ted Steele because of his union activities, and unlawfully threatened to close the bindery department should the employees become unionized.[1] However, contrary to my colleagues, I would dismiss the 8(a)(1) allegations involving the purported interrogation of and promise of benefits to Steele on August 16, 1996.[2]

The relevant background and facts pertaining to these August 16 allegations are as follows. Earlier on July 31, Steele had arranged a meeting with Plant Manager Jerry Ireland, in which Steele apologized for his behavior at an ESOP meeting conducted on July 29. After his apology, Steele told Ireland that the employees were not satisfied with the way raises and company policy were being administered and wanted management to sit down with the hourly employees and work things out. In response, Ireland said "[A]t that time that could not be done." At some point, Ireland mentioned possible job advancement opportunities for Steele, and he and Steele briefly discussed this topic.[3] Towards the end of the meeting, Steele voluntarily announced his interest in union organizing if management declined his demand to sit down with the employees and work things out. In response, Ireland asked to continue their discussion at a later date after his scheduled vacation was over. Steele agreed to this arrangement, and the meeting ended amicably.

After Ireland returned from his vacation, he and Steele met on August 16 in the office of Bindery Department Manager Martin (Marty) Heathcoat, with Heathcoat present. The meeting began with Steele updating Ireland that, while he had been on vacation, an agreement had been reached between the employees and the human resources personnel regarding the Company's new drug policy. They then talked about Steele's July 31 announcement of his union interest. Ireland asked why Steele wanted to bring a union into the Company. Steele replied that "it would be nice to have seniority rights, better working conditions, raises when it was possible, and so on." According to Steele's testimony, Ireland did not specifically respond to these demands. Sometime later in their meeting, Ireland returned to another topic that he and Steele had discussed on July 31. He asked Steele what could be done to improve Steele's situation with the Company. In this connection, Steele mentioned, for the first time, his interest in a maintenance position.[4]

[9] See, e.g., *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112 fn. 9 (1999), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959); *Florida Steel Corp.*, supra at 97.

[1] In adopting the judge's finding of an unlawful threat to close the bindery department, I find it unnecessary to rely on the judge's discussion about the profitability of the bindery department set forth in sec. II, par. 31 of his decision.

[2] All dates are in 1996 unless otherwise noted.

[3] The judge erred when he found that the subject of possible job advancement for Steele had not been discussed prior to August 16. Steele's testimony reveals that at the July 31 meeting he and Ireland talked about how he could get ahead or make progress in his job. The record also shows that this discussion occurred before there was any mention of Steele's union interest at the end of the meeting.

[4] The record gives no indication whether the maintenance position paid more or was considered more desirable by employees.

Ireland replied that Steele could pursue his interest further by interviewing with Maintenance Supervisor Bill Wolfram, although there were no maintenance positions open at that time. At the end of the meeting, Ireland asked what it would take to satisfy Steele. Steele answered that it would satisfy him "if management would sit down with the hourly employees and work something out." When Ireland indicated that he could not satisfy that request, Steele said that he was leaving the meeting and was going to organize.

The next day, Steele interviewed with the maintenance supervisor. The interview revealed that Steele lacked the necessary qualifications for the job and was not really interested in the position after all.

As interrogation is not per se unlawful, "[t]o fall within the ambit of §8(a)(1), the words themselves or the context in which they are used must suggest an element of coercion or interference." *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980), cited by the Board with approval in *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The traditional test for determining whether interrogations violate the Act is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." Id. In analyzing whether alleged unlawful interrogations are coercive of employees' Section 7 rights, useful indicia include the *Bourne*[5] factors—history of employer hostility, nature of information sought, identity of questioner, place and method of interrogation, and truthfulness of reply. "[T]he *Bourne* factors are a primary analytical tool in determining whether an employer's questioning of employees is coercive and therefore unlawful and, as such, they offer a systematic application of the totality of the circumstances analysis."[6] In addition, the analysis may include other factors such as tone, duration, and purpose of the question and whether it was repeated.[7]

I find that the *Bourne* factors do not support the conclusion that Ireland's questioning was coercive and therefore unlawful. When Ireland and Heathcoat spoke with Steele on August 16, there was no history of employer hostility or union discrimination and the August 16 conversation itself contained no expression of displeasure or antagonism towards the Union. Ireland's general questions why Steele, an open union supporter, wanted to bring a union in and what would satisfy him were nonthreatening in nature and were framed to promote a dialogue to gather information about Steele's concerns.[8] Further, Steele himself had sought out the July 31 meeting with Ireland a little over 2 weeks earlier when he voluntarily informed Ireland that he might contact a union. At the close of that July 31 meeting, Steele had indicated his willingness to continue these discussions after Ireland returned from his vacation. Thus, Ireland's question as to why Steele wanted a union appears to have been simply a continuation of their prior conversation in which Steele had raised the union issue. Also, Steele responded truthfully to the question of why he wanted to bring a union in, and he was not intimidated by the questioning, according to the judge's credited findings. In addition, there was no evidence that the manner or tone of the August 16 meeting was threatening or hostile. Finally, although the questions were asked by a relatively high-ranking official, Ireland, in the office of the department manager, they were not accompanied by any threats or unlawful promises as discussed below.

Unlike my colleagues and the judge, I find that none of Ireland's statements about the maintenance position on August 16 constituted an implied promise of benefits that violated Section 8(a)(1) of the Act.[9] The context for Ireland's remarks reveals that he had earlier discussed career possibilities for Steele at their July 31 meeting before Steele had given any indication of an interest in union organizing. Then, when Steele, not Ireland, suggested the maintenance position for the first time on August 16, Ireland's response was that Steele could *interview* with the maintenance supervisor, not that Steele had the job. Thus, in stating that the maintenance supervisor could talk to Steele, Ireland imparted no false hopes or made any commitment to Steele about the maintenance position. In fact, Ireland made sure that Steele knew that there were no immediate maintenance job openings, and he gave no indication that he would treat Steele special by creating a job opening for him or holding out the maintenance position as a future possibility for him.[10]

[5] *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), cited with approval in *Rossmore House*, 269 NLRB at 1178 fn. 20.

[6] See my separate opinion in *Medcare Associates, Inc.*, 330 NLRB 935, 950 (2000).

[7] Id. slip op. at 14.

[8] See *Baptist Medical System v. NLRB*, 876 F.2d 661, 665–666 (8th Cir. 1989) (no violation of Sec. 8(a)(1) where a supervisor asked a nurse "why she was prounion and what problems she had with hospital management"); *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988) (no violation of Sec. 8(a)(1) where company president and co-owner asked a group of mostly open union supporters what they hoped to gain from the union).

[9] I do not adopt the judge's erroneous finding that Ireland solicited Steele's grievances on August 16. The judge incorrectly found grievance solicitation based on the same set of facts which the General Counsel had submitted in support of the implied promise allegation. I note that grievance solicitation was never alleged by the outstanding complaint, never argued by the General Counsel, and never litigated by the parties at the hearing.

[10] Cf. *Frank Leta Honda*, 321 NLRB 482, 489 (1996) (company parts manager unlawfully offered to create an assistant manager position if employee Smith would not join the union, and he then unlawfully offered an assistant parts manager position if Smith would not support an upcoming strike); *Ernst Enterprises*, 289 NLRB 565, 566 (1988), enfd. mem. 895 F.2d 1414 (6th Cir. 1990) (company president unlawfully offered a lead man position to union activist Lamb if he would "forget about this union stuff here"); *Wilker Bros. Co.*, 236

If he had been trying to divert Steele in a direction away from the union, I do not believe that Ireland would have put Steele in an interview situation in which the latter would have likely experienced even more frustration with management. Having an employee interview for a position for which there was no actual opening, and for which he was not qualified, hardly seems to be a move calculated to make the employee think that management, as opposed to a union, would be responsive to his needs. Furthermore, the Respondent made no effort to soften the maintenance supervisor's rejection by making any allowance for Steele's skills deficiencies.[11] In addition, Ireland's outright rejection of Steele's suggested ways to keep the union out—i.e., provide seniority rights, better working conditions, and raises, and have management sit down with the hourly employees and work something out—demonstrates that Steele had no reason to suspect that Ireland was responding to Steele's interest in the maintenance position as a way to dissuade him from union support.

My colleagues and the judge overlook that Ireland never stated nor indicated that the job interview was in exchange for Steele's abandonment of his union interest. According to Steele's credited testimony, Ireland did not refer to the union in connection with the maintenance position,[12] and he did not speak against the union or say anything to discourage Steele's union support on August 16.[13] Rather, Ireland specifically rebuffed Steele's ultimatum, which was expressed at the end of their meeting, to stop him from engaging in union organizing. Thus, if anything, Ireland put considerable distance between his course of action and Steele's union interest.[14]

Accordingly, for the reasons set forth above, I would dismiss the 8(a)(1) complaint allegations based on Ireland's August 16 statements.

NLRB 1371 (1978), enfd. in relevant part 652 F.2d 660 (6th Cir. 1981) (company vice president unlawfully promised a future promotion to an employee if she helped in defeating the union).

[11] Cf. *Gencorp*., 294 NLRB 717 (1989) (violation of Sec. 8(a)(1) found where supervisor suggested that employee May "would make good supervisory material and broadly hinted that past obstacles to such a promotion, such as checkered attendance record, could be overlooked if May would abandon his known support of the Union").

[12] Cf. *Montgomery Ward & Co.*, 227 NLRB 1170, 1173 (1977) (violation of Sec. 8(a)(1) found when company store manager told union adherent that there were management positions becoming available for which she would be eligible, and then stated that he hoped her union activities would not continue).

[13] Cf. *The Coca-Cola Bottling Co*., 232 NLRB 794 (1977) (violation found where the company personnel director urged employee to assist in soliciting employees to sign an antiunion petition and then offered to "help" him if he "helped" the company).

[14] Cf. *K. G. Knitting Mills*, 320 NLRB 374, 378 fn. 4 (1995) (violation of Sec. 8(a)(1) found where company vice president told an employee who supported one union that his wife could have a job with the employer, and then immediately told him to vote for another union favored by the employer); *Triumph Twist Drill*, 237 NLRB 1442, 1444 (1978) (violation of Sec. 8(a)(1) found when employer told a staunch union adherent that "if [he] quit[s] [his] union activity . . . and would work towards the company side, [he] could work into this supervision deal or [a] better paying position"); and *United Artists Eastern Theatres*, 275 NLRB 158, 160 (1985), enfd. mem. 795 F.2d 79 (2d Cir. 1985) (employer unlawfully offered employee union organizer a promotion "if everything will be dropped with the union").

Sang-yul Lee, Esq., for the General Counsel.
Michael R. Lied, Esq. (Husch & Eppenberger), of Peoria, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Peoria, Illinois, on May 29, 1997. On December 20, 1996,[1] the Regional Director for Region 33 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing, based on an unfair labor practice charge filed on September 27 and amended on December 20, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs which were filed, and on my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The complaint presents an issue of the lawfulness of the September 4 discharge of a bindery department employee and, in addition, issues of whether statutory supervisors made unlawful statements to bindery department employees during August.

Since approximately 1986, Multi-Ad Services, Inc. (Respondent), has been an employee-owned corporation with one of its offices and places of business located at 1720 West Detwiler Drive in Peoria. There it engages in the business of providing printing services and related marketing services. More specifically, it is a commercial printer with its own product lines for retail advertising, for art work supplied in printed and in electronic formats, and for binders.

Respondent admits that at all material times it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, based on the admitted facts that, in conducting the above-described operations at Peoria during calendar year 1996, it derived gross revenues in excess of $500,000 and, moreover, sold goods valued in excess of $50,000 which were shipped from its Peoria facility directly to points outside of the State of Illinois and, also, purchased goods valued in excess of $50,000 which were shipped directly to its Peoria facility from points outside of Illinois.

During 1996 approximately 450 employees worked at Respondent's Peoria facility. A large number of them were commercial artists and approximately 85 others were production employees. Though some departments do work second shifts, from 3 to 11 p.m., employees at Peoria ordinarily work from 7 a.m. to 3 p.m. When necessitated by increased business, second shifts have been instituted temporarily, from 3 to 11 p.m., until the workload diminishes. Occasionally, employees will be assigned to work a third shift.

Respondent's president is Larry Clore, an admitted statutory supervisor and agent of Respondent at all material times. Its vice president of finance has been Bruce Taylor. Responsible

[1] Unless otherwise stated, all dates occurred during 1996.

for the Peoria facility's daily production operations is Plant Manager Jerry Ireland, also an admitted statutory supervisor and agent of Respondent at all material times. Reporting to Ireland are individuals with the title of manager. Reporting to the managers, in turn, are individuals with the title of supervisor. Rank-and-file employees report directly to the supervisors. Some of those employees are designated as leadpersons who, while serving in that capacity, earn an extra 25 cents an hour. But, there is no contention, nor evidence to support one, that lead persons, or any one of them, are or have been statutory supervisors.

As must be evidence from what was said in the initial paragraph in this subsection, the complaint is based on conduct occurring in Respondent's Peoria bindery department. Employees in that department produce looseleaf, three-ring binders for Respondent's product lines and for commercial applications. At all times material to this proceeding, the supervisor of that department was Ted DeRossett and the manager, Martin (Marty) Heathcoat, both admitted statutory supervisors and agents of Respondent during August and early September. Heathcoat continued to be employed by Respondent as manager by the time of the hearing. But, by then DeRossett had left employment with Respondent, although there is neither representation nor evidence that he had become unavailable to appear as a witness in this proceeding. The leadman in the bindery department during late August and early September had been Larry Clutts.

Bindery department operations are among the least significant of Respondent's overall operation. For example, by the time of the hearing on May 29, 1997, bindery department sales had amounted to approximately $750,000 of total sales to that date of $35 to $38 million. Moreover, historically the bindery department's profit margin has been low compared to that of other products. Indeed, employment in that department has been declining. Eleven or 12 employees had been employed in the bindery department during 1997, while approximately 15 employees had worked there during 1996, and about 18 or 19 had been employed in the bindery department during 1995.

The bindery department employee whose September 4 discharge is at issue is Ted Steele. He had been employed continuously by Respondent as a bindery worker since June 1989. Steele testified that, by the time of his discharge, he had become "pretty much" qualified to operate all bindery department machinery, having floated from machine to machine over the years. Indeed, when a second shift for that department had been created during 1993, Steele had been appointed leadman for that shift. After performing those duties for awhile, he took leave for surgery and had been replaced as leadman by the time that he returned. The important point is that he had not been demoted from leadman for cause, but merely as a consequence of happenstance.

Plant Manager Ireland characterized Steele's work record as "acceptable" and "okay." In fact, Ireland agreed that while Steele's work record had not attained the category of "excellent," it had achieved a rating "just below that in most of his reviews[.]" Viewed from the opposite perspective, although he testified that Steele had "problems with absenteeism, tardiness" during some unspecified past period, Ireland acknowledged that Steele had never been terminated, suspended, or placed on probation during the approximately 7 years that he had worked for Respondent as a bindery worker. Furthermore, it is undisputed that, prior to September 4, Steele had received no warnings that he might be disciplined or possibly terminated by Respondent.

By late summer, Steele had become upset with some of Respondent's policies: projected initiation of certain aspects of a drug testing program, overtime work, and assignment to a second shift. As discussed in succeeding subsections, he spoke out against those policies during meetings and conversations with Respondent's officials. He threatened to, and eventually did, contact a union. He demanded to see certain documents. Eventually, on September 4, he admittedly walked out in the middle of a meeting in Vice President of Finance Taylor's office. He refused to return when ordered to do so by Manager Heathcoat. Ireland made a decision to discharge Steele for that conduct.

Respondent contends that Ireland's motivation had been solely Steele's insubordination in walking out of, and refusing to return to, that meeting. The General Counsel alleges that Steele's conduct on September 4 had been no more than a pretext advanced to conceal Respondent's actual motivation which had been to discharge a likely union proponent before he had time to initiate an organizing campaign among Respondent's employees and, further, to discourage other employees from engaging in such activities.

The general principles applicable to the General Counsel's theories of motivation are settled. An employer violates the Act whenever it discharges a perceived union adherent to prevent that employee from initiating an organizing campaign and, as well, as a lesson to other employees regarding what may happen to them if they participate in and support such a campaign. As to the first, unlawful motivation exists whenever an employer discharges an actual or potential union activist as a means of "scotch[ing] lawful measures of the employees before they [have] progressed too far toward fruition," *NLRB v. Jamestown Sterling Corp.*, 211 F.2d 725, 726 (2d Cir. 1954), thereby "so extinguish[ing] seeds [that] it would have no need to uproot sprouts." *Ethan Allan, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975).

As to the second above-enumerated unlawful motivation, discharge of even "a single dissident may have—and may be intended to have—an *in terrorem* effect on others," (citation omitted), *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971), "by making 'an example' of [one] of them." *NLRB v. Shedd-Brown Mfg.*, 213 F.2d 163, 175 (7th Cir. 1954).

Still, an employee who engages in statutorily protected activity is not immune altogether from discipline, even discharge. "Indeed, there is a point when even activity ordinarily protected by Section 7 of the Act is conducted in such a manner that it becomes deprived of protection that it otherwise would enjoy." *Indian Hills Care Center*, 321 NLRB 144, 151 (1996). Beyond that, should such an employee engage in misconduct which would normally warrant discipline, that employee is not shielded from discipline even if his/her employer is pleased at being afforded the opportunity to administer that discipline to a union activist. As the Board stated in *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966):

> If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful. [Footnote omitted.]

For the reasons set forth in section II, below, I conclude that a preponderance of the credible evidence does establish that Respondent's statutory supervisors and agents did make unlawful statements to employees during late August, evidencing hostility toward unionization of employees. Moreover, I conclude that a preponderance of the credible evidence establishes that Respondent seized upon Steele's abrupt departure from Taylor's office as a pretext for terminating a likely union activist, before he began conducting an organizing campaign on behalf of a union. Therefore, I conclude that Respondent violated Section 8(a)(1) and (3) of the Act.

B. The July–August Meetings

It is not altogether clear exactly when Steele began feeling dissatisfied with his employment situation at Respondent. What is clear is that he expressed that dissatisfaction at one of the periodic ESOP meetings, one conducted on July 29.

By way of background, as pointed out in subsection A above, Respondent is an employee-owned corporation. Thus, its employees are also among its shareholders. As a result, Respondent conducts quarterly meetings of its employees to review its financial situation. While the record is not clear, it appears that each quarter there are a series of such meetings with employee groups, each consisting of several departments, timed so that, when applicable, first-shift employees attend near the end of their shift and into the beginning of the incoming shift, which arrives early to attend the entire meeting.

Attendance at such meetings, however, is not mandatory. That was admitted by Plant Manager Ireland. Nevertheless, Terry Harms, a bindery department employee who appeared as a witness for the General Counsel, agreed that employees are encouraged to attend quarterly ESOP meetings and, if unable to attend ones scheduled for their departments, are encouraged, but not obliged, to attend a different meeting for other departments.

Ireland testified that there have been occasions when employees have departed early from a quarterly ESOP meeting. But, he testified, "They always have enough courtesy to let me know of what their intentions are or if they have another engagement or something."

As to the substance of the quarterly meetings, made available to assembled employees are Respondent's quarterly financial reports and other financial information such as whether Respondent has met its goals, and departmental performance and profitability. While individual departments also have periodic production meetings, Respondent's officials also take advantage of quarterly ESOP meetings to announce or discuss other work-related subjects. And time is allotted for employees to ask questions about, it is undisputed, any work-related subject—not merely about financial matters. To facilitate those aspects of the meetings, Respondent's officials, including President Clore, typically attend quarterly ESOP meetings. Finally, Plant Manager Ireland testified, without contradiction, that it is "usual" for quarterly ESOP meetings to be followed by meetings of employees in smaller groups, on a departmental basis, "[i]n a formal setting[.]"

Which leads to what occurred on July 29 at the second-quarter ESOP meeting for employees in the bindery, press, and finishing departments. Among the management in attendance were Supervisor DeRossett and Plant Manager Ireland. In fact, as Manager Heathcoat was then on vacation, Ireland conducted that meeting. As it progressed, President Clore entered the room.

After the financial information portion of the meeting had been completed, Ireland brought up a new or revised, it is really not clear from the record which, drug policy which would be implemented for employees. Steele, at least, protested the need for such a policy and got into an argument with Clore over it. All who testified agreed that Steele had been loud and persistent in his opposition to the program. Some other employees protested testing of blood and saliva, in addition to urine. The exchange between Steele and Clore ended with the former asking for "laws and bylaws" of Respondent and with Clore responding that Steele "could have those right after the meeting."

When the ESOP meeting concluded, group meetings were conducted, with press department employees adjourning to the production office and with the bindery department employees going to the lunchroom. By the time those meetings commenced it was approximately 3 p.m., the normal quitting time for day-shift employees. Ireland began to discuss bindery issues when Clore entered and gave Steele the Summary Plan Description (SPD) of the ESOP. Steele testified, "I told him that I already had summary papers and these were not what I requested. And his reply to me was, have your lawyer get them." Apparently those were not the only remarks exchanged between the two of them. For Ireland testified that Clore said to Steele, "Ted, if you don't like the policies, why don't you think about leaving the Company?" According to Ireland, Steele retorted, "Mr. Clore, I will not give you the pleasure of quitting."

Ireland testified that Clore left and that he (Ireland) tried to continue the meeting. It is uncontroverted that Steele suddenly stood up, announced that he was on his own time now and was leaving, and left the meeting. Steele testified that Ireland "[J]ust said okay," but Ireland testified that Steele's remark had shocked him and, "I didn't really say anything that I know of," but, after Steele left, "apologized to the group for Ted's behavior." In any event, it is undisputed that Steele was not ordered to remain for the rest of the meeting which, Ireland testified, ended shortly after Steele had left.

Clore was not called as a witness, though there was neither representation nor evidence that he was not available to testify. Ireland testified that Clore had been "totally offended by Ted Steele's actions in that meeting and he let me know that." Yet, it is uncontested that, during the following day as Steele was having a cigarette break at the back door of the bindery department, he encountered Clore who "offered an apology for the way the things went in our meeting." In turn, Steele apologized for his own statements, saying that, "I was not trying to put anybody on the spot with my comments, that I was trying to make a correction in his statements," and that, "I just wanted to know the answers to the questions." So far as the evidence discloses, no comments were exchanged during that conversation about Steele obtaining Respondent's "laws and by laws."

Ireland conceded that, to his knowledge, no one ever reprimanded Steele for his conduct on July 29. In fact, no evidence was adduced that Respondent had done so. Instead, it was Steele who broached Ireland about the events of the meeting that day.

On July 31 Steele asked to meet with Ireland. The two men met alone in Ireland's office. Steele acknowledged that he apologized "about the way our ESOP meeting had went," saying, "I wasn't trying to put anyone on the spot." In contrast,

Ireland testified that Steele had apologized "for his behavior at the ESOP meeting," admitting "that he was totally out of line," after which "we agreed that I would not expect to see those types of actions again." Both men agreed, however, that Steele did mention during this meeting the possibility of contacting a union.

"Right after his apology to me, then Ted informed me that he did not like the policies, some of the policies that were in effect or going to be in effect," testified Ireland, "And that if things did not change, that he knew people in a union and he would consider contacting them." Ireland testified that he expressed disappointment with Steele's attitude, given that Respondent is "an ESOP company" and "a very good organization," and that he (Ireland) was disappointed "that he would have those types of views." Yet, Ireland never denied specifically certain aspects of Steele's earlier description of their July 31 meeting.

Steele testified that after the apology, he had said that "the hourly workers out in the shop were, were not satisfied with the way Company policy was being handed out and raises and so on and that management needed to just sit down with hourly employees and work some things out." In other words, while Ireland's above-quoted description portrays Steele as having complained on his own behalf—about what "he did not like"—Ireland never denied that Steele had said that it was "hourly workers out in the shop" who were not satisfied with Respondent's policies. Nor did he deny that Steele had suggested that "management needed to just sit down with hourly employees and work some things out." Beyond that, undenied also was Steele's testimony that, in response to that suggestion, Ireland had said "[A]t that time that could not be done." It had been that response which, Steele testified, had led him to say, "[T]hat if we could not sit down and work things over and talk things out, that I was going to organize a union."

There is no dispute about the fact that their meeting had ended amicably, with the two men shaking hands. However, there is a conflict in their accounts as to what had been said immediately before that. Steele testified that, in response to his remark about organizing a union, Ireland "had asked me to wait until he came back from vacation to discuss that further. And I told him I would." During cross-examination, Steele attempted to expand on that account: "He asked me not to talk to the other employees about it while he was gone." But that expanded version was not necessarily consistent with Steele's earlier above-quoted account. Certainly it was not consistent with his description in his prehearing affidavit: "Ireland asked me if I would hold off *on my thoughts* until he returned from vacation. And I told him I would do that." (Emphasis added.)

Even if Steele's account on cross-examination did not correspond with his accounts given elsewhere about what had been said by Ireland, the latter did not advance wholly consistent testimony about that aspect of the July 31 conversation. During direct examination, as quoted above, Ireland testified that he had merely expressed disappointment upon hearing Steele talk about contacting a union. But, during cross-examination he was asked if he had told Steele that they would continue the conversation after Ireland's return from vacation. Ireland answered: "Well, I was busy that day. I have a lot of functions that I was trying to wrap up. So it's quite possible that I said that I would talk to him again."

Now, according to Ireland, as set forth above, by the conclusion of their July 31 conversation, Steele had already apologized for his July 29 conduct and had promised that Ireland "would not expect to see those types of actions again." Seemingly, there would have been nothing further to be said about that aspect of the conversation. So, if there was to be continued conversation between them, after Ireland returned from vacation, that conversation would seemingly have to pertain to Steele's remarks about meeting with employees and, if that could not be done, contacting a union. No other purpose for such a subsequent meeting is suggested by either Steele's or Ireland's description of their July 31 meeting.

Apparently perceiving as much, Ireland attempted to attribute any discussion of a further meeting to Steele, based upon the latter's asserted remark, "I am not going to do anything while you are gone." According to Ireland, Steele had been referring to "his behavior, first of all. His disruptive behavior." But, it makes no sense for Steele to promise to hold off on disruptive behavior, in the context of Ireland's overall testimony concerning the July 31 meeting. After all, as quoted above, Ireland testified that Steele had promised that Respondent "would not expect to see those types of actions again." Given that promise, it hardly makes sense for that same employee to then promise to hold off on disruptive behavior only until the departmental manager returns from vacation. And it hardly seems logical that a statutory supervisor would accept as satisfactory so limited a promise not to engage in disruptive behavior for but a limited period.

In any event, Steele made no effort to contact a union while Ireland was on vacation. Ireland testified that "I probably came back around August 10th or 11th, somewhere in there." There is no dispute about the fact that, following his return, Ireland did engage in another meeting with Steele, this time on August 16 in Heathcoat's office, with Heathcoat present. It is alleged that, during that meeting, Ireland and/or Heathcoat coercively interrogated Steele, offered him unspecified benefits to refrain from organizing activity, and threatened him with layoffs if the employees became represented. Ireland and Heathcoat each testified that he had made no threats or promises during the August 16 meeting.

According to Ireland, the meeting had occurred because of a report by Heathcoat and DeRossett that, during one of the periodic bindery department production meetings, "there were some disruptions during that meeting and Ted [Steele] was the disruptive force in that meeting." Ireland continued, in that regard, "they informed me that Ted Steele was still upset and I made myself available to meet with them and Ted Steele in Marty's office." Interestingly, while he appeared as a witness for Respondent, Heathcoat did not corroborate that account by Ireland as to how their August 16 meeting with Steele had come to be conducted. As pointed out above, DeRossett was never called as a witness. So, there was no corroboration from him as to how that meeting came to be conducted. The General Counsel portrays it as essentially a continuation of Ireland's July 31 meeting with Steele, as picking up where that conversation had left off.

"They asked me why I would want to bring a union into the Company," Steele testified, and, "I responded by saying I, it would be nice to have seniority rights, better working conditions, raises when it was possible and so on." Ireland did not deny that Steele had been asked why he wanted to bring a union into Respondent. Questioned as to whether he had asked why Steele wanted the union, Heathcoat answered merely, "I, I don't remember. I may have."

As to Steele's above-quoted response to such a question, Ireland equivocated, testifying that Steele "could have said" unions are good because they provide things like seniority and better working conditions, but "I really do not remember." Of course, it is difficult to ascertain why Steele might have made such statements unless he had been responding to a question regarding why he wanted a union. In fact, Heathcoat acknowledged that Steele "did" talk about unions during the August 16 meeting and, further, had "brought up other people's wages and he also made the statement that he doesn't even make enough money to have a savings account yet."

According to Steele, there also was a discussion on August 16 about what could be done to improve his situation and the subject of a mechanic's job was mentioned. Steele testified that he was encouraged to talk to someone about the job. Yet, so far as the evidence shows, no such subject had been discussed with Steele prior to August 16, before his reasons for wanting to bring in a union were questioned.

There is no dispute that the subject of a mechanic's job was discussed that day. Ireland testified, "I posed the question to Ted, Ted, let's talk about you and what you can do to improve your situation here at [Respondent]. What can you do to help yourself work your way up the ladder, make more money and that type of thing." When he pointed out that Respondent posts jobs, testified Ireland, Steele retorted, "Jerry, there is only two things that I have ever gotten out of this Company, bad arms and a bad attitude." Still, when Steele also expressed interest in a maintenance position, Ireland testified that he said he would have Maintenance Supervisor Bill Wolfram "interview Ted about a maintenance position, although at the time we did not have an opening." Eventually, Heathcoat corroborated the testimony given by Ireland. In fact, Ireland acknowledged that on the following day Wolfram did interview Steele, at Ireland's direction, but the interview revealed that Steele lacked the necessary qualifications and, in any event, that Steele was not really interested in the position.

Steele testified that, as the August 16 meeting progressed, Ireland "asked me what it would take to satisfy me. And I told him that it would satisfy me if management would sit down with the hourly employees and work something out." When Ireland replied that "we could not do that," testified Steele, "I informed him that I was leaving the meeting and that I was going to attempt to organize." According to Steele, Ireland asked Steele to come back and talk some more, but Steele responded that there was nothing left to talk about and left. No one told him to remain or stay and, moreover, he was never reprimanded for having left that meeting. Significantly, when he left, it was 3:30 p.m., a half hour after his shift had ended, and another employee, Bob Caldwell, was waiting for a ride home with Steele.

Ireland acknowledged that the meeting had broken up at approximately 3:30 p.m. and, further, testified, "I had indicated to [Steele] that I knew Bob Caldwell was riding with him. And Bob Caldwell was outside I was sure." When he mentioned that, Ireland testified, "Ted's parting words were, well, you guys aren't listening to me and he kind of threw up his hands and walked out." Ireland admitted that he had not ordered Steele to remain in Heathcoat's office. But, Ireland was less forthright about other aspects of that meeting.

Questioned as to whether he had asked what would satisfy Steele, Ireland answered merely, "I don't remember asking him that." As a result, Ireland never did deny having put that question to Steele. Nor did Heathcoat deny that Ireland had done so. Beyond that, when asked if Steele had said that he wanted management to sit down with the employees and work things out, Ireland again answered, "I don't remember him saying that." However, Heathcoat answered, "Yes," when asked if Steele had said that management really needed to sit down and talk to employees about their concerns. Moreover, although Heathcoat testified that he "did not hear" Steele say that he would contact a union if management did not sit down with the employees, he conceded, "I heard that he would have to do what he would have to do," and, moreover, as to whether that had meant contacting a union, Heathcoat acknowledged, "I assumed that that's what [Steele] meant, yes."

Steele testified that on August 25 he met with an official of Graphic Communications Union, Local 68C, Graphic Communications International Union, AFL–CIO, CLC (the Union), an admitted labor organization within the meaning of Section 2(5) of the Act. They agreed that a meeting with employees would be conducted during the evening of August 26 at the Holiday Inn in East Peoria. Other than Steele, apparently the only employee who attended that meeting was bindery department employee Harms, Steele's brother-in-law. Even so, rumors about the Union began to circulate through Respondent's Peoria facility. Both Bob Seckler, a silk screener, and Betty Isbell, formerly a detail operator, testified that employees had been talking there about Steele and the Union.

Isbell was a particularly significant witness concerning those rumors. For she quit on August 26, returning to employment with Respondent on October 4 or 5. Thus, the rumors which she heard had to have been circulating prior to August 27. Her testimony was also significant in another respect.

She testified that on the day before she first left employment with Respondent, during August, she had attended a meeting of bindery department employees called hastily by Heathcoat and DeRossett. In fact, Steele, Harms, and Seckler also testified about that meeting during which, the complaint alleges, DeRossett threatened that the bindery department would be the first to close if the Union came in and things got "tight."

Heathcoat agreed that there had been a meeting during late August at which production and profitability in the bindery department had been discussed, as occurred each month. Most of the employees agreed that bindery department production had been mentioned during that meeting. All four bindery department employees testified that Heathcoat also had mentioned the union and had asked for the assembled employees' opinions or reasons for wanting a union. Harms and Steele testified that the latter had said that everyone knew who it was that was trying to bring in the Union. Steele testified that he had added, "I am trying to bring the union in here." According to Harms and Seckler, some other employees also spoke up.

Heathcoat initially denied flatly having encouraged or solicited employees' view on unionism during a meeting. Yet, during cross-examination, he became more equivocal about that subject. Thus, asked if during that August departmental meeting, or at a productivity meeting prior to that meeting, he had asked employees what they thought in general about unions, Heathcoat answered merely, "Not that I am aware of." Later, he answered that he could not recall a time when employees had provided him with their opinions about unions or organizing, in general.

According to all four employees—Isbell, Seckler, Harms, and Steele—they then had been told, during the meeting, that if

the Union got in, the bindery department would be the first to go. Steele, Harms, and Seckler attributed that statement to DeRossett. Isbell testified that it had been made both by DeRossett and by Heathcoat. Beyond that, Steele testified that DeRossett had not explained what he meant by that comment. Asked if Heathcoat or DeRossett had explained why bindery possibly would be the first to go, Seckler testified, "Probably because, if they did, it was probably because it's probably a small part of the Company's profit." "But," added Seckler, "[I]f they said something like that, I can't remember." Isbell testified that, in connection with "the first to go" statement, there had been mention of that being because of wages going up and it being too costly.

Harms testified that DeRossett had no opportunity to explain his warning because Steele had interjected, "[Y]ou can't be telling us that." Indeed, Steele did testify that, "I told Ted DeRossett what he had just told the bindery employees was against the law." As it turned out, Heathcoat put an abrupt end to the meeting as the argument between Steele and DeRossett became more heated.

Inasmuch as he was not called as a witness, there was no denial by DeRossett concerning the "first to go" statement attributed to him during that meeting. Initially, as he did concerning other subjects, Heathcoat denied flatly having said or heard anyone else say that the bindery employees would be the first to go if the Union got in, but then qualified that denial. Asked during cross-examination if DeRossett had told a gathering of employees that if the Union got in bindery would be the first to go, Heathcoat answered, "The word union was not mentioned in there," adding, "what was mentioned in there was if the profitability of the bindery department did not increase, that bindery department would be, it wouldn't be there anymore."

That would have been a somewhat strange remark for DeRossett to have made in the circumstances, were it not connected to unionization of bindery department employees. For, as explained below, business in bindery had been picking up to the point where Respondent would first extend the workday in that department to ten hours and, then, add a second bindery department shift. Certainly, during late August, there was no decline in business for bindery department employees. In consequence, it makes no sense for DeRossett to have been expressing concern about discontinuance of the bindery department unless his concern had related to unionization of employees working in that department. A conclusion that DeRossett's "first to go" warning had been tied to the Union is reinforced by what occurred during the following day.

Isbell had tendered her resignation. On the day after the abruptly convened bindery department meeting, described above, she testified that she went into Heathcoat's office and explained her reasons for resigning. Later that afternoon, it is undisputed, she was summoned by DeRossett to another meeting with Heathcoat. DeRossett remained during that meeting. After discussing further her reasons for quitting, Isbell was asked if Steele was serious "[a]bout trying to getting [sic] a union in there," and "if there was a lot of people that were interes5ted [sic] in it or was it just a few." Isbell testified that, "I told him I thought he was serious and I didn't really know if people were really interested in it." Heathcoat never denied having made, or having heard DeRossett make, those remarks to Isbell.

Nor did Heathcoat deny having approached Seckler, during this same time period, and having said, somewhat cryptically, "by law we can't call a meeting about union activities, but you can with us if you want." Neither this statement nor the ones to Isbell are alleged as unfair labor practices. Even so, those conversations evidence both knowledge by Respondent that union activity was in progress and, at least, suspicion that Steele was a primary activist on the Union's behalf.

Two final meetings also occurred during the latter half of August. At one, bindery department employees were informed that they would begin working 10-hour shifts. It is difficult to date that meeting, since counsel suggested a date to Steele in one instance—August 27—and opposing counsel suggested a different date—August 15—to Heathcoat. The significant point about this meeting, in the context of alleged discriminatory motivation, is Steele's testimony that, during this meeting, he had protested the unfairness of making bindery employees work overtime, when employees "in the past had been able to pass up overtime" and "it was decisions like that that were making me check into bringing a union into" Respondent.

Heathcoat acknowledged that Steele had "seemed a bit upset" at the announced extended workdays. Moreover, Heathcoat testified that Steele had left his position in the meeting and "came up to me and told me, this is why we need a union here. And he pointed his finger an inch away from my face," at which point, "I just asked him if he could conduct himself in a more professional point [sic] in the meetings cause it was disrupting our work flow during the meetings." Still, Heathcoat acknowledged that, later that day, he and DeRossett had approached Steele and had explained that employees had to work the 10-hour days, but that they would accommodate Steele's scheduled days off and try to accommodate time off which he needed to take.

To that point, it might seem that there was support for the suggestion to Heathcoat of the August 15 date, given the fact that, as described above, Ireland testified that he had participated in the August 16 meeting with Steele as a result of a complaint by Heathcoat and DeRossett that Steele had disrupted a production meeting. Moreover, if the August 27 date suggested to Steele had been the correct one, that would mean that Respondent had announced a 10-hour workday and, then, almost immediately thereafter, announced creation of a second shift for the bindery department on August 28 or 29, as described below. Such immediate shifts in planning seem somewhat disorganized and, for that very reason, might appear to have been unlikely, meaning that the 10-hour shift announcement meeting had occurred earlier in August. But, in fact, there is evidence which does lend support to a conclusion that, after having announced 10-hour workdays, Respondent had suddenly shifted direction and created a second shift.

Ireland testified that, once Heathcoat and DeRossett had decided "to go to ten hour shifts" and had announced as much in a meeting with bindery department employees, "shortly thereafter I got a call from . . . the CMR department . . . basically questioning if we were going to be able to handle the workload." Afterward, Ireland testified that he suggested to Heathcoat and DeRossett that they consider going to a second shift and they decided to do so. Thus, the 10-hour workday could have been announced on 1 day, with the second shift being decided upon and announced within a day or two thereafter. If so, then the date suggested to Steele for the 10-hour workday announcement may have been the correct date.

In any event, when creation of the second shift was announced, three bindery department employees were told that

they would be assigned to it. One was to be Steele who, as he had in 1993, would be leadman on that shift. In his brief, counsel for the General Counsel wanders into arguing that the selection of Steele for that shift had been made to isolate him from other bindery department employees, save for the two who would be working with him on second shift. Yet, there is no allegation in the complaint that Respondent had unlawfully selected Steele to work on the second shift. Neither during the hearing nor in his brief, moreover, did counsel for the General Counsel move to amend the complaint to add such an allegation. As a result, there is no basis in the pleadings for making any finding that Respondent had violated the Act by selecting Steele to work on the second bindery department shift.

Beyond that, there is no basis for concluding that a preponderance of the credible evidence warrants such a conclusion. To be sure, Steele's assignment to second shift would have isolated him at work from the bindery department employees remaining on the day shift. But, there is no evidence that he had engaged in any activity on behalf of the Union, save for repeatedly announcing to Respondent's officials his planned union support, while actually at Respondent's Peoria facility. Nor is there evidence that he had contemplated doing so or that Respondent could fairly have anticipated that he would be soliciting and campaigning for the Union at its facility.

On the other hand, while Larry Clutts had been a leadman on the second shift at one time, by August Clutts was first-shift bindery department leadman. Transferring him to second shift would mean that Respondent would have to replace him on first shift. There is no evidence showing that doing so—playing musical chairs by transferring Clutts to second shift and replacing him as leadman on first shift with another employee—was inherently more logical than simply appointing Steele to the position of second-shift leadman. Certainly the latter course created the least disruption to operational continuity.

Aside from Clutts, Steele identified only one other bindery department employee—Terry Legtboet—who was as capable and knowledgeable about running all bindery department machines as was Steele. At that, however, Steele acknowledged that Legtboet was not familiar with the screen printer. Further, there is no evidence that Legtboet had ever previously occupied the position of lead, whereas Steele had done so during 1993, as pointed out in subsection A, above. In consequence, selection of Steele for second-shift leadman has not been shown to have been an inherently illogical choice.

One point about that assignment is material to the discharge allegation which is included in the complaint. When he heard of the assignment, Steele became concerned about its affect on leave which he had scheduled from August 30 through September 3. Heathcoat testified that he and DeRossett discussed that subject with Steele on August 29. According to Heathcoat, the two officials wanted to ascertain if Steele "could, in fact, go to that second shift with a positive attitude with the rest of the employees" and, in the process, assured Steele that he still could take his scheduled days off. The significant point about that conversation, in light of the events discussed in the following subsection, is that after Heathcoat and DeRossett's conversation with Steele, Ireland testified that he was told by those two officials that Steele had said to them "that he would go to second shift and he would do the job and represent the Company as was expected of him."

C. The Discharge of Steele on September 4

On Friday, August 30, while Steele was on scheduled leave, Respondent received from him a registered letter. That letter was not introduced by any party and, as a result, the record contains only secondary evidence as to what it stated. Steele and Ireland testified that the letter requested the laws and bylaws of the ESOP, financial information, and the laws and bylaws of Respondent.

The letter did not state why Steele wanted that information and he had not told any official of Respondent why he wanted it. Ireland testified that he had been puzzled about the request, since Steele already had the SPD and financial information through the second quarter of calendar 1996. Moreover, the bylaws of Respondent are 50 years old and the only copy is kept in Vice President of Finance Taylor's office. As to that, Ireland testified, "[W]e don't have very many people that I can recall that have requested to see the bylaws."

Still, Ireland conceded that there was nothing improper about Steele's request. Respondent's employee handbook provides that employees are allowed to request access to information concerning the ESOP. Ireland admitted that no reason need be given. He also admitted that Steele's request for the information did not break any rule.

At one point Ireland testified that, upon receipt of the letter, "I contacted Marty [Heathcoat] about it and we agreed that we wanted to meet, they wanted to meet with Ted in Bruce's office to find out why exactly he wanted this information, some of it." Heathcoat did not corroborate that account. To the contrary, while he testified that he had been aware of the letter's receipt by Respondent, when asked if he had known what was going to happen on September 4, Heathcoat answered, "No. I wasn't. I was kind of disappointed that the letter came. But, no."

Indeed, rather than going to Taylor's office on September 4 pursuant to an agreement with Ireland to meet with Steele about the information request, as Ireland claimed, Heathcoat testified that on September 4 he and DeRossett had merely "tagged along with" Steele to Taylor's office because, "We just wanted to see what the materials were more than anything else. Just to make sure that he did, in fact, get over there and that the meeting or whatever it was over there was going to be conducted." That hardly is the account of an official who had planned to meet with Steele on September 4, as Ireland portrayed.

At another point Ireland laid the decision to meet with Steele at the door of Taylor: "I had a brief discussion with him [Taylor]," and, "I believe Mr. Taylor" made the decision to have Steele brought to the office on September 4. Significantly, Taylor never was called as a witness to corroborate that particular account by Ireland and, if so, to explain why such a meeting —to have Steele explain why he was requesting documents which the employee handbook allowed him to request and which he broke no rule by having requested to examine them—had been regarded as necessary. Certainly Taylor's nonappearance as a witness was not because he was not available to testify. As shown by the appearances which were entered, he sat with counsel for Respondent throughout the hearing.

An overview of what occurred on September 4 shows that Steele was told by Heathcoat and DeRossett that he could see the requested documents in Taylor's office. He then went there where, besides Taylor, also attending were Ireland, Heathcoat and DeRossett. Eventually, Steele walked out, saying that he would not participate in a meeting with them. Heathcoat pursued him, directing Steele to return to the office. Also in pur-

suit of Steele, as he walked to the plant, was Ireland. When Steele continued refusing to return to the office, as directed by Heathcoat, Ireland fired Steele. At Steele's insistence, Heathcoat prepared a written explanation of the reason for the discharge and Steele then left Respondent's facility.

Breaking down that overview, Steele testified that when he had arrived to start his second-shift work on September 4, waiting for him were Heathcoat and DeRossett: And they asked me if I wanted the documents that I had requested by registered mail. And I told them that I did. According to Steele, they said that he could get those documents in Taylor's office, he punched in on the timeclock, and started to walk toward the building where Taylor's office was located. But, as he did so, he testified that he "noticed Ted DeRossett and Marty Heathcoat were still walking behind me." "I told them that I didn't need them to go pick these papers up," testified Steele, but "their reply to me was, we are just going in case you have some questions." Steele testified that he told Heathcoat, "I can't possibly have any questions until I read over this literature. And they proceeded to follow me to Bruce Taylor's office."

As set forth above, Heathcoat admitted that he and DeRossett had "tagged along" with Steele as the latter walked to Taylor's office. Heathcoat testified that he and DeRossett had done so "to make sure that [Steele] did, in fact get over there," but he did not dispute having told Steele that he and DeRossett were going with Steele "in case you have some questions." The fact is that neither of those explanations makes any sense.

Having told Steele that the requested information was available in Taylor's office, and having heard Steele say that he still wanted to see it, there is no basis in the record for Heathcoat or DeRossett to suspect that Steele would not "get over" to Taylor's office. Indeed, Heathcoat never claimed that he had suspected that Steele might go elsewhere than to Taylor's office after punching in on September 4. On the other hand, Heathcoat provided no basis for a conclusion that either he or DeRossett would be able to supply answers to Steele's "questions" that could not be provided by Taylor.

It should not escape notice that on September 4 Heathcoat and DeRossett were, in effect, abandoning their own duties merely to "tag[ ] along" with Steele, if Heathcoat's above-quoted explanation is believed, to do no more than satisfy their own curiosity about the documents. The fact that there was no apparent reason for them to have followed him would naturally lead an employee to become apprehensive about the true reason for being trailed to the vice president of finance's office. That apprehension could only be inherently heightened by what occurred once that employee reached the office.

According to Ireland, Taylor's office during September "was a very small" one. Nonetheless, Heathcoat and DeRossett squeezed into it, along with Steele and, of course, Taylor, who was sitting at his desk. They were then joined by Ireland who testified that, "I did not really plan on being there," but he had asked Taylor beforehand "[I]f he thought that I should be in that meeting. And Bruce said that, yes, why don't you come into the meeting? And so I was there on last minute notice." Two points about that testimony should not be overlooked.

First, since Taylor did not testify, Ireland's explanation for his presence in the office on September 4 is uncorroborated. Moreover, Taylor's failure to testify leaves the record devoid of evidence as to his reason for assertedly wanting Ireland to be present during the meeting. Of course, one could speculate as to a lawful reason. But, given the absence of testimony about a reason, that is all that can be done: speculate. To indulge in it would be to supply an explanation that Taylor, himself, failed to provide. That is not permitted in formal proceedings under the Act. "The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." *Inland Steel Co.*, 257 NLRB 65, 65 (1981).

Second, Ireland's above-quoted testimony about being asked by Taylor to attend the meeting tends to contradict his earlier testimony, also quoted above, that, upon receipt of Steele's letter requesting information, he and Heathcoat had "agreed that we wanted to meet . . . with Ted in Bruce's office to find out why exactly he wanted this information, some of it." If that truly had been Ireland's plan upon receipt of Steele's letter, then surely there later was no reason for him to inquire if Taylor thought that he (Ireland) "should be in that meeting." Of course, there might have been some intervening change in Ireland's initial plan, assertedly discussed with Heathcoat. If so, however, Respondent failed to provide evidence of it.

Ireland did testify that, from what he had ascertained from Taylor, the latter's purposes for conducting a meeting with Steele had been to ascertain "why did Ted want this information since he had some of it," and, as well, "we wanted some assurance from Ted that he was going to be able to carry out his previous commitment that he had agreed to . . . perform the duty over there on the second shift in the bindery department." Yet, Respondent has not shown any connection between Steele's request for information and his performance of work on a second shift. So far as the evidence reveals, the two subjects are entirely separate. There is no basis for concluding that the request for information was somehow inextricably connected to performance of work on a second shift. Of course, Taylor never appeared as a witness to supply the connection which Ireland claimed that Taylor felt warranted such a meeting. And, as pointed out at the end of the preceding subsection, Steele had assured Heathcoat and DeRossett that he would try to do a good job on second shift. There is no basis for concluding that that assurance became somehow called into question as a result of Steele's letter requesting information.

The fact that the plant manager had joined the departmental manager and supervisor in a meeting, ostensibly convened for no purpose other than to examine information, would naturally serve to increase an employee's apprehension arising from being followed to such a meeting by departmental supervision. That apprehension would be increased further by what occurred once the meeting began.

According to Heathcoat, the materials requested by Steele were on Taylor's desk and, "I think the only thing that was said was, well, Ted, here is the information you requested. We thought you already had a copy of the financial report." But, this testimony by Heathcoat, that the information was offered to Steele, is contradicted both by Ireland and by Steele. For, Ireland testified that, as he walked into Taylor's office, it had been Heathcoat who had been talking to Steele, saying,

> Ted, I, you know, I thought we had, you know, an understanding here. Why is it that you are requesting these things again? Not that you can't see them, but I thought we had an understanding and that you had gave [sic] us the impression that you were going to do a good job over in the bindery area on second shift.

From that account, obviously something quite different had been said to Steele than an offer to furnish him with informa-

tion which he had requested and which he had broken no rule in asking to examine.

Indeed, Steele testified that when he had asked Taylor "if he had the papers," he had not been "given an answer." Instead, he testified, Taylor said that Steele had previously been given the ESOP statement during the quarterly meeting. Steele testified that he replied that he was not asking for a summary, but for the complete documents and "I asked him again for a copy of the papers I requested and I got no response." While Steele did not dispute that he had been told by Heathcoat, who supposedly was in the office merely out of curiosity, "[n]ot that you can't see" the documents, neither Ireland nor Heathcoat actually contested Steele's testimony that when he had asked twice for the documents, Taylor had not offered them to him and had not even responded to Steele's requests.

There is no real dispute about what followed. Steele announced that he would not participate in a meeting. He walked out. In doing so, he ignored Heathcoat's order to remain, even though he was warned that he would be fired if he did not stay in the office. Interestingly, based upon his own account, Heathcoat had been no more than an interested observer at this meeting. Taylor, who had been the official who had convened it, apparently said nothing about Steele's sudden departure from it.

Steele walked back to the plant, pursued by Heathcoat and by Ireland. Heathcoat ordered Steele to return to Taylor's office or be fired. Steele ignored that order. When he overtook Steele and Heathcoat, Ireland testified that he said, "Ted, this is the third meeting you walked out of. You are gone." As to what he meant by "the third meeting," Ireland testified that, in addition to the September 4 meeting, he had been referring to the July 29 post-ESOP departmental meeting in the lunchroom and to the August 16 meeting in Heathcoat's office, both described in subsection B, above.

Ireland testified that he had been the official who had made the decision to discharge Steele. He did so, he testified, solely because Steele had walked out of the meeting on September 4 despite specific direction to remain and, then, to return to that meeting. Against a background of having walked out of two other meetings, testified Ireland, Steele had displayed insubordination by being "disrespectful to management." "Refusing to obey orders of supervisors pertaining to work or supervisors' duties," under Respondent's discipline and performance rules, is a Group II offense which warrants "immediate termination of employment without warning." Yet, leaving these meetings was not the sole reason given to Steele on September 4 for his termination.

After Ireland fired Steele, the latter demanded a written termination letter. A written explanation was prepared by Heathcoat. In pertinent part, it states:

> He said that he didn't come here for a meeting, [sic] and then walked out of the room. I told him to get back in Bruce's office to discuss this with us. He repeated himself again saying that he didn't want a meeting. Jerry Ireland then Fired [sic] him.
>
> Ted Steele has walked out of three meetings within a month because he didn't feel like hearing what was being said to him. He has said that he does not agree with corporate policies set for all the employees of Multi Ad. He has interrupted the work flow of the Bindery Department by persuading it's [sic] employees that this is not a good place to work. Ted will never see eye to eye with [Respondent]'s policies and goals for it's [sic] employees and will not even conduct himself in professional manner when talking to management about his concerns. Ted is terminated on 9–4–96 because of his unwillingness to abide to [sic] corporate policies.

Heathcoat never explained what had been meant by such phrases as "corporate policies," "persuading its employees that this is not a good place to work," and "never see eye to eye with [Respondent]'s policies and goals for it's employees." Obviously, such phrases contemplate more than merely having left a meeting or meetings.

To be sure, the written account had been prepared by Heathcoat and he did so without conferring with Ireland who claims to have made the actual decision to fire Steele. In another setting it might be possible to infer that Heathcoat had not truly understood a plant manager's discharge reasons. Yet, Heathcoat never claimed that he had prepared the written account without such an understanding. "Yes. That's fair," testified Heathcoat when asked if he had prepared the written account based on his own contact with Steele and on the basis of what he was informed by other management. Most significantly, Ireland has not disavowed any portion of the above-quoted written explanation prepared by Heathcoat. Yet, like Heathcoat, Ireland never explained what was meant by phrases such as "corporate policies," "persuading its employees that this is not a good place to work," and "never see eye to eye with [Respondent]'s policies and goals for its employees."

II. DISCUSSION

In evaluating allegations of discrimination under the Act, the ultimate question which must be answered is the actual motivation for a respondent's allegedly unlawful action. See *Schaeff Inc.*, 321 NLRB 202, 210 (1996), enfd. 113 F.3d 264 (D.C. Cir. 1997), and cases cited therein. More specifically at issue is the actual motivation of the official or officials who made the decision to take that allegedly unlawful action. *Advanced Installations, Inc.*, 257 NLRB 845, 854 (1981), enfd. mem. 698 F.2d 1231 (9th Cir. 1982). "The state of mind of the company officials who made the decision . . . reflects the company's motive for" the allegedly discriminatory action. *Abilene Sheet Metal, v. NLRB*, 619 F.2d 332, 336 (5th Cir. 1980).

Here, though Heathcoat prepared the written explanation for Steele's termination, Plant Manager Ireland testified that he had been the official who had made the actual decision to fire Steele. Accordingly, the starting point for analysis of the motivation issue is the explanation advanced by Ireland for discharging Steele.

Ireland denied that his reason for making that decision had been influenced by Steele's expressions of intent or desire to bring a union into Respondent's Peoria facility or, for that matter, by any possibility that Steele had been acting as a spokesman for other employees. Instead, testified Ireland, he had made that discharge decision because Steele, was totally disrespectful to management. Here was an individual that was very sarcastic with the president of our Company and in the ESOP meeting, the tone of his voice directed towards our president. Bruce Taylor occupies the second or third most powerful position within our organization, the vice president of finance. He is on the executive management team.

And he walked out of his office without so much as a word, without saying excuse me or anything.

And I am also on the management team and he has shown total disrespect to me.

More specifically, Ireland testified that Steele had been insubordinate on September 4 when he walked out of Taylor's office and ignored Heathcoat's orders to return to the meeting there.

As pointed out in section I,A, above, the protection afforded employees by Section 7 of the Act is not unlimited. "To be sure . . . otherwise protected employee conduct may be so extreme as to lose the protection of the Act; and in such a case discharge or discipline by the employer for that conduct is lawful." *Brunswick Food & Drug*, 284 NLRB 663, 664 (1987), enfd. mem. 859 F.2d 927 (11th Cir. 1988). As a general proposition, subject to some exception, the Act does not protect insubordinate conduct by an employees.

On the surface, at least, there are certain objective facts which tend to support Ireland's above-quoted testimony that his discharge decision had been motivated by no more than Steele having walked out of Taylor's office and refusing to return there, against a background of having walked out of two earlier meetings. Steele had walked out of three meetings, including the one on September 4. He did ignore specific orders to remain and, then, to return to Taylor's office. The September 4 meeting was being conducted on company time. There is no allegation that Respondent had committed an unfair labor practice by convening that meeting. There is no evidence that, by the time that Steele walked out of it, any unfair labor practice had been committed during that meeting by any of Respondent's officials. The events of September 4 occurred spontaneously: Steele abruptly left the meeting, he refused to obey orders to stay and return, he was discharged on the spot. There is no basis for concluding that Respondent's officials could have anticipated, before the meeting, that Steele would leave it and refuse to return.

The fact that those events were spontaneous precludes a finding that Steele's September 4 discharge had somehow been planned in advance. Nevertheless, it is not unheard of for an employer to seize upon an unanticipated event and convert that event to its own purposes, by terminating an employee's employment to prevent unionization of that employer's employees. In this instance, the above-enumerated factors do not exist in isolation. Rather, certain other considerations refute a conclusion that Steele's departure from the meetings, including the one on September 4, had been the *sole* reason for his termination. Most compelling is the written explanation for that discharge. True, it does mention that Steele had walked out on, and had refused to return to, the meeting in Taylor's office. And it also mentions that Steele "has walked out of three meetings within a month." But, if those had been the sole reasons for discharging Steele, that is not what the written explanation states.

Instead, it recites that, "Ted is terminated . . . because of his unwillingness to abide to corporate policies." Undoubtedly, subordination is one company policy. Yet, if that had been the only company policy which had been the actual reason for Respondent's discharge decision, it seems odd that the written explanation does not so state. Use of the plural, "policies," inherently implies that there is more than one reason for the termination.

In fact, a conclusion that Steele's discharge had been motivated by more than walking out of meetings is reinforced by other statements appearing in the written explanation: that Steele "has said that he does not agree with corporate policies," that Steele had been "persuading . . . employees that this is not a good place to work," and that Steele "will never see eye to eye with [Respondent]'s policies and goals for its employees." Such statements have no seeming relationship to walking out of meetings and Respondent's officials provided no connection. Indeed, a reading of the entire written explanation reveals that mention of Steele walking out of meetings appears as, at best, a springboard to the explanation's more prolonged complaints about those other, unrelated, subjects. That more prolonged series of complaints is strong objective evidence that walking out of and refusing to return to the September 4 meeting, and walking out of earlier meetings, was not the *sole* reason for Steele's termination, as Ireland has tried to portray.

To be sure, it had been Heathcoat, not Ireland, who had prepared the written explanation. But, as pointed out section I,C, above, Heathcoat admitted that he had prepared that written explanation based both upon his own contacts with Steele and upon what he had been informed by other management. Given that testimony, there is no basis for concluding that Heathcoat, an admitted agent of Respondent, had been unclear as to the reasons for having fired Steele. Certainly Ireland never disavowed any aspect of what Heathcoat had written.

Beyond the substance of that written account, neither Ireland nor Heathcoat seemed to be testifying with candor, when each appeared as a witness. A review of the record of their testimonies confirms that impression, formed as each testified. As described throughout sections I,B, and C, above, the testimony of each was sometimes internally contradictory, other time uncorroborated, and too often inconsistent with objective considerations and with each other's accounts. I do not credit either Ireland or Heathcoat.

Therefore, I do not credit the testimony underlying the defense that Steele's having walked out of meetings, and his refusal to return to the September 4 meeting, had been the *sole* reason for the decision to fire him. Even though walking out of one or more of those meetings might have constituted legitimate cause for discharge, "an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee," *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), since "the policy and protection provided by the . . . Act does not allow the employer to substitute 'good' reasons for 'real' reasons." *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970). "The mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination." *J. P. Stevens & Co., v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981). See also *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, (1994).

Of course, the fact that Respondent has advanced an unreliable defense is not necessarily dispositive of the ultimate issue as to whether its true motive had been one unlawful under the Act. See, e.g., *Society to Advance the Retarded & Handicapped,* 324 NLRB 314–315 (1997). The methodology for determining motivation is that set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as modified in *Office of Workers' Compensation Programs v. Greenwich Colleries*, 512 U.S. 267, 276–278 (1994).

That is, the General Counsel bears the burden of establishing that antiunion animus motivated the employer's action. *Rose Hills Co.*, 324 NLRB 406 fn. 4 (1997). See *Schaeff Inc. v.*

NLRB, 113 F.3d 264 fn. 5 (D.C. Cir. 1997). In turn, "[t]he employer may escape liability for its action either by . . . disproving one or more of the critical elements of [the General Counsel's] case, or by establishing as an affirmative defense that it would have taken the same action even in the absence of the employee's protected conduct." *TNT Skypak, Inc.*, 312 NLRB 1009, 1010 (1993).

There can be no question here that at the very least Steele had announced that he intended to contact a union and that Respondent at least believed that Steele would, or at least was likely to, do so. By its terms, the right "to form, join, or assist labor organizations" is encompassed by Section 7 of the Act. "In fact, [Section] 7 itself defines both joining and assisting labor organizations–activities in which a single employee can engage–as concerted activities." (Footnote omitted.) *NLRB v. City Disposal Systems,* 465 U.S. 822, 831 (1984).

As set forth in section I,B, supra, Ireland admitted that, during the July 31 meeting, Steele had said, "[T]hat he knew people in a union and he would consider contacting them." Heathcoat admitted that, during the August 16 meeting, Steele has said, "[H]e would have to do what he would have to do" and, further, that he (Heathcoat) "assumed" that Steele meant contact a union. Heathcoat also acknowledged that during the meeting when 10-hour shifts were announced, Steele had said, "[T]his is why we need a union here." Accordingly, there can be no question that the record establishes that Respondent had been put on notice that Steele had been disposed to contacting a union to attempt to correct what he perceived as unsatisfactory working conditions.

To establish unlawful discrimination under the Act, it is not a prerequisite that the respondent know of actual union activity by the alleged discriminatee. For, "the Act is violated if an employer acts against the employee[ ] in the belief that [he/she has] engaged in protected activities." *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). See also *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996). Clearly, Respondent suspected that Steele was likely to follow through on his expressions of intent to contact a union. It is not contested that Isbell was asked if she thought that Steele was serious "[a]bout trying to get[ ] a union in" Respondent. As discussed further below, bindery department employees were asked for their opinions about unionizing and, during a meeting with Ireland and Heathcoat on August 16, it is essentially undisputed that Steele was asked why he wanted a union. Obviously, Respondent's officials believed that Steele might follow through on his statements about contacting a union.

Beyond that, a conversation such as Heathcoat's uncontested one with Isbell evidences Respondent's concern that Steele might actually contact a union and try to initiate an organizing campaign among Respondent's employees. In fact, credible evidence shows that such concern led Respondent to engage in unfair labor practices.

Heathcoat admitted that he "may have" asked Steele, during the August 16 meeting described in section I,B, above, why Steele would want to bring in a union. In fact, Steele testified credibly that he had been asked that question during his meeting with Ireland and Heathcoat that day. The same conversation had continued with a discussion, admittedly initiated by Ireland, of what could be done to improve Steele's employment situation.

When testifying, Ireland seemed to be attempting to portray that particular discussion as no more than an effort to satisfy Steele's dissatisfaction as expressed during a departmental production meeting and as reported to him (Ireland) by Heathcoat and DeRossett. Yet, Ireland's testimony about such a report was not corroborated by Heathcoat nor, of course, by DeRossett. Indeed, even if the 10-hour bindery department shifts had truly been announced on August 15, as was suggested to Heathcoat, whatever dissatisfaction it had caused Steele seems to have been resolved by a later conversation in which Heathcoat testified that he and DeRossett had engaged with Steele. As a result, there seems to have been no need for Ireland to become involved in a controversy which had been resolved between the employee and his departmental supervisor and manager. And Ireland suggested no role which he could have so belatedly played in that resolved controversy.

Of course, if the 10-hour shift announcement meeting was not the meeting to which Ireland had claimed to be referring, then not only is there no corroboration for his assertion of a report by Heathcoat and DeRossett, about supposed disruption by Steele during a production meeting, but neither is there any evidence of a meeting having occurred immediately prior to August 16 which likely would have generated such a report by departmental supervision.

In fact, there is substantial evidence that on August 16 Ireland had brought up improving Steele's employment situation as a means for weaning Steele away from his earlier announced intention to contact a union as a means of resolving his employment dissatisfactions. As pointed out above, it is not truly denied that the August 16 meeting had begun with questioning about why Steele "would want to bring a union into" Respondent. Steele testified that he had enumerated a series of reasons for wanting to do so. While Ireland professed lack of recollection concerning that enumeration, Heathcoat agreed, at least, that Steele had complained about the employees' wages during the August 16 meeting. Against such an immediate conversational background, injecting the issue of what could be done to improve an employee's employment situation appears to be an obvious effort to ascertain what could be done to diminish, if not eliminate altogether, that employee's desire for representation.

That appearance was but reinforced by Ireland's prompt arrangement to have Steele interviewed on the following day by Maintenance Supervisor Wolfram. To be sure, Respondent did not then have a maintenance opening and, as it turned out, Steele was not qualified for a maintenance position. Yet, by having him interviewed for a maintenance position, Respondent demonstrated its willingness to make an effort to address Steele's employment dissatisfactions and to do so without the need for him to be represented.

In effect, Ireland had been soliciting Steele's grievances on August 16. There is no evidence that Respondent had a practice of soliciting employees' grievances. More particularly, there is no evidence that Ireland, or any other official of Respondent, had previously taken the time to ascertain from Steele why he might be dissatisfied with his employment situation and what could be done to improve it. True, no express promises were made to Steele on August 16 by Ireland or by Heathcoat. Nonetheless, even a supervisor's "refusal to give a *specific* promise did not demonstrate the absence of an implied, general promise." *NLRB v. Cable Vision, Inc.*, 660 F.2d 1, 6 (1st Cir. 1981). See also *Peavey Co. v. NLRB*, 648 F.2d 460,

462 (7th Cir. 1981). Given the totality of the foregoing considerations, I conclude that Ireland's remarks to Steele on August 16 did constitute an implied promise of benefits, to dissuade him from his avowed intention to contact a union by demonstrating Respondent's willingness to address his employment dissatisfactions without the need for union representation.

As to the interrogation allegation, it is accurate that Steele had openly professed an intention to contact a union. Thus, his position was tantamount to that of an open union proponent during an organizing campaign. Such open advocacy allows some room under the Act for "questioning, as part of the ongoing dialogue involved in employee choice regarding representation, of leading union proponents concerning the benefits those proponents foresee as resulting from selection of a bargaining agent," but it does "not completely strip [open employee union advocates] of the Act's protection." (Citations omitted.) *Koronis Parts, Inc.*, 324 NLRB 675, 691 (1997).

The questioning of Steele occurred in his departmental manager's office. There, he had been confronted by both that departmental manager and by the plant manager. So far as the evidence discloses, Steele was not informed of any legitimate purpose for a meeting in which he was asked why he wanted a union. Nor is there evidence that he was given assurances that he need not answer such questioning, nor that reprisals would not be taken against him for whatever answers he chose to provide. Questioning of an employee about his union attitude in such circumstances would naturally cause that employee to become apprehensive and, consequently, the questioning would be inherently coercive.

To be sure, it does not appear that Steele actually had been intimidated by the questioning. But, that is only a single indicium of coercion when evaluating interrogations. See, e.g., *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 624 (7th Cir. 1981); and *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307, 1314 (7th Cir. 1983) (per curiam). The basic test for evaluating whether or not there has been a violation of Section 8(a)(1) of the Act is an objective one which does not ordinarily "turn on the employer's motive, or on actual effect." *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992). On balance of the totality of the foregoing considerations, I conclude that an employee would naturally be intimidated by questioning in circumstances such as those present on August 16. Therefore, I conclude that the interrogation of Steele, as to why he wanted a union, had been inherently coercive and did violate Section 8(a)(1) of the Act.

Additional interrogation was conducted during an abruptly convened bindery department meeting, as also described in section I,B, above. During that meeting, credible testimony shows that the employees were asked for their opinions about a union. In addition, there is testimony that DeRossett had threatened that the bindery department would be the first to go should Respondent become unionized. DeRossett was never called as a witness to deny having made such a threat, though there is no basis in the record for concluding that he was not available to Respondent, as a witness. Heathcoat, in effect, conceded that DeRossett had made statements about closure of the bindery department, though Heathcoat claimed that, "[t]he word union was not mentioned in there." As concluded above, however, Heathcoat was not a credible witness and four employees testified credibly that DeRossett had said "union." Even had he not expressly said that word, the preceding questioning about employees' opinions of a union would naturally lead employees to conclude that DeRossett's closure statement was connected to their becoming unionized.

An employer may make predictions about the precise effects of unionization. When it does so, however, those "prediction[s] must be carefully made on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control." *Schaumburg Hyundai,* 318 NLRB 449, 450 (1995), citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). As the Board held in that case, it is the respondent who bears the burden of showing the accuracy of such predictions.

There is testimony concerning the relatively low volume of income generated by the bindery department and, as well, its low profitability. Even so, there is no evidence that, during that meeting with bindery department employees, DeRossett—or Heathcoat either, for that matter—made any effort to connect possible closure of the department to increased labor costs as a result of negotiations with a union. Steele, Harms, and Seckler each testified that DeRossett had said simply that the bindery department would be the first to go if the union got in. Isbell's testimony on that point was garbled. But, the important point is that Respondent failed to produce credible evidence that DeRossett had mentioned any "objective fact" that would leave employees with even an impression that department closure would be based upon anything other than "solely [Respondent's] own initiative" and for reasons "known only to" Respondent, *NLRB v. Gissel,* supra, 395 U.S. at 618, rather than upon "demonstrably probable consequences beyond its control," *Schaumburg Hyundai,* supra.

True, Seckler testified that Steele had interrupted DeRossett when the latter had made the threat, by challenging the legality of what DeRossett had said. Nevertheless, there is not even a contention by Respondent that DeRossett had intended to add statements to his announcement which would have converted a plainly-worded threat into a legitimate prediction, but for Steele's interruption.

Beyond that, it should not escape notice that although the bindery department is small and not particularly profitable, it still was profitable, at least so far as the record reveals. Respondent had been operating it continuously before August and was continuing to operate it at the time of the hearing. There is no evidence of a policy which leads Respondent to close departments whenever their profitability drops below a certain level. And there is no evidence that, if such a policy exists, bindery department profitability had been declining by August to anywhere even near that level. To the contrary, at the time of that bindery department meeting, Respondent was moving toward extending the workday in the department and, then, added a second shift for the department.

In sum, I conclude that Heathcoat and DeRossett did conduct a meeting during which, after having asked for employees' opinions about unionization, DeRossett unlawfully threatened department closure should Respondent's employees become unionized. By that threat, Respondent violated Section 8(a)(1) of the Act. Moreover, that unlawful threat and the unlawful remarks on August 16 to Steele demonstrate Respondent's animus toward the concept of unionization of its employees. Violations of that type convey "unmistakable overtones of a purpose to discriminate and retaliate because of the union activity." *NLRB v. Ferguson*, 257 F.2d 88, 89 (5th Cir. 1958).

"Inference of an employer's unlawful motive [toward an employee] may be drawn from the employer's hostility toward the union." *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991).

By September 4, so far as the evidence shows, Steele had been the only identified likely proponent of unionization at Respondent's Peoria facility. His termination can "give rise to an inference of violative discrimination." *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980). See also *NLRB v. Des Moines Foods, Inc.*, 296 F.2d 285, 289 (8th Cir. 1961); *Intermountain Rural Electric Assn. v. NLRB*, 732 F.2d 754, 759 (10th Cir. 1984), and cases cited therein. Further indication of unlawful motivation is supplied by the timing of Steele's termination—shortly after his likely efforts to contact a union were disclosed and confirmed by Respondent's questioning of Steele, Isbell and the bindery department employees. See *Handicabs,* supra, 318 NLRB at 897, and cases cited therein. Finally, Respondent has advanced a reason for the termination, solely because he left meetings and refused to return to the September 4 one, which, as concluded above, is not an accurate description of Respondent's motivation for terminating Steele.

Given the totality of the foregoing considerations, the record does establish that Respondent had seized upon Steele's abrupt departure from Taylor's office, and Steele's refusal to return to that office, as a pretext for discharging a likely union activist, thereby ending any possibility that he would engage in efforts to bring in a union and, also, diminishing the possibility that other employees would try to do so. Turning to Respondent's advanced defense, as concluded above, Respondent has failed to credibly show that the reason which it advanced for discharging Steele had been the sole reason for its decision, as its officials claimed. As a result, Respondent has failed to satisfy its burden of establishing that it would have fired Steele for leaving Taylor's office, and refusing to return to it, even if he had not been a likely union activist. Aside from the lack of candor displayed by Ireland and by Heathcoat, several objective factors about that defense should not escape notice.

First, if Steele's conduct in connection with the September 4 meeting, and in connection with two previous meetings, had been the actual motive for discharging him, it would logically seem that the written explanation for his discharge would have straightforwardly said so. Instead, it recites that his discharge was "because of his unwillingness to abide to corporate policies."

Second, that language and, as well, other language used in the written explanation appears to be no more than euphemisms for dissatisfaction with his employment conditions which Steele was announcing would lead him to contact a union.

Third, the very circumstances of the September 4 meeting would likely have caused an employee to become apprehensive about what might occur during it. Prior to September 4 Steele had been a target of unlawful statements by Respondent's officials. When he reported for work on September 4, he was told that he could examine documents which he had requested to inspect, and, which he should have been allowed to inspect without violating any company rule. But, when he walked to Taylor's office, he was trailed by his departmental supervisor and manager for no apparent reason. Once he arrived at Taylor's small office, DeRossett and Heathcoat also crowded into it and they were joined by Plant Manager Ireland. An employee could hardly be expected to believe that the presence of all of these supervisors was needed in so confined an area merely to watch him looking at documents. In fact, it is not truly disputed that Steele was not offered the opportunity to look at the documents. Instead, he was questioned about why he wanted to see them. In such circumstances, Respondent's own officials created the situation which would cause an employee to become apprehensive.

Fourth, based on objective considerations, the meeting appears to have been a voluntary one on the part of Steele. He had been the party who requested examination of the documents. When he arrived at work on September 4, he was asked if he still wanted to do so. So far as the evidence discloses, had he said that he did not want to do so, he would not have been directed to Taylor's office and no discipline would have been imposed upon him. In essence, his decision to abandon an effort to examine the documents, once in Taylor's office, was no different than an initial decision, when he arrived at work, to change his mind and not examine the documents. If no discipline would have been imposed for the latter, there seems no logic in disciplining him for deciding abruptly, once in Taylor's office, to abandon his desire to examine the documents.

Fifth, possibly perceiving that above-described flaw, Ireland claimed that Respondent also wanted to question Steele, in Taylor's office, about his willingness to do a good job on second shift, in light of his registered letter requesting to see information. Yet, there is no logical connection between the two subjects. Steele had promised, before going on leave the preceding week, that he would try to go to second shift and do a good job. There is no evidence that anything in his letter inherently brought that commitment into question. Rather, it appears that Ireland, at least, perceived that a strictly voluntary meeting, on the part of Steele, might not truly supply a reason for terminating Steele because he left it. So, Ireland added another reason for the meeting: finding out if Steele would apply himself to second shift work. But, in doing so, Ireland gave internally contradictory explanations about the meeting. As described in section I,C, above, at one point he testified that he and Heathcoat had decided that a meeting was necessary; at another he testified that Taylor had said that he planned to meet with Steele and asked Ireland to join that meeting. Yet, Taylor never appeared as a witness, with the result that there is no testimony that he had been concerned about Steele's work on second shift.

In sum, I do not credit Respondent's defense. Viewing the record in its totality, I conclude that a preponderance of the credible evidence establishes that Respondent was hostile toward unionization of its employees which Steele had been announcing that he would attempt to accomplish and, accordingly, acted upon that hostility by seizing on Steele's departure from the September 4 meeting as a vehicle for eliminating him before any union campaign could be initiated, in the process deterring other employees from contemplating an effort to become represented. Therefore, by discharging Steele, Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

Multi-Ad Services, Inc., has committed unfair labor practices affecting commerce by coercively interrogating employees concerning their union sympathies, by impliedly promising to help an employee improve his employment situation without the need for representation, and by threatening to close the bindery department should its employees become represented by a union, in violation of Section 8(a)(1) of the Act; and, by discharging Ted Steele on September 4, 1996, because of a belief that Steele might contact a union to initiate efforts to organize its Peoria employees.

REMEDY

Having concluded that Multi-Ad Services, Inc. has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, offer Ted Steele full reinstatement to the same position of bindery worker from which he was discharged on September 4, 1996, dismissing, if necessary, anyone who may have been hired or assigned to perform that job after that date. If that job no longer exists, Steele will be offered employment in a substantially equivalent position, without prejudice to his seniority or other rights and privileges which he would have enjoyed had he not been unlawfully discharged. Moreover, it shall make Steele whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It also shall, within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Ted Steele and, within 3 days thereafter, notify Steele in writing that this has been done and that his discharge will not be used against him in any way.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Multi-Ad Services, Inc., Peoria, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies and activities, impliedly promising to improve the employment situations of employees to dissuade them from engaging in union activities, and threatening to close the bindery department if employees become represented by Graphic Communications Union, Local 68C, Graphic Communications International Union, AFL–CIO, CLC, or by any other labor organization.

(b) Discharging or otherwise discriminating against Ted Steele or against any other employees because of their support or suspected likely support for the above-named labor organization or for any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Ted Steele full reinstatement to the job of bindery worker from which he was discharged on September 4, 1996, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges which he would have enjoyed had he not been unlawfully discharged.

(b) Make Ted Steele whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

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

(d) Within 14 days from the date of this Order, remove from its files any reference to the discharge of Ted Steele on September 4, 1996, and within 3 days thereafter notify Steele in writing that this has been done and that his discharge will not be used against him in any way.

(e) Within 14 days after service by the Region, post at its Peoria, Illinois place of business copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by its duly authorized representative, shall be posted by Multi-Ad Services, Inc. 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 it to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Multi-Ad Services, Inc. has gone out of business or closed the Peoria facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since March 27, 1996.

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

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 you concerning you union activities or sympathies.

WE WILL NOT impliedly promise to help you improve your work situation to dissuade you from contacting or supporting Graphic Communications Union, Local 68C, Graphic Commu-

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] 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."

nications International Union, AFL–CIO, CLC, or any other labor organization.

WE WILL NOT threaten to close our bindery department if you choose to become represented by the above-named labor organization or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against Ted Steele, or any other employee, because of support or suspected support of the above-named labor organization or any other labor organization.

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

WE WILL, within 14 days from the date of this Order, offer Ted Steele full reinstatement to the bindery worker job from which he was discharged on September 4, 1996, or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights or privileges which he would have enjoyed had we not unlawfully discharged him.

WE WILL make whole Ted Steele for any loss of earnings and other benefits resulting from our unlawful discharge of him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Ted Steele on September 4, 1996, and WE WILL, within 3 days thereafter, notify Steele in writing that this has been done and that that unlawful discharge will not be used against him in any way.

MULTI-AD SERVICES, INC.