C. Factotum, Inc. *and* David Kulczycki *and* Ronald Carter, Individuals. Cases 7–CA–42352(1) and 7–CA–42352(2)

May 30, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On September 20, 2000, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Charging Parties, appearing pro se, filed exceptions and supporting statements. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

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

ORDER

The recommended order of the administrative law judge is adopted and the complaint is dismissed.

Richard F. Czubaj, Esq., for the General Counsel.
John C. Dickinson, Esq., of Birmingham, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Detroit, Michigan, on April 24, 2000. The charge in Case 7–CA–42352(1) was filed on September 1, 1999, and the charge in Case 7–CA–42352(2) was filed on November 30, 1999.[1] A consolidated complaint was issued on November 30, 1999. It alleges that in June and July 1999 the Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of employment if they did not stop complaining about wages and benefits; by threatening employees with loss of employment if they questioned the Respondent or complained to the media about their concerns regarding wages and benefits; by orally promulgating an overly broad no-talking rule restricting employees from discussing the Union, or their wages and benefits, while allowing them to discuss other subjects; and by enforcing the above-referenced oral no-talking rule. The consolidated complaint further alleges that the Respondent violated Section 8(a)(3) of the Act on or about August 6, 1999, by laying off and discharging Charging Parties David Kulczycki and Ronald Carter.

The Respondent's timely answer denied the material allegations of the complaint. The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Michigan corporation, is a painting and plastering contractor located in Detroit, Michigan. During the 12-month period immediately preceding the filing of the charges, the Respondent in conducting its business has derived gross revenues in excess of $500,000, and has provided services valued in excess of $50,000 to an enterprise located in the State of Michigan, which is directly engaged in interstate commerce. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find that Local 22, International Brotherhood of Painters and Allied Trades, AFL–CIO (Union or Local 22), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a small painting contractor owned and operated by Thomas Cieszkowski (Tom C.). It does not employ any regular full-time employees. Instead, employees are hired on an "as needed" basis depending on the size and type of the job. The Respondent is nonunion, but occasionally works on prevailing wage projects.

Charging Party David Kulczycki had worked on and off for the Respondent for approximately 5 years, sometimes as a painter and sometimes as a foreman. He was a longtime friend of David C.ieszkowski (David C.), the brother of Tom C. and lived in an apartment building owned by Tom C. Kulczycki and Tom C. had a long-running confrontational relationship. The two argued about work-related matters because Kulczycki would question Tom C.'s judgment and ignore his instructions. Tom C. nevertheless continued to employ Kulczycki because he was a close friend of David C..

Charging Party Ronald Carter (Carter) also worked for the Respondent on and off for a number of years. He often was assigned to work with Kulczycki.

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

In adopting the judge's dismissal of the allegations of 8(a)(1) and (3) violations by the discharge of employee David Kulczycki, Member Liebman relies solely on the credited evidence that Kulczycki was insubordinate, confrontational, and abusive to Supervisor Larry Moss in front of other employees. She does not pass on the judge's finding that the General Counsel failed in carrying his initial evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *Alldata Corp.*, 327 NLRB 127 at fn. 2 (1998).

[1] All dates are in 1999 unless otherwise indicated.

B. The Detroit Public Schools District Project

In June 1999 the Respondent began a 2-month project painting the interiors of the Detroit public schools. The Respondent signed a project labor agreement as a signatory subcontractor agreeing to pay its employees prevailing wages and to make payments on their behalf to the benefit trust funds of the appropriate union affiliate of the Greater Detroit Building Trades Council (i.e., Local 22). (R. Exh. 2.)

Larry Moss was hired by the Respondent specifically to supervise the Detroit schools project. He had operated his own painting company for many years and had over 40 years of painting experience. Moss was responsible for supervising all of Respondent's employees, including Kulczycki and Carter, who were also hired for the Detroit schools project.[2]

Tom C. told every employee at the time of hire that the Detroit schools project was a union job and that they would have to join the painters' union. At a meeting held at the beginning of the project, he explained that everyone would be paid the prevailing wage and that they would receive union benefits. Several employees asked whether their contributions to benefits would be paid in a lump sum or in installments. Tom C. told them that the benefit payments would be deducted from their paychecks over a period of time, but he was unsure how the contributions would be made to the Union.

Tom C. unsuccessfully sought guidance from the general contractor, Barton Marlow Co., about making the benefit payments to the Union. He also tried to pay the benefit monies directly to the Union, but it refused to accept the payments unless the Respondent signed a 5-year collective-bargaining agreement. Although Tom C. believed that he was required to sign a contract with the Union only for the duration of the Detroit schools project, he offered to sign a 1-year contract with the Union, which the Union rejected. In the meantime, Tom C. held weekly meetings with the employees to keep them apprised of his attempts to make the benefit payments.

C. Workplace Disharmony

From the beginning of the project, Charging Party Kulczycki was unhappy about his pay and status on the schools project. He believed that he was entitled to more overtime and that he should have been made a foreman because of his skill, experience, and seniority with the Respondent. (Tr. 77–78.) In early July, Kulczycki expressed his dissatisfaction to Tom C.. After hearing that other employees were receiving a higher wage than he was being paid, Kulczycki confronted Tom C.. He complained that he should be receiving a higher wage and more overtime hours because of his seniority. He pointed out that his first week's paycheck was short by 1-½ hours. Kulczycki opined that he should have been made a foreman and also questioned Tom C. about making the appropriate contributions to the union benefit funds. (Tr. 74.) The two argued and their meeting ended with them cursing and yelling at each other in the hallway.

[2] Kulczycki testified that he heard about the school project from someone in his apartment building. He stated that originally he was hired as a night supervisor for the school project, but was assigned to paint during the day after Tom C. decided there would be no night crew.

Kulczycki also showed little regard for his immediate Supervisor Larry Moss. On one occasion when Moss told Tom C. that Kulczycki and Carter were taking too long to paint a bathroom, Tom C. asked them to pick up the pace. Tom C. testified that Kulczycki became irate, cursed Moss, stated that Moss knew nothing about painting, and stood in the hall screaming at Tom C. (Tr. 238.)

Supervisor Larry Moss complained to Tom C. about Kulczycki and Carter on a weekly basis and repeatedly urged him to fire them.[3] (Tr. 150.) He testified that they had poor attitudes and did not work up to their potential. According to Moss, they often failed to follow his instructions and took his remarks negatively. (Tr. 148.) Moss told Tom C. that Kulczycki and Carter were trying to slow down work[4] and that their poor work attitude would adversely affect the other employees. (Tr. 237.)

Carter testified that there was a personality clash between he and Larry Moss, which Carter attributed to the fact that he and Kulczycki were close friends, and that they had worked for the Respondent for a long time.

D. The July 8 Meeting

As the schools project progressed, there were daily discussions by the employees about the status of the union benefits and what was happening to the money being deducted from their paychecks. On or about July 8, 1999, Kulczycki and Carter, and some other employees, decided to contact the Union. Around lunchtime, Kulczycki phoned the union hall. A short time later, Union Representative Bill Kesslak arrived at the jobsite and called a meeting of all the Respondent's employees. When Supervisor Larry Moss heard that the Union was going to have a meeting on the jobsite, he gathered the Respondent's employees for the meeting.

Tom C. joined the meeting after it started, unaware that the Union was even on the jobsite. He listen to Union Representative Kesslak explain to the employees that they were required to pay union dues and make payments toward union benefits. In everyone's presence, Tom C. stated that he had tried to pay the benefit money to the Union, but it would not accept the payments. Kesslak responded that the Union would not accept the payments unless the Respondent signed a 5-year contract with the Union. Tom C. replied that he was willing to sign a 1-year contract, but he did not think that he should have to sign a 5-year contract.

Even though the meeting lasted more than an hour and a half, Tom C. permitted his employees to remain until it ended and paid them for the time spent at the meeting.

[3] In addition to Moss, other coworkers complained to Tom C. that Kulczycki and Carter were working slowly. (Tr. 111, 189.) Employee Jonathan McDowell testified that he urged Tom C. to fire Kulczycki, but Tom C. refused because he had known Kulczycki for many years and thought that he would work out. (Tr. 172.)

[4] Employee Michael Mantyk credibly testified that Kulczycki told him to slow down because he wanted more overtime. (Tr. 211.) Kulczycki denied telling any employee to slow down. For demeanor reasons, I credit Mantyk's testimony on this point.

E. More Questions About Benefits

In mid-July, Kulczycki asked Supervisor Larry Moss when the employees were going to receive their union benefits. Even though the union representative had essentially corroborated everything that Tom C. had told the employees, Kulczycki was not satisfied that Tom C. was doing everything he could to obtain the benefits.[5] Moss told him that he thought the benefits would "kick-in" after 90 days. Beth Yearly, who worked with Kulczycki, asked Larry Moss who was going to pay for the benefits? She was unsure whether the Union or the Respondent was going to contribute to the benefits, even though that information had been provided at the union meeting. Moss lost his temper. He told Yearly, in the presence of Kulczycki and Carter, that he was sick of all the questions about benefits. He stated that he had tried his best to answer everyone's questions and that they should go down to the union hall to talk to somebody there. Moss instructed Yearly, Kulczycki, and Carter to punch out and leave.

Kulczycki and Carter ignored Moss' instructions and went back to work. Yearly was offended by the tone and manner in which Moss spoke to her. She complained to Tom C., who apologized for Moss' behavior. He attributed Moss' comments to the fact that Kulczycki had persisted in questioning Moss about the union benefits and that Moss reacted as he did because she was working with Kulczycki. Tom C. told Yearly that she did not have to punch out, if she did not want to. Yearly nevertheless left early and went to the union hall.

Later that day, Tom C. promoted Kulczycki to foreman and gave him a $3-per-hour wage increase. He testified that his brother, David C., suggested the promotion and pay raise as a way of motivating Kulczycki to work harder. (Tr. 244.)

F. Talk on Your Time, Work on My Time

Despite the union meeting, and Tom C.'s weekly meetings to answer questions about joining the Union and receiving benefits, the employees were stopping work with increasing frequency to talk about joining the Union and receiving benefits. (Tr. 183, 232–233.) Former employee Yearly testified that the employees often stopped work for 10–15 minutes to talk about joining the Union and receiving benefits. (Tr. 26–27.)

In mid-July, Tom C. called a meeting of Kulczycki's work crew. Kulczycki testified that "Tom C.ome in all agitated, pull us all into the meeting. Said he's had enough talk about the union. He doesn't care if anybody calls the union, calls the newspapers, calls anybody else. That they would be on the street looking for another job. And while he was saying this, he was staring directly at me."[6] (Tr. 48.) Carter testified that "Tom C.ame in. It was a very quick meeting. Said, 'I've had enough of this. I've had enough talk about the union. I've had enough talk about the benefit money. I'm not a crook.' And basically anybody that wanted to go to the news, there problem solvers because that was coming up a lot. 'Go ahead and you will be out of a job.'" (Tr. 109.)

Tom C. testified that he lost his temper at the end of a meeting and stated, "Listen, I have had enough of this. You know what, if you want to work, stay here. If you don't, get off the job." (Tr. 233.) He testified that he told the employees, "I don't want to hear this talk anymore," referring to all of the questions—"I don't want to hear this talk anymore. I answered every question you had dozens of time . . talk on your own time, work on my time." (Tr. 234.) For demeanor reasons, I credit Tom C.'s version of what he told the employees.

G. The Layoffs

Although the Detroit schools project originally was scheduled to end on August 16, it began winding down about a week early. On Thursday, August 5, Tom C. asked Larry Moss to pick eight or nine of the best workers to finish the project over the weekend. (Tr. 248, 153.) Moss prepared a list of employees, which excluded Kulczycki and Carter. When Tom C. saw the list, he told Moss to add Kulczycki to the crew. Tom C. testified that he felt obligated to accommodate Kulczycki because he was a close friend of his brother. Moss reluctantly added Kulczycki to the crew.

The next day, Friday, August 6, Moss walked the jobsite asking the employees that he had selected if they wanted to work on Saturday and Sunday. On Kulczycki's crew, Moss spoke to Larry Miller, Steve Dzurnak, and Roxanne Kelm. Kulczycki overheard Moss ask Dzurnak to work the extra days, and asked Moss if he and Carter were on the list. When Moss assured him that he was on the list to work, Kulczycki asked what about Carter. Moss walked away without responding. (Tr. 54.)

Carter testified that he realized that August 6 would probably be his last workday, when he overheard some employees talking about being asked to work on Saturday. (Tr. 114.) A coworker, Roxanne, told Carter that Moss told her that she was selected to work on Saturday because of her good effort. Carter speculated that he was not asked to work because he and Moss had a personality clash. (Tr. 114.)

When he got home, however, Carter phoned Tom C. complaining that Moss did not ask him to work on Saturday and Sunday. According to Carter, Tom C. told him, "Ron, I have to stand behind Larry's decision. . . . Just give it a little while. We'll see what's going on." (Tr. 116.)

H. The Discharge of Kulczycki

On Friday morning, August 6, Moss told the employees that they would receive their paychecks at 3:30 p.m.[7] (Tr. 153.) Moss testified that around 1:30 p.m., Kulczycki and Carter, along with several other employees, came to him demanding their paychecks. When Moss reiterated that the paychecks would be given out at 3:30 p.m., Kulczycki became upset, yelled and cursed at Moss, and demanded his paycheck. At that point, Moss

[5] Tom C.'s secretary, Kathie Patterson, credibly testified that Kulczycki asked her if she knew anything about the union benefits, and she told him that Tom C. was trying to obtain information from the general contractor Barton Malow Co., about paying the benefit moneys to the fund. (Tr. 196.)

[6] The credible evidence shows that Kulczycki had been telling some employees that Tom C. could not be trusted. Employees Kathie Patterson and Michael Mantyk testified that Kulczycki told them that Tom C. had been convicted of embezzlement. (Tr. 196, 210.) Kulczycki denied making such statements. For demeanor reasons, I credit the testimonies of Patterson and Mantyk.

[7] According to the unrebutted testimony of employee Jonathan McDowell, the 8-hour workday on Friday ends at 3:30 p.m. (Tr.172.)

gave Kulczycki his paycheck and told him that he was not working anymore, he was done.

Kulczycki did not deny having a confrontation with Moss, but gave a different version of the event. He testified that around noon he and Carter asked if the paychecks were ready, and were told that the checks had not arrived. (Tr. 54.) At 3:30 p.m., Carter again asked Moss for his paycheck because he was leaving early.[8] Kulczycki testified that he and the rest of his crew went with Carter to get their paychecks because they had heard that the paychecks were ready. According to Kulczycki, Carter reminded Moss that he was leaving early, so Moss gave him his paycheck. When Kulczycki asked Moss for his paycheck, Moss became upset and began cursing at him. Kulczycki stated that he cursed back at Moss and told him that because it was a union job, the paychecks had to be distributed between 8 a.m.–4:30 p.m. Kulczycki testified that Moss handed out all of the checks and that he went back to work. Kulczycki acknowledged that the exchange took place in front of his crew and several other employees. (Tr. 75.)

Employee Jonathan McDowell generally corroborated Moss' testimony and contradicted Kulczycki's. He recalled two confrontations between Moss and Kulczycki on August 6. He testified that at noon, Kulczycki and his crew approached Moss asking for their paychecks. According to McDowell, Moss stated, "We don't hand checks out until 3:30 p.m." Kulczycki responded, "That's bullsh_t, . . . we deserve our checks now, and we have to go cash them." Moss repeated that he would hand out the checks at 3:30 p.m. (Tr. 172–173.) Around 1:30 p.m., Kulczycki and his crew returned asking for paychecks again. Moss got very upset, swore a couple of times, told Kulczycki he had to wait, and turned to walk away. McDowell testified that Kulczycki got in front of Moss, blocking his way and told him, "I'm going to kick your ass if we don't get the checks." (Tr. 173.) Moss relented by handing out the checks to everyone. McDowell stated that the second confrontation took place in the parking lot where all of the painters were taking their break. (Tr. 176.)

Employee Michael Harris testified that he walked in at the end of the argument. He stated that the employees normally received their paychecks in the morning, but the checks were late, so they weren't going to get them until the afternoon. (Tr. 191.) He testified that Kulczycki became upset, argued, and cursed Larry Moss. He also heard Moss tell Kulczycki that he was not working on Saturday, that there was no sense for him to come to work on Saturday. (Tr. 194.)

I credit the testimony of Larry Moss that Kulczycki and Carter requested their paychecks at 1:30 p.m. and that when he refused to give Kulczycki his paycheck, he became confrontational and abusive. Moss was a very credible witness, with good recall, who answered questions directly. His testimony is corroborated by employees McDowell and Harris, neither of whom worked for the Respondent at the time of trial. In contrast, Kulczycki was not a credible witness. He sought to downplay the intensity of his remarks and he unpersuasively denied threatening Moss. (Tr. 55, 96.) Thus, for demeanor, and other reasons, I do not credit Kulczycki's testimony on this point. Also, for demeanor reasons, and because of his close affinity to Kulczycki, I do not credit the testimony of Carter's testimony that the incident occurred around 3:30 p.m.

I. The Aftermath

Tom C. heard about the paycheck incident and Kulczycki's dismissal from Larry Moss and several other employees. Later that night, in the parking lot of their apartment building, Kulczycki spoke to Tom C. about returning to work. David C. was present. Kulczycki told Tom C. that "it wasn't right what Larry did. Larry started this whole trouble. He had no reason to talk to me like that. The checks should have been given out." (Tr. 55.) The two argued. According to Kulczycki, Tom C. told him that he should have gotten rid of him long ago, that he was tired of all the union trouble he was making, and he was tired of everything Kulczycki had been telling the employees. According to Tom C., Kulczycki was loud and abusive. David C. testified that he was appalled at the way Kulczycki spoke to Tom C.. He realized then that Tom C. had no choice, but to uphold Moss' decision.

The next morning, Kulczycki got ready for work thinking that everything had settled down, but Tom C. would not let him return to work.

J. Analysis and Findings

1. 8(a)(1) allegations

Paragraph 8 of the complaint alleges that in late June 1999, Tom C. threatened employees with the loss of employment if they did not stop complaining about wages and benefits. Counsel for the General Counsel does not specifically address this allegation in his posthearing brief. Nor is there any evidence in the record to support it. Accordingly, I shall recommend the dismissal of the allegations of paragraph 8 of the complaint.

Paragraph 9 (a)–(c) of the complaint alleges that in mid-July 1999, Tom C. orally promulgated a no-talking rule restricting employees from discussing the Union, wages, benefits, or other terms and conditions of employment while permitting employees to discuss other subjects. It further alleges that in accordance with the no-talking rule, employees were told to stop talking about benefits, and threatened with loss of employment if they questioned the Respondent or complained to the media about their concerns regarding benefits.

The evidence shows that in mid-July, the employees were anxious to join the Union and to begin receiving union benefits. The Union refused to accept the paycheck deductions for union benefits, unless the Respondent signed a 5-year collective-bargaining agreement. The Respondent was willing to sign a 1-year contract. The stalemate delayed the receipt of benefits,[9] which prompted the employees to question what was happening to the paycheck deductions. In this connection, the evidence also shows, and I find, that Kulczycki was circulating rumors that

[8] Carter had told Moss that morning that he would have to leave at 3:30 p.m. in order to insure his automobile. He testified that sometime before 3:30 p.m., Kulczycki told him that he had not been selected to work on Saturday and Sunday. (Tr. 115.) Around 3:20 p.m., Carter decided to ask Moss for his paycheck and leave. Carter testified that at first Moss told him he would have to work to 5:30 p.m., but gave him his paycheck after being reminded of their conversation earlier that day. Carter left as Kulczycki and Moss began to argue.

[9] The evidence shows that Tom C. eventually paid the paycheck deductions to the Union in November 1999.

Tom C. was an embezzler. With increasing frequency, the employees were stopping work for 10–15 minutes at a time to discuss these issues, even though Tom C. held ongoing meetings with the employees to keep them abreast of what was occurring. Thus, production was being disrupted because the employees frequently stopped working for prolonged time periods to talk to each other about the status of their union benefits. Thus, I find that it was the frequent work stoppages, and not the talking, that prompted Tom C. to impose the no-talking rule.

The evidence shows that Tom C. told the employees that he did not want to hear anymore talk about the Union or benefits, that the employees should work on his time and talk on their own time, and that if they did not want to work they should get off the job. (Tr. 233.) The evidence shows that this was the only time that Tom C. made such a statement. (Tr. 31.)

The Board has held that where an employer adopts a rule placing restrictions on employees during a union campaign, it does not automatically follow that the rule is invalid, particularly if the employer has acted for legitimate business interests, rather than for unlawful reasons. *Brigadier Industries Corp.,* 271 NLRB 656, 657 (1984). The evidence shows that the Respondent's no-talking rule was presumptively valid. Talking about the Union or benefits was not completely prohibited. Rather, by telling the employees to talk on their own time and work on his time, Tom C. effectively prohibited the employees from discussing these issues while performing actual job duties, but permitted discussion during nonworking time, that is, on the employees' own time. *Our Way, Inc.,* 268 NLRB 394, 395 (1983). In addition, the General Counsel does not argue nor is there credible evidence reflecting that the employees were permitted to talk about other subjects during working time, but not allowed to discuss the Union or union benefits.

Although counsel for the General Counsel argues at page 4 of his posthearing brief that the no-talking rule was specifically instituted to inhibit and/or interfere with the employees' union and protected concerted activities, there is no evidence to support such an inference. Rather, the evidence shows that Tom C. told all employees at the time of hire that they would have to join the Union, that he deducted union dues and benefit contributions from their paychecks and unsuccessfully sought to pay the money deducted to the Union, that the Union was allowed to conduct an unannounced meeting at the workplace which ran well beyond the normal lunchbreak and that the employees who attended were nevertheless paid for the entire time, and that Tom C. was willing to sign a 1-year collective-bargaining agreement in order to appease the Union and resolved the issue, even though he was only obligated to sign a contract for the duration of the project. In addition, the cases cited by counsel for the General Counsel[10] are inapposite because there, unlike here, there was a blanket restriction on discussing the Union and/or wages and benefits at the workplace (i.e., during working hours).

In addition, I find that Tom C.'s statement to the employees "if you want to work, stay here. If you don't, get off the job," which was made in the context of telling them to talk on their own time, did not restrain or inhibit the employees from discussing the Union or benefits during nonworking time and therefore does not constitute an independent violation of Section 8(a)(1) of the Act.

Accordingly, I shall recommend the dismissal of the allegations in paragraphs 9 (a)–(c) of the complaint.

2. 8(a)(3) allegations

a. Legal standard

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.[11] Specifically, the General Counsel must establish protected concerted activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage protected concerted activity. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected concerted activity. *T&J Trucking Co.,* 316 NLRB 771 (1995).

b. The discharge of Kulczycki

The evidence shows that Kulczycki engaged in discussions with the other employees about joining the Union and obtaining union benefits. He also raised questions about the delay in obtaining union membership and the status of the paycheck deductions. His interaction with the employees was in support of a common goal (i.e., joining the Union) and also related to their terms and conditions of employment. Thus, I find that Kulczycki engaged in protected concerted activity under Section 7 of the Act. *Meyers Industries,* 268 NLRB 493 (1984).

The undisputed evidence also shows Tom C. knew that Kulczycki, along with many other employees, participated in daily discussions about joining the Union and receiving union benefits.[12] These discussions, which frequently disrupted work time, eventually prompted Tom C. to implement the "no-talking" rule. At one point, Tom C. specifically told Kulczycki to stop "playing lawyer" and get back to work, which supports a reasonable inference that Tom C. viewed Kulczycki as a protagonist of the discussions. Thus, the evidence shows that the Respondent had knowledge of Kulczycki's protected concerted activities.

However, counsel for the General Counsel does not argue nor is there evidence of union animus. The unrebutted evidence discloses that Tom C. told everyone at the time of hire that they would have to join the Union, that he deducted union dues and benefit contributions from their paychecks, that he accommo-

[10] *Capital EMI Music,* 311 NLRB 997 (1993); *Turnbull Cone Baking Co.,* 271 NLRB 1320 (1984), enfd. 778 F.2d 292 (6th Cir. 1985); *Hilton Environmental, Inc.,* 320 NLRB 437 (1995).

[11] *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996).

[12] Although the unrebutted evidence shows that Kulczycki phoned the Union on July 8 and invited the union representative to address the employees, there is no evidence that Tom C., Larry Moss, or any other manager or agent of the Respondent was aware of this fact.

dated the Union by allowing an unannounced union meeting to be held on the jobsite, that more than once he attempted to pay the Union the amounts deducted for union dues and benefits, and that he offered to sign a 1-year collective-bargaining agreement with the Union. In addition, there is no evidence that the Respondent sought to impose a blanket restriction on the employees discussing the Union and/or union benefits. Rather, a valid rule was imposed for a legitimate business reason, that is, to prevent the repeated disruption of work. Thus, I find that the General Counsel has failed to show requisite animus.

Finally, the General Counsel has failed to show that Kulczycki was discharged because he was engaged in the protected concerted activity. Instead, the evidence shows that despite the fact that Kulcyzcki frequently argued with Tom C., made disparaging remarks about his integrity, questioned his true motives, disregarded Moss' instructions, and worked slowly to obtain more overtime (while encouraging other employees to do the same), Tom C. declined to fire Kulczycki because of his personal relationship with David C., right up until the very end of the schools project when he told Moss to place Kulczycki on the work list for Saturday and Sunday. The evidence further shows that only after Kulczycki was insubordinate, confrontational, and abusive toward Moss in front of the other employees, did Tom C. stand behind the decision of his front line manager, and decline to overturn the discharge.

Thus, I find that counsel for the General Counsel has failed to satisfy his initial evidentiary burden under *Wright Line*. Accordingly, I shall recommend the allegations concerning the discharge of Richard Kulczycki in paragraph 10 of the complaint be dismissed.

c. The layoff of Ronald Carter

Ronald Carter also participated in the discussions about joining the Union and obtaining union benefits. Contrary to the General Counsel's assertions, he was not a protagonist like Kulczycki. To the contrary, Carter testified that he kept quiet and did his work in order to avoid exacerbating a personality clash with Moss. (Tr. 127–128.) Carter's close working relationship with Kulczycki, however, supports a reasonable inference that the Respondent either knew or correctly surmised that Carter participated in the discussions about joining the union and obtaining union benefits. *Permanent Label Corp.,* 248 NLRB 118, 136 (1980). Thus, I find that Carter, like Kulczycki, was engaged in protected concerted activity known to the Respondent.

As with Kulczycki, however, the General Counsel does not argue nor is there any evidence that the Respondent opposed the Union or opposed the employees talking about joining the Union or obtaining benefits during nonworking time. In the absence of such evidence, the General Counsel has failed to satisfy a crucial criterion of the *Wright Line* standard.

Finally, there is no evidence that Carter was laid off because he participated in the discussions about joining the Union and receiving union benefits. Contrary to the General Counsel's assertion that Carter was singled out, the evidence shows that he was one of many employees laid off on August 6. The credible evidence also show that Carter did not work to his potential and as a result was not regarded highly by Moss.

For these reasons, I find that counsel for the General Counsel has failed to satisfy his initial evidentiary burden under the *Wright Line* analysis. Accordingly, I shall recommend that the allegations in paragraph 10 of the complaint pertaining to Ronald Carter be dismissed.

CONCLUSION OF LAW

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

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[13]

ORDER

The complaint is dismissed.

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