Intercon I (Zercom) *and* International Brotherhood of Electrical Workers. Case 18–CA–14533

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On October 6, 1998, Administrative Law Judge William J. Pannier III issued the attached decision. The General Counsel filed exceptions and a supporting brief; the Charging Party filed cross-exceptions and a supporting brief; and the Respondent filed cross-exceptions, a supporting brief, a responsive brief to the General Counsel's exceptions and an answering brief to the Charging Party's cross-exceptions.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found, inter alia, that employee Suzanne Witha's resignation from her job did not constitute a constructive discharge, in violation of Section 8(a)(3) and (1) of the Act, under either the traditional constructive discharge theory[3] or the "Hobson's Choice" doctrine.[4] For the reasons set forth below, we disagree with the judge, and find that Witha's resignation constituted a constructive discharge under the Hobson's Choice doctrine.[5]

"A constructive discharge is not a discharge at all but a quit which the Board treats as a discharge because of the circumstances which surround it. Such situations may arise when an employer confronts an employee with the Hobson's Choice of either continuing to work or foregoing rights protected by the Act." *Multimatic Products*, 288 NLRB 1279, 1348 (1988). As stated above, under the Hobson's Choice line of cases, an employee's voluntary resignation will be considered a constructive discharge when an employer conditions the employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp.*, 227 NLRB 612 (1976).[6]

In this case, the undisputed facts show that in early June 1997, Witha contacted the Union about organizing and discussed the matter with her coworkers to assess their interest. The judge found, and we agree, that as a result of Witha's organizing attempt, Supervisor Deborah Williams unlawfully threatened Witha and other employees with retaliation if they discussed the Union on company time and plant closure if the Union were selected. Witha was also issued an unlawful written warning for her allegedly poor work quality and "negative attitude," and was notified that she would be transferred to the day shift for 4 days for additional training and reevaluation. Further, Witha was informed that if she did not improve her "negative attitude" and unsatisfactory work performance within 4 days, the Respondent's next action would be "termination," as stated in Witha's written warning. As a result of this unlawful written warning and transfer, Witha resigned her employment.

The warning and transfer, the judge found, violated Section 8(a)(3) and (1) of the Act because they were pretextual and discouraged Witha from supporting the Union. The judge also found that the reference to Witha's "negative attitude" was a euphemism for her prounion activity, and that Witha could infer that the Respondent's unlawful conduct was a form of retaliation for her union

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by (1) threatening employees with plant closure and relocation if they selected a union as their representative, and (2) threatening employees with retaliation, termination, discharge, and reprimand for discussing unions or union-related subjects during company time. Further, no exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by issuing an oral warning to employee Suzanne Witha on June 17, 1997.

[2] The Respondent has excepted to 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.

[3] Under the National Labor Relations Act, a traditional constructive discharge occurs when an employee quits because his employer has deliberately made the working conditions unbearable and it is proven that (1) the burden imposed on the employee caused, and was intended to cause, a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities. *Grocers Supply Co.*, 294 NLRB 438, 439 (1989); and *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

[4] Under the Hobson's Choice theory, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp.*, 227 NLRB 612, 613 (1976).

[5] Because we find an unlawful constructive discharge under the Hobson's Choice doctrine, we find it unnecessary to pass on the judge's finding that Witha was not constructively discharged under the traditional constructive discharge theory.

[6] "To condition employment upon the abandonment by the employees of the rights guaranteed them by the Act is equivalent to discharging them outright for union activities." *Atlas Mills, Inc.*, 3 NLRB 10, 17 (1937).

activities. Despite the Respondent's unlawful conduct, the judge concluded, however, that Witha's resignation in response to the Respondent's unfair labor practices did not constitute a Hobson's Choice constructive discharge because, inter alia, the Respondent's words and conduct did not expressly convey that Witha would be terminated if she did not abandon support for the Union.[7]

Not every case where an employee quits in reaction to an unfair labor practice constitutes a constructive discharge. We conclude, however, that under the particular circumstances presented here, Witha's resignation constitutes a constructive discharge in violation of Section 8(a)(3) and (1). We find that the Respondent's conduct led Witha to reasonably believe that she was compelled to choose between abandoning her union support or being terminated. When the Respondent told Witha that she had 4 days to improve her "negative attitude," a euphemism for prounion activity,[8] the Respondent effectively told Witha that she had 4 days to abandon her prounion attitude if she wanted to preserve her job. As a result, Witha was presented with the Hobson's Choice of relinquishing her statutory rights or facing termination. She resigned rather than abandon her union support.

Although the Respondent did not literally state that Witha had to abandon her support for the Union as a condition of her continued employment, we find, contrary to our colleague, that the Respondent's message was unmistakable and that the Hobson's Choice was clearly and unequivocally conveyed to Witha. The term "negative attitude" as used by the Respondent was a code word for union support. The Respondent's conduct, therefore, led Witha to reasonably believe that continuing to support the Union and continuing her employment were incompatible. Thus, she was compelled either to abandon her statutory rights or to quit.[9]

In finding that Witha would not have reasonably believed that her termination was imminent, the judge relied on the Respondent's decision not to fire Witha on the day that it issued its disciplinary warning and transfer. In our view, the fact that Witha was not immediately terminated does not mitigate the Respondent's clear message that Witha faced "termination" if she did not abandon her prounion attitude within 4 days. Witha was not required to wait 4 days to be dismissed by the Respondent for continuing to support the Union. Because the term "negative attitude" used by the Respondent is a euphemism for union activity, a prudent person in Witha's position would reasonably believe that the Respondent would fire her if she did not forego her union activity. Such a belief was particularly reasonable in light of the Respondent's other threats found unlawful in this case.[10] The conclusion is inescapable that the option given to Witha, tantamount to a choice to refrain, within 4 days, from continuing to support the Union or be terminated, was made an unlawful condition of her continued employment. For these reasons, we find that Witha was faced with a Hobson's Choice and reasonably resigned rather than forsake her statutory rights. Accordingly, we conclude that Witha's resignation constituted a constructive discharge in violation of Section 8(a)(3) and (1) of the Act. *Hoerner Waldorf,* supra. See also S*wain Mfg. Co.*, supra.

AMENDED CONCLUSIONS OF LAW

1. By threatening to retaliate against employees for discussing unions and union-related subjects on company time and by threatening closure of the Aitkin, Minnesota facility and relocation of its operations should the employees become represented by a union, the Respondent has violated Section 8(a)(1) of the Act.

2. By issuing a written warning notice to employee Suzanne Witha and announcing her transfer to the day shift, and by causing Witha to be constructively discharged because of her sympathies for and activities on

[7] The judge also implied that the Hobson's Choice doctrine is only applicable where an employer curtails the Sec. 7 rights of already represented employees, and is not applicable in cases where the employees are currently unrepresented. We disagree. The Board's case law clearly establishes that an unrepresented employee who quits because his employment is conditioned on abandonment of statutory rights can be found to have been constructively discharged in violation of the Act. See, e.g., *Swain Mfg.*, 201 NLRB 681, 683 (1973).

[8] See, e.g., *James Julian Inc. of Delaware*, 325 NLRB 1109 (1998).

[9] To establish a Hobson's Choice constructive discharge, the choice "must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork on his part." *ComGeneral Corp.*, 251 NLRB 653, 657–658 (1980), enfd. 684 F.2d 367 (6th Cir. 1982). Contrary to our dissenting colleague, we find that this test has been met. Under the circumstances, Witha's predicament was not left to guesswork or inference. She was told that if she did not improve her "negative attitude" within 4 days she would be terminated. In this case, the judge found, and we agree, that "negative attitude" is equivalent to union support. Thus, in our view, Witha was clearly and unequivocally given the choice of foregoing her union activity or being terminated. Witha understood that choice and resigned to avoid it. We believe the message was loud and clear, and left little to the imagination, that Witha was required to abandon her union support or face termination. See generally *Mayrath Co.*, 132 NLRB 1628, 1630 (1961), enfd. in pertinent part 319 F.2d 424 (7th Cir. 1963) ("reasonable inference" from an employer's ordering employees to take off their union buttons or "leave" was that employees would be discharged if they did not remove their union buttons; employees were given a Hobson's Choice of foregoing their protected right to wear union buttons or being discharged).

[10] The Respondent violated Sec. 8(a)(1) of the Act by threatening employees with adverse employment consequences if they were caught discussing the Union or union-related subjects at the Respondent's facility, and by threatening plant closure and relocation if the employees became unionized.

behalf of the International Brotherhood of Electrical Workers, the Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The Respondent has not violated the Act in any other manner alleged in the complaint.

4. 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.

AMENDED REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, we shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. We shall also order the Respondent, within 14 days from the date of this Order, to offer Suzanne Witha immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed. In addition, we shall order the Respondent to make Witha whole for any loss of earnings and other benefits she may have suffered as a result of the Respondent's discrimination against her from June 19, 1997. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall also order the Respondent, within 14 days from the date of this Order, to remove from its files any reference to the unlawful discharge of Witha; the employee counseling report issued to her on June 19, 1997; and her intended transfer to the day shift on June 23, 1997, and within 3 days thereafter, notify Witha in writing that this has been done and that the discharge, the employee counseling report and the intended transfer to the day shift will not be used against her in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Intercon I (Zercom), Aitkin, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening termination, discharge, reprimand, or any other form of retaliation against employees for discussing union or union-related subjects during company time, and threatening to close the Aitkin facility if the employees selected International Brotherhood of Electrical Workers, or any other labor organization, as their exclusive collective-bargaining representative.

(b) Issuing employee counseling reports to, transferring to another shift, or otherwise discriminating against Suzanne Witha, or any other employee, because of their support and activities, or because of their suspected support and activities, for the labor organization named in subparagraph (a) above, or for any other labor organization.

(c) Causing the constructive discharge of employee Suzanne Witha, or any other employee, because of support for and activities on behalf of the above-named Union or for any other labor organization.

(d) 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 Suzanne Witha full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Suzanne Witha; all copies of and references to the employee counseling report issued to her on June 19, 1997; and the intended transfer of Witha to the day shift on June 23, 1997, and within 3 days thereafter, notify Witha in writing that this has been done and that the discharge, the employee counseling report and the intended transfer will not be used against her in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its Aitkin, Minnesota facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 18, 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,

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

defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at the Aitkin facility at any time since June 17, 1997.

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

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Suzanne Witha and transferring her to the day shift. However, contrary to my colleagues, I find that the Respondent did not constructively discharge Witha in violation of Section 8(a)(3) and (1) of the Act.

I agree with the "traditional" principles concerning a constructive discharge. In those limited situations, the employer, for discriminatory reasons, imposes working conditions that are so difficult or unpleasant as to force an employee to resign. The inference in such cases is that the employer intended the foreseeable consequence of the employee's resignation. In this case, I agree with the judge that Witha was not subjected to working conditions that were so difficult or unpleasant that she was forced to resign.

I also agree with the "Hobson's Choice" theory of constructive discharge *in the narrow circumstance* where the employee is presented with the stark choice of (1) ceasing Section 7 activity and (2) discharge. In such circumstances, I believe that the employee (who wishes to continue with Section 7 activity) need not wait for the discharge. She can resign, and such resignation will be considered a constructive discharge.

However, as stated in *ComGeneral Corp.*, 251 NLRB 653, 657–658 (1980), the Hobson's Choice must be "clear and unequivocal and the employee's predicament not one which is left to inference or guesswork on his part." In the instant case, the choice was less than clear and unequivocal. The employee was told that her choices were (1) improving her work and her "negative attitude" and (2) discharge. The phrase "negative attitude" *may* have been a euphemism for union activity. However, it was not "clearly and unequivocally" such a euphemism. Morever, her work was deficient in at least one respect (doing work pursuant to instructions which she questioned, rather than first checking with the engineer as required). Even if the employee thought that her choice was between foregoing Section 7 activity and discharge, that was only her inference. Under *ComGeneral*, that is not enough to support a constructive discharge.

My colleagues rely on *Mayrath Co.*, 132 NLRB 1628 (1961). The case offers them no support. In that case, the employees were ordered to take off their union buttons or leave employment. The Hobson's Choice was clear and unequivocal. Further, although the Board used the language "reasonable inference in that case," it is clear from the more recent case of *ComGeneral* that the correct test is "clear and unequivocal." In sum it was not "clear and unequivocal" that Witha was faced with the choice of (1) foregoing Section 7 activity and (2) discharge. Accordingly, her resignation was not constructive discharge.

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 threaten you with termination, discharge, reprimand, or any other form of retaliation because you discuss unions or union-related subjects during company time.

WE WILL NOT threaten to close our Aitkin, Minnesota facility, or threaten that it possibly might be closed, if you select the above-named Union, or any other union, as your collective-bargaining representative.

WE WILL NOT issue written warnings to, announce that we intend to transfer to another shift, or otherwise discriminate against employee Suzanne Witha, or any other employee, because of support for, and activities on behalf of, the above-named Union, or any other union, or to discourage other employees from supporting the above-named union or any other union.

WE WILL NOT constructively discharge employee Suzanne Witha, or any other employee, because of their

support for and activities on behalf of the International Brotherhood of Electrical Workers, or any other union.

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 the Board's Order, offer Suzanne Witha full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Suzanne Witha whole, with interest, for any loss of earnings and other benefits she suffered as a result of our discrimination against her.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Suzanne Witha; all copies of and any references to the employee counseling report issued her on June 19, 1997; and the intended transfer of Witha to the day shift on June 23, 1997, and WE WILL, within 3 days thereafter, notify Witha in writing that this has been done and that the discharge, employee counseling report and the intended transfer will not be used against her in any way.

INTERCON I (ZERCOM)

Karen Nygren Wallin, for the General Counsel.
Steven C. Miller (Law Offices of Martin L. Garden), of Minneapolis, Minnesota, for the Respondent.
Mary Harrigan, International Representative, of Lombard, Illinois, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Aitkin, Minnesota, on February 4, 1998. On October 9, 1997,[1] the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on June 24 and amended on September 5, 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

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

This case presents issues of whether unlawful statements had been made to employees on June 17 and 19, in violation of Section 8(a)(1) of the Act. Additionally, it is alleged that, based upon motives unlawful under the Act, one employee had been issued an oral warning on June 17 and, on June 19, received a written warning and a notice of transfer from night to day shift, accompanied by a threat of termination if her performance and attitude did not improve by June 26. Those assertedly unlawful actions, it is further alleged, forced that employee to work under intolerable conditions and led her to conclude that she would inevitably be fired. So, she quit on June 19. The General Counsel argues that, given the circumstances confronting her, that employee either had been constructively discharged or, alternatively, had reasonably anticipated that she would soon be discharged. See *MDI Commercial Services*, 325 NLRB 53–54 (anticipated discharge) and 65 (constructive discharge) (1997).

Those allegations arise within an overall framework of facts which are undisputed and in many instances acknowledged to have occurred. First, at all material times Intercon I (Zercom) (Respondent) has been a Minnesota corporation with an office and place of business in Aitkin, engaged in the contract manufacturing and nonretail sale and distribution of cable and harness assemblies. Respondent admits that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, based on the further admissions that, in conducting the above-described business operations during calendar year 1996, it purchased goods valued in excess of $50,000 which it received at its Aitkin facility directly from points outside of the State of Minnesota and, also, sold goods valued in excess of $50,000 which it shipped from that Aitkin facility directly to points outside of Minnesota.

Second, although the record is not altogether clear about the subject, it seems undisputed that until some point during late 1996 or very early during 1997 Respondent had been owned by a company which has been referred to as CSI. At that point ownership passed to another company, referred to as Nortech. As will be seen in subsection C below, Nortech's attitude toward unions is mentioned during the course of allegedly unlawful statements attributed to Line Leader, Deborah Williams Weimer, an admitted statutory supervisor and agent of Respondent at all material times.[2]

Third, prior to February, Bob Schrieker had been Respondent's Aitkin plant manager. His January 7 performance review of alleged discriminatee, Suzanne Witha is discussed below. On February 10 he was succeeded as plant manager at Aitkin by Ted Youker who remained in that position until the following October, when he was terminated. While serving in

[1] Unless stated otherwise, all dates occurred during 1997.

[2] During June she had been unmarried and her last name was Williams. Afterward, she married, with her last name becoming Weimer. As her surname had been Williams during June and inasmuch as for the most part she was referred to as Williams during the events at issue in the instant proceeding, for clarity she will be referred to as Williams during this decision.

When testifying, Williams characterized her position during June as assistant line leader. But, the answer admitted the allegation that her title had been line leader. The latter is the title which will be utilized here when referring to her position, because an admission in pleadings constitutes a judicial admission which no party is at liberty to later contradict, even through its witnesses. See, e.g., *Soo Line R. Co. v. St. Louis Southwestern Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997).

the position of plant manager, it is admitted, Youker had been a statutory supervisor and agent of Respondent. As will be seen in subsection D below, it is Youker to whom the decision to discipline Witha on June 19 is attributed.

Fourth, several areas—lines one and two, mold room, offices—occupy the Aitkin production floor. All of the complaint's allegations are based on events concerning line one employees. Employees on that line assemble electrical cables. That is accomplished at two rows of seven tables, set back to back so that the two rows are adjoining and employees working at each row face those working at line one's opposite row of tables. Located on the end tables of the rows, facing each other, are testers. They are used to test the sufficiency of electrical cable assemblies performed by line one employees. At one table at the other end of the lines of tables is a stripper. All other tables in both rows are assigned to employees classified as permanent or temporary assemblers. Witha was one such permanent assembler. Williams served as line leader for line one at all times material to events in this proceeding.

Fifth, to understand what occurred during June, it is necessary to describe some aspects of line one electrical cable assembly. Cables of various types are received there for assembly. They must first be prepped, by sliding casings over the ends and cutting back the cables' sleeving to expose ends of the cable wires covered by that sleeving. Those wires are connected and soldered to a connector. Connectors also are of various types. The important point about them, for one defense which is raised, is that a connector must correspond to the casing at the cable end to which that connector is soldered. For example, as illustrated by the photographs which are Respondent's Exhibits 2 and 3, there is a D-sub casing and connector and, in addition, a Hirose casing and connector. Each is so different, as those exhibits reveal, that an experienced assembler should not confuse the two: attach the wrong connector to the wrong cable end.

For each job, the assembler completes one cable connection, referred to as the first article. Using a tester, the assembler ascertains if the connection is open or miswired. If so, the assembler is responsible for correcting the defect. Once the first article tests out, it is taken to the line leader who inspects and signs off on it. Then, it is taken to the plant manager who, if satisfied with it, also signs off on the first article. Succeeding assemblies for that job are then made pursuant to that of the first article.

With respect to materials received by an assembler for a particular job, in addition to parts and a parts list, also received are instructions, called the green bar, and a print or drawings showing how the parts should match once assembled. If there is a discrepancy—parts not included that are shown on the green bar or print, or a green bar that differs in some respect from the supposedly corresponding print—a long-posted instruction directs assemblers not to start the job, but instead to "CALL THE ENGINEER." During June that had been Joe Ranweiler who occupied an office located a few feet from one end of line one.

In practice, apparently, assemblers did not always follow that posted instruction. For example, Line Leader Diane Passig testified that when she had been a line one assembler during June and had discovered a discrepancy between the green bar and supposedly corresponding print, she would stop assembling "and either address a supervisor or an engineer." Similarly, Line Leader Kathy Wiitala testified that, while an assembler, she had, "Stopped the work in process and either gone to the engineer or gone to Deb [Williams] or anyone." And assembler Suetta Banks, a onetime night shift lead, testified, "I usually go to the person who has built the cables before."

Even so, all three of those witnesses acknowledged having seen the posted instruction directing assemblers to go the engineer. More importantly, given the events on June 16, Witha testified, "Well, just if Joe [Ranweiler] was available you would just take it to Joe and if he wasn't then you would, you know, talk to your supervisor and find out what to do from there." As to the latter alternative, however, Witha testified, "I never did. He [Ranweiler] was always there but that was the policy to stop the job."

Sixth, Witha was hired by Respondent as an electrical assembler on October 7, 1996. While she had no experience working with cables, she had over a decade's experience as an electrical assembler, a fact which Youker acknowledged: "Sue obviously had ten or twelve years experience in some manufacturing with electronic assemblies." She was assigned to work on line one.

At that time there was only a day shift for line one employees, from 7 a.m. to 3:30 p.m. Overtime was common, usually for an hour or an hour-and-a-half, though sometimes for as much as 2 hours. Ordinarily, overtime was worked before 7 a.m., but sometimes it was worked after 3:30 and occasionally both before 7 a.m. and after 3:30 p.m.

During November 1996 Respondent began assigning then-line one assembler Banks to work, in effect, a night shift. Initially, she worked by herself. But, by June 2, two other line one assemblers had been added: Becky Steele and, on June 1 or 2, Suzanne Witha. By then night shift was scheduled for 3:30 p.m. to midnight, though overtime before or after those hours, sometimes both, was common.

The evidence concerning Witha's performance history does not all point in a single direction. In her probationary performance review of January 7, then-Plant Manager Schrieker gave Witha excellent ratings in the majority of performance categories and satisfactory ratings in all others. On the evaluation he wrote that Witha brought "prior knowledge and leadership skills from prior employers," and "fit in well with the team and constantly strives to meet our quality and std [?] requirements." On February 13 Williams prepared a performance review for Witha. On it Williams wrote that Witha "needs to find a happy medium between speed and accuracy," but listed Witha's strengths as "fast learner, good problem solver, very easy to work with."

Beyond that, Williams never contradicted Witha's testimony that, when presenting the February 13 evaluation, Williams had said that Witha "was like the cream of the crop. I was always willing to do any jobs that——job that was given to me. I was always on time, never cutting it to the wire, ready to start work. My appearance was always good. Friendly," and that "she would have gave [sic] me an excellent but Ted did not believe in giving an excellent review because that left no room for im-

provement." Indeed, Youker characterized Witha as "a fantastic employee" whom he had recommended "to be a supervisor for nights, to be considered for one of those positions."

On the other hand, Williams claimed generally, "Whenever we had a problem and tried to show Sue her errors we were——like I said before we were met with arguments and a lot of hostility." Asked to provide examples, however, Williams testified, "I can't give you a specific example other than it was an ongoing——it was an ongoing issue." The best she could muster was an order for which Witha had closed back shells on June 11, in the process smashing wires inside the shells which, in turn, caused shorts when tested. Yet, when she described her conversation with Witha about that job, Williams testified that Witha had said only "I couldn't have possibly have done that." Williams provided no testimony showing with particularity that, in the course of discussing that mistake, Witha had displayed "hostility," nor that Witha had begun arguing. It should not escape notice, nonetheless, that day-shift assembler Terry Krumm, a witness called by the General Counsel, did testify to having overheard Williams criticize the quality and quantity of Witha's work, a couple of weeks before the latter left on June 19. Still, neither Krumm nor any other witness corroborated Williams' assertions about Witha being argumentative and becoming hostile when her performance had been criticized prior to June 17.

Seventh, in addition to her transfer to night shift, a parallel sequence of events involving Witha began unfolding on June 1. She contacted International Brotherhood of Electrical Workers (the Union), an admitted labor organization within the meaning of Section 2(5) of the Act. International Representative Mary Harrigan suggested that Witha contact coworkers to ascertain the extent of their interest in representation by the Union. Witha testified, "I started asking employees what their interest would be" in becoming represented by the Union.

Quite sketchy is the evidence regarding Witha's contacts with Respondent's other employees. She testified that she had spoken with "[a]bout fifteen" people and had done so "[k]ind of all over," in "their area," during "the beginning of June some time." However, Witha never described with specificity what had been said during her encounters with any of those approximately 15 coworkers. Nor did she identify any one of the employees to whom she had spoken. No other employee testified having been approached by Witha concerning the Union. Nevertheless, as discussed further in subsection C below, Williams admitted that by June 17 she had been made aware, by an employee, that talk about a Union was taking place at the Aitkin facility.

There is no direct evidence that Witha's name had been mentioned to Williams, nor to any other supervisor, in connection with the union activity at Aitkin. Still, there is no evidence that any employee other than Witha had been approaching coworkers about their possible interest in union representation. That is, while other employees may have been discussing among themselves what had been said to them by Witha, there is no evidence that any other employee also had undertaken to inquire of coworkers about their interest in becoming represented. So far as the record shows, only Witha had been making such inquiries among Respondent's employees prior to June 19.

Against that background occurred the events of June 16 through 19. When she reported for night-shift work on June 16 Witha was assigned responsibility for completing assembly of D-sub casings and remaining prep work on 75 cables, after which she was to wire and solder that end of those cables to their D-sub connectors. It is undisputed that no heat shrink, for covering wires exposed after soldering, had been among the parts supplied for that job. Nor was heat shrink required in the green bar for that job. Witha testified that she felt heat shrink was necessary and that she stopped the job to ask Williams about its omission, but the latter told her to do the job pursuant to the green bar's instructions. Witha never claimed that, pursuant to the fifth above-enumerated point, she had tried to contact Engineer Ranweiler about the omitted heat shrink, though it is not disputed that he had been present when Witha had started the job.

Witha finished the 75 cables during her night shift on June 16. Williams testified that, after arriving for work on June 17, she learned not only that no heat shrink had been applied to the D-sub exposed wires on the cables, but that connectors had been soldered to the wrong ends of approximately 20 cables. Exploration during the hearing was conducted as to whether some other employee could have made such incorrect assemblies. However, that exploration yielded no viable alternative employee to with a—assuming that misconnections had been made, in fact.

Of course, Witha would not arrive for work on June 17 until the night shift was scheduled to commence work at 3:30 p.m. Before then, during the morning, Williams admittedly addressed the day-shift line one employees about the Union, as described in subsection C below, making statements which allegedly violated the Act. Once she arrived for work, Witha was chewed out by Williams about the June 16 cable work. After that, Williams spoke to the three line one night-shift employees about the Union, again making allegedly unlawful statements.

Witha acknowledged having been upset and angered at being accused of misperformance, given that she had questioned Williams on June 16 about the omitted heat shrink. As described in subsection C below, Witha spoke about the subject on June 17 with another line leader, with Engineer Ranweiler and with Plant Manager Youker. The next day she telephoned Youker to say that she would not be reporting for work because she was sick. After receiving that call, Youker reached a decision to issue a written warning to Witha and, in addition, to transfer her to day shift from June 23 through 26, assertedly for further training.

During her day shift on June 19, then-line one assembler Passig was summoned to Youker's office and issued a verbal warning for, according to Passig, "my attitude and my big mouth and my performance as an assembler." It is undisputed that, in the course of issuing that warning to her, Youker told Passig that discussing union on company time would be grounds for termination, a threat alleged to have violated Section 8(a)(1) of the Act.

When Witha arrived for work that afternoon, she was ushered into Youker's office where she was issued the written warning and informed of her transfer to day shift on the follow-

ing Monday. "Poor work quality and negative attitude" are recited on the warning as "the problem." Written in the "Supervisor Comments:" portion is, "Work quality and her poor attitude cause a negative affect on the rest of the plant." "Employee will go back on the day shift and her work and attitude must improve immediately," the warning states, under "Expected improvement and/or standards for the future," with Witha's "Next Review" listed to occur on "6/27/97." After "Next action if employee does not meet the improvement/standards required:" is written, "Termination."

Following that meeting Witha returned to work. As described further in subsection D below, at 5 p.m. she left work, writing on her daily time report the single word, "Done." She made no further effort to contact Respondent; it made no further effort to contact her about continuing to work for it.

B. Work Performed by Witha on June 16

As mentioned in the preceding subsection, when Witha arrived for work on June 16 she was assigned 75 cables which she was to prep and on which she was to assemble the D-sub connectors. By then, that work had already been started by day-shift part-time assembler Rose Blakesley to fill out her workday. Blakesley had finished a few of the cables.

When she began examining the job, Witha testified that she discovered that no heat shrink had been included to cover wires left exposed after the D-sub connectors had been soldered to the cables. She further testified that no heat shrink was required on those wires by either the job's green bar or print, though it was required and included for the connectors' pins. It is undisputed that heat shrink is not always required to cover exposed wires on some projects. Nonetheless, Witha felt that she should stop the job and verify that heat shrink should not be applied over the wires exposed after the D-subs were soldered to the cables.

Despite the outstanding instruction to bring such problems to Engineer Ranweiler, who still was present at the Aitkin facility that afternoon, Witha testified that she spoke with Line Leader Williams about the heat shrink. As a line leader, Williams possessed no authority to make changes to green bars, prints and parts lists; only Ranweiler possessed that authority.

During later conversations, Williams would claim that she had no recollection of being spoken to by Witha on June 16 about the heat shrink. Witha testified that she had asked Williams about it and that Williams had said it "wasn't necessary." That testimony by Witha was corroborated by day-shift assembler Mona McCarthy, who was still at the facility finishing out her shift that day on line one. McCarthy testified that she had overheard Williams telling Witha, "'Well, if it's not in the green bar then don't deviate from it,' more or less." More importantly, asked, based obviously upon information later conveyed to him about the incident, if Witha had gone to her supervisor about the heat shrink, Plant Manager Youker answered, "Yes, she did."

Witha testified that, notwithstanding the direction she had received from Williams, she remained concerned about the absence of heat shrink on the wires which would be exposed. She inspected the few D-sub connections which Blakesley had completed before leaving, discovering that Blakesley had put heat shrink over those wires on the cables which she had completed. Witha then conferred with Banks about the subject. Both women testified that Witha asked what Banks thought should be done and, testified Banks, "I said 'If it's not in the green bar don't put it on.'" Thereafter, Witha completed work on the D-sub ends of the 75 cables, without applying heat shrink to the wires left exposed on them.

Next morning Williams took the rack of those cables to Blakesley for completion. At that point the lack of heat shrink was discovered. However, Respondent effectively concedes that its absence had not been inconsistent with the green bar's instructions. Engineer Ranweiler admitted that he had later added heat shrink for those wires to the green bar for those cables. Thus, had absence of heat shrink been the only asserted deficiency in Witha's June 16 work, there would be ample basis for concluding that she had been responsible for no more than having failed to check on June 16 with Ranweiler. But, Respondent contends that there was a second problem with some of the cables assembled by Witha on June 16.

Both Williams and Blakesley testified to discovering on the morning of June 17 that D-sub connectors had been soldered to the opposite ends of the cables – to the ones for Hirose connectors. That is a serious mistake in two respects. First, as pointed out in subsection A, above, such a misconnection is so obvious that it should never be made or overlooked by an experienced assembler. Indeed, Witha admitted as much. Second, correction of such a mistake is time-consuming, requiring that the connectors be taken off, the solder be cleaned out of those connectors, the wires be re-tinned, and the connectors then reassembled correctly.

Witha never denied specifically having assembled D-sub connectors to Hirose ends of cables on June 16. On the other hand, she did deny that there had been anything wrong with those cables other than the lack of heat shrink applied to exposed wires at the cables' D-sub ends. As pointed out in subsection A above, to buttress Witha's general denial the General Counsel pursued essentially two avenues. First, assuming arguendo that some wrong connections had been made, the General Counsel raised the possibility that an employee other than Witha might have done so. But, no such conclusion is tenable in light of the evidence presented.

Witha acknowledged having worked on all of the cables, save the few which Blakesley had completed before having left work on June 16. Beyond that, the record suggests no one else who could have worked on those cables prior to June 17—no alternative worker is suggested by the evidence. All else aside, there is no basis for inferring that Blakesley's few assemblies might have been performed incorrectly. As pointed out above, Witha testified that she had inspected Blakesley's assemblies, to ascertain if heat shrink had been applied to them. Had Blakesley assembled connectors to those cables' wrong ends, surely that would have been noticed by so experienced an electrical assembler as Witha. Yet, Witha never claimed that she had observed any incorrect work when she examined the work which Blakesley had performed.

The second avenue proved somewhat more fruitful for the General Counsel. Essentially, the argument proceeds, there had been no misassemblies whatsoever, but instead Respondent had

created that assertion out of whole cloth, to provide a seemingly legitimate reason for having disciplined Witha, thereby disguising its true motivation which had been unlawful. In fact, there is a basis for such an argument, given the evidence of work which actually was performed on those cables during day shift on June 17.

It must be remembered that Hirose connectors had to be assembled to those cables on June 17, inasmuch as Witha had been assigned assembly only of the D-subs. So, completion of those cables' assembly was going to be, and was, required on June 17, regardless of the work performed by Witha during the preceding night shift. Based on the testimony, four people were identified as having worked on those 75 cables during day shift on June 17: Blakesley, Williams, Diane Passig, and Kathy Wiitala. Only Blakesley claimed to have removed D-sub connectors from the cables' Hirose ends. Williams testified that she and Blakesley had assembled the cables' Hirose ends, but made no mention of having been involved in removing D-sub connectors from Hirose cable ends.

Williams did testify that she had first brought the cables to Blakesley and Passig for completion on June 17, after which the lack of heat shrink and asserted misassemblies had been discovered. But, when questioned about the work which she had performed on those cables on June 17, Passig testified that the only corrections which she had made to them had been "to put heat shrink on a string on a drain wire." After that, testified Passig, "we also finished closing the cables." Interestingly, Passig referred to "the job that myself and Kathy Wiitala had done that day," but made no mention of Blakesley having worked on those cables during day shift on June 17. Wiitala never claimed that she had needed to reverse connectors on cables on which she worked on June 17.

C. Conversations on June 17

Both Williams and Youker testified that the former had reported to the latter during the day shift on June 17 about the cables on which Witha had worked. Yet, their accounts of that conversation were not always consistent. Youker testified that he had been told by Williams, "That they had been wired backwards basically, that the D sub was on the Hirose end, the Hirose end was on the D sub end, and that there was a problem with the heat shrink." Williams advanced a more generalized description of her remarks to Youker: "Well, I told him what we had come into, that this had been a problem that we had had. Well, the second morning we had come into rework because, you know, a couple days before that we had come into smashed wires on D subs and this time it was—you know, it was a pretty big—pretty big mistake." Williams further testified that it was decided that "we'll talk to her when she came in and point it out to her and that would . . . probably be that," but Youker testified, "at that time I wanted to talk with Sue about the problem."

Before any conversation with With a—whether between her and Youker, only, or with both Youker and Williams—could occur on June 17, conversations occurred with respect to another subject. Williams testified that she had been approached, she did not specify when, by day-shift assembler Joanne Ostriech, who expressed concern "about how much more money was going to be taken out of her paycheck if we were unionized." Williams was not asked to describe that conversation in any greater detail; Ostriech was not called as a witness to explain what she had said to Williams about the Union.

"I didn't feel [the employees] were getting the full story and—I mean from a background of 37 years with family members that were in the union I wanted them to understand that it wasn't going to be—I don't think it was [what they] thought it was going to be," testified Williams and so, "I wanted them to know that one of the things to watch out for was chances of the company closing, that they were under no obligation to stay there whether we got a union in there or not, and also to let them know that talking about it on company time was not permitted." Threats of closure and of retaliation for discussing the Union on company time are unlawful statements alleged to have been made by Williams to employees on June 17.

Day-shift line one employees were assembled by Williams following Respondent's morning shipper—i.e., supervisors—meeting. Passig testified that Williams had said, "Ted had gotten wind that there was talk of a union,"[3] after which Williams had warned that such talk "wouldn't be tolerated, that Nortech wouldn't hear of it and if we were caught discussing it on company time that we'd be terminated." Wiitala testified that she did not recall the exact words used by Williams on June 17, but that the latter had mentioned "reports that there had been some people talking to union officials about possibly getting a union to come in," and that "if we were found out who was talking to the union there would be a possibility of some reprimanding being done," though Wiitala was not certain whether Williams had mentioned loss of jobs for doing so. Wiitala also testified that Williams had said "that Nortech frowned on unions and that there would be a possibility they could close our plant if a union should come in." But, when it was pointed out that in her prehearing affidavit she had stated that she did not recall if Williams had said anything about the plant closing or moving if the Union came in, Wiitala answered, "No, I don't think she said anything about it closing." Of course, as quoted above, Williams admitted that possible plant closing had been one message that she had wanted to communicate to line one employees, in the course of talking to them about the Union.

Part-time assembler Krumm gave testimony about a series of ongoing remarks by Williams concerning the consequences of unionization. Williams disputed none of that testimony by Krumm. As to what had been said on June 17, Krumm recalled only that Williams had said, "That someone had been talking about a union and that it wasn't allowed on company property

[3] Passig admitted that her prehearing affidavit's description of Williams's statements made no mention of conveying a message from Youker, nor of having gotten instructions from him. Nevertheless, the affidavit's account was neither read into the record nor was the affidavit offered as an exhibit. Accordingly, it is not possible to conclude that Passig's affidavit account did not recite that Williams had said "Ted had gotten wind that there was talk of a union." Williams denied that, before Witha had left on June 19, she had been instructed by anyone in management to talk to employees about the Union. But, she did not deny having told employees that Youker had said that he "had gotten wind that there was talk of a union."

or on company time." Over the next week or two, as Williams and the employees worked on line one, Krumm testified that Williams had warned that there would be reprimands for anyone caught talking to union officials and "that maybe Nortech wouldn't want a union there, that they could just move it someplace else. Shut the plant down and move."

Witha testified that when she arrived for work on June 17 an "angry" Williams had accused her (Witha) of having done "all the cables wrong." According to Witha, she replied that she had asked Williams about those cables, but Williams retorted "that I didn't and that she didn't want to . . . come in to a bunch of rework." These are the remarks upon which the General Counsel bases the allegation of unlawfully motivated oral warning.

Williams agreed that she had broached the previous night's cable work when Witha reported for work on June 17: "I recall telling her that this was like the second or third day we had had to come in and do rework on . . . jobs that had been done the night before and the problem we had with this one was, you know, it took several hours to correct and put us behind for the day." Interestingly, when asked specifically, Williams testified that she had told Witha that the problem was not just the omitted heat shrink and, further, when asked specifically if she had told Witha about putting the connections on wrong cable ends, Williams responded, "Yes, I did." Yet, in her narrative description of this conversation, Williams advanced no spontaneous description of having said anything to Witha about D-sub connectors having been assembled on the Hirose cable ends nor, for that matter, the reverse.

Asked about Witha's response to what had been said to her, Williams testified, "Well, her immediate response was she had asked me the question about the heat shrink which I absolutely did not recall her asking me, and from there it just got hostile and argumentative." There is no basis for concluding that Williams had not been afforded an opportunity to describe any statements about purported criticism about connectors being put on the wrong cable ends. She was asked specifically if Witha had denied having done that. But, Williams sidestepped a direct answer to that question: "Well, she was the one who had worked on the job up to, you know, that point."

Beyond the substance of what had been said by the two women, there can be no question that their conversation did evolve into an argument. Banks observed it. She testified, "It was quite obvious, quite loud." Passig, still at work when Witha had arrived that day, testified that some of that conversation had been conducted in normal conversational tone, but part of the time it had been, "A little loud I suppose."

After her exchange with Williams, Witha started to work. But a few minutes later she was included in a conversation between Williams and the three night-shift line one assemblers. Witha testified that Williams said "there was [sic] rumors of a union, of union activity, and that if we want a union that's fine to do it on our own time but any union discussion during company time would be grounds for immediate dismissal, and that if a union were to come in within six months nobody would have a job." Similarly, Banks testified that Williams "said that there were rumors that we were talking about union in the plant and that if it was continued that the people talking would be terminated and that the plant would close and leave the area"—that "they'd move to a different area."

Over the course of the remainder of that afternoon Witha spoke with three officials regarding her work on June 16. She spoke about it with Line Leader Kathy Laughlin. It is undisputed that Laughlin agreed that Witha had followed the green bar by not applying heat shrink to the D-sub cable ends' exposed wires and, also, agreed that Williams made derogatory remarks about and showed no respect for the employees. It also is undisputed that, during that latter discussion, Witha had characterized Williams as a "rotten c--t." However, neither Youker nor Williams testified that Laughlin had reported that remark by Witha. And there is no other evidence which would supply a basis for concluding that either Williams or, more importantly in view of his decision-making role, Youker had knowledge as of June 19 that Witha had so characterized Williams to Laughlin.

Witha also engaged Engineer Ranweiler in a discussion of her D-sub cable assemblies. Both testified that she had reported that she had assembled the cable ends as provided by the green bar. Ranweiler acknowledged that the heat shrink had been "the only issue that she brought to me." Not surprisingly, given posted instructions described in subsection A above, it is uncontroverted that Ranweiler had asked why Witha had not gotten the job "signed off" with him, as she did with other jobs. There is no evidence concerning what, if any, reply Witha had made to that question.

It also is uncontradicted that Witha complained to Ranweiler about Williams as a supervisor. Pointing out that she had questioned Williams about the heat shrink, Witha stated that Williams was "a bad line leader" and was "not answering a question properly or whatever," as Ranweiler put it. However, although he described generally that Witha had been "very upset and irritated at," and seemed to be "trying to get me to side with her to basically be against," Williams, as well as "just upset at Debbie and wanting to let me know that," Ranweiler never attributed to Witha any derogatory remark about Williams, such as the above-mentioned one which Witha had made to Laughlin about Williams.

Significantly, Ranweiler testified that, during his conversation with Witha, "My only objective was to—if it was incorrect and wasn't correct on the green bar was to get it added on to there. So that in future jobs that it was very clear that that heat shrink needed to be on there." In fact, as pointed out in subsection B, above, Ranweiler acknowledged that he subsequently had made that correction to the green bar for that job.

The final official with whom Witha spoke on June 17 had been Plant Manager Youker. Their conversation occurred at the facility's copier. Each testified to having wanted to speak to the other. As will be seen, however, Youker's explanation for wanting to speak with Witha encountered heavy going in view of the overall evidence presented by the record.

Witha testified that she had approached Youker. "This is bullshit," she testified that she had told him, "because I kind of got reamed out in front of everybody, and that there was nothing on the parts list, nothing on the print, nothing in the instructions, and that I had questioned this beforehand," after which he had asked if she wanted to "get together with Deb and discuss

it" in his office. To that question, she testified that she had replied, "We've already discussed it and I know what her position is. She is saying that I never asked so I really don't see any point in it."

Actually, Youker did not contradict Witha's description of their conversation at the copier. During cross-examination, he acknowledged that she had begun the conversation by bringing up the heat shrink problem. Witha "expressed to me that Deb had not been clear on the heat shrink on the cables and we discussed that," he agreed. During direct examination, Youker provided a fairly complete narrative description of the heat shrink problem. But, during that description, he made no mention of D-sub and Hirose cable ends. Asked specifically if he had "talked to" Witha about that, Youker responded, with some seeming uncertainty, "we—yeah, we mentioned that," and, in response to a followup specific question, "She didn't really deny it, no." But, in contrast to his narrative account of what had been said about the heat shrink, Youker advanced no like description of what assertedly had been "mentioned" at the copier about D-subs and Hiroses. As it turns out, that is not the only problem for Respondent revealed by examination of Youker's testimony concerning his conversation with Witha at the copier.

First, in the course of explaining why he had wanted to talk to Witha at the copier, Youker actually minimized whatever mistakes might have occurred on the 75 cables. Thus, he testified that he had been "concerned about the fact that we had a problem with quality and the fact that we had to take our key cable assemblers" and assign them to rework at the expense of "losing production in another area." But, testified Youker, that had not been his main concern: "this was such a small incident, such a small issue," and, further, "as I said this was not a big issue to me. We were going to talk this out and be done with it so I assumed the next day we could just rationally talk this thing out and have it done." In fact, the evidence shows that mistakes are not all that uncommon on work performed by Respondent's Aitkin assemblers.

Second, as of June 17, testified Youker, his biggest concern about Witha had been her purported negative or bad attitude: "it sounded like Sue was starting a lot of fires in different places so I said I'm just going to go up and talk with her and iron this thing out. So I went out to the copy machine to make—." Then, Youker testified, "I wanted to discuss the problems with her attitude at that time," but Witha appeared "very agitated. Very abrupt. Her body language told me right away that she was not in a state to be really pressured or talked to so I just thought to myself the best thing I can do at this point is to let her cool off and I'll pull her in tomorrow. We'll have a discussion." Yet, "attitude," as opposed to quality of work, turned out to be a difficult criticism for Youker to support, as discussed in the following points.

Third, Youker testified that his concern about Witha's supposed negative or bad attitude had arisen, in part, because of what had assertedly been reported to him when "a couple of people [came] in and [said] there was a lot of friction going on on the line," identifying those people as Diane Passig, Becky Steele and "another employee also and I don't recall who that was but I remember there were three employees." Indeed, as his testimony progressed, Youker appeared to be trying to fortify the significance of what employees purportedly had reported: "The fact was [Witha] caused much turmoil in the plant," and Witha "decided that she was going to undermine the authority of her line leader." Yet, Williams never corroborated that assertion. Although she complained about Witha's assertedly hostile and argumentative conduct, Williams never claimed that she felt that Witha had been attempting to undermine her authority as line leader. Nor did Williams testify that she had ever discussed such a possibility with Youker.

Beyond that, Passig appeared as a witness. But, she never corroborated Youker's account of her having complained to him about Witha causing "a lot of friction" on line one. Nor did Passig testify that, in fact, Witha ever had done so. Moreover, neither Steele nor any other employee appeared and gave testimony either about Witha having engaged in such misconduct or about having complained to Youker about it.

Fourth, in the course of describing events which had led him to want to talk with Witha, and about his copier conversation with her, Youker testified, "I talked to Joe Ranweiler" who purportedly reported, "That Sue had come in to him basically not so much discussing the cable problem but complained more about Deb than anything else." Of course, as described above, that was pretty much what Ranweiler did testify had occurred when Witha had spoken to him on June 17. The difficulty which that conversation poses for Youker's descriptions of events which had led him to want to talk to Witha that afternoon, at the copier, is that Witha had not reported for work on June 17 until 3:30 p.m. and Ranweiler testified that he had reported her remarks to Youker when the two men "went to lunch," at which luncheon discussion Ranweiler testified that he had described for Youker what Witha had said "the day before." To be sure, Ranweiler almost immediately expressed some uncertainty about whether it had been "the day before." Nonetheless, Youker and Ranweiler's luncheon conversation could not have occurred on June 17, inasmuch as Witha had not arrived for work that day until after lunch. Therefore, Youker could not have been relying upon anything said to him by Ranweiler, as Youker claimed he had been, when he (Youker) spoke with Witha at the copier.

Finally, as his testimony progressed, Youker began to add to his accusations against Witha. After having complained about her attitude toward Williams, toward being criticized, and toward proper maintenance of order in the Aitkin facility, Youker abruptly threw in, during cross-examination, that Witha had been "throwing stuff around." Challenged regarding that abruptly injected complaint about Witha, Youker claimed that she had thrown around, "Cables, you know, like picking a cable up here and just tossing it like this and doing her work and just, you know, really being—." Youker did not claim that he had seen Witha do that. Nor did he claim that Williams or any other line leader had reported having seen Witha throwing around cables. Instead, Youker testified that he had learned from "other employees" that Witha had been doing that. But, he never identified any one of those "other employees." Not one employee appeared as a witness and testified to having seen Witha "throwing stuff around," nor to having seen her "tossing" around cables.

D. Events of June 18 and 19

Youker testified that no decision to discipline Witha had been made by him when he had spoken to her at the copier on June 17. In fact, he claimed that, "Everything would have stopped if Sue and I could have spoke[n] that day at the copy machine. We would not have pursued anything any further. I'm sure we could have ironed everything out then." Of course, he admittedly had not said anything to Witha about purported attitude problems at the copier. But, he blamed on Witha that failure to have done so: "That didn't take place because of her hostility and you just couldn't communicate with her or this whole thing could have been avoided and Sue would have still been with the company." Furthermore, Youker did not claim that, even after that conversation, he had made any decision on June 17 to discipline Witha: "I just thought to myself the best thing I can do at this point is to let her cool off and I'll pull her in tomorrow. We'll have a discussion."

Williams, however, claimed that "the next morning when I came in it had been determined that they were going to have a disciplinary meeting with her [Witha]." There can be no question about the fact that Williams was referring in that testimony to Wednesday, June 18. As discussed below, Witha did not report for work that afternoon. And with respect to that asserted disciplinary decision, Williams testified, "We were going to have it the 18th but she didn't come to work."

Youker did not advance any testimony about having made such a disciplinary decision so early as by the morning of June 18. As mentioned in the preceding subsection, he and Ranweiler had lunch. By then, Ranweiler testified, he had spoken with Williams. When he asked her "what was the problems" with the cables worked on by Witha on June 16, he claimed that Williams had responded only that "a certain number of these cables had been soldered with the D sub end on the end that had the Hirose back shell already on it as in Exhibit R-3." Interestingly, while he made no mention of Williams having said anything about the missing heat shrink when he had asked her "what was the problems," Ranweiler did testify, "I don't remember at that point if we went and changed the green bar at that time to reflect the proper—that's what we do."

When he later that day had lunch with Youker, Ranweiler testified, "discussions at that point came up as far as what had happened, how hostile and irritated or agitated or whatever like that the day before" With assertedly had been: "Sue was talking about Debbie and we discussed that at that time, and about the issue of which end the D sub went on and also briefly the issue of the heat shrink," testified Ranweiler. Youker testified only that Ranweiler had said, "That Sue had come in to him basically not so much discussing the cable problem but complained more about Deb than anything else"—about, "Being treated unfairly and just, you know, that she was being unreasonable and she just tried to explain the problem and that that didn't happen and that was basically it." In recounting his luncheon conversation with Ranweiler, Youker once more made no spontaneous reference to having discussed "the issue of which end the D sub went on." Moreover, though not involved in disciplinary decisions or supervision of employees, Ranweiler testified, Ted may have mentioned that he was going to speak to her." As a result, both Youker and Ranweiler portrayed the situation as more investigatory than disciplinary by the time of lunch on June 18, notwithstanding the testimony by Williams that a disciplinary decision already had been made by the morning of June 18.

Youker appeared to be testifying that his decision to discipline Witha did not occur until that afternoon when she telephoned him to give notice that she would not be reporting for work on June 18. That call occurred before Witha was scheduled to report at 3:30 p.m. "I was upset and I didn't feel well," she testified, so she called Youker and "told him that I didn't feel well and that I would not be in today and there was a pause and he said 'Okay' and I said 'Okay'. I said 'goodbye' and hung up."

Youker testified that when called by Witha on June 18, she "was very short, very abrupt with me on the phone, said 'I'm not coming in.' I said 'Okay. Why?' She says 'I don't feel good' and basically she hung up the phone so I didn't get a chance to speak with her at all that day other than that very brief fifteen second conversation." Yet, cross-examination led Youker to concede that employees ordinarily report in such calls only that they are sick and that is about the extent of such conversations. "No normally, no," he testified, do employees explain why they are sick and why they are calling; only "[s]ometimes they will" do so, he acknowledged.

Nevertheless, Youker testified that after Witha's call, "at that point it became clear that there was more going on with her attitude because she hadn't cooled off at all after all night to think about it so I decided then that we needed to do something because the other employees—my concern with this as a production manager is that it affects all other people in the plant and my main concern is that production goes out the door." He added, "I can't have that affected so I needed to nip that in the bud because I was in fear that she was undermining the authority of our supervisor and myself with that so I needed to take care of it right away. So we decided upon the formal written statement."

Youker never explained who "we" had been—certainly not Williams, as she denied having been involved in making the decision to issue the written warning to Witha: "I was not in a position to really do that at that time." Furthermore, Youker never did explain with particularity how Witha's sick call would adversely affect production of other employees at the Aitkin facility, nor how such a call would undermine supervision there. Certainly there is neither contention nor evidence that sick calls are extraordinary events at Respondent's Aitkin facility, nor that they sometimes display to coworkers an attitude detrimental to production and plant discipline.

As described in subsection A, above, Witha received the written warning and was notified of the transfer to day shift at a meeting during the afternoon of June 19. Before that happened that day, however, another disciplinary action was taken by Respondent that day. It is alleged that, in the course of doing so, a statement was made which violated Section 8(a)(1) of the Act.

Shortly after noon on June 19, assembler Passig was summoned by Williams to Youker's office. With Youker present, Williams said that Passig had displayed a bad attitude by "[g]rumbling about wages" and "that the new people were sick

of hearing me in the lunchroom." After Williams finished her remarks, Youker said that Passig "could consider that a verbal warning," and that she could improve her attitude, Passig testified, "Basically by keeping my mouth shut." Someone brought up the Union and, Passig testified, without dispute, Youker "brought out a legal book and said that, you know, it was against the law to discuss union on company time, that it would be grounds for termination."

Passig then said that in view of what had been said to her, she felt that she wanted a transfer to a line supervised by a line leader other than Williams, or else she (Passig) would quit. After brief discussion between themselves, Youker and Williams agreed to Passig's request and, shortly afterward that same afternoon, Passig was transferred.[4]

Turning back to Witha, shortly after she began work on June 19 she also was summoned to Youker's office where she was read, line-by-line, and issued a copy of the written warning and, in addition, was told that she would be transferred on Monday, June 24 to day shift where she would be working until reviewed on Thursday, June 27 and could be terminated if that review did not reveal improvement in her work and attitude. Those facts are not disputed. Others warrant closer inspection.

Consistent with Youker's testimony about whatever mistakes made on June 16 being "such a small incident, such a small issue," as described in subsection C above, both Youker and Williams testified that the subject of Witha's performance had occupied but a small portion of the June 19 disciplinary meeting. "No, not a great deal" of time, Youker testified, had been spent discussing Witha's performance. Similarly, while Williams testified that Witha was told "we seemed to have problems with her quality," Williams further testified, "I guess the biggest problem about it was when approached with different issues as far as quality was concerned it was always met with a hostile argumentative response," such as, "It wasn't her fault. None of these things were ever her fault. It was someone else's fault." Indeed, asked to explain the very purpose of the written warning, Williams conceded that it had only been "in small part her work because of the mistakes."

If Witha's attitude truly had been Respondent's concern, that leads naturally to evaluation of a second consideration. Both Williams and Youker claimed that the transfer to day shift had been to provide further training for Witha. "Training," of course, can be a nice generality, susceptible of being advanced to provide a legitimate shield for what, in reality, is a concealed sword of retaliatory action because of union activity. Once that shield is pushed aside here, it is difficult to understand exactly how further training might improve asserted employee recalcitrance. Respondent presented no evidence whatsoever that its training encompassed, or ever had encompassed, attitude improvement. So far as the evidence discloses, training supplied no more for Respondent's employees than opportunity to become more proficient in job performance. Respondent was not concerned with Witha's job performance; it claimed that it had been her hostility, abruptness, argumentativeness which supposedly had given rise to concern. There is simply no evidence that ongoing training, as supplied by Respondent, would address those purported concerns.

Witha denied that any explanation had been provided to her during the June 19 meeting as to what was meant by poor attitude. She also denied having been told what she could do to improve her attitude nor, for that matter, her performance. When Williams was asked what explanation had been given to Witha as to why training was being imposed, Williams sidestepped a direct answer, responding first, "Well, I believe that's why we were going to bring her back," and, then, "As far as I recall she was told she was going to come back for training and evaluation and that was why we wanted her back during the day." Youker, to whom Williams attributed those remarks, as well as the decision to transfer Witha to day shift, never really explained precisely how he felt that further training might improve Witha's attitude.

Before he left work that day, Youker testified, he had gone to where Witha had resumed work on line one, at about 4 p.m., and, observing that she was upset and angry, assured her that it was not "a big deal" and "that we can work through this". Witha denied that such a conversation had occurred. No other assembler working on line one that day at 4 o'clock corroborated Youker's testimony: testified to having seen him approach and speak to Witha. To the contrary, Wiitala testified that she had worked until approximately 4:30 p.m. on June 19, but had no recollection of seeing Youker approach Witha on line one, after having seen the latter return from Youker's office. Even more certain was night shift assembler Banks. "No," she answered firmly, when asked if Youker had spoken

[4] As pointed out above, the complaint alleges that Youker had unlawfully threatened Passig during the June 19 meeting. After direct examination of Passig had been completed, the General Counsel suddenly moved to amend the complaint to allege that the verbal warning issued to her had been unlawfully motivated, in violation of Sec. 8(a)(3) and (1) of the Act. I denied that motion.

By February 4, 1998, the date of the hearing, more than 6 months had passed since the verbal warning had issued to Passig. True, the charge underlying the complaint alleged violation of Sec. 8(a)(3) of the Act. But it did so only with respect to "a constructive discharge [of] employee Sue Witha." Obviously, the Government knew, or should have known, about the verbal warning to Passig when the complaint issued on October 9. After all, it had issued to her during the course of a meeting in which, it is alleged specifically, Youker had made an assertedly unlawful remark to Passig. Beyond that, Passig's testimony about that meeting was elicited by the General Counsel during direct examination, not by Respondent. Cf., *Pincus Elevator & Electric Co.*, 308 NLRB 684 (1992). Consequently, there is no basis for inferring that issuance of that verbal warning to Passig somehow came as a surprise to the General Counsel at the hearing. To the contrary, it is fair to conclude that the Government knew about it before the hearing had commenced. Yet, when preliminary motions were invited after the hearing commenced, no motion to amend the complaint was made at that time. Nor, so far as the record discloses, was Respondent's counsel given any notice prior to the hearing that there was a possibility that an amendment might be made to the complaint.

The Board traditionally allows complaint amendments during hearings. See, e.g., *Performance Friction Corp.*, 319 NLRB 859 (1995). That is normally allowed, however, when unexpected evidence is adduced. Unexpectedness cannot be said to have existed here. Simple fairness dictates that respondents be informed off all alleged unlawful conduct at the earliest point possible, so that they are able to marshal all evidence needed to present a complete defense to all misconduct attributed to them.

to anyone on line one before leaving work on June 19, after the "highly agitated" Witha had returned from Youker's office.

Banks also testified that, after Williams and Youker had left for the day on June 19, she had been told by Witha that the latter was being returned to day shift. "I figured she was out of there," testified Banks and she told as much to Witha. Thus, Witha testified that she had been told by Banks, "It's been nice knowing you."

As she tried to continue working on June 19, Witha testified, "I was having a very hard time concentrating and even focusing," because "I was really depressed and . . . if I built it right and I followed all my procedures and everything I had no chance staying there," inasmuch as it appeared "that this was just a way to get me out." So, she signed out, writing "Done" on her daily time report: "I just really felt I had no future left."

II. DISCUSSION

There can be no legitimate doubt about a conclusion that Respondent's line one employees had been threatened with retaliation if they were caught discussing the Union at Respondent's Aitkin facility. As set forth in section I,C, supra, Williams admitted that she had set out on June 17 to "let [employees] know that talking about [a union] on company time was not permitted." Moreover, Williams never disputed that she had warned employees of adverse employment consequences should they be caught doing so.

True, the employees' testimony did not always correspond regarding the precise adverse employment consequences enunciated by Williams, should someone be caught discussing the Union, a union or union-related subjects on company time. Yet, Williams never denied actually having made any of those types of threats. Moreover, there is ample basis for concluding that Williams had threatened more than one adverse employment consequence, for being caught engaging in such discussions, on each occasion when she raised the subject and, beyond that, on the various occasions when she addressed that subject with employees. Inherently, after all, reprimand, termination, and dismissal are not mutually inconsistent personnel actions; more than one could be taken, without excluding the possibility of another, as well. Therefore, I conclude that the undisputed evidence credibly establishes that Williams did threaten adverse employment consequences would be directed against employees caught talking about the Union, unions, and union-related subjects during company time.

The statutory protection accorded under the Act by the Supreme Court to workplace discussion of unions among employees has been reviewed in *MDI Commercial Services,* supra, 325 NLRB 33 at 71–72, and in *Koronis Parts, Inc.*, 324 NLRB 675, 695, 696 (1997). There is no evidence that Respondent has any rule prohibiting or restricting workplace discussion among employees of non-work-related subjects. Thus, by warning employees of adverse employment consequences for discussing the Union, unions, or union-related subjects during company time, Williams had singled out only statutorily protected discussions for prohibition. Beyond that, utilization of the phrase "company time" naturally conveys both work and paid non-work—breaks, lunch periods—times, thereby imposing an overly broad and unlawful prohibition. See, e.g., *Limestone Apparel Corp.*, 255 NLRB 722 fn. 1 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); and *Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1230–1231 (5th Cir. 1976). Therefore, by Williams' threats of employment retaliation against employees caught discussing the Union, unions, or union-related subjects during company time, Respondent violated Section 8(a)(1) of the Act.

Any argument that those remarks had represented no more than a single statutory supervisor's opinion, and did not truly reflect an antiunion position by Respondent, is dispelled by the uncontested evidence regarding what occurred on June 19, during Passig's meeting with Williams and Youker. As described in section I,D, supra, during that meeting Youker warned that discussion of unions on company time would be grounds for termination. Aside from the fact that his warning constitutes an independent violation of Section 8(a)(1) of the Act, it also demonstrates that similar threats by Williams represented not simply her personal view, but the antagonistic view toward unions harbored by Respondent.

It also is alleged that on June 17 Williams "threatened employees with either termination or more onerous working conditions for talking about union-related subjects, the latter of which would cause them to quit their employment." If true, of course, such an allegation would be evidence supporting the constructive discharge allegation involving Witha. Yet, although Williams did make threats of termination, there is no evidence either that she threatened more onerous working conditions or, more importantly, warned of causing employees to quit. Therefore, I shall dismiss the "more onerous working conditions" alternative to that allegation, as well as the "cause them to quit their employment" portion of it.

Beyond the June 17 prohibitions and threats connected to it, the complaint alleges that Williams also warned of the possibility that Nortech might close the Aitkin facility, and relocate its operations, should employees become represented by the Union. In fact, Williams never disputed the testimony of employees Wiitala, Krumm, Witha, and Banks that she (Williams) had warned that the Aitkin facility might be closed should its employees become unionized, with operations there being relocated. To the contrary, Williams conceded that such a possible consequence had been one of the messages that she wanted to communicate to employees on June 17. In consequence, the credible evidence establishes that Williams did warn employees that their unionization could lead to closure of the Aitkin facility and to relocation of the operations conducted there.

Threats of closure are regarded as one of the "hallmark" and most serious violations of the Act. See, e.g., *Koronis Parts, Inc.,* supra at 691. True, an employer can make predictions about the consequences of employees exercising statutorily protected activities. However, such "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." *Schaumberg Hyundai,* 318 NLRB 449, 450 (1995), citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Obviously, Nortech could control whether or not to close the Aitkin facility; that was seemingly within its power. Respondent presented no evidence during the hearing of any objective facts showing that consequences beyond its or Nortech's control would force closure of the Aitkin facility,

should employees working there select representation by the Union. Certainly, Williams did not convey any such fact to employees on June 17, in the course of warning them of possible closure.

To be sure, Williams warned only of a possibility of closure of the Aitkin facility, should employees working there become unionized. Nevertheless, equivocation hardly diminishes the impact of unlawful threats. See discussion, *L'Eggs Products* 236 NLRB 354, 388 (1997), enfd. in pertinent part 619 F.2d 1337 (9th Cir. 1980), and cases cited therein.

Similarly, the coercive impact of such threats is hardly lessened by a supervisor's portrayal of an unlawful threat as being a personal opinion of that supervisor. *Winkler Bros. Co.*, 236 NLRB 1371, 1372 (1978). Nor can Respondent take solace in some sort of defense that Williams had been doing no more than conveying "friendly advice" to line one's employees on June 17, about possible job loss resulting from closure should the Union become their bargaining agent. For, "warnings of Company retaliation cast as friendly advice from a familiar associate might be more credible, hence more offensive to [Section] 8(a)(1) than generalized utterances by distant company officials." *NLRB v. Big Three Industries Gas & Equipment Co.*, 579 F.2d 304, 311 (5th Cir. 1978), cert. denied 440 U.S. 960 (1979). Accord: *NLRB v. Dover Corp.*, 535 F.2d 1205, 1209 (10th Cir. 1976), cert. denied 429 U.S. 978 (1976); *Seligman and Associates, Inc. v. NLRB*, 639 F.2d 307, 309 (6th Cir. 1981). Therefore, Respondent violated Section 8(a)(1) of the Act when Williams threatened that the Aitkin facility might by closed by Nortech, and operations there relocated, should employees working there become represented by the Union.

Those violations of Section 8(a)(1) of the Act provide a significant background for Respondent's issuance of a written warning to, and transfer to day shift of, Suzanne Witha. That is, they display Respondent's animus toward unions and toward unionization of employees working at the Aitkin facility where, of course, Witha was employed. Still, as pointed out in subsection A above, it must not escape notice that there is no direct evidence that Respondent had known about Witha's union sympathies and activities as of June 19. Even so, direct evidence is not essential to a conclusion that knowledge of union activities existed at the time of alleged discriminatory conduct. "This 'knowledge' need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." (Citation omitted.) *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). See also *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384 (8th Cir. 1980); *Webco Bodies, Inc. v. NLRB*, 595 F.2d 451, 454 (8th Cir. 1979); *Davis Supermarket v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994).

There is ample basis for inferring that Respondent had known—or, at least, suspected, see *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S 1118 (1997), and cases cited therein—that Witha had been active on behalf of the Union. Prior to June 17 Witha had been inquiring of employees about their interest in representation by the Union and, in the process, she had directed inquiries to a not insubstantial number of her coworkers. Williams admitted that she had learned that union conversations were occurring from an employee, Joanne Ostriech. Williams never testified in any detail regarding everything said to her by Ostreich about those activities. Ostreich did not appear as a witness to describe what all she had said to Williams about the union activities then occurring at the facility. Still, Williams admitted that it had been based on Ostreich's information that she (Williams) had set out to inform employees of the restriction on union discussions among employees and the possible consequences of unionization. Those meetings with employees tend to demonstrate so great a concern by Williams, about union activity in progress at Aitkin, that it seems difficult to believe that Williams would not have asked Ostriech about the identity of the employee who was doing the talking about a union. Indeed, Williams never denied having been told by Ostriech that Witha was that employee.

There are other factors which tend to further support an inference of knowledge, as well as tending to undermine Respondent's defense that its motivation for disciplining Witha on June 19 had been a legitimate one. Prior to June, Witha had an exemplary employment record. Once her union activity began in early June, however, Respondent abruptly began regarding her work as deficient. Yet, in the end, Youker minimized the significance of any purported work deficiencies, asserting instead that it had been Witha's supposed "negative attitude" which really had led to his decision to discipline her. But, as discussed in greater detail below, Respondent was never really able to substantiate that assertion, save to the extent that Witha had protested about being publicly admonished by Williams over the lack of heat shrink on cables which Witha had assembled on June 16. The unreliability of the defense advanced by Respondent, coupled with the considerations enumerated in the preceding two paragraphs, supply ample basis for inferring that, by June 19, Respondent had become aware, or at least suspected or believed, that Witha was the source of the union discussion which Ostriech had reported to Williams.

The fact that Witha was the lone employee who had contacted the Union and, so far as the record discloses, was the only employee making inquiries of coworkers on the Union's behalf are objective factors which serve as indicators of unlawful motivation. See, e.g., *Concepts & Designs*, 318 NLRB 948, 952–953 (1995), enfd. 101 F.3d 1243 (8th Cir. 1996), and cases cited therein. So, too, is the timing of the June 19 discipline: shortly after Witha began engaging in union activity and even more proximately to Ostriech's report to Williams about the union activity. *Handicabs, Inc.,* supra, 318 NLRB at 897, and cases cited therein. Respondent's unlawful statements to employees demonstrate both its hostility toward unionization of Aitkin employees and, also, its willingness to resort to unfair labor practices to thwart that from happening. *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991).

The totality of the foregoing considerations establish the threshold showing, which the General Counsel must make, that Respondent's animus toward unions and toward unionization of its Aitkin facility employees had motivated it to discipline the Union's lone activist, Suzanne Witha, on June 19, under the methodology provided 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 Workers' Compensation Programs v. Greenwich Colleries*, 512 U.S. 267, 276–278 (1994). See *Rose Hills Co.*, 324 NLRB 406 fn. 4 (1997). Of course, in following that methodology, what should not be lost sight of is the fact that the motivation being evaluated is that of the official who made the alleged discriminatory decisions. "The state of mind of the company officials who made the decision . . . reflects the company's motive for" those decisions. *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 336 (5th Cir. 1980). See also *Advanced Installations, Inc.*, 257 NLRB 845, 854 (1981), enfd. mem. 698 F.2d 1231 (9th Cir. 1982).

Youker and Williams claimed that the former had been the official who had decided on June 19 to issue a written warning to Witha and to transfer her the following Monday to day shift. Some doubt about his lone role in that decision is raised as a result of his use of the pronoun "we," mentioned in section I,D, supra, but there is no choice to accept the defense as presented by Respondent. As probably can be discerned from the review of the testimony and other evidence in section I, Youker gave testimony so at odds with other evidence, including objective considerations, and so uncorroborated as to significant points, that it cannot be accorded reliability.

In the end, Youker minimized Respondent's accusation of Witha's supposed work deficiencies—"[p]oor work quality"—as the true reason for the June 19 discipline of her. Still, that accusation should not be overlooked, altogether. Witha never actually denied the testimony about her work deficiencies on June 11. Even so, Youker testified that prior to June 17 he only had heard about "little things that come up but nothing that really stands out in my mind." In fact, not only did he not testify that the June 19 discipline had been motivated by deficiencies on June 11, but he never claimed that he had been even aware of any mistakes which Witha might have made on that date. Obviously, it is impossible to rely for motivation upon something of which the decision-maker had no knowledge at the time of making a decision. See, e.g., *ABF Freight System v. NLRB*, 510 U.S. 317, 321–322 (1994). Beyond that asserted June 11 incident, there is no particularized evidence of deficient work performed by Witha prior to June 16.

Turning to the work which Witha had performed on June 16, despite the testimony of Blakesley and Williams, it is difficult to conclude that Witha truly had assembled D-sub connectors to the Hirose ends on 10 to 20 cables. Even a brief examination of Respondent's Exhibits 2 and 3 reveals that assembly of that connector to the other cable end is a "mistake" of quite obvious proportions. For an assembler to have done that on so many cables, during a single shift, would appear to transcend the realm of mistake and enter that of deliberateness, even of sabotage. Yet, Respondent voiced no assertion of gross misperformance on June 17 through 19. To the contrary, Youker claimed that he had regarded Witha's June 16 "mistakes" as no more than "a small incident, such a small issue".

Of course, the accusation that connectors might have been assembled to the wrong cable ends is one which lends legitimacy to Respondent's defense. Yet, any contention that an experienced assembler such as Witha could have done so obviously incorrect work is virtually unbelievable on its face. And the unsupported evidence, eventually minimized by Youker, of such a mistake having occurred seemed contrived and unreliable.

There is no basis for assuming or speculating that Respondent had been aware on June 19 that it might have to confront an unfair labor practice charge regarding its June 19 discipline of Witha. The more plausible inference is that it disciplined Witha, to deter her from continued activities on behalf of the Union and to make of her an example to others as to what might occur to them should they engage in like conduct, see, e.g., *Handicabs, Inc*., supra, 318 NLRB at 897–898, and cases cited therein, but then had to construct a seemingly legitimate defense once a charge had been filed, given the wording "Poor work quality" on the written warning.

Obviously, the lack of heat shrink would not satisfy that criticism. It had not been called for by the green bar. It had not been included among the parts for the 75 cables' D-sub ends. Moreover, Witha had asked Williams about that omission, while the two of them were at line one and could be overheard by other line one assemblers, such as McCarthy. Afterward, Engineer Ranweiler had corrected the green bar, to provide for heat shrink at that connection. In such circumstances, criticism for "[p]oor work quality" would hardly be supported by Witha's failure to have applied heat shrink on June 16.

It should not escape notice that Witha could justifiably have been criticized for not having taken the heat shrink omission problem to Ranweiler on June 16, rather than taking it to Williams. But, Respondent has not claimed that failure to do so had been a reason for its discipline of Witha and I am not at liberty under the Act to supply reasons not advanced by a respondent. See, e.g., *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978). In any event, failure to inquire of Ranweiler on June 16 about the omission is an offense of which Williams was no less culpable than Witha. In sum, I conclude that there is no credible evidence of D-sub assembly to the wrong cable ends on June 16, but instead that Respondent has advanced that assertion based upon no fact other than its desire to construct a seemingly legitimate defense for having disciplined Witha on June 19.

Of course, in the final analysis, Youker abandoned even that defense as a basis for his decision to discipline Witha, testifying instead that his actual concern had been about her "negative attitude." Given the evidence, however, it is difficult to conclude that such a phrase was being utilized by him as other than a euphemism for Witha's union support and activities. Many of Youker's assertions in that connection are not corroborated. As set out in Section I.C., *supra*, the two, possibly three, employees who purportedly had complained that "a lot of friction was going on on the line," as a result of Witha's supposed misconduct, never appeared as witnesses to corroborate that assertion. In fact, one of them—Diane Passig—did appear as a witness. But, she never claimed to have made such a report to Youker and, beyond that, never testified to any "friction" which Witha had created. Of course, "friction" may have been but another euphemism used to describe Witha's inquiries on behalf of the Union which had upset at least one employee, Joanne Ostreich.

Rendering his assertions of "negative attitude" even more unreliable was Youker's attempt to embellish it during cross-

examination. Suddenly, he added that Witha had been "throwing stuff around" and, committed to support that assertion, then claimed "that was brought to me by the other employees." The addition of that assertion, under the circumstances, appeared to represent nothing more than an effort to fortify Respondent's defense that Witha's discipline had been legitimate. Surely, an offense so flagrant as "throwing stuff around" would have been developed during direct examination, had such conduct been a reality. And, once more, no employee testified either to having made such a report to Youker, nor to having observed Witha engage in such activity.

It is abundantly clear that Witha had become upset at being criticized for not having applied heat shrink to the June 16 assemblies. Yet, her reaction, while perhaps sometimes strident, is not particularly surprising, given the situation, and it seems unlikely that Youker would have so regarded it, absent other considerations. After all, Witha had followed the green bar as directed by her line leader, the latter being a fact which Youker admitted having known. To be sure, the stridency of Witha's anger at the situation reached the point where she made a crude remark to Line Leader Laughlin about Williams which was crude. But, there is no evidence that Laughlin had repeated that remark to either Williams or Youker. In fact, neither one testified to having known about it prior to the hearing. Thus, that remark cannot serve to legitimize Respondent's defense: "an employer obviously cannot be motivated by facts of which it is not aware at the time it makes its decision." (Citation omitted.) *Respond First Aid*, 299 NLRB 167, 169 fn. 14 (1990). See also *Singer Co. v. NLRB*, 429 F.2d 172, 179 (8th Cir. 1980).

In fact, save for Witha's reaction to having been criticized about the omitted heat shrink, Youker did not supply any particularized testimony about any occasion when Witha had undermined management's authority. He did attempt to rely upon her June 18 sick call as evidence of negative attitude: "at that point it became clear that there was more going on with her attitude because she hadn't cooled off at all after that night to think about it so I decided then that we needed to do something." It should not escape notice that the latter portion of that answer is at odds with the testimony given by Williams. As pointed out at the beginning of section I,D, supra, Williams testified that when she had arrived for work on the morning of June 18 there already had been a determination "to have a disciplinary meeting with" Witha. Beyond that, Youker conceded that the substance of Witha's sick call had not been all that different, if at all, from other sick calls placed to him by other employees on other occasions. Nor did he ever explain with particularity how her call "undermine[d]" his authority and that of Williams, much less how it "affect[ed] all the other people in the plant." Facially, those phrases sound nice. But, in the circumstances, they do not serve to conceal the lack of substance beneath them.

One other point should not escape unnoticed. Both Youker and Williams testified that Witha's transfer to day shift on June 23, with evaluation of her to occur on June 26, had been intended to provide her with training. In fact, training is an ongoing process at Respondent. But, as with the phrases in the preceding paragraph, "training" seemed to be advanced as an explanation without substantive support. At no point did Youker explain precisely what type of "training" he assertedly believed would be supplied to Witha. To accept Respondent's defense is to conclude not that Witha did not know how to perform her work, for which training would serve as a corrective, but that she had become a recalcitrant and belligerent employee. There is no evidence that training supplied to employees by Respondent would serve to correct recalcitrance and belligerence. In short, the term simply does not fit the situation as Respondent has sought to portray it with respect to Witha.

In sum, a review of the entirety of the record establishes that Youker's explanations are uncorroborated at some points, are at odds with credible evidence and objective considerations at other points, and are sometimes simply illogical. That review supports my conclusion, formed while watching him testifying, that Youker was not being candid and that his accounts were not reliable. In consequence, Respondent has not presented a credible explanation for the discipline meted out to Witha on June 19. Given that conclusion and the above-enumerated factors showing that Witha's discipline had been motivated by her union activities, I conclude that a preponderance of the credible evidence establishes that she was disciplined on June 19 in retaliation for her, those activities, and to make an example of what could happen to employees who engaged in like statutorily protected activity. See, e.g., *NLRB v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 175 (7th Cir. 1954); and *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971). Therefore, by issuing a written warning to, and by announcing a transfer to day shift of, Suzanne Witha, Respondent violated Section 8(a)(3) and (1) of the Act.

I do not conclude, however, that an unlawfully motivated oral warning had been issued to Witha on June 17, as alleged in the complaint. To be sure, Williams unfairly chewed out Witha that day, over the heat shrink. Yet, there is no evidence that, under Respondent's disciplinary scheme, a chewing out is tantamount to a verbal warning. To the contrary, an illustration of the latter was provided on June 19, in connection with what happened to Passig, as described in section I,D, supra. Obviously, what happened to Passig differed considerably from what occurred on June 17 when Witha was chewed out by Williams. In the circumstances presented here, a chewing out, no matter for what actual motive, does not constitute a personnel action showing "discrimination in regard to hire or tenure of employment or any term or condition of employment," within the meaning of Section 8(a)(3) of the Act. Therefore, I shall dismiss that allegation.

Left for consideration is Witha's June 19 resignation which the General Counsel argues is a constructive discharge or, possibly, action taken by Witha in response to an anticipated discharge. Facially, there is a certain appeal to application of one or both of those doctrines to the situation presented here. Respondent had threatened to retaliate, including by termination, against employees who talked about union on company time. Witha had been the only employee who had been active on behalf of the Union. She was issued a pretextual written warning for misconduct which is not supported by the evidence and, also, which she obviously knew to be unwarranted. She was notified of a transfer to first shift, and warned of termination when evaluated four days after the transfer, which made no

sense and which objectively appeared to be intended to deter her from further support for the Union. Yet, application of the doctrine of anticipated discharge, and that of constructive discharge, is prevented by closer examination of what occurred here in the context of certain fundamental principles developed under the Act.

Were this a situation involving no more than a victimized employee and a wrongdoing employer, then there would be a certain appeal to, as it were, "sock it to" the wrongdoer in favor of the victim. The problem with so simple an approach is that more than an interest on the part of private parties is involved in cases arising under the Act. The Act operates "in the public interest in order to enforce a public right." *NLRB v. Threads, Inc.*, 308 F.2d 1, 8 (4th Cir. 1962). See also *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). In consequence, public policy must be taken into account in evaluating application of doctrines, such as anticipated and constructive discharges, developed and applied under the Act.

In the area of discrimination, one public policy is that the Act should not be interpreted and applied in a manner which results in discouraging gainful employment. For example, in the interest of a "healthy policy of promoting production and employment," *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 200 (1941), unlawfully discharged employees must seek interim employment, not merely to mitigate their losses, see discussion, *Electrical Workers 401 (Stone & Webster Enineering Corp.)*, 266 NLRB 870, 875 (1983), but to implement a policy of not encouraging "a skilled and healthy worker to remain idly unemployed . . . [but instead] . . . encouraging him to obtain a job." *NLRB v. Madison Courier*, 505 F.2d 391, 397 (D.C. Cir. 1974).

That policy "of promoting production and employment" also guides evaluation of situations at the other end of the overall spectrum of employment: in situations where employees resign from gainful employment ostensibly in response to their employers' unlawful conduct. In such situations, the Board has cautioned that "it seems ill advised as a matter of policy to encourage employees to quit their jobs whenever they suffer *any* unlawful condition, at least if they have avenues for remedying that condition." *Lively Electric*, 316 NLRB 471, 473 (1995). As a result, given availability of proceedings under the Act to remedy unfair labor practices, the Board has "long held that there is no constructive discharge where an employee quits in protest against an unfair labor practice." *Kogy's Inc.*, 272 NLRB 202, 202 (1984). Indeed, even where discriminatorily-motivated unfair labor practices have occurred, the Board has held that "mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge." (Footnote omitted.) *Algreco Sportswear Co.*, 271 NLRB 499, 500 (1984).

Turning to the first so-called prong of the constructive discharge doctrine, the only change effected in Witha's working condition, by the transfer announced on June 19, had been that she would be transferred to day shift the following week. There is no evidence that, while work there, she would have suffered any diminution in pay or benefits, nor that she could reasonably have anticipated that any such diminution would occur. Although she preferred night shift work for personal reasons, there is no evidence that, as a result of the transfer, Witha would have been placed in the position, because of other considerations, of having to resign rather than abandon some pressing personal burden. Cf. *American Licorice Co.*, 299 NLRB 145 (1990). After all, by June 19 Witha had been working on night shift for less than a month. For almost 8 months before that, she had been working for Respondent on day shift, without any apparent personal burden having arisen that necessitated her transfer to night shift and without any apparent burden existing that would require her to continue working on that shift.

The first prong of the constructive discharge doctrine requires a showing of more than "difficult or unpleasant" working conditions—it necessitates a showing that "the change be so 'difficult and unpleasant' as to *force* resignation." (Footnote omitted.) *Algreco Sportswear Co.,* supra. In view of the preceding paragraph's considerations, that showing cannot be said to have been made here.

Turning to the second prong of constructive discharge doctrine—Hobson's choice between continued exercise of statutory rights and continued employment—the General Counsel argues ably that Witha was effectively being told on June 19 that Respondent would discharge her on June 26 unless she improved her "negative attitude"—a euphemism for prounion sympathy and activity. In fact, many of the elements of Witha's situation are ones on which the Board has relied, in cases cited by the General Counsel, when concluding that constructive discharges have occurred. Nevertheless, able argument and some similarities in prior cases cannot blindly dictate the result in cases where different circumstances are presented.

The Hobson's choice prong arose in contexts where already represented employees were told that their employers were changing the bargaining status quo: were withdrawing recognition from their historic bargaining agent and were unilaterally changing, usually reducing, their existing employment terms. See, e.g., *Superior Sprinkler, Inc.*, 227 NLRB 204, 210 (1976). Here, it should not escape notice, the status quo as of June 19 was that Respondent's assemblers were not represented and, moreover, no diminution of any of Witha's employment terms was threatened, save to the extent of a seemingly temporary transfer to another shift.

Obviously, an employee such as Witha could infer that the transfer to day shift, along with the warning notice, was intended as some form of retaliation for her activities on behalf of the Union—that "negative attitude" was a euphemism for prounion attitude. Still, abandonment of support for the Union was not stated expressly as a condition for her continued employment after June 26. At no point did either Youker or Williams state that Witha would have to abandon support for the Union to continue working for Respondent. Cf. *Hoerner Waldorf Corp.*, 227 NLRB 612, 612–613 (1976).

That may seem to be a difference without distinction. Yet, viewed from an objective perspective, it cannot be said as of June 19 that Respondent truly intended to fire Witha on June 26 if she continued supporting the Union. Threats "of some future action which may or may not be carried out . . . may be nothing more than an unlawful bluff for which the Act provides an appropriate and direct remedy." (Citation omitted.) *Groves Truck*

& Trailer, 281 NLRB 1194, 1195 (1986). Even in the seminal classic Hobson's choice situation—where continued recognition of an incumbent and perpetuation of existing benefits are the issue—the Board has distinguished between "resigning in the face of the unlawful withdrawl [sic] of union recognition and termination of existing benefits and membership," on the one hand, and "quitting in anticipation that such may take place later," on the other. *Marquis Elevator Co.*, 217 NLRB 461, 461 (1975). No constructive discharge occurs in the latter situation.

As concluded above, Witha had been one victim of unlawful threats of retaliation for discussing the Union during company time and of closure and, as well, had been the victim of an unlawfully motivated written warning and transfer. Those unfair labor practices can be remedied through the Act's procedures. There is no argument that Witha had been unaware of that statutory mechanism. Even so, she was in contact with the Union and it is the charging party in this proceeding. Surely, it could have advised her of the existence of unfair labor practice proceedings, to provide a remedy for the unlawful conduct directed toward her.

Respondent is a wrongdoer. But, there is no evidence sufficient to support even an inference that its unlawful conduct, viewed as an objective matter, had been aimed at, or intended to, compel Witha to quit. Indeed, it appears that Youker had been genuinely surprised to learn on June 20 that Witha had resigned. Beyond that, there is no basis for inferring that Respondent could likely have anticipated that Witha would resign over a written warning and a transfer to day shift, even one providing for evaluation of her performance four days later. Therefore, "no matter how reasonable [Witha's] fear of future discharge by Respondent might have been, it does not permit [her] to elevate, unilaterally, the issuance of the warning [the transfer and the unlawful threats] into an unlawful discharge in the circumstances here." (Footnote omitted.) *Aero Industries*, 314 NLRB 741, 742 (1994).

In the context of what already has been said, resolution of Witha's resignation under the anticipated discharge doctrine is relatively straightforward. That doctrine rests on finding that, despite absence "of formal words of firing," the actual "words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated." *NLRB v. Trumball Asphalt Co. of Delaware*, 327 F.2d 841, 843 (8th Cir. 1964). See also *Ridgeway Trucking Co.,* 243 NLRB 1048, 1048–1049 (1979). Of course, the very fact that Witha had been effectively told that her employment would be continuing, albeit on a different shift and with an evaluation imminent, is strong evidence that her tenure was not being terminated, at least not as of June 19.

Certainly, there were no accompanying statements on June 19 that Witha should "get out of here," nor that she should "find another company to work for." Cf. *Romar Refuse Removal*, 314 NLRB 658, 670 (1994). Nor is there evidence of the types of employer conduct—direct accusation of being a union "organizer[ ]", demand for return of company property needed for Witha to perform her job, statements about not being trusted anymore—which led the discriminatee "to believe that he was soon to be discharged" in *MDI Commercial Services,* supra. To the contrary, Respondent's termination-possibility statement on June 19 cannot be said to have been any less a "bluff," which "may or may not be carried out," than was the fact in *Groves Truck,* supra, under the second constructive discharge prong.

To conclude, as an objective matter, that in the circumstances presented on June 19, an employee could believe that her tenure had been terminated would be to reach a result contrary to the underlying policy of promoting continued employment. After all, had Respondent truly intended to fire Witha, there was no need on June 19 for it to go through the process of first transferring her to another shift. No seeming impediment existed to merely discharging her on June 19, without the need for a charade of transfer to first shift. That course is a strong indication that, as of June 19, Respondent had been bluffing and had made no decision to fire Witha. Therefore, I shall dismiss the unlawful discharge allegation.

CONCLUSION OF LAW

Intercon I (Zercom) has committed unfair labor practices affecting commerce by issuing a written warning notice to, and by announcing a transfer to day shift of, employee Suzanne Witha on June 19, 1997, because of her sympathies for and activities on behalf of International Brotherhood of Electrical Workers, in violation of Section 8(a)(3) and (1) of the Act; and, by threatening to retaliate against employees for discussing unions and union-related subjects on company time and by threatening closure of the Aitkin facility, and relocation of its operations, should the employees working there become represented by a union, in violation of Section 8(a)(1) of the Act. However, it has not violated the Act in any other manner alleged in the complaint.

REMEDY

Having concluded that Intercon I (Zercom) 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 actions to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of the Order, remove from its files the employee counseling report issued to Suzanne Witha on June 19, 1997 and, also, remove any reference to that employee counseling report and to the intended transfer of Witha to day shift on June 23, 1997, and, within 3 days thereafter, notify Witha in writing that this has been done and that the employee counseling report and intended transfer to day shift will not be used against her in any way.

[Recommended Order omitted from publication.]