**F. Mullins Construction, Inc. *and* Local Lodge 30, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO.** Cases 11-CA-10124 and 11-CA-10250

14 December 1984

## DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 1 April 1983 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

The judge found, inter alia, that the Respondent violated Section 8(a)(1) by coercively interrogating employee Rodney Gibbs and thereafter violated Section 8(a)(3) by laying off Gibbs because he engaged in union activity. In reaching this conclusion, the judge relied on his finding that Robert McMillan was acting as the Respondent's agent when he interrogated Gibbs and thus learned that Gibbs supported the Union. The Respondent excepts contending that McMillan was not its agent. We find merit in the Respondent's exception.

The Respondent is a corporation engaged as a general contractor at the North Carolina Phosphate jobsite in Aurora, North Carolina. The project requires the use of earthmoving equipment that has to be constructed at the jobsite. North Carolina Phosphate purchased a large piece of equipment, called a dragline, from the Marion Power Shovel Company. The Respondent contracted to install the equipment.

McMillan, an employee of Marion Power Shovel Company, worked at the site as a field weld specialist. McMillan's primary reason for being at the site was to serve as a representative of Marion Power and to recommend to Marion Power whether the welds were done in a manner so that Marion Power could warrant the equipment.

McMillan did make requests to the site superintendent that welds not done in accordance with the specifications be corrected. Additionally, McMillan participated in the testing of welders. He signed the test results on the signature line for "welding engineer, supervisor, or erection engineer." Based on the test results, McMillan made recommendations for or against a welder's employment. Most of his recommendations were followed. The only evidence that McMillan issued direct instructions to employees consists of McMillan's request to Rodney Gibbs that he get a union card from his car. Gibbs ignored the first such request but complied the second time the request was made.

As the judge correctly noted, McMillan's recommendations carried weight with respect to the employment of welders. While this evidence ordinarily would tend to establish that the Respondent had made McMillan its agent, we find that it is insufficient to support such a finding under the circumstances of this case. McMillan's role was to ensure that the Respondent was performing the welding in accordance with the standards established by his employer, Marion Power. Thus, in testing and making recommendations about welders, McMillan was acting solely on behalf of Marion Power. In following McMillan's recommendations the Respondent was simply seeking to satisfy him so that Marion Power would issue a warranty on the

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

We have examined the judge's findings that the Respondent violated Sec 8(a)(1) by interrogating employees in light of the Board's decision in *Rossmore House*, 269 NLRB 1176 (Apr 25, 1984), and find, in agreement with the judge, that the interrogations were unlawful

In finding Jones and Brooks to be supervisors, we do not rely on the judge's finding that welding constituted skilled work

The judge inadvertently concluded that it was Douglas Lee who spoke to Heath about the Union in the beginning of September It is clear from Heath's affidavit that the judge was referring to Jones, not Lee However, it is not clear whether Jones' questioning of Heath regarding whether Heath was going to join the Union occurred prior to or after Mullins' takeover Accordingly, we do not pass on this complaint allegation since, in any event, it would be cumulative

The judge incorrectly cites *Cumberland Farms Dairy*, 258 NLRB 900 (1981), as being enforced at 674 F 2d 943 (1st Cir 1982) That Board decision has not been addressed by the circuit court of appeals The Board decision that was enforced in the First Circuit's 1982 decision is reported at 250 NLRB 1204 (1980)

[2] In finding that Welding Foremen Jones and Brooks are supervisors as defined by the Act, Member Hunter does not rely on the judge's conclusion that the Respondent would be responsible for their actions even in the absence of evidence that they possessed such authority or his reference to *Sambo's Restaurant*, 247 NLRB 777, 782 (1980)

Member Hunter agrees with the judge's conclusion at sec III,C,2, par 4, that Jones' telling employee Edwards that he could not talk about the Union during "working" time violated Sec 8(a)(1) because Jones' admonition was discriminatory, i e , it only prohibited talk about the Union but did not prohibit conversation about other subjects during the same time In so concluding, however, Member Hunter does not agree that this one comment constituted a "rule," as the judge also found The judge's cite to *Pedro's Restaurant*, 246 NLRB 567 (1979), in that regard is not apt as *Pedro's* involved the posting of a notice on a bulletin board Here, we have a single unlawful admonition which Member Hunter finds clearly does not constitute the promulgation of a "rule "

equipment. In that sense the Respondent was in a position analogous to that of a provider of services who hires or fires based partially on the recommendation of an essential customer. In these circumstances, the Respondent's efforts to comply with the hiring recommendations McMillan made were not, without more, sufficient to make McMillan its agent. Moreover, the only evidence that employees may have thought the Respondent had given McMillan authority over them was the fact that, at McMillan's request, Gibbs left work to get the union card from his car. However, even here the evidence is weak in that the first such request was ignored.

Contrary to the judge, we therefore conclude that McMillan was not an agent of the Respondent. Accordingly, we find that the Respondent was not responsible for McMillan's action in questioning employees as to whether they had received cards, in asking Gibbs where the card was, and in requesting that Gibbs get the card from his car. Therefore, we shall dismiss this allegation of the complaint.[3]

Additionally, because we have found that McMillan was not an agent for the Respondent, we further disagree with the judge's finding that Gibbs' layoff was discriminatorily motivated. Absent a finding that McMillan's knowledge is attributed to the Respondent, there is no basis in the record for concluding that the Respondent was aware of Gibbs' union activity. Accordingly, we also dismiss the 8(a)(3) allegation involving Gibbs.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, F. Mullins Construction, Inc., Aurora, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Barry Edwards, Randall Walker, Jerry Eisenzimmer, and Douglas Lee immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any employee hired to replace any of them, and make them and the estate of Leslie Heath whole for any loss of earnings any of them or the estate may have suffered by reason of the Respondent's discrimination against them and Heath, in the manner described in the section of this decision entitled 'The Remedy.'"

2. Substitute the attached notice for that of the administrative law judge.

## APPENDIX

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

The 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.

WE WILL NOT ask employees whether they have received union cards, whether certain employees are trying to get other employees to sign union cards, or to describe the nature of union literature distributed to employees.

WE WILL NOT ask employees whether they intend to "carry on" the Union or lead its organizational efforts.

WE WILL NOT ask employees where they obtained union hats or other union paraphernalia, who gave it to them, or whether they had to sign union cards to obtain them.

WE WILL NOT direct employees to deliver union cards to company agents.

WE WILL NOT tell employees that they would probably lose their jobs if they voted the Union in.

WE WILL NOT tell employees that a supervisor would not be able to obtain a job with the owner of a jobsite who has engaged us to perform work there if the Union comes onto the jobsite.

WE WILL NOT discriminatorily tell employees after the beginning of a union campaign that they cannot talk about the Union during working time.

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 offer Barry Edwards, Randall Walker, Jerry Eisenzimmer, and Douglas Lee immediate reinstatement to their former positions or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary any employee hired to replace any of them.

WE WILL make these employees, and the estate of Leslie Heath, whole for any loss of earnings they or the estate may have suffered, with interest, because we laid them off unlawfully.

WE WILL expunge from our personnel records or other files of these employees any reference to our unlawful layoffs of them and notify them in writing

[3] Even though we dismiss the 8(a)(1) allegation concerning the incident between McMillan and Gibbs, the remedy remains unchanged as the 8(a)(1) violation would be cumulative

that this action has been taken and that evidence of these unlawful layoffs will not be used as a basis for further personnel actions against them.

## F. MULLINS CONSTRUCTION, INC.

## DECISION

### STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge in Case 11-CA-10124 was filed on September 24, 1981, by Local Lodge 30, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO (the Union). An amended charge was filed on October 13, and a complaint was issued on November 6, 1981. Thereafter, on November 16, the Union filed a second amended charge. The charge in Case 11-CA-10250 was filed by the Union on December 24, 1981, and a consolidated complaint was issued on January 28, 1982.

As subsequently amended at the hearing, the complaint alleges that F. Mullins Construction, Inc. (Respondent),[1] in September 1981 and thereafter, interrogated its employees concerning their union sympathies and the sympathies of fellow employees, created an impression among its employees that their union activities were under surveillance, orally promulgated a rule prohibiting employees from talking about the Union during working hours, and threatened employees with loss of jobs if they selected the Union as their collective-bargaining representative, all in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The amended complaint also alleges that Respondent laid off employees Barry Edwards, Randall Walker, and Jerry Eisenzimmer on September 24, 1981, and employees Leslie Heath, Rodney Gibbs, and Douglas Lee on December 3, 1981, because of their union activities, in violation of Section 8(a)(3) and (1) of the Act.

A hearing was held before me on these matters in Washington, North Carolina, on July 27 and 28, 1982, and in Raleigh, North Carolina, on October 5, 1982. On the basis of the entire record, including a brief filed by Respondent, and my observation of the demeanor of the witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a Florida corporation licensed to do business in the State of North Carolina, where it has been engaged as a general contractor at the North Carolina Phosphate jobsite in Aurora, North Carolina. The complaint alleges that Respondent purchased supplies and materials for use at the Aurora jobsite valued in excess of $50,000 directly from sources outside North Carolina, and that it performs services valued in excess of that amount for customers located outside the State.

Respondent's answer denies the direct outflow allegation, but appears to admit the direct inflow allegation.[2] The answer also admits that Respondent is an employer engaged in interstate commerce, and that it meets the Board's indirect inflow jurisdictional standard.[3] At the hearing Respondent appeared to contest, although not explicitly, the direct inflow allegation. However, the parties stipulated that Respondent receives materials, supplies, and services from an employer located within the State of North Carolina which is subject to the Board's jurisdiction under the "direct standards." I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act under the Board's indirect inflow standard.[4]

#### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Background*

The General Counsel introduced what he called background evidence tending to show union animus on the part of Respondent. This principally involved two other companies, North Carolina Phosphate, a firm engaged in phosphate extraction at the Aurora jobsite, and Mulberry Construction Co. of Mulberry, Florida, with whom North Carolina Phosphate had contracted to install very large earthmoving equipment, called a dragline, at Aurora. Mulberry was the original contractor on this job, and was succeeded by Respondent.

Charles L. Dover, a business manager for the International Union of Fire, Brakemen, and Engineers, associated with the North Carolina Building and Construction Trades Council, testified that Mulberry had a contract with his organization. About mid-June 1981, Dover discovered that Mulberry was in violation of the contract at a project in Aurora. He met with the president of Mulberry, and informed him that Florida unions would shut down every job that Mulberry had in Florida. The Mulberry official replied that he would get back to North Carolina Phosphate, and was sure that he could arrange with that company to employ union men at the Aurora jobsite. If not, Dover was assured, Mulberry would leave the job.

L. F. Shipman, a coordinator for the North Carolina Trades Council, testified that Mulberry asked him to speak to North Carolina Phosphate about the Aurora job. On July 9, 1981, Shipman had a meeting with the North Carolina Phosphate president, and was informed that the company had decided not to use union men on the job

About the same time in July, Mulberry employed Barry Edwards at the Aurora jobsite. Edwards indicated

[1] Respondent's name appears as stipulated at the hearing

[2] G C Exhs 1(o), pars 3 and 4, and 1(q), pars 3 and 4

[3] G C Exh 1(q), par 5

[4] See *Siemons Mailing Service*, 122 NLRB 81 fn 12 (1958), *St Francis Pie Shop*, 172 NLRB 89, 90 (1968) The General Counsel elected not to litigate the direct outflow allegation

his union affiliation on his application form, and began a campaign on behalf of the Union immediately. He distributed handbills on the day he was hired and obtained 8 to 10 signed union authorization cards from Mulberry employees. Mulberry's lead welder at that time was Terry Jones, who was later promoted to foreman. During his first week of employment, Edwards told Jones and other employees that he was attempting to organize the job, and that he would appreciate any support they could give.

Respondent protested the introduction of much of this evidence on the ground that it was irrelevant with respect to the issue of whether it had committed an unfair labor practice. The Company noted that an unfair labor practice charge had been filed by the Union against North Carolina Phosphate, but that it had been withdrawn.[5] Respondent also observed that the Union had filed a charge against Mulberry, but that that organization had entered into an informal settlement agreement.[6]

Barry Edwards and Douglas Lee, employees under both Mulberry and Mullins, testified that Steve Ryder, Mulberry's superintendent, told a group of Mulberry employees in July or August that North Carolina Phosphate would not "tolerate" union men on the job. Employee Randall Walker averred that Ryder called a meeting in the latter part of August, and said "they were changing the name of the company," and that the only difference would be the fact that Ryder would not be there any more. Employer Rodney Gibbs asserted that there was picketing at the jobsite during this meeting, and that Ryder said they would shut the job down rather than let the Union come in. Employee Jerry Eisenzimmer testified that Mulberry Supervisor Terry Seville [7] told union activist Barry Edwards in mid-August that the "Union would not be on that job."

Fred G. Mullins testified that he was the president of the Company bearing his name, Respondent herein, and that he had been with the Company since July 1, 1981. He agreed that Mulberry had previously been constructing a dragline for North Carolina Phosphate at Aurora, and that his company took over the job on September 9, 1981.

Mullins made a speech to employees at the time he took over the job. Walker averred that Mullins told employees that he wanted to retain all of them in their existing jobs, and that the job would last until April or May 1982. Employee Jerry Eisenzimmer gave similar testimony Mullins denied telling employees that they would remain until the completion of the job, but admitted telling them that the job would take until July 1982. I credit Walker's testimony. Although Mullins may not have promised explicitly to keep all employees until the end of the job, his statement that it would last until the following year, coupled with his stated intention to retain all of them in their existing jobs, could reasonably have been interpreted as a promise of continued employment until the end of the project.

Employee Jerry Eisenzimmer testified that he had a conversation with Mulberry Supervisor Terry Seville in mid-August, in which Seville told him that he could stay on the job "as long as they had work down there." I credit this testimony.

Mullins in fact employed all of the Mulberry employees except Superintendent Ryder, and utilized the same equipment which Mulberry had used.[8]

### B. *The Supervisory and Agency Issues*

#### 1. The issues

The pleadings establish that Respondent's president Mullins was a supervisor within the meaning of Section 2(11) of the Act, and the parties stipulated that Site Superintendent Jeffrey McGuire and Assistant Site Superintendent Terry Seville had the same status. The parties differ over the status of Terry Jones, John Brooks, and Robert McMillan.

#### 2. Terry Jones and John Brooks

##### a. *Summary of the evidence*

Jones and Brooks were called leadmen by company witnesses. Brooks was on the day shift and Jones on the night shift.[9] They assigned work to employees in accordance with a "priority list" of jobs to be done, given to them by Site Superintendent McGuire or Assistant Site Superintendent Seville. According to Mullins, this list was given to Jones and Brooks "each morning." McGuire, however, testified that he "prepared a priority list weekly that was handed out Monday . . . to the leadmen—the work had been assigned to the leadman at that point, and at that time he had so many people and so many areas to work, so he distributed his people to those areas." Seville defined a priority list as a "list of things . . . to be done either during that week or to complete a phase of the project." I credit McGuire's and Seville's testimonies, and conclude that the priority list assigned work to Jones and Brooks on a weekly or job basis, but not on a daily basis.

Employee Douglas Lee testified that Jones moved him "from job to job." Jones said that he moved employees to a different "department" when they were finished with a prior "department." He also recorded the employees' time. Employee Rodney Gibbs gave similar testimony about Brooks Site Superintendent McGuire stated that the "leadmen were given great independence in the distribution of their personnel." Comparing his own duties with those of Brooks, Seville testified as follows:

> I ran quite a few more areas. John was basically welding, and I did a lot more of the iron-work and sub-structures which he supervised the welding on . . . I shouldn't say "supervised," you know, but I'd tell him what to do and then he would just commence to take care of business.

[5] R Exh 1
[6] R Exh 3
[7] Seville was an admitted supervisor under Mullins

[8] I credit the testimony of employee Barry Edwards corroborated by Walker on this issue
[9] Jones said that he changed to the day shift the week before Thanksgiving 1981

Employee Barry Edwards averred that Mulberry distributed a document with the titles of employees in the "chain of command," followed by their telephone numbers. Brooks was listed as welding foreman on the day shift. According to Edwards, employees who were going to be absent from work were required to call the appropriate person on the list and report the absence. Although Brooks described his position as "leadman" under Mullins, he did not expressly contradict Edwards' testimony, which I credit.

Edwards was employed on the night shift. He testified that Jones was promoted to "foreman" in late July or early August 1981, about 2 or 3 weeks after Edwards had been hired. Although Jones described himself as the lead welder, he did not expressly contradict Edwards' testimony about the promotion. Further, according to Edwards' uncontradicted testimony, he congratulated Jones after the promotion, to which the latter replied that there was no need for congratulations, since he had "been made foreman . . . to keep an eye on Edwards." I credit Edwards on the issues of Jones' promotion and his response to Edwards' congratulations.

Edwards testified that Jones "quit working with his tools and started passing out work assignments" after the promotion. There is implicit corroboration from Jones, who said that he "went back to [his] tools" after his transfer to the day shift just before Thanksgiving. On one night, apparently prior to this transfer, Jones did work with his tools, but was "reprimanded" by an individual whom Edwards, relying on Jones, believed to be associated with North Carolina Phosphate. Asked what percentage of time he spent in "manual labor," Jones replied: "Well, I'd say 90 percent, because . . . I had to drag leads, run and get drop lights; first one thing and then another. And then I would try to weld some, and go around and help as much as I could." Brooks, asked how much he worked with his hands, initially answered, "Some," which he later estimated to be 75 percent of his time. His description of his duties is similar to that of Jones.

I conclude that Jones and Brooks, in addition to their work assignment duties, engaged in some manual labor. However, this consisted of a variety of jobs, including help to other employees, unlike the steady "working with tools" of rank-and-file employees. I also conclude that Jones spent less time in manual labor after his promotion to foreman than he had previously done as lead welder.

I find that Jones and Brooks had the title of "foreman" or "welding foreman" under Mulberry at the time that Mullins took over the job on September 9, 1981. They also had the job characteristics outlined above. Inasmuch as Mullins told employees at the time of the takeover that he wanted them to continue in their existing jobs, I also conclude that Jones and Brooks continued in the same capacity under Mullins [10]

[10] As indicated above, Jones transferred to the day shift just before Thanksgiving, i e , in the week beginning November 16, 1981, and apparently returned to rank-and-file status at that time

b. *Factual and legal analysis*

Section 2(11) of the Act sets forth various indicia of supervisory status, including the authority to "assign" or "to responsibly direct" employees, where the exercise of such authority "requires the use of independent judgment." "The functions of a supervisor listed in the statute are disjunctive; the Board need not show that an employee performed all or several of the functions to support a finding of supervisory status " *NLRB v. Dadco Fashions*, 632 F.2d 493, 496 (5th Cir. 1980), enfg. 243 NLRB 1193 (1979).[11]

Brooks and Jones were employed on a jobsite involving the construction of large earthmoving equipment. They assigned work to other employees, principally welders. I conclude that this direction of work was "responsible" and required "independent judgment." This conclusion is based on the following factors: (1) the work to be assigned was given to Brooks and Jones on a weekly or job-phase basis rather than more frequently; it included jobs to be completed followed by other jobs, and thus involved the scheduling of work in which Jones and Brooks were given "great independence in the distribution of their personnel"; (2) welding constitutes skilled work; (3) Jones and Brooks did less manual work than other employees, and almost no routine "work with tools"; (4) they had the title of "foreman" or "welding foreman"; (5) they kept employee timecards; (6) employees were required to call Brooks, and probably Jones, in the event of absence from work, (7) one admitted supervisor's description of his own duties was almost indistinguishable from his description of Brooks', and differed only as to extent of area covered; and (8) Jones' statement to Edwards—that he had been promoted to foreman to "keep an eye" on Edwards—suggested a position of authority over the latter. Although this statement was made under Mulberry's tenure, there was no change in Jones' status under Mullins, at least until his transfer to the day shift.

No two cases involving supervisory issues present exactly the same facts. However, at least two circuit courts of appeals have sustained the Board's findings of supervisory status in cases where responsible direction of work constituted a key factor in the Board's conclusions,[12] and one where the monitoring of timecards was a factor.[13] A similar conclusion is warranted herein, and I find that Brooks and Jones were supervisors within the meaning of Section 2(11) of the Act—Jones until his transfer to the day shift the week of November 16, 1981. Even in the absence of such finding, Respondent would be responsible for their actions since it placed them in positions where employees could reasonably believe that they spoke on behalf of management. *Sambo's Restau-*

[11] See also *NLRB v Brown Specialty Co*, 436 F 2d 372, 375 (7th Cir 1971), enfg 174 NLRB 519 (1969), 180 NLRB 969 (1970)

[12] *NLRB v Dadco Fashions*, supra; *Justak Brothers & Co v NLRB*, 664 F 2d 1074 (7th Cir 1981), enfg 253 NLRB 1054 (1981) See also *NLRB v Adam & Eve Cosmetics*, 567 F 2d 723 (7th Cir 1977), revg 218 NLRB 1317 (1975)

[13] *Dresser Industries v NLRB*, 654 F 2d 944 (4th Cir 1981), enfg as modified 248 NLRB 33 (1980)

*rant*, 247 NLRB 777, 782 (1980), enfd. 641 F.2d 794 (9th Cir. 1981).

3. Robert McMillan

a. *Factual summary*

The earthmoving equipment, or dragline, which was being constructed at the Aurora jobsite had been purchased by North Carolina Phosphate from Marion Power Shovel Company, a Division of Dresser Industries, located in Marion, Ohio. The equipment was so large that it had to be put together at the jobsite. McMillan worked for Marion as a field weld specialist at the Aurora jobsite from about June 1981 until about June 1982. One of his duties was to witness the contractor's construction of the dragline, and to determine whether it was in accordance with Marion's specifications. Based on his reports, Marion could then decide whether to give a warranty to North Carolina Phosphate. If certain welds had not been done in accordance with the specifications, McMillan would report this fact to the site superintendent and request that the work be corrected.

McMillan also participated in the testing of welders. Edwards testified that McMillan "gave" him a welding test. McMillan disputed this, stating that he only "witnessed" tests given by the contractor. However, he signed a document recording the test results for welders, and the description of his capacity underneath his signature is that of "welding engineer, supervisor, or erection engineer" (R. Exhs. 13 and 14). McMillan also informed the site superintendent whether the applicant had passed the test, with a recommendation for or against his qualification and employment as a welder. Most of his recommendations were followed, according to McMillan.

Another issue is whether McMillan tested welders and made recommendations after Mullins took over the job. Part of the testing involved X-ray analysis of the welds done by the applicant. Asked whether any tests of welders were conducted after Mullins took over from Mulberry, McMillan "guessed" that none had been conducted, but then expressed doubt that all the X-ray results were back by the time of the takeover. Other evidence suggests the probability of testing after September 9. Thus, the welding qualification form provides for expiration of the qualification if the employee had not welded for 6 months. The earliest known qualification form is dated July 2, 1981 (R. Exh. 14). Respondent contends that welding work diminished in late 1981, warranting the layoff of welders. On the other hand, Mullins admitted that he had welding work subsequent to December 3, 1981, and McGuire said that two welders were "rehired" in December. As noted above, McMillan was at the jobsite until June 1982. I conclude from this evidence that McMillan made at least some recommendations concerning the qualifications of welders subsequent to the time that Mullins took over the job on September 9, 1981.

As appears hereinafter, an employee engaged in work was asked by McMillan to get a union card which was located in the employee's automobile. The employee stopped working, obtained the card, and gave it to McMillan.

b. *Legal analysis*

The Board has concluded with judicial approval that an employer was responsible for the actions of a safety director where it appeared to employees that his comments "carried some weight with respect to their employment." *Cumberland Farms Dairy*, 258 NLRB 900 fn. 3 (1981), enfd. as modified 674 F.2d 943 (1st Cir. 1982). It is obvious that McMillan's recommendations concerning the employment of welders, based on the test results, carried "some weight" with respect to *their* employment. Indeed, his recommendations were followed most of the time. Moreover, one employee perceived McMillan as having sufficient authority to warrant the employee's leaving work to get McMillan a union card. I conclude under these circumstances that Respondent is responsible for McMillan's actions.

C. *The Alleged Violations of Section 8(a)(1)*

1. The facts

a. *Terry Jones*

(1) Summary of the evidence

The complaint does not allege any violations of the Act prior to September 1981. However, some of the evidence adduced at the hearing relates to events allegedly having taken place prior to that month, i.e., during Mulberry's tenure. The General Counsel's apparent position is that this constitutes background evidence.

Randall Walker testified that Jones asked him in August whether he had signed a union card. "No, not yet," Walker replied. In another conversation in August, Jones told employees that Edwards "would be an all-right guy if he wasn't a union man," according to Walker. Jones denied making this statement, but asserted that he heard another employee make it.

One of employee Leslie Heath's affidavits affirms that Jones asked him several times in August whether he was for the Union, and Heath replied, "Yes, one hundred percent." Heath signed a union card in August, and asked 10–15 other employees to join the Union. Seville and Jones were present during one of these discussions in August or September.[14]

[14] G C Exh 3 During the hearing in July 1982, the General Counsel represented that Heath was ill with a heart attack and requested admission of his affidavit under Rule 804(b)(5) of the Federal Rules of Evidence The General Counsel acknowledged, however, that he had not complied with the requirement of that rule that he give advance notice to Respondent and argued that he was precluded from giving Respondent a copy of the affidavit by Sec. 102 118 of the Board's Rules and Regulations During the recess between the hearing dates on July 28 and October 5, I received Heath's affidavit into evidence on condition that he still be unavailable as a witness on the date the hearing resumed and directed the General Counsel to give a copy to Respondent Respondent appealed this ruling, which was sustained by the Board On October 5, the date the hearing resumed, it appeared that Heath had died during the recess The General Counsel stated that he had complied with my order I thereupon reaffirmed, during the hearing on October 5, my prior ruling, and two of Heath's affidavits were received, dated October 2, 1981, and January 15, 1982, respectively (G C Exhs 3 and 4). Respondent submitted evidence to contradict some of Heath's averments

Randall Walker described conversations about the Union with employees, including Jones, in August and September. The Union had started its campaign, and Edwards had given Walker a union card. The first conversations took place in the lunchroom. Jones was "putting the Union down," and Walker on two occasions said that he had been a member of the Steelworkers Union in Tennessee, and that he did not see anything wrong with the Union. Edwards corroborated this testimony. In the first part of September, after Mullins had taken over the job, according to Walker, Jones approached him at his work station and asked whether Barry Edwards was trying to get Walker to sign a union card. Walker replied, "Yes." About a week later, while driving to work with Jones and employee Johnny Williams, Walker asked Jones how the Union worked, and Jones replied that the employees would probably lose their jobs if they voted the Union in.

Jones agreed that he rode to work with Walker and Johnny Williams, but denied that the former ever asked him to explain the Union. They would talk about the Union, Williams testified, and Walker gave the impression that he was against it. Jones denied threatening any employees with loss of jobs. He agreed that he had a conversation with Walker about Edwards' union activities, but gave a different version of it. According to Jones, Walker came to him one day and said that Edwards was talking to Walker about the Union.

Employee Jerry Eisenzimmer testified that Jones asked him about the first of September whether he supported the Union, and Eisenzimmer replied affirmatively. Eisenzimmer's pretrial statement indicates that this conversation took place prior to the Mullins takeover. Jones denied having this conversation.

Employee Douglas Lee averred that Jones told employees on top of a revolving rig in late September, i.e., after the Mullins takeover and the September 24 layoffs, that he would not have anything to do with the Union himself, because North Carolina Phosphate had given the company the first chance to do the job as long as it kept the Union out, and bringing the Union in would mean that Jones could not work "with Carolina Phosphate." Jones admitted having this conversation but contended that what he said was that he intended to "get out of construction" and take a job with North Carolina Phosphate and, therefore, saw no reason to get a union book. He mentioned the cost of union dues.

Barry Edwards testified to a conversation with Jones in the first week of September, i.e., probably under Mulberry. Jones told him that the union organizer on the day shift had been fired, and asked Edwards what chance he had organizing the night shift. Union Organizer James Phillips in fact had been fired, according to Edwards.

Edwards affirmed that employees normally engaged in conversation during working time when it did not interfere with work. He testified that he talked to employees about the Union under these circumstances. In late September, according to Edwards, i.e., under Mullins, Jones told him that he would have to quit talking about the Union on company time. About the same time, Jones asked Edwards how many organizers he had, how many people supported the Union, and whether Edwards thought he would be able to get a union onto the job. Edwards replied that he thought he could get a union in, and that the rest of the information was privileged. Jones denied prohibiting Edwards or anyone else from talking about the Union during working hours.

One of Heath's affidavits[15] avers that Lee, "around the beginning of September," said that he would never join a union, that he would cross a picket line, and admonished Heath to "look at all the money you'd lose like the people picketing down at New Bern." I infer that Heath referred to statements allegedly made prior to the Mullins takeover. The affidavit thereafter states that "sometime in September" Jones asked Heath whether he was going to join the Union, and Heath replied that he would if it would benefit his pocketbook. From the sequence of allegations in the affidavit, I infer that Heath was alleging an event which took place after September 9, i.e., after the takeover. "During the week of September 28," the affidavit also relates, Jones noted that Edwards had been laid off, and asked whether Heath would carry on for the Union or take Edwards' place. According to his affidavits, Heath replied, "Whatever will turn me on," or "Yes, if it becomes necessary."

In addition to the specific denials listed above, Jones was asked on direct examination whether he had ever interrogated employees concerning their union activities and sympathies. He replied, "Not that I recollect." Asked whether he had ever interrogated other employees concerning the union sympathies of other employees, Jones answered, "No, I don't think so."

(2) Factual analysis

Walker's testimony about the lunchroom conversations in August and September was not contradicted. I credit it and find that Walker stated in Jones' presence on two occasions that he had been a member of another union, and saw nothing wrong with the Union. I do not credit Jones' account of the conversations with Walker and Williams during the automobile ride, since it is unbelievable, in light of my prior finding, that Walker could have given the impression that he was opposed to the Union. Inasmuch as Jones was thus an unreliable witness, I credit Walker's account of the conversation and find that Jones, after September 9, told employees that they would probably lose their jobs if they voted the Union in.

Since Walker was a union supporter, it is also improbable, as Jones contended, that Walker would have come to the welding foreman with a statement that Edwards was talking to Walker about the Union. I credit Walker's account of this conversation, and find that Jones, after September 9, asked Walker whether Edwards was trying to get Walker to sign a union card.

Jones' account of the conversation on top of the revolving rig with Lee and other employees admits essential elements of Lee's version of the conversation—Jones' desire to work with North Carolina Phosphate, and the relationship of the Union to this goal. I credit Lee's addi-

[15] Ibid.

tion of the missing element—that Jones said bringing the Union onto the Aurora jobsite would mean that Jones could not obtain employment with North Carolina Phosphate. I also find that this conversation took place after September 9.

Jones was a less reliable witness than Edwards, and I do not credit his denial that he prohibited Edwards from talking about the Union during working hours. Accordingly, I find that, subsequent to Mullins' takeover of the job, Jones told Edwards that he could not talk about the Union during working hours, while it was customary practice for employees to talk about other subjects during working hours. I also reject Jones' general denial of interrogation, and find that, subsequent to September 9, he asked Edwards how many organizers he had, how many people supported the Union, and whether Edwards thought he would be able to get a union onto the job.

I also credit Heath's uncontradicted averments that, subsequent to September 9, Jones asked Heath whether he was going to join the Union, and, after Edwards' layoff, whether Heath was going to "carry on the Union."

I also credit the General Counsel's evidence in the following instances, and find that each took place prior to September 9: Jones' asking Walker whether he had signed a union card yet; Jones' telling employees that he did not see anything wrong with the Union; Jones' asking Eisenzimmer whether he supported the Union, and Eisenzimmer's reply that he did; Jones' telling Edwards that the organizer on the day shift had been fired, and asking him what chance he had to organize the night shift; Jones' asking Heath whether he was for the Union, and Heath's replying, "Yes, one hundred percent"; and Jones' advising Heath to look at all the money pickets were losing at another location.

b. *Terry Seville and John Brooks*

Douglas Lee affirmed that on September 24, after Edwards had been laid off, another employee informed Seville that Edwards had been passing out union information in the yard. Seville inquired about the nature of the information, and Lee told him that it was an "authorization for a representation card." Seville said that he would like to see one, and another employee brought a card to Seville a few days later. Seville looked at it, and said that he did not need it any more, that the "problem had been taken card of." A short time later Seville asked Lee what kind of cards Edwards was distributing, and Lee gave the same answer. This testimony was partially corroborated by Seville, and I credit it.

Lee was laid off on December 3, 1981. He testified that, about 2 or 3 weeks before that event, i.e., in mid-November, he was wearing a union cap at a party. Seville and Brooks were in attendance at the party. According to Lee, Brooks asked him where he managed to get the hat, saying that he had been unable to get one even though he was a union member. Seville then walked over and asked Lee whether Edwards had given him that hat. Lee replied affirmatively. Seville then asked whether Lee had to "sign one of those little blue cards" to get the hat. Lee replied that he had signed a card "a long time ago." I credit this testimony, which was corroborated by Brooks and Seville. I infer that Seville, by his reference to "little blue cards," meant union cards. Seville asserted that the reason for his inquiry was the fact that he collects hats as a hobby, wanted one like the hat Lee was wearing.

c. *Robert McMillan*

Rodney Gibbs testified that Lee was handing out union cards at the gate in "late November." The next day McMillan asked employees, including Gibbs, whether they had received union cards. This took place in the shelter where the welding tests were given. Gibbs replied that he had received one, and McMillan asked where it was. Gibbs replied that it was in his car, and McMillan told him to get it. Gibbs did not do so at the time, and went back to work. Later in the day, when Gibbs was working, McMillan again asked him to get the card. Gibbs complied, and gave the card to McMillan.

McMillan first testified that he had no recollection of this event, and then said: "I am going to state that it didn't happen. I don't remember it ever happening." McMillan contended that he received a card in early July while going through the gate. McMillan's denial is inconclusive and Gibbs' version shows that he had superior recollection of the event. I credit the latter's testimony, and, in light of McMillan's authority, consider his request to Gibbs—to get the union card—to be an order.

2. Legal analysis

The evidence thus shows that, subsequent to September 9, 1981, Respondent asked its employees: (1) to describe union information being distributed to employees; (2) whether one employee was trying to get another employee to sign a union card; (3) whether employees had received union cards; (4) whether employees supported or intended to join the Union; (5) after the layoff of the leading union activist, whether another employee intended to "carry on the Union"; and (6) where an employee had obtained a union hat, whether a specific employee who was a union activist had given it to him, and whether the employee had to sign a union card to get it. The first five inquiries conveyed to employees Respondent's displeasure with the union activity at the jobsite and were, therefore, coercive. The same reasoning applies to McMillan's order to Gibbs to give one of the cards to McMillan. Accordingly, these inquiries and order violated Section 8(a)(1) of the Act.[16]

Respondent argues the innocence of the various inquiries grouped under number 6 above because of Seville's asserted hobby of collecting hats. I do not accept this argument. Brooks professed no such hobby, and there is no evidence that Seville stated his hobby as the alleged reason when he asked Lee the question. Therefore, nothing was said to offset the inherently coercive nature of the questions. Nor is there any good reason for the questions about Edwards and the signing of union cards. Ac-

[16] *Gossen Co.*, 254 NLRB 339 (1981), *PPG Industries, Inc.*, 251 NLRB 1146, 1147 (1981)

cordingly, I find that such questions also violated Section 8(a)(1).

Jones' statement to Walker and other employees—that they would probably lose their jobs if they voted the Union in—was coercive under established Board law, and I so find. Jones' statement to Lee and other employees—that Jones could not get a job, with North Carolina Phosphate if the Union came onto the Aurora jobsite—must be interpreted in light of Respondent's other unlawful conduct, and Jones' threat concerning loss of jobs made to Walker and other employees, which threat, I find, preceded the statement to Lee. Even though the latter ostensibly concerned only Jones' employment prospects with North Carolina Phosphate, in the context of the preceding events the employees could reasonably interpret Jones' statement as meaning that their own jobs with Mullins, or Mullins' continued presence on the jobsite, would be endangered if they selected the Union as their collective-bargaining representative. Accordingly, Jones' statement to Lee and other employees was also violative of Section 8(a)(1).

Jones' telling Edwards that he could not talk about the Union during working time was a discriminatory no-solicitation rule because it did not prohibit employee conversation about other subjects during such time. The rule was promulgated after the commencement of union activities in which Edwards played a leading role. Accordingly, it discouraged employees from engaging in union activities, and thereby violated Section 8(a)(1) of the Act. *Pedro's Restaurant*, 246 NLRB 567, 573, 583 (1979), enfd. as modified 652 F.2d 1005 (D.C. Cir. 1981).

### D. *The Alleged Violations of Section 8(a)(3)*

#### 1. Evidence of adverse working conditions

The General Counsel elicited evidence of adverse working conditions selectively applied against Edwards and Walker. There is no complaint allegation concerning this evidence, and the General Counsel's apparent intention was to establish discriminatory motivation with respect to Edwards' and Walker's layoffs. The evidence concerns "overhead welding," and the measures used to ameliorate its rigors. According to Walker, in this kind of welding the employee is lying down on an "angled" chair, welding over his head with the sparks falling down on him. The parties differed over the issues of alleged rotation of this work among employees and protective clothing used to guard against the sparks.

Walker testified that, during Mulberry's tenure, Seville told Walker that it was company policy to rotate jobs among employees; that this policy continued under Mullins; and that Walker saw overhead welding jobs being rotated under Mullins. Edwards asserted that Superintendent Ryder told him under Mulberry that employees were rotated from one job to the next, and that Mullins told employees at the time of the takeover there would be no change in working conditions. However, Foreman Brooks said that, as far as he knew, there was no policy on rotation of jobs, and Jones gave similar testimony. Brooks' and Jones' testimonies do not meet the specific averments of Walker and Edwards, and the latter are probably accurate because they reflect an employment practice which was reasonable. Moreover, they are consistent with the authority of Brooks and Jones to switch employees from job to job. I conclude that Mulberry and Mullins had a policy of rotating job to job. I conclude that Mulberry and Mullins had a policy of rotating among employees, particularly jobs which are onerous, such as overhead welding.

In addition to job rotation, both Mulberry and Mullins utilized protective clothing against the sparks. This consisted of leather sleeves, vests, and aprons.

Edwards testified that, shortly after Jones' promotion to welding foreman, i.e., under Mulberry, he was placed on overhead welding under "the tub." He asked for protective clothing, and Jones replied, "This ain't no union job and we ain't got to furnish you none." Jones first testified that Edwards asked for a set of welding sleeves, but that he said, "They don't furnish them." However, Jones asserted, "If a man needed a pair he could go get a pair." Then, Jones "offered Barry a pair when we were welding under the tub," but Edwards failed to get them. This testimony from Jones is contradictory and unintelligible, and I credit Edwards.

Edwards asserted that he was given some job rotation, but on some occasions he was left on overhead welding as much as 7 days in a row. Walker testified that three employees, Walker, Edwards, and one other, were not rotated as frequently as other employees. Edwards protested to Jones and Seville, but was told that the overhead welding had to be done. In the middle of September, i.e., under Mullins, Edwards asked what it would take to get off the overhead welding job. Would he have to burn his union card? Seville replied, "No comment," and Jones, laughing, said that "it might help." Jones testified that there was a "lot of joking" going around, and that he might have said this. I credit Edwards.

Edwards was assigned to welding the revolving frame in mid-September. He asked for protective clothing, and Jones replied: "This ain't no union job. How many times do I have to tell you we ain't going to furnish you none:" Edwards complained that Jones was "discriminating" against him. The two of them then went to Seville, who arranged for Edwards to weld on top of the frame. Jones testified that he "didn't think" he was discriminating against Edwards.

It started to rain, and Jones put all employees except Edwards in a protected position inside the frame. Edwards got wet, informed Jones that he was not going to work in the rain, and went home after arranging to clock out.

I conclude that Respondent gave Edwards and Walker more onerous work assignments than those given to other employees.

#### 2. The continuation of the union campaign—the union sympathies of Edwards, Walker, and Eisenzimmer

Edwards continued to engage in union activities throughout the change in contractors from Mulberry to Mullins. He obtained 10 to 12 signed union cards after the Mullins takeover. On September 21, the Charging Party's attorney signed unfair labor charges against Mul-

lins, Mulberry, and North Carolina Phosphate.[17] The next day, September 22, Edwards informed Foreman Jones that he had filed the charges. On the following day, September 23, Edwards distributed handbills to Respondent's employees at its front gate. On the day after, September 24, he was laid off.

As noted above, Edwards had given Walker a union card, and Jones interrogated Walker about it. Also as noted, Walker spoke up for the Union in the lunchroom when Jones was "putting it down." Further, Walker told Jones that he had been a member of another labor organization and saw nothing wrong with the Union.

Eisenzimmer signed a union card when Mulberry was the contractor and gave it to Edwards. He signed another card when Mullins became the contractor. Walker testified that he did not see Eisenzimmer manifest any inclinations for or against the Union. However, as set forth above, Eisenzimmer told Jones that he supported the Union. He also testified credibly that he rode to work "every day" with Barry Edwards, and that company supervisors saw him doing so. Since he did this every day, I infer that this took place under both Mulberry and Mullins. Edwards testified on cross-examination that Eisenzimmer wore a union hat on several occasions.

Mullins, McGuire, and Seville admitted knowledge of Edwards' union sympathies, but denied knowing that Walker or Eisenzimmer had the same sentiments. I reject this latter contention. The evidence is unmistakable in the case of Walker. Although he himself was unaware of similar sentiments on the part of Eisenzimmer, this does not negate the evidence which clearly establishes that Respondent was also aware of Eisenzimmer's union sympathies.

### 3. The September 24 layoffs

According to Edwards, Respondent laid off six employees on September 24—Edwards, Walker, Eisenzimmer, Guy Jeanette, Russell Caroway, and a sixth employee whose first name was "Joe." Although only two of them had signed cards prior to the layoffs, all were union supporters, according to Edwards Caroway told Edwards the day before the layoff that he was seriously considering signing a card, and Joe attempted to sign one after the layoff—an attempt which Edwards rejected because it did not take place during Joe's employment.[18]

According to Walker, he was assigned to the night shift on September 24. He was laid off without advance notice at 5 p m. together with the other employees by Site Superintendent McGuire. The latter told the employees to turn in their gear and get off the premises as soon as possible. The employees were not allowed to complete the shift. According to Walker McGuire told them that they were being laid off because of lack of work. Walker was then welding a revolving frame, and said that about 60 percent of this work had been completed. Edwards was also working on the revolving frame, said that it was unfinished, and was told that he had no job and to get off the premises immediately.

Eisenzimmer gave similar testimony—McGuire told them that most of the welding work had been completed, and that the employees were not needed any more. Eisenzimmer said that there were 2 to 3 days of work left on the job on which he had been working.

Seville gave reasons for the lack of notice of the layoff and the employees' rapid departure from the jobsite after the layoff. As to the first, he said that advance notice makes an employee "edgy," and the employer gets no work out of him thereafter. He also said that it was his experience to ask people to leave as soon as they were dismissed. McGuire averred that the employees were given "showup" pay for 2 hours on the day of the layoff. As for the degree of completion of the work, McGuire estimated "total machine completion at approximately 30 percent by September 24. The welding phase of the work involved two projects—assembly and welding of the "tub" and the "revolving frame " McGuire said that the tub was completely welded by September 24, and that the welding of the revolving frame was 30 to 40 percent completed. This is even less than Walker's estimate.

Site Superintendent McGuire described Edwards as an "excellent welder," while Assistant Site Superintendent Seville said that he was a "very good welder and he worked." Employee Douglas Lee affirmed that Foreman Jones, during the above-described conversation with employees in late September on top of a revolving rig, said that he "would hate to see Barry go because he was a good welder." Jones could put him on a job, and "he would go and do the job." However, Jones added, Edwards "had to go because he was a union organizer." Jones denied saying this. As noted above, I have credited Lee's version of the "revolving rig" conversation, and I also credit his testimony concerning Jones' statement about Edwards during this conversation. Lee's testimony is consistent with supervisory assessments of Edwards' ability, and Lee was a more reliable witness than Jones.

### 4. The December 3 layoffs

As set forth above, Jones asked Heath in August whether he was for the Union, and Heath answered, "Yes, 100 percent." Heath solicited other employees to join the Union in the presence of supervisors. Later, in September, Jones asked Heath whether he was going to join the Union, and Heath replied that he would do so if it would benefit his pocketbook. After Edwards was laid off, Jones asked Heath whether he was going to take Edwards' place, and Heath answered affirmatively

Lee testified that, after Edwards was let go, he started "taking up where Barry left off." He distributed handbills, solicited union cards, and wore a union hat, about which Seville and Brooks interrogated him in mid-November.

Gibbs received two union cards, and talked to several employees about the Union. In late November, when

[17] G C Exh 1(a), R Exhs 2 and 3 The charges were received and filed by the Board on September 24

[18] Respondent points to Edwards' pretrial affidavit in which he said that four out of the six employees laid off were union supporters Walker expressed a similar opinion However, Edwards gave the reasons described above to explain his judgment that Caroway and Joe might also be appropriately described as union supporters. I do not consider this to be a contradiction of sufficient importance to impeach Edwards' credibility

McMillan asked employees whether they had received union cards, Gibbs said that he had received one, and McMillan ordered him to get it.

As in the cases of Walker and Eisenzimmer, Respondent's witnesses denied knowledge of the union "affiliations" of Heath, Lee, and Gibbs. I reject this testimony. It is clear that all three employees were supporters of the Union, and that Respondent knew this fact.

The Company laid off Lee, Gibbs, and Heath on December 3, 1981.[19] About six other employees were laid off at the same time. About 3 p.m. on December 3, when the employees were on break, McGuire said that some employees would get an envelope with two checks and some with one check. Those with two checks were to turn in their equipment and get off the premises immediately. There had been no advance notice, and McGuire did not give any reason for the layoff, according to the uncontradicted testimonies of Lee and Gibbs. One of Heath's affidavits states that the layoff made no sense—he was then cutting holes for electrical wire, and there were 6 to 8 months of work left on the job (G.C. Exh 3). McGuire testified that the "total machine" was 50 to 60 percent complete by the time that the welding on the tub was complete, and welding on the revolving frame was 90 percent complete.

5. Respondent's economic defense

As stated by Mullins, Respondent decided to lay off employees as phases of the work were completed. The entire project was finished by July 14, 1982, at which time everyone was gone except some maintenance employees. The alleged discriminatees were those selected for these phased layoffs for business rather than discriminatory reasons. Mullins asked McGuire for "manpower study" on taking over the job in September 1981.

McGuire testified that his study resulted in a conclusion that a reduction in force was necessary, taking into consideration the projected completion date and the degree of work which had been done. He and Mullins decided on "productivity" as the factor to be determinative in the selection of employees to be laid off. There were no records on productivity, and McGuire did not make any as a result of his investigation. He asked himself, "Who is most productive?" He kept a list, and relied on reports from Seville and Jones. Seville, however, denied that McGuire ever asked him to observe the productivity of employees for layoff purposes and denied that he reported on this to McGuire. On the other hand, Seville said that he made a study of productivity "in a sense," and reported his "feelings" about the alleged discriminatees to McGuire. However, he could not remember what his feelings were with respect to other employees.

McGuire's testimony on productivity in relevant part is as follows:

> The same criteria was used [sic] every time we laid off people—overall productivity, what we were getting out of people. I must say, though, that the people who were selected, I didn't say "this person is less productive, and this one is less productive, and so is this one." I said, "Who is most productive?" And I made my list there and I said, "Here is how many I can afford to keep. Who's at the top of the list?" And you come down here, and the ones at the bottom. I decided that 6 were going, or 10 were going . . . . It doesn't mean he isn't a good worker, it means I may not have considered him to be one of the best overall performers.

McGuire added that he considered quality and quantity of work performed, attendance records, "general attitude," and "personal problems" which might affect productivity.

McGuire said that he personally observed each of the 26 welders on the day shift for a minimum period of 5 minutes to 1 hour each day. On the other hand, the site superintendent also testified that he considered only the qualifications of 10 welders and 4 laborers on the night shift for the September 24 layoff. The night shift was selected because of a planned elimination of that shift and because of inadequate lighting. However, a short time after the September 24 layoffs Respondent started running a 12- or 24-hour-a-day, 7-day-a-week "millwright" operation,[20] which must also have had lighting problems. McGuire explained that the problem was too much sunlight rather than too little—the final "machine cuts" could not be made in the heat of the day, and the millwright area had proper lighting. These hours were made necessary by the "field machining" phase of the operation.

Mullins testified that the accelerated millwright operation involved jobs that were "associated with the millwrights. Sometimes there's some small welding that goes along with it." Accordingly, the work was performed by millwrights, laborers, and welders who had "dual classifications."

Mullins said that he did not know whether McGuire had determined the skills of the laid-off employees, and the site superintendent admitted that he was only "partially" familiar with their skills. They were all "qualified," he said, but he had simply determined to make the cuts from the night shift.

With respect to Respondent's contention that phased construction projects such as draglines involve progressive layoffs of employees, Eisenzimmer asserted that such layoffs are usually preceded by notice. Assistant Site Superintendent Seville agreed that it is customary in the construction industry to shift employees from one type of a job to another if they are qualified, since their other skills might be needed on the first job at a later time.

[19] The consolidated complaint alleges the date as September 24—the date of the first three layoffs—and the answer admits this (G C Exhs 1(o) and (q)) At the hearing, the General Counsel moved to amend the date to December 3, and Respondent stated that it had no objection This motion is granted, and the pleadings thus establish December 3 as the date of the layoff of all three alleged discriminatees, a fact buttressed by the testimonies of Lee and Gibbs and one of Heath's affidavits (G C Exh. 3)

[20] Mullins and Lee affirmed that it was 12 hours per day, McGuire said that it was 24 hours

Barry Edwards testified that he was qualified as a welder, construction boilermaker, rigger, fitter, electrician, aligner, and general laborer. As noted above, McGuire considered him to be an "excellent welder," but noted his complaints about overhead welding and his "unauthorized" departure from work in the rain Randall Walker, in addition to being a welder, was also qualified as a carpenter and in fitting and setting up machinery. Eisenzimmer qualified in welding, operating a drill rig, and a little "carpentry." McGuire claimed that Walker and Eisenzimmer "barely" passed their welding tests under Mulberry. Eisenzimmer agreed that his overhead welding was deficient under Mulberry, and that he received a reprimand for it, but testified that he thereafter improved and received Ryder's assurances of a job as long as there was work at the project.

Despite the September layoffs, Respondent hired new employees thereafter. Company records show that it hired the following employees after September 24: two welders (December 29, 1981); two operators (October and November 1981); two millwrights (October 1981), two millwright helpers (October 1981); one laborer (December 15, 1981); and four electricians (November 1981; December 7, 1981, January 1982; March 1982) (R Exh. 7). Mullins claimed that two of these were "rehires." He also admitted that the classifications of some employees were changed when the accelerated operation began in October. Lee identified two of these as Dale Ipock and A. J. Cahoon, and testified that during the accelerated operation in October they were transferred to the millwright operation and were "drilling holes." One of Heath's affidavits states that Ipock and another employee, who were retained, were "known antiunion" employees.[21]

McGuire asserted that the same criteria were used in selecting employees for the December 3 layoff. Gibbs was qualified as a welder. He had been reprimanded twice for lack of production, once under Mulberry and again under Mullins, but McGuire considered him to be "very qualified as a welder." As described above, Respondent had no records on productivity. Lee, employed as a welder, had been in construction work for 15–16 years, and could do "most anything on construction that comes along," including millwright work McGuire described Lee as a "good welder" and a "good worker." He was laid off because McGuire thought he had a death in the family, and had missed work because of this. Heath's affidavits affirm that he had 21 years' experience as a welder. Respondent never disciplined him. On September 21, Mullins complimented Heath and six other employees, saying that they were the "best men," and that he was going to keep them working "with other trades" when the welding work ran out (G.C. Exh. 3) McGuire admitted that Leslie was a good welder and a good worker, but claimed that he was selected for layoff because he "liked to chat more than he liked to weld."

[21] G C Exh 3 Heath also affirmed that Ipock and the other employee had less welding experience than he did, and Respondent introduced their welding certificates to rebut this (R Exhs 13 and 14)

6. Legal conclusions

Respondent's violations of Section 8(a)(1) establish its union animus,[22] and tend to show discriminatory motivation in the layoffs. The evidence is particularly strong in the case of Edwards. He was the leading union activist, a factor tending to establish Respondent's unlawful motive. *Comet Corp.*, 261 NLRB 1414 (1982). The Company had subjected him to working conditions more onerous than those of other employees. *Ward Products Corp.*, 243 NLRB 354 (1979). The timing of events preceding his layoff also supports the General Counsel's case—Edwards' acquisition of signed union cards after the September 9 takeover by Mullins, the filing of the unfair labor practice charge on September 21, Edwards' informing Foreman Jones of this fact on September 22, and Edwards' handbilling at the gate on September 23 followed by his layoff the next day. *Injected Rubber Products Corp.*, 258 NLRB 687, 696 (1981). The fact that Respondent admitted his excellence as an employee but nonetheless laid him off is additional evidence. *Boyer Ford Trucks*, 254 NLRB 1389, 1396 (1981).

Walker and Eisenzimmer were both known union sympathizers, and Walker, like Edwards, had been subjected to onerous working conditions not applied to other employees. *Ward Products Corp.*, supra. All three employees had been told by Mullins on September 9 that the job would last until the following year, which the employees could reasonably have interpreted as an implied promise of continued employment The short time interval between Mullins' speech and the September 24 layoffs, coupled with the absence of any warning of a pending layoff, constitutes additional evidence of Respondent's discriminatory intention. *Glengarry Contracting Industries*, 258 NLRB 1167, 1174 (1981). I reject Seville's argument against such notice—that it makes an employee "edgy," and that the employer thereafter gets no work out of him—and conclude that this was simply manufactured testimony to justify the absence of notice.

The fact that the project was incomplete at the time of the layoffs, and that work remained to be done, is additional evidence.[23] One of the two principal components of the dragline was the revolving frame, and only 30 to 40 percent of the welding on this part had been completed by September 24, according to Site Superintendent McGuire. Edwards, Walker, and Eisenzimmer were all

[22] Although Respondent objected to what the General Counsel called "background evidence" of events under Mulberry, in the absence of any proved connection between Mullins and Mulberry, I have not relied on background evidence, as there is sufficient evidence of events taking place after the Mullins takeover to support the General Counsel's case It may be noted in passing that knowledge of some of the alleged discriminatees' union activities and sympathies was first acquired under Mulberry by individuals who later became supervisors under Mullins, and that such knowledge must be presumed to have been retained

Although there is also evidence that North Carolina Phosphate was opposed to having a union at the Aurora jobsite, that Mulberry, a unionized firm, left the job because it could not persuade North Carolina Phosphate to change this policy, and that Mullins was selected by North Carolina Phosphate to take over the job—Respondent calls this the General Counsel's "conspiracy" theory of the case—I have not found it necessary to rely on this evidence

[23] *General Tire & Rubber Co*, 262 NLRB 1248 (1982), *H B Zachry Co*, 261 NLRB 681 (1982)

welders, yet they were laid off. There is no rational business reason for this action The fact Respondent thereafter hired welders is simply more evidence that it was opposed to the three alleged discriminatees for discriminatory reasons,[24] as is the fact that some of the laid-off employees were recalled. *Industrial Erectors, Inc.*, 261 NLRB 888 (1982).

The accelerated production schedule beginning in October, a few weeks after the September 24 layoffs, shows Respondent's continuing need for employees, and further detracts from its case. Respondent's argument that this was a "millwright" operation, for which it did not need welders, is pure sophistry partially admitted by Mullins. The Company hired welders after September 24. Edwards had many other construction skills, and was an electrician. After getting rid of him, Respondent hired four electricians. Finally, the Company simply reclassified employees for the millwright operation, including Ipock, a welder and a known antiunion employee, further demonstrating its unlawful intention. *Daniel Construction Co.*, 264 NLRB 569 (1982). Eisenzimmer's reprimand for deficient overhead welding under Mulberry, a fault which he corrected, is insignificant in the fact of the General Counsel's evidence.

The record further shows that, after Edwards' layoff, Respondent asked Heath whether he was going to take Edwards' place, while Lee actually did so. One of Lee's activities consisted of handbilling, engaged in at Respondent's front gate in late November. Gibbs also engaged in union activity, and was subjected to coercive interrogation concerning it.

The same pattern of events which preceded the September 24 layoffs is also present in the later layoffs. There was continued union activity and unlawful conduct from Respondent concerning it. Matters came to a head with Lee's handbilling at Respondent's front gate in late November. As in Edwards' case, this was followed almost immediately by the layoff of known union sympathizers. As in the earlier layoffs, this timing suggests unlawful motivation.

Although McGuire attempted to give a reason for the September 24 layoffs—telling employees that there was no more welding work—he did not give any reason to the employees in connection with the December 3 layoffs, thus suggesting Respondent's illegal motive. *Acme Die Casting Corp.*, 262 NLRB 777 (1982).

Respondent's economic defense is no more valid in connection with the later layoffs than it was with respect to the earlier ones. It still had work to be done on the project, and, after the December 3 layoffs, hired two welders, one laborer, and three electricians. Heath, with 21 years' experience in the construction industry and praise on September 21 from Mullins as one of the "best" men, was laid off without notice or reason on December 3 The explanation given at the hearing by McGuire—Heath liked to "chat more than he liked to weld." Respondent's professed reason for the layoff of Lee is even more bizarre. Although he was a "good welder" in McGuire's opinion, and could do almost anything in construction, he was laid off because he suffered the misfortune of a death in the family (presumably, although not certainly, requiring him to take time off for the funeral). Although Gibbs had been twice reprimanded, this could not have been the reason for his layoff in light of McGuire's opinion that he was "very" qualified as a welder.

Respondent may well have reduced its employee complement as the project progressed toward completion.[25] However, the asserted "productivity" criteria for the order of layoffs, enunciated by McGuire, was completely vague and subjective. In lieu of objective standards, Respondent relied on supervisory "feelings" about the alleged discriminatees' "general attitudes" and "personal problems." Seville's inability to remember his "feelings" about other employees, the contradiction between his testimony and McGuire's, and his admission that he made a productivity study only "in a sense" show that the alleged study was a sham. Unlike other enterprises, every construction project comes to an end, one way or another. Respondent seized on this fact to rid itself of known union adherents long before completion of the job.

For these reasons, the General Counsel has established a very strong prima facie case that Respondent discharged all six alleged discriminatees because of their union sympathies and activities. And, for the reasons given above, Respondent has not rebutted that case by showing that they would have been discharged in the absence of those activities or sympathies. Accordingly, I find that Respondent laid off all six employees for the reasons alleged in the consolidated complaint, in violation of Section 8(a)(3) and (1) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

In accordance with my findings above, I make the following

## CONCLUSIONS OF LAW

1. F. Mullins Construction, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Lodge 30, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Asking employees whether they had received union cards, whether one employee was trying to get another to sign a card, and the nature of union information being distributed to employees.

[24] *Franchet Metal Craft*, 262 NLRB 552 (1982), *Coil-ACC, Inc*, 262 NLRB 76 (1982), *Rain-Ware, Inc*, 263 NLRB 50 (1982)

[25] Respondent attempted to bolster its case with an appendix attached to its brief assertedly showing a reduction in its employee complement throughout the life of the project This document was not received at the hearing, and does not constitute part of the record within the meaning of Sec 102 45 of the Board's Rules and Regulations, since Respondent's brief is not an "answering brief" within the meaning of Sec 102 46(d) of the Rules I note in passing that said appendix suggests that Respondent continued to employ millwright workers, electricians, rigger workers, operators, and pipefitter helpers at least until June 1982—skills possessed by some of the discriminatees

(b) Asking employees whether they supported or intended to join the Union.

(c) After the layoff of the leading union activist, asking another employee whether he intended to "carry on" the Union or lead its organizational efforts.

(d) Asking an employee where he obtained a union hat, whether a specific employee gave it to him, and whether he had to sign a union card to get it.

(e) Directing an employee to give a union card, which he had received from another employee, to a company agent.

(f) Telling employees that they would probably lose their jobs if they voted the Union in.

(g) Telling employees that a supervisor would not be able to find employment with the owner of the site where the employees' employer had been engaged by the owner to perform work if the Union came onto the jobsite.

(h) After the beginning of the union campaign, discriminatorily telling employees that they could not talk about the Union during working time.

4. By laying off Barry Edwards, Randall Walker, and Jerry Eisenzimmer on September 24, 1981, and Leslie Heath, Rodney Gibbs, and Douglas Lee on December 3, 1981, because of their union activities or sympathies, Respondent thereby violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

6. Respondent has not violated the Act except as herein specified.

## THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes of the Act

It having been found that Respondent unlawfully laid off Barry Edwards, Randall Walker, and Jerry Eisenzimmer on September 24, 1981, and Leslie Heath, Rodney Gibbs, and Douglas Lee on December 3, 1981, and Leslie Heath having died, it is recommended that Respondent be ordered to offer Barry Edwards, Randall Walker, Jerry Eisenzimmer, Rodney Gibbs, and Douglas Lee immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, dismissing if necessary any employee hired to fill any of said positions, and to make them and the estate of Leslie Heath whole for any loss of earnings they or said estate may have suffered by reason of Respondent's unlawful conduct, by severally paying them and said estate sums of money to the amount each individual would have earned from the date of his unlawful layoff to the date of an offer of reinstatement, and in the case of the estate of Leslie Heath up to and including the quarter in which he died, less net earnings during such period, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[26] In addition, it is recommended that Respondent be required to expunge from its personnel records all references to its unlawful layoffs of the aforesaid employees, except Heath, and to notify each of them except Heath's estate, in writing, that this action had been taken and that evidence of their unlawful layoffs will not be used as a basis for future personnel actions against them.

I shall also recommend that Respondent be required to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

## ORDER

The Respondent, F. Mullins Construction, Inc., Aurora, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Asking employees whether they had received union cards, whether certain employees are trying to get other employees to sign union cards, or to describe the nature of union literature being distributed to employees.

(b) Asking employees whether they support or intend to join the Union, or any other labor organization.

(c) Asking employees whether they intend to "carry on" or lead the union organizational efforts.

(d) Asking employees where they obtained union hats or other union paraphernalia, whether specific employees gave such items to them, and whether they had to sign union authorization cards in order to get them.

(e) Directing employees to give union cards to company agents.

(f) Telling employees that they would probably lose their jobs if they voted the Union in.

(g) Telling employees that a supervisor would not be able to obtain employment with the owner of the site where the employees' employer had been engaged by the owner to perform work if the Union came onto the jobsite.

(h) Discriminatorily telling employees after the beginning of a union campaign that they may not talk about the Union during working time.

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

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

(a) Offer Barry Edwards, Randall Walker, Jerry Eisenzimmer, Rodney Gibbs, and Douglas Lee immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights

[26] See generally *Isis Plumbing*, 138 NLRB 716 (1962), and in the case of Heath's estate, *Mastro Plastics Corp*, 136 NLRB 1342, 1347, 1364 (1962), enfd as modified 354 F 2d 170, (2d Cir 1965)

[27] 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

and privileges, discharging if necessary any employee hired to replace any of them, and make them and the estate of Leslie Heath whole for any loss of earnings any of them or said estate may have suffered by reason of Respondent's discrimination against them and Heath, in the manner described in the section of this decision entitled "The Remedy."

(b) Expunge from its personnel records, or other files of the aforesaid individuals, any reference to their unlawful layoffs, and notify them, except the estate of Leslie Heath, in writing, that this action has been taken and that evidence of their unlawful layoffs will not be used as a basis for future personnel actions against them

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

(d) Post at the North Carolina Phosphate jobsite at Aurora, North Carolina, if any of its employees are still employed there, and mail to each of its employees at any time employed on that jobsite, to his or her last known address, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that insofar as the complaint alleges violations of the Act not specifically found herein it is hereby dismissed.

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[28] 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."