

Brandeis Machinery and Supply Company, a Wholly Owned Subsidiary of Bramco, L.L.C. and International Union of Operating Engineers, Local 150, AFL-CIO. Case 25-CA-28201-1

July 21, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 25, 2003, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent and the Charging Party Union each filed exceptions and supporting briefs, and both parties filed answering briefs.

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 exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

¹ There are no exceptions to the judge's dismissal of complaint allegations that the Respondent violated Sec. 8(a)(1): by removing union literature from an employee bulletin board; by searching Bob Cook's toolbox; and by threatening Cook with discharge because he spoke to other employees on the picket line. There are also no exceptions to the judge's dismissal of complaint allegations that Respondent violated Sec. 8(a)(3) and (1): by issuing Steven Benefield a written reprimand for poor performance and extending his original 90-day probationary period; by refusing to assign Cook and Benefield overtime; and by assigning Cook and Benefield more onerous work.

² The Respondent and Charging Party 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The judge found, and we agree, that the Respondent did not violate Sec. 8(a)(3) and (1) by discharging Benefield. However, we disagree with the judge to the extent that he implies in the penultimate sentence of sec. II.L.2.b. of his decision that there was no showing that union animus was a motivating factor behind that discharge. We find, as did the judge in sec. II.L.2.a of his decision, that the General Counsel met his initial burden by establishing that the Respondent's animus toward Benefield's union membership and activities was a motivating factor behind his discharge, but we further find that the Respondent established its defense, under *Wright Line*, 251 NLRB 1083 (1980), that it would have discharged Benefield even in the absence of his protected union activity.

⁴ In the cease-and-desist provision of his recommended Order, the judge inadvertently omitted a requirement that the Respondent refrain from altering its lunchtime policy in order to stifle union activity. We shall modify his Order accordingly. We shall also substitute a new notice to conform to the Order as modified.

In accord with *Excel Container, Inc.*, 325 NLRB 17 (1997), the correct date in par. 2(d) of the judge's recommended Order is December 26, 2001, not May 8, 2002.

The judge found that the Respondent's production manager, Tom Muraski, violated Section 8(a)(1) by prohibiting shop mechanic, Bob Cook, from wearing a union hat. The judge also found that branch manager, Tom Freeman, violated Section 8(a)(1) by prohibiting field service mechanic, Steve Benefield, from wearing a union button that covered the company logo on his hat. We affirm the judge's Section 8(a)(1) finding with regard to Cook, and as explained in footnote 7, below, find it unnecessary to pass on his 8(a)(1) finding with regard to Benefield.⁵

On May 14, 2002, Production Manager Muraski noticed Cook wearing his union hat at work. Muraski handed Cook a company hat and "suggested that I wear this [company] hat instead of wearing my union hat." The judge found that Muraski's remark to Cook was unlawful because he "strongly implied that Cook should remove his Union hat and replace it with a company hat." We agree.

As the judge correctly notes, an employee's right to wear union insignia while at work is protected by Section 7. An employer may not interfere with that right absent a showing of special circumstances, such as the need to maintain production or discipline. *Albis Plastics*, 335 NLRB 923, 924-925 (2001). We view it as a clear interference with the protected right to wear union insignia where, as here, a supervisor hands an employee a company hat and "suggests" that he substitute it for his union hat. This was the second time within a week that the Respondent had commented on Cook's wearing of union insignia. Just a few days earlier, on May 9, Plant Manager Freeman had pointed to a union button that Cook wore on his hat and stated that "he didn't appreciate me wearing it at work." Although the judge did not address whether this earlier remark was also unlawful,⁶ we find that it gives further meaning to Muraski's statement to Cook on May 14, and additionally supports the conclusion that the May 14 remark violated Section 8(a)(1).⁷

⁵ We correct two factual errors made by the judge in connection with these findings. In the last sentence of the first par. of sec. II.I.1. of the judge's decision, it was Benefield, not Cook, whom Freeman testified was not reprimanded for wearing a union button. And in the third sentence of sec. II.I.2., it was Benefield again, not Cook, about whom Freeman was testifying.

⁶ The complaint alleges that this remark violates Sec. 8(a)(1), but neither the General Counsel nor the Union except to the judge's failure to find the violation.

⁷ The violation that we find regarding Cook essentially constitutes a finding of an unlawful prohibition against the wearing of union insignia. We shall amend par. 1(e) of the judge's cease-and-desist order to reflect this finding. Because it would be cumulative of this violation to consider and affirm the judge's finding that the Respondent additionally violated Sec. 8(a)(1) by prohibiting Benefield from wearing union

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brandeis Machinery and Supply Company, South Bend, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 1(e).
“(e) Prohibiting employees from wearing union insignia on the job during working hours.”
2. Insert the following as paragraph 1(g) and reletter the subsequent paragraph.
“(g) Stifling employees’ union activity by shortening the length of the lunch period and by requiring that they go to lunch at staggered times.”
3. 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection

insignia (a button) on his hat, and it would not affect the remedy, we find it unnecessary to pass on this latter allegation.

Chairman Battista would find neither violation. With respect to the Cook allegation, the Chairman finds that a suggestion that an employee wear a company hat rather than a union hat is simply a statement that the Respondent would prefer that the employee favor the company rather than the union in regard to the union’s organizational campaign. Such a statement is clearly lawful under Sec. 8(c). In addition, Chairman Battista notes that the Respondent did not order the removal of the hat. Indeed, Cook continued to wear the union hat, and nothing happened to him because of that. Finally, plant manager Freeman’s earlier remark was in the same vein as the one under discussion, and it was not found to be unlawful.

Chairman Battista finds the judge’s union button violation regarding Benefield even less supportable. Contrary to the judge, Benefield was not ordered to remove a union button entirely from his person. Rather, the button was covering the company logo on the hat that he was wearing, and he was simply “asked . . . to remove the button from the logo . . . but [was] . . . not t[o] [d] . . . he could not wear the button.” Accordingly, Chairman Battista would reverse the judge’s Sec. 8(a)(1) finding that Benefield was prohibited from wearing a union button.

Choose not to engage in any of these protected activities.

WE WILL NOT question job applicants about their union membership and union affiliation.

WE WILL NOT promulgate, maintain, and enforce a written policy that encourages employees to report to management any employees who solicit support for a union.

WE WILL NOT threaten job applicants with plant closure if our employees choose to be represented by a union.

WE WILL NOT verbally encourage employees to report to management any employees who solicit support for a union and WE WILL NOT tell employees that we will put a stop to such union solicitation.

WE WILL NOT prohibit employees from wearing union insignia on the job during working hours.

WE WILL NOT verbally promulgate, maintain, and enforce a rule that prohibits employees from discussing unions during working time, while allowing discussion about nonunion related and nonwork related topics during the same time.

WE WILL NOT stifle employees’ union activity by shortening the length of their lunch hour and by requiring that they go to lunch at staggered times.

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

WE WILL, within 14 days of the Board’s Order, restore the lunch hour and lunchtime practice that existed at our South Bend facility prior to May 8, 2002.

WE WILL, within 14 days of the Board’s Order, rescind and remove from our employee handbook the provisions that encourage employees to report to management other employees who solicit support for unions.

WE WILL, within 14 days of the Board’s Order, rescind in writing our verbal policy prohibiting employees from discussing unions during working hours, while permitting discussions on nonunion related and nonwork related topics during the same hours.

BRANDEIS MACHINERY AND SUPPLY COMPANY

Belinda J. Brown, Esq., for the General Counsel.
Walter L. Sales, Esq. and *Craig C. Dilger, Esq.*, of Louisville, Kentucky, for the Company.
Alexia M. Kulwiec, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in South Bend, Indiana, on March 10–12, 2003.

The charge was filed¹ by International Union of Operating Engineers, Local 150, AFL-CIO (Union) on May 28, 2002, and was amended twice. On August 28, 2002, the complaint was issued against Brandeis Machinery and Supply Company, a wholly owned subsidiary of Bramco, L.L.C. (Respondent or Brandeis) alleging multiple violations of Section 8(a)(1) of Act, as well as an unlawful disciplinary action and an unlawful discharge in violation of Section 8(a)(3) of the Act. The alleged violations occurred when union organizers/employees Robert Cook and Steven Benefield attempted to organize a union at the Respondent's South Bend, Indiana, facility.

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 posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and facility in South Bend, Indiana, is engaged in the sale, rental, and service of construction and mining equipment. During the 12-month period ending April 30, 2002, it sold and shipped, and purchased and received, from its South Bend facility, goods valued in excess of \$50,000 directly to and from points located outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. The South Bend Facility

Brandeis sells and services heavy construction and mining equipment throughout Kentucky and Indiana. In early 2000, the Company decided to open a branch in South Bend, Indiana, to better serve its customers in the South Bend-Fort Wayne, Indiana area. Thomas Freeman was the branch manager. He began hiring employees for the South Bend facility in June 2001. (Tr. 237.) Freeman hired Tom Muraski as the product support manager in charge of parts and service. Muraski had been working for Brandeis in Indianapolis, Indiana. Freeman also hired James Montgomery as the field service mechanic: a key position that requires very good technical skills, very good problem solving ability, and excellent customer service skills. (Tr. 239.) The field mechanic was an important job, since customer service was the primary reason the South Bend facility was opened.

In October 2001, Freeman hired Mike Karre as a shop mechanic. A shop mechanic does not require the high technical

skills of a field mechanic and works on equipment at the South Bend facility. Other shop mechanics were hired in the start-up stages of the South Bend facility, but they were terminated for less than satisfactory performance. In December 2001, Supervisor Tom Muraski interviewed Robert Cook as a shop mechanic.

B. Bob Cook Is Hired

1. Facts

Bob Cook was a heavy equipment mechanic for 30 years. He also was a member of the Union for 23 years. (Tr. 53.) Cook was unemployed at the time he submitted a job application to Brandeis. He applied for the job at the suggestion of union organizer David Fagan. Cook did not mention his union affiliation to Muraski when he interviewed for the job nor was it listed on his job application. (R. Exh. 41.)

On December 26, 2001, Muraski interviewed Cook, who explained his past job experience. Cook testified that when he told Muraski that he had been employed by LTV Steel, Muraski asked him what union was involved. Cook responded the "Steelworkers." (Tr. 54.) Muraski testified that it was not his practice to inquire about union affiliations during job interviews and further stated that he did not ask Cook about his union affiliation during his interview. (Tr. 493.) Muraski did not deny, however, that he and Cook talked about his previous employment at LTV Steel, which would be expected during a job interview. He also did not specifically deny that he asked Cook what union represented the LTV employees. Because the steel industry traditionally has been heavily unionized, I find that it is more likely, than not, that Muraski casually asked which union represented the employees at LTV. For this, and demeanor reasons, I credit Cook's testimony that Muraski asked him what union was involved at LTV Steel.

In addition, Cook testified that Muraski told him that Brandeis was a nonunion company and that he could not foresee them going union. Cook stated that Muraski asked him how he felt about working nonunion. (Tr. 54.) Muraski did not deny making this statement or asking Cook this question. Moreover, the statement is consistent with Brandeis' company policy as expressed in its employee handbook. It states, in relevant part, that "[t]his is a non-union organization. It always has been and it is certainly our desire that it always will be that way." (GC Exh. 11, 16.) The Brandeis' employee handbook also states, in relevant part:

You have a right to join and belong to a union and you have an equal right NOT to join and belong to a union. If any other employee should interfere or try to coerce you into signing a union authorization card, please report it to your [s]upervisor and we will see that the harassment is stopped immediately.

Thus, it is more likely, than not, that Muraski reiterated the Company policy in the course of telling Cook about the Company. Further, and in the absence of any denial, specific or otherwise, I credit Cook's testimony that Muraski asked him how he felt about working for a nonunion company.

At the end of the interview, Muraski told Cook that he would have to take an exam and he would be interviewed by the branch manager. Muraski also opined that Cook would be hired.

¹ All dates are 2002, unless otherwise indicated.

Cook met with Branch Manager Freeman the next day, and shortly after that he was hired. He started work on January 2, 2002.

2. Analysis and findings

In *Rochester Cadet Cleaners, Inc.*, 205 NLRB 773 (1973), the Board stated:

[Q]uestions concerning former union membership and union preference, in the context of a job application interview, are inherently coercive, without accompanying threats (sic), and are therefore violative of Section 8(a)(1) of the Act, even when the interviewee is subsequently hired.

See also, *Bighorn Beverage*, 236 NLRB 736, 751 (1978).

The credible evidence shows that Muraski informed Cook that Brandeis was nonunion and probably would remain nonunion. The evidence further shows that Muraski asked Cook how he would like working for a nonunion company. These statements were consistent with the Company policy as outlined in the employee handbook. I find that Muraski's interview statements were aimed at ascertaining Cook's union preference and are inherently coercive and violative of the Act. Moreover, Muraski's casual question about Cook's former employer can reasonably be viewed as a question aimed at ascertaining his former union membership, and therefore interferes with the job applicants Section 7 rights under the Act. Therefore, I find that Muraski's questions during Cook's job interview violated Section 8(a)(1) of the Act.

In addition, the complaint alleges that the Respondent violated the Act by promulgating and maintaining a written policy encouraging employees to report other employees who solicit support for a union. The Board has held that an employer violates the Act when it invites its employees to report instances of fellow employees bothering, pressuring, abusing, or harassing them with union solicitations and it implies that such conduct will be punished. *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998). The Respondent's policy statement invites the employees to report "harassment" by union organizers attempting to get employees to sign authorization cards. It reasonably could be construed to mean that the conduct would be punished. Accordingly, I find that the Respondent's written policy as stated in its handbook unlawfully interferes with the employees' Section 7 rights and therefore violates Section 8(a)(1) of the Act as alleged in paragraph 5(b) and (7) of the complaint.

C. Productivity Peaks, Montgomery Resigns

By all accounts, James Montgomery was a crackerjack field mechanic. His adept field mechanical skills were widely recognized by the Brandeis' customers serviced by the South Bend facility. As the South Bend facility developed its customer base, profitability based on mechanic productivity steadily grew.²

In December 2001, the utilization percentage for the South Bend facility was 50.5 percent. Management was concerned about the utilization rate, but recognized that it would take time

for a new branch to develop a customer base.³ (Tr. 369–370.) In January 2002, after its first full month of operation, the utilization rate for South Bend was 78.6 percent, which was considered fairly acceptable. In February 2002, the rate increased to 94 percent, which was unusually high.

In February 2002, Montgomery resigned to work for R&R Excavating, one of the Brandeis' largest parts and service customers in the South Bend area.⁴ (Tr. 241.) Thus, Freeman had to hire a field service mechanic to replace Montgomery.

D. Brandeis Hires Steve Benefield

1. Facts

On February 18, Muraski interviewed Steven Benefield for the field service mechanic position. Benefield, like Cook, was a long time member of the Union. (Tr. 167.) He learned about the job from union organizer Phil Overmyer. Benefield was recommended to Muraski by Cook. Muraski asked Benefield about his work experience, and in particular, if he worked with Komatsu equipment. Benefield told Muraski that he had worked on heavy equipment for LTV Steel for 10 years, which was untrue, and that he could fix anything if he had a manual. (Tr. 169, 496.) He did not tell him that he was a union member. Muraski was impressed with Benefield and spoke to Branch Manager Freeman about hiring him.

On February 25, Benefield was interviewed by Freeman and Muraski. Freeman went over Benefield's work experience. When he asked him about his mechanic skills, Benefield told him that if he had a book (i.e., a repair manual) he could repair anything and that he was an excellent mechanic. (Tr. 242.)

According to Benefield, Freeman also asked him what he knew about Brandeis and explained the history of the Company. Benefield stated that Freeman told him that Brandeis was a nonunion shop and "they would close the doors before they went union." (Tr. 169.) Freeman did not deny making that statement. He was unsure whether he gave Benefield a history of the Company and did not recall telling Benefield that Brandeis was a nonunion shop. He admitted that he hurried through the interview and that he was more concerned with Benefield's technical skills. (Tr. 243.) In the absence of a specific denial, and for demeanor reasons, I credit Benefield's testimony on this point. In addition, I find that the remarks are consistent with the message contained in the employee handbook, that is, that the Company is nonunion and hopes to remain that way.

Freeman hired Benefield, who began a 90-day probationary period. If his work was satisfactory, his employment would become permanent on June 4, 2002. (Tr. 202–203.)

² The branch had one field mechanic (Montgomery) and two shop mechanics (Cook and Karre).

³ Brandeis uses a service analysis report to track mechanic productivity, which it correlates to profitability. The computer-generated report divides the number of hours charged to revenue jobs by the number of hours paid to the mechanics. The standard utilization for the Company is 80 percent. (Tr. 369.)

⁴ The South Bend facility's three largest customers were Schrock Excavating, R&R Excavating, and Clark Farm Aggregates.

2. Analysis and findings

Paragraph 5(c) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Freeman stated that the South Bend facility would close if unionized. The issue here is whether Freeman's statement is an unlawful threat in violation of Section 8(a)(1) of the Act or employer protected speech under Section 8(c) of the Act.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969), the Supreme Court articulated the standard for evaluating the lawfulness of employer statements concerning employees' Section 7 rights to support or oppose a labor organization or to engage in or refrain from engaging in concerted activity. The Court stated "[a]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" 395 U.S. at 618. The Court further stated that an employer "may even make a prediction as to the precise effects he believes unionization will have on his company." *Id.* The prediction however must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." *Id.* The employer is therefore free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside of his control," and not "threats of economic reprisal taken solely on his own volition." *Id.* The evaluation must be made in the context of the labor relations setting, taking into account the totality of the relevant circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

Freeman's remarks were not accompanied by any objective factual information explaining why the plant would have to close based on factors beyond the Respondent's control. Nor is there any evidence of a previously made management decision to shut down operations for economic reasons in the event of unionization. Rather, Freeman's statement that the Respondent will "close the doors" if the branch is ever unionized conveys the impression that it would be entirely within the Respondent's control to close or not to close the facility. I find that Freeman's statement is not protected by Section 8(c) of the Act. I further find that the un rebutted statement is a threat of reprisal or force against any attempt to unionize. Accordingly, I find that Freeman's statement violates Section 8(a)(1) of the Act as alleged in paragraph 5(c) of the complaint.

E. Benefield's Work Performance Problems

1. Rex Royer

Rex Royer, a small Brandeis' customer, owned two Komatsu excavators. On March 21, 2002, Benefield performed a PBC hydraulic tune up on one of Royer's excavators. Royer testified that after Benefield completed the work, the machine ran slower than before the tune up. (Tr. 250.) Royer stated that he complained to Benefield about the problem, and that Benefield attempted to fix it at least twice, but he could not get the ma-

chine to run correctly.⁵ Royer stated that he complained to Brandeis about Benefield's work, so Brandeis waived payment of the \$428 bill for performing the tune up. (Tr. 257; R. Exh. 6.)

2. Shrock Excavating

On April 4, Benefield did a hydraulic tune up on two excavators owned by Shrock Excavating, one of Brandeis' largest customers in the South Bend area. Shrock's manager, Scott Clark, did not like the way the machines ran after the tune up and complained to Muraski. (R. Exh. 18.)

On April 25, Benefield was again sent to Shrock to perform a hydraulic tune up on another machine. Scott Clark testified that Benefield incorrectly set the pressures and brake on the machine, so that it stopped abruptly causing the excavator to spin in a dangerous manner. (Tr. 263.) Clark testified that he complained to Muraski about Benefield's work and told him that he did not want Benefield to return to correct the problem. Instead, he asked James Montgomery, who worked for R&R Construction,⁶ to adjust the machine. (Tr. 264.)

3. R&R Excavating

On March 13, 2002, Benefield performed warranty service work on a loader owned by R&R Excavating. (Tr. 286.) R&R's service manager, James Montgomery, the former Brandeis' field mechanic, observed Benefield perform the work. He testified that Benefield appeared unsure of himself and that he had to coach Benefield through certain parts of the work. After Benefield completed the service work, the loader worked fine for a while, but then began blowing white smoke from the exhaust. (Tr. 289.)

On Friday, May 1, 2002, Benefield was dispatched to R&R to determine the cause of the white smoke. He took shop mechanic, Mike Karre,⁷ with him to perform a diagnostic test on the machine using a laptop computer. Neither Benefield nor Karre had any experience using the laptop. After checking the manual, and consulting Montgomery, the computer displayed a fault code indicating that a sensor had to be replaced. Montgomery, who had an off-site appointment, left the premises while Benefield made the repair. After the sensor was replaced, however, the error code came up on the computer even when it was not hooked up to the machine. Benefield and Karre came back the next day, Saturday, May 2, which meant that they were being paid overtime for weekend work. The overtime was not covered under the warranty and therefore the customer, R&R, incurred the additional cost. When Montgomery arrived at the jobsite, he examined the laptop computer and realized that Benefield and Karre had been running the diagnostic test in

⁵ Royer testified that because the excavator ran slower after the tune up, it took more time to complete a job, and he was unable to charge the same hourly rate for excavating.

⁶ Clark and Montgomery had developed a good rapport and friendship. Because Montgomery also did side jobs servicing and repairing heavy equipment, Clark asked him to correct the problem.

⁷ Karre was a relatively inexperienced shop mechanic, who went along to observe and learn on a day when there was not very much to do in the shop. (Tr. 474.)

a simulator, rather than troubleshooting mode, and therefore they had been trouble shooting a problem that did not exist.

Montgomery decided to troubleshoot the problem himself. He found that the overhead adjustments were off, the injectors were incorrectly set, and the valves were loose. (Tr. 294.) Montgomery determined that some of the bolts had not been torqued properly. He also determined that Benefield had made these adjustments when he previously worked on the machine. (Tr. 294–295.)

Montgomery complained to Muraski and told him that he was not going to pay for the overtime.⁸ He also told him that Benefield did not know what he was doing and that he did not want him to work on R&R equipment again. (Tr. 295.) Montgomery told Muraski that he would make the repairs himself, that he wanted a credit for the overtime billed by Benefield and Karre, and he wanted to be reimbursed for the cost of making the repairs himself under the warranty. If Muraski refused, Montgomery told him that he would demand a field mechanic be sent from Indianapolis in the future, which would reflect poorly on the South Bend facility's service department. Muraski complied with Montgomery's demand, agreed to cover Montgomery's service costs under the warranty work, and gave him a credit for the overtime.

F. Cook and Benefield Begin Organizing Activity

In early April, Cook was told by union organizer Phil Overmyer to initiate an organizing campaign at Brandeis. (Tr. 58.) Cook spoke first to employee Ken Lubinski telling him that he had spoken with a union organizer who wanted to know if the Brandeis' employees were interested in starting a union. (Tr. 58.) Lubinski told Cook he would think about it. The next day he told Cook he was not interested. (Tr. 412.) Lubinski testified that he did not tell anyone about his conversations with Cook. (Tr. 412.)

Two weeks later, on May 1, Cook took Mike Karre to lunch to discretely question him about joining a union. Cook told Karre about Union wages and benefits. (Tr. 60.) Karre asked Cook if Benefield was also a member of the Union, but Cook did not respond. He continued talking about union benefits. Karre told Cook that he wanted to meet with the union organizer. The next day, May 2, Karre met Cook, Benefield, and union organizers Phil Overmyer and Delbert Watson at a local restaurant. They went over the benefits of joining the Union with Karre. (Tr. 171.) That night Karre talked to his parents about his meeting with the union organizers. They advised him against joining a union. (Tr. 473.)

On May 3, Karre went to lunch with Freeman and Muraski. (Tr. 245.) He told them that Cook and Benefield had approached him about joining a union. Freeman was stunned. (Tr. 246.) When they returned from lunch, Freeman called Benefield into his office to tell him that the training session that he and Karre were scheduled to attend in Atlanta, Georgia, was off. (Tr. 173.) He asked him to return the advance check for training and told him that he would attend a class in July.

⁸ Benefield did not tell Muraski about the problem with the laptop and also failed to tell him that Montgomery was upset. (Tr. 215-216; GC Exh. 3; R. Exh. 7.) Muraski first heard of the problem from Montgomery.

Benefield promptly phoned Cook, who was home from work that day. Benefield told him that he thought that Brandeis knew that they were union members because Freeman canceled his training trip. (Tr. 62.) Benefield immediately called union organizer Phil Overmyer and left a message telling him that Benefield believed that Brandeis knew that they were trying to organize a union. That afternoon around 3 p.m., Freeman received a fax letter from Overmyer advising him that Cook and Benefield were union members who were going to try to organize the South Bend branch employees. (Tr. 30, 246; GC Exh. 4.)

When Freeman received the fax, he phoned Brandeis' President Gene Snowden and Vice President Larry Shuck, informing them that Cook and Benefield were union organizers. They told him that they were going to consult legal counsel and that he was not to make any major personnel decisions without consulting them first. (Tr. 246–247; 374.)

The following Monday, May 6, Freeman came to work later than usual.⁹ He refused to speak to Cook and Benefield unless it was business related. He phoned Snowden and Shuck to advise them that over the weekend James Montgomery from R&R Excavating had complained about work performed by Benefield. He told them that Montgomery did not want Benefield to do any more work for R&R Excavating. (Tr. 310.) Freeman was concerned that Brandeis might lose R&R's service business. The possibility of terminating Benefield was discussed, but because of the union organizing drive, it was decided to give Benefield the benefit of the doubt by extending his 90-day probationary period. (Tr. 384.) It was also decided that Snowden and Shuck would travel to South Bend on Wednesday, May 8, to advise Benefield of his extended probation and to meet with the employees.

G. May 7, 2002

On May 7 Freeman and Muraski held a weekly meeting. According to Benefield, they emphasized that the South Bend branch was losing money, that sales and services were down, and that the parts department was barely breaking even. (Tr. 176.) Benefield further testified that Freeman and Muraski stressed the importance of working together as a team.

Later that day, Cook and Benefield were working in close proximity of employee Ken Lubinski, when Benefield made the comment that nobody was talking to them, except Ken Lubinski. According to Benefield, Lubinski started yelling at Benefield to stop talking to him and to stop sending union organizers to his house.¹⁰ (Tr. 178.) Employee Kevin Hardy, who was working nearby in the parts department, heard the shouting and intervened, telling Benefield that he better leave Lubinski alone or he might do something that was regrettable. (Tr. 178.) Benefield testified that when he later told Muraski that Hardy had threatened him and that Lubinski had screamed at him, Muraski rolled his eyes without responding.

⁹ Freeman had a heart condition and diabetes. Over the weekend, he had been admitted to the hospital with chest pains. (Tr. 308–309.)

¹⁰ Lubinski testified that union organizer Overmyer came to his home, where Lubinski told him three times that he was not interested in joining a union. (Tr. 413.)

H. May 8, 2003

1. Facts

The next day, May 8, Lubinski complained to Freeman about Benefield talking to him about the Union. Lubinski told Freeman that he did not want any contact with Cook and Benefield, except about Company business. (Tr. 414.) When Benefield arrived at work on May 8, Muraski asked him to follow him to Freeman's office. There, behind closed door, Benefield was told that the meeting had been called to talk about Ken Lubinski. (Tr. 179.) Benefield asked for a union representative. When Freeman told him that Brandeis did not recognize his Union, Benefield asked for Cook to be present. Freeman reluctantly allowed Cook to attend.

Freeman told Benefield that Ken Lubinski had requested that Benefield "not talk to him, speak to him, [or] work by him." (Tr. 179, 315-316.) Benefield explained that it was Lubinski who became angry and started yelling at him, and that Hardy intervened and threatened Benefield. He on the other hand had remained calm and promptly reported the incident to Muraski. After Freeman confirmed that Benefield had reported the incident to Muraski, he told Benefield to stay away from Lubinski and that he would talk to Hardy and get back with him. (Tr. 179-180.) A short time later, Freeman advised Benefield that Kevin Hardy told him that he did not threaten Benefield. Instead, when he stated that he would do something that he regretted, he meant that he (Hardy) would quit his job purportedly because he was tired of hearing about the Union. Freeman told Benefield that Hardy also requested that Benefield not speak to him. (Tr. 180.) On that basis, he told Benefield that if either he or Cook needed to talk to these employees they had to do it through Muraski.¹¹ (Tr. 316.)

Also on the morning of May 8, Snowden and Shuck met with the employees to tell them the Company's position on the Union. (Tr. 379.) Snowden had a written speech, which he worked from, but he did not read it or memorize it. (Tr. 380.) Cook secretly taped the session. (GC Exh. 12.) Snowden at one point told the group:

Well they have the right to talk to you. If they want to talk to you they can. But again you have the right not to listen. If they follow you on your property you have a right to tell them to leave the property. They don't have any right on your property if you don't want them on it. So, once again, if the union gets so aggressive that you feel you're being harassed, then we need to know about it because we will do everything within our legal means to keep you from being harassed.

(GC Exh. 12.)

After the group meeting, Shuck and Snowden met with Benefield and gave him a copy of the probationary letter. (GC Exh. 5.) They also discussed the problem reported by Mont-

gomery. The probationary letter expressed concern that Benefield did not follow procedure by contacting his manager for guidance and instead sought help from the customer in making the repair. It also pointed out that Benefield had failed to report the potential customer relations problem immediately to Muraski. The letter stated that Benefield would be provided additional training to improve his knowledge and would be placed on 90-day probation within which Benefield was expected to improve communications with his manager, as well as the quality of his work.¹² In the event Benefield failed to do so, it could result in termination.

2. Analysis and findings

Paragraph 5(d) of the complaint alleges that Snowden's statement encouraging employees to report other employees who solicit support for the Union was unlawful. Snowden's statement runs afoul of the *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998). The speech was a direct invitation for employees to report any instances of being harassed, pressured, or bothered by union organizers. It also could be reasonably construed to mean that the conduct would be punished. As such, I find that the speech encouraging employees to report union supporters who solicit their support, with implications that those employees will be disciplined, violated Section 8(a)(1) of the Act as alleged in paragraph 5(d) of the complaint.

Paragraph 6(e) of the complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by giving Benefield a written reprimand and extending his 90-day probation, thereby discriminating against him with respect to the terms and conditions of his employment because he was a union member engaging in activities on behalf of the Union.

In *Wright Line, Inc.*, 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 union activity was a motivating factor in the employer's decision.¹³ Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage union 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 the reasons for its decision were not pretextual or that it would have made the same decision, even in the absence of protected concerted activity. *T&J Trucking Co.*, 316 NLRB 771 (1995).

¹¹ As Freeman explained, the employees were becoming very angry and the branch operation was being disrupted. (Tr. 316.) He asked Cook and Benefield "to basically kind of cool their efforts, let things cool down, that people were angry." (Tr. 316.) On the other hand, he testified that Snowden and Shuck told him not to interfere with the organizing efforts.

¹² The evidence shows that during his employment tenure at Brandeis, he received the following onsite training: WA501 motor systems and trouble shooting (March 26-28); excavator tune up (April 11-12); Blaw-Knox paver (April 15-19); and forklift operator and training certification (May 22). (Tr. 218.)

¹³ *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

a. The General Counsel's evidence

The undisputed evidence shows that the Respondent knew of Benefield's union affiliation and activity before Benefield was disciplined. Prior to the reprimand, Brandeis' Manager Freeman was informed that Benefield and Cook had approached a fellow employee about joining the Union. Freeman was also faxed a letter from a union organizer indicating that Benefield and Cook were attempting to organize the South Bend branch. There is also ample evidence of the Respondent's animus toward the Union. This animus was evident in the policy statement in the Brandeis' employee handbook declaring opposition to unions, as well as Snowden's May 8 speech to the employees reiterating the Company position. Further evidence can be found in the disapproving and disparaging comments about unions that Muraski and Freeman made during interviews with Cook and Benefield, respectively.

The timing of an employer's discipline is an element commonly used to support a showing of discriminatory motivation. *Packaging Techniques, Inc.*, 317 NLRB 1252, 1257 (1995). The issuance of the written reprimand came within days after Benefield was identified as a union organizer. Thus, the timing of the adverse action taken by the Respondent is highly suspect, and supports an inference that the discipline was taken because of Benefield's union affiliation and activity.

I therefore find that the General Counsel has satisfied her initial evidentiary burden. The burden now shifts to the Respondent to persuasively establish by a preponderance of the evidence that it would have disciplined Benefield and placed him on extended probation, regardless of his union membership.

b. The Respondent's evidence

The Respondent argues, and the evidence shows, that Benefield was a probationary employee and the reasons cited for his disciplining Benefield were not fabricated. Specifically, Benefield's discipline came only after several customers expressed dissatisfaction with Benefield's work. The evidence shows that complaints were received from two of Brandeis' largest customers, as well as another customer. These customers credibly testified that Benefield failed to successfully fix machinery problems after multiple attempts. The customers asked that Benefield no longer service their equipment in the future, which effectively resulted in a loss of future business for the Company. In addition, the costs of the repairs made by Benefield had to be absorbed by the Company thereby resulting in an immediate financial loss for the Company. The evidence also shows that the complaints by Montgomery brought the matter to a head, and were made coincidentally at the same time that the Company found out about Benefield's union affiliation. If anything, the evidence viewed as a whole shows that the Respondent used restraint in dealing with Benefield by not outright terminating his employment.

The General Counsel nevertheless argues that Benefield was not treated the same as nonunion affiliated employees. It argues that Mike Karre also made several errors on the job, but was not disciplined. I do not agree. Even though Karre did not have anywhere near the same mechanical experience that Benefield purportedly possessed, he nevertheless was given a verbal warning and was written up for a mistake on the job. (Tr. 487.)

The credible evidence also shows that other employees were disciplined, regardless of union membership. A shop mechanic was fired prior to December for poor performance during his probationary period, after only approximately 2 weeks at Brandeis. (Tr. 240–241.)

The General Counsel also argues that Benefield did not receive the training required to service some of the equipment that he failed to properly service. The undisputed evidence shows Benefield represented to Freeman and Muraski that he was a highly experienced mechanic who could fix anything so long as he had a manual. Given that statement, and the increasing frequency and variety of customer complaints that were received in the first 2 months of his employment, the evidence supports a reasonable inference that he significantly overstated his abilities and experience, which could have affected the type and amount of training that he received during that 2-month period. That notwithstanding, the evidence shows that Benefield received the following onsite training prior to his extended probation: WA501 motor systems and trouble shooting (March 26–28); excavator tune up (April 11–12); and Blaw-Knox paver (April 15–19).¹⁴ (Tr. 218.) Given the fact that he only began working for the Company in the early part of March, it is reasonable that the amount of training that he received would be progressive in order to enable him to engage in revenue producing work.

Based on the evidence viewed as a whole, I find that the Respondent has persuasively established by a preponderance of the evidence that its reason for disciplining Benefield was not pretextual, and that it would have made this decision even in the absence of Benefield's union activity.

Thus, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it gave Benefield a written reprimand and extended his probation. Accordingly, I shall recommend the dismissal of paragraph 6(e) of the complaint.

I. Union Activity Continues

1. Facts

On May 9, Cook was working in the shop when Freeman asked him to deliver a message to his union officials. He told Cook that they should not contact him by phone, fax, or letter. Instead, all communications should be addressed to Brandeis' President Snowden. (Tr. 82.) Cook testified that Freeman also pointed to a union button on Cook's hat and told him that he did not appreciate him wearing the button at work. (Tr. 83.) Freeman did not deny making this statement to Cook. Instead, Brandeis' counsel asked Freeman if he recalled seeing Benefield wearing a union button on May 9. Freeman testified that Benefield wore the button on top of the Brandeis' logo, so he asked him to remove the button from the logo. (Tr. 315.) Freeman stated that he did not tell him he could not still wear the button. Freeman also stated that he did not reprimand Cook for wearing it in the first place. (Tr. 315.)

Also on May 9, a service meeting was held during which Muraski told the employees that they could no longer take a 1-hour lunch and they no longer could go to lunch at the same

¹⁴ After his probationary period was extended, Benefield attended a forklift operator certification training (May 22).

time. Rather, all lunches would be a half-hour long and lunches had to be staggered so one person would go at a time. (Tr. 183.)

On May 10, Benefield asked Karen Bailey, a secretary, if her husband would be interested in joining the Union.¹⁵ (Tr. 150.) According to Benefield, Bailey responded, “No, absolutely not. I have to put up with you here. It is not coming to my house . . . Don’t send those people to my house, so help me God.” She left and slammed the door behind her. (Tr. 184; 350.)

As Benefield was walking back to his workstation, Muraski asked to speak with him. They walked back to the parts department, where unknown to Muraski, Benefield taped their conversation. (Tr. 185.) Muraski effectively told Benefield that he had walked in on the end of the exchange between Bailey and Benefield. Although he did not hear the entire conversation, it was his understanding that Benefield could not solicit employees who were working, even though Benefield was on break or lunch. (GC Exh. 19.) Benefield asked Muraski, “so that means that we can’t talk to anybody that’s working about anything” and Muraski replied, “No, about soliciting your stuff.” Benefield stated, “About soliciting what kind of stuff?” and Muraski responded, “Your union.” Muraski did not deny making the statement. Rather, he testified “it is just like I said here in this transcript. I told him. I said, you know, after work, before work, you know, do whatever you want to do but during working hours, let us just—to keep the peace.” (Tr. 185; 505.)

On May 14 Cook was wearing a union hat, when Muraski approached him carrying a hat with a Brandeis’ logo. According to Cook, Muraski handed him the Brandeis’ hat telling him that he might want to wear the Brandeis’ hat, instead of wearing the union hat. (Tr. 109.) Muraski did not deny making the statement.

2. Analysis and findings

It is settled law that the display of items, such as union buttons, is protected by Section 7 of the Act, unless the employer can show that special circumstances existed at its facility that outweighed the employees’ statutory rights. *Escanaba Paper Co.*, 314 NLRB 732, 733 (1994). Freeman admitted that he asked Benefield to remove his union button from on top of the Company logo. There is no testimony, however, that Freeman told Cook that he could still wear the union button somewhere else on his uniform. The fact that Freeman did not threaten Benefield with discipline for wearing the union button is not pertinent to an analysis of this type of a violation of the Act. Finally, there is no evidence, or argument, that special circumstances necessitated the removal of the button. Thus, I find that Brandeis violated 8(a)(1) of the Act by prohibiting Benefield from wearing a union button on the jobsite as alleged in paragraph 5(e) of the complaint.

Wearing a hat with a union insignia is also protected by Section 7 of the Act. *Id.* The un rebutted evidence shows that Muraski strongly implied that Cook should remove his union hat and replace it with a Company hat. Muraski did not indicate that it was optional to wear the union hat. Again, no special circumstances existed that would warrant Muraski making the statement to remove the hat. Further, telling one employee that

he should wear a Company hat, absent evidence that all other employees are required to wear Company hats, is an additional interference with an employee’s Section 7 rights. I therefore find that the Respondent violated Section 8(a)(1) as alleged in paragraph 5(g) of the complaint by impinging on Cook’s right to wear a hat with a union insignia.

Paragraph 5(f) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act orally promulgating a rule that prohibited employees from discussing the Union during working time, while allowing other nonwork related subjects to be discussed during working time. When an employer imposes a restriction on employees’ conversations, it violates Section 8(a)(1) of the Act if the restriction applies only to union-related talk. *Opryland Hotel*, 323 NLRB 723, 729 (1997). See also, *Industrial Wire Products*, 317 NLRB 190 (1995). The evidence shows that Benefield tape-recorded a conversation in which Muraski indicated that the restriction on nonwork related talk was only applicable to union discussions. (GC Exh. 18, 19.) Muraski admitted to imposing this restriction on union-related talk. (Tr. 505.) Muraski also did not prohibit other nonwork conversations such as conversations concerning sports or other personal issues. (Tr. 527.) Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by prohibiting only union-related conversations during work hours.

Paragraph 6(f)(i) and (ii) allege that the Respondent violated Section 8(a)(3) of the Act by implementing a staggered lunch hour and by shortening the lunch period from 1 hour to 1-1/2 hour. The un rebutted evidence shows that in April 2002, employee Ken Lubinski went to lunch with Cook, who unsuccessfully tried to persuade him to join the Union. On May 1 and 2, Karre went to lunch with Cook and also union organizer Phil Overmeyer, where they tried to persuade him to join the Union. The following day, Karre went to lunch with Freeman and Muraski where he told them that he went to lunch with Cook and Benefield where they tried to get him to join a union. Less than 1 week later, the Respondent changed the lunch procedure, thereby making it difficult for employees to take their lunches at the same time, and thereby inhibiting the Union’s organizing efforts. Under these circumstances, and particularly in light of the timing of the announced changes, I find that the General Counsel has satisfied her initial *Wright Line* evidentiary burden.

The Respondent asserts that the reason for the changes were best articulated at trial by Vice President Larry Shuck. He testified that when he and President Snowden visited the South Bend facility on May 8, an incident occurred at lunchtime, which underscored the need to have a mechanic available during lunch. Specifically, a truck leased by a customer had stopped running a short distance from the facility. Snowden and Shuck drove over to the truck to render assistance, and then returned to the facility to get a mechanic. Everyone was at lunch, so they prevailed on Muraski to help the customer. A short time later, Karre returned from lunch, relieved Muraski, and made the repair. Shuck testified that as a result of this incident he suggested to Freeman that he stagger the lunches. (Tr. 440-441.)

A careful analysis of situation, however, discloses that the changes imposed by the Respondent were not necessary to resolve the problem. According to Shuck, there was someone

¹⁵ Bailey’s husband owns an excavating company.

available to render assistance to the customer, i.e., Muraski. Only 5 minutes passed before he was relieved by Karre, who quickly fixed the problem. Nor does the evidence disclose that this was an on-going or repeated problem or that similar situations were likely to occur in the future given the nature of the Respondent's business. For example, the field service mechanic for the most part is out of the building and most likely would not be available to render assistance, regardless of whether lunches were staggered and shortened. There are two in-house service mechanics, who normally do not perform field service work, but who conceivably could provide the type of coverage that Shuck envisioned if they, and they alone, staggered their lunch hours. But the changes imposed by Freeman went far beyond what was necessary to remedy Shrock's concern because the changes affected all employees, like Ken Lubinski and Kevin Hardy, who were not mechanics, and Benefield who was a field service mechanic. Indeed, the changes restricted everyone from taking lunch with anyone else and therefore stymied any attempts to organize during lunch time, which is when Cook and Benefield previously had spoken to employees one-on-one about joining the Union. Thus, I find that the Respondent has failed to persuasively show that in the absence of a union organizing drive, the changes that it imposed on lunch times would have been the same.

Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 6(f) of the Act.

J. Scott Clark Complains About Benefield

On Friday, May 17, Benefield was sent to Clark Farm Aggregates, owned by Scott Clark,¹⁶ to repair a bucket cylinder on a loader. In the course of making the repair, Benefield allowed several gallons of oil to spill on the ground. Benefield did not take appropriate action to contain the oil spill. Clark, who happened to be working in the area, saw that the oil was draining toward his water ponds, and began building a sand berm with a loader. (Tr. 264.) Once the oil spill was contained, Clark tried to soak up the oil with absorbent pads.

Scott Clark was so upset that he took photos of the oil spill. (R. Exh. 1, 2.) He phoned Muraski complaining about Benefield and demanded that his property be environmentally cleaned. He also demanded that Brandeis pay for the cleanup. Finally, Clark told Muraski that Benefield would never be allowed to work again for Clark Aggregates or Schrock Excavating.¹⁷ (Tr. 271–272.) Clark followed up the phone call with a letter and a bill for \$895 for the cleanup expenses. (R. Exh. 3, 4.) Muraski agreed to pay the bill for the cleanup.

K. More Union Activity

1. Facts

On May 23, Benefield, Cook, and Karre were about to begin an in-house bobcat equipment training session, when Freeman

called Benefield away from the group. Freeman had seen union stickers on the dashboard of Benefield's service truck. According to Benefield, Freeman told him that it was a Company truck, to remove the stickers immediately, or pay the consequences. (Tr. 190.) Freeman asked Benefield if he was going to remove the union stickers, and Benefield responded affirmatively. Freeman then sent Benefield to a customer jobsite to repair an equipment breakdown.

The week of May 27, Benefield was on vacation. He nevertheless reported to the South Bend facility to walk a picket line posted by the Union. For the next 2 days, he walked the picket line wearing his Brandeis' uniform. (Tr. 191–192.) On one of those days, Benefield testified that he saw Freeman and asked him how he enjoyed his holiday.

On May 29, Cook stopped to talk to the pickets on his way into work. At the same time, Freeman entered the facility. When Cook went to the locker room to prepare for work, Freeman entered the locker room to tell Cook not to start work until he found out from headquarters whether he could work after being on the picket line. Cook told Freeman that he was going to work anyway. According to Cook, Freeman told him that he was being insubordinate and that he could be fired. (Tr. 92.) Freeman testified that he did not know whether Cook could be on a picket line and also go to work on the same day. He stated that he "asked him basically to cool his heels until I checked with counsel. I simply didn't know if he could do this or not." (Tr. 323.) Freeman denied telling Cook that he would be discharged for being insubordinate. (Tr. 324.) He testified that Cook "smarted off to me when I told him that I was going to talk to [counsel]." Cook was allowed to work and nothing was deducted from his pay.

For demeanor reasons, I credit Freeman's testimony that he did not threaten Cook with discharge on May 29. Freeman credibly admitted that he was uncertain if Cook could work after picketing that day and that he asked Cook to delay starting work until he called headquarters to ascertain the answer. The evidence further reflects that Freeman was acting in accordance with the instructions given to him by Company President Snowden to take no action against Cook and Benefield without getting prior approval. The evidence reflects that when Freeman asked Cook to wait while he made a phone call, Cook became confrontational by telling Freeman he was going to start work anyway. At that point, Freeman told Cook he was being insubordinate. For these, and demeanor reasons, I find that Cook's version of the story is less plausible than Freeman's testimony. Thus, I credit Freeman's testimony that he did not threaten Cook with discharge in the course of this discussion.

On May 31, Cook approached Karen Bailey, who immediately told him that she did not want to talk to him. She testified that she told Cook that the employees did not want a union and that he and Benefield were forcing themselves on the employees. She ended the conversation with "a few choice words." (Tr. 352; R. Exh. 33.) Cook complained to Freeman and Bailey was reprimanded by Freeman for using foul language. (R. Exh. 34.)

2. Analysis and findings

Paragraph 5(h) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by threatening Cook with

¹⁶ Scott Clark was also a manager for Schrock Excavating, another large customer of Brandeis.

¹⁷ The evidence shows that since that time, Brandeis has not performed any service work for Clark Farm Aggregates or Schrock Excavating. James Montgomery now services the equipment for both companies. (Tr. 281.)

discharge after Freeman saw Cook speaking to members of the picket line.

As noted above, the evidence does not show that Freeman threatened to discharge Cook on May 29 nor does it show that Freeman cautioned Cook about being insubordinate for picketing. Rather, the credible evidence viewed as a whole shows that when Freeman legitimately asked Cook not to start work until he got guidance from higher management, Cook became confrontational by telling Freeman, the branch manager, that he was going to start work anyway. I find that Freeman's reference to insubordination was a reaction to Cook's confrontation position on starting work and not the fact that he was on the picket line. Thus, Freeman did not caution Cook about being insubordinate because of his Union or protected concerted activity.

Accordingly, I find that Freeman did not interfere with Cook's Section 7 rights under the Act and I shall recommend that the allegations of paragraph 5(h) be dismissed.

L. Benefield is Terminated

1. Facts

On May 30, Freeman received a letter from Scott Clark reiterating his complaint about Benefield's failure to contain the oil spill on May 17, and demanding that Brandeis pay for the cost of the cleanup. (R. Exh. 3.) Freeman spoke with Shuck telling him that he did not believe that Benefield had the ability to function in the field based on all the complaints that he had received and the business that they had lost and may lose in the future. (Tr. 325, 444.) They discussed the possibility of moving Benefield to the shop, but decided against doing so because work was slow and because the mechanics in the shop had completed their probation without incident. The decision was made to terminate Benefield.

On June 3, Benefield returned from vacation. Muraski asked him to sweep the shop floor until Freeman was ready to meet with him. When Freeman met with Benefield, he told him he was terminated for inability to work as a field mechanic. Freeman also told Benefield that they had considered bringing him into the shop, but the other two mechanics had been there longer. (Tr. 193.) Benefield asked for a termination letter. Freeman gave him the letter and asked for the Company credit keys and credit cards. (Tr. 193; GC Exh. 6.)

When Benefield told Freeman that he would have to retrieve the keys from the Company truck, Freeman told him that some security guards would accompany him to the truck.¹⁸ (Tr. 193-194.) Benefield was escorted to the truck by three security guards, who would not allow him to enter the truck. They asked him for the keys to the truck and told him that they would allow him to get his personal belongings after they searched the truck. (Tr. 194, 16.) John Weir, a security guard, told Benefield that

¹⁸ Freeman testified that he hired the security guards because he was concerned about Benefield's demeanor. (Tr. 48.) He stated that Benefield had engaged in strange behavior in the shop and that Cook had told him that nobody could control Benefield. (Tr. 47-48.) He thought Benefield would become very confrontational when he was terminated. (Tr. 46.) He testified that he told the security guards to protect the employees and Company property and to escort Benefield home, if necessary. (Tr. 49.)

he was aware that Benefield had a weapon's permit and that he wanted to check the truck before allowing Benefield inside the truck. Benefield refused to turn over the keys complaining that the security guards had no right to search his personal belongings.¹⁹ When he attempted to enter the truck, one of the guards bumped him with his chest and pulled his coat open to display his badge and gun. Benefield tried to step around the guard, who blocked his path again. He went to Muraski's office where he dialed 911 to summons the police. (Tr. 194-195.)

Cook saw Benefield walking briskly through the shop toward his truck followed by three men. When he asked Benefield what was going on, Benefield told him that they wanted his keys to search the truck, that they thought he had a weapon, and that he had been fired. (Tr. 94.) When Cook asked one of the security guards what was going on, he was told it was none of his business. Cook went outside and called Overmeyer on his cell phone and Overmeyer called 911. (Tr. 95.) Cook went back inside the facility.

The police arrived and spoke with Freeman. (Tr. 195.) Benefield convinced the police to allow him to get his personal belongings. The security guards searched the truck. Once they determined that Benefield did not have a weapon, they allowed him to retrieve his tools, and drove him home. (Tr. 99, 196.)

2. Analysis and findings

The General Counsel alleges that Benefield was discharged because of his union affiliation in violation of Section 8(a)(1) and (3) of the Act. The *Wright Line* analysis is the appropriate standard for determining whether Benefield's discharge was motivated by unlawful discrimination.

a. The General Counsel's evidence

It has already been established that the Respondent knew of Benefield's union affiliation and activity. The Respondent's animus toward the Union has also been established. The timing of the adverse action supports an inference that Benefield was terminated because of his union membership. The termination came only one month after the Respondent became aware of Benefield's union membership and activity.

I find that the General Counsel has satisfied the initial evidentiary burden of proof. The burden of proof now shifts to the Respondent to persuasively establish by a preponderance of the evidence that it would have discharged Benefield regardless of his union membership.

b. The Respondent's defense

The Respondent argues that Benefield's continued poor job performance, and not union affiliation, necessitated his termination. It asserts that it had no choice but to fire Benefield after his repeated mistakes which cost the Respondent future business and money.

The evidence shows that after Benefield's probation was extended due to several instances of poor service, he had another problem performing field mechanic work and created more customer dissatisfaction issues for the Respondent. During his extended probation, Benefield failed to properly repair a cylin-

¹⁹ Benefield had his tools, wallet, keys to his house, cell phone, and clipboard with notes in the truck. (Tr. 194.)

der for Clark Farm Aggregates. (Tr. 221; 264–267.) By Benefield’s own account, he spilled oil on Scott Clark’s personal property. (Tr. 222.) The oil nearly polluted a pond on Clark’s property and Clark demanded Brandeis pay for the costs of the clean up. Clark also stated that Benefield would never perform work with the two companies Clark was involved: Clark Farm Aggregates and Shrock Excavating. (Tr. 270–272.)

I find that this incident, and the resulting additional loss of business, precipitated the decision to end Benefield’s employment with Brandeis. Benefield’s carelessness at Clark Farm Aggregates was the final straw in a less than satisfactory employment tenure with the Respondent. His multiple errors were counterproductive to the overall goal of establishing the South Bend facility, which was specifically set up to better serve customers in the area. Instead, the evidence viewed as a whole shows that his termination was precipitated by the Clark Farm incident, which was a continuation of major customers complaints about Benefield’s work. Thus, I am persuaded by the Respondent’s argument that it would have terminated Benefield even in the absence of a union.

The General Counsel argues that Benefield’s performance did not warrant termination. However, the evidence shows that Benefield had difficulties performing numerous tasks which resulted in multiple customer complaints. The General Counsel also argues that shop mechanic Karre was treated less harshly than Benefield, but the evidence does show although Karre did make some mistakes on the job, he also was disciplined. (Tr. 486–489.) Moreover, Benefield’s mistakes not only were more frequent and severe in nature, they also had a direct and conspicuous effect on customer relations.

Accordingly, the credible evidence viewed as a whole shows that Benefield was discharged because of his job performance, and not because he was affiliated and active with the Union. I therefore find that the Respondent did not violate Section 8(a)(1) and (3) of the Act and recommend the dismissal of paragraph 6(g) of the complaint.

M. Searching the Toolboxes

During the course of events on June 3, 2002, a security guard went over to Cook’s toolbox and moved a clipboard lying on top. (Tr. 17, 96–98). Cook became agitated telling the guard to get out of his toolbox. Muraski, who was standing nearby, simply watched.

Paragraph 5(i) of the complaint alleges, and the General Counsel argues, the security guards, acting as agents of the Respondent, violated Section 8(a)(1) of the Act by searching Cook’s toolbox. I am not convinced that a search was conducted simply because a security guard picked up the clipboard and looked underneath it. But even if that conduct constituted a “search,” the General Counsel does not explain in her posthearing brief the Union or protected concerted activity that Cook was engaged in at the time and how moving the clipboard interfered with that activity.

The General Counsel argues that a violation should be found because this case is strikingly similar to *Hospital of Good Samaritan*, 315 NLRB 794, 810 (1994). I do not agree. In *Good Samaritan*, the nurses had begun to disseminate union literature outside the hospital premises and therefore were clearly en-

gaged in union activity. That prompted security guards to check their bags and other items as they came to work, and at the same time the guards told the nurses that they would be written up if they brought union flyers into the hospital. The evidence there supported a reasonable inference that the search was to find and confiscate union flyers. Here, it is questionable whether there was a search in the first place, and its unclear what union activity Cook was undertaking.

Under these circumstances, I find that the Respondent did not violate Cook’s Section 7 rights when the security guards moved his clipboard. Accordingly, I shall recommend the dismissal of paragraph 5(i) of the complaint.

M. Cook Quits

Cook was on vacation the week of June 10. On June 17, he returned to the South Bend facility and waited in the parking lot for Muraski. When Muraski arrived at 7:50 a.m., Cook asked him what he needed to do to get his vacation pay. Muraski gave him a form to complete and Cook gave Muraski a letter stating that he was going on strike to protest the unfair labor practices committed by Brandeis. (CP Exh. 1.) He completed the form and went into the Brandeis’ store to talk to an employee. Freeman and Muraski followed Cook into the store, where Freeman told Cook to get off the property. (Tr. 103–104.)

N. Removing Union Literature

According to Cook, on his way out of the building, he went through the lunchroom, where he noticed that a union flyer that he had posted on the employee bulletin board prior to going on vacation was missing.²⁰ When Cook asked Freeman if he knew what happened to the flyers, Freeman told him that he regularly removes dated materials from the bulletin board, and that he removed the union flyer. (Tr. 105.)

Paragraph 5(j) of the complaint alleges that Freeman unlawfully removed the union literature on June 17, while allowing other nonwork related materials to remain posted. There is no testimony or documentary evidence, however, showing that on June 17, there were “non-work” related materials on the employee bulletin board. Rather, the General Counsel’s evidence shows the following.

Cook testified that he and Benefield first posted union literature on the employee bulletin board shortly after they became union organizers. (Tr. 103.) He further testified that the same day “somebody would rip them down, take them down.” (Tr. 103–104.) Cook testified that on May 24, he asked Freeman about the missing union literature and Freeman told him “he regularly cleans off the bulletin board, any dated materials, he just takes it down, and that he had cleaned it off.” (Tr. 105.) At the same time, however, Cook asked and received permission from Freeman to post the union literature on the employee bulletin board again. (Tr. 105.) Cook testified that he posted the union literature a second time, but he did not check “how long they stayed but I just know they were gone when I departed

²⁰ Cook testified that in mid-May, he had obtained Freeman’s permission to post the union flyers on the bulletin board. (Tr. 105.)

Brandeis.”²¹ (Tr. 104.) At that time, he mentioned it to Freeman, but he did not respond. (Tr. 103.)

In an effort to illustrate that the union literature had been removed in mid-May, the General Counsel introduced two photographs. GC Exh. 15, which purportedly shows the union literature posted on the bulletin board and GC Exh. 14, which purportedly shows nonwork related literature on the bulletin board. Cook testified that he took both photos on the same day approximately 4–5 hours apart. (Tr. 106, 147.) However, in General Counsel Exhibit 15, which was taken first, the clock on the wall shows the time as 3:50 p.m. That means that the second photo, GC Exh. 14, would have been taken between 8–9 p.m. Cook conceded on cross-examination, however, that he normally got off work at 5 p.m. and that he never worked to 8–9 p.m. (Tr. 148–149.) He could not explain the discrepancy in his testimony. Cook also conceded that he never took any photos prior to taking these two photos, which raises the question of why he had a camera at work on this particular day. Thus, the circumstances surrounding the taking of the photos is suspect, and I find that their probative value is negligible.

The sum and the substance of the General Counsel’s evidence, therefore, is that Freeman regularly takes dated materials off the employee bulletin board, that on May 24, he admitted to Cook that he removed some union literature in accordance with his practice, and that at the same time he gave Cook permission to repost the union literature, which Cook did. There is no evidence showing how long the union literature remained posted a second time. It could have been a day, a week, or a month. There is no evidence that there was nonwork related materials on the bulletin board on June 17, or that Freeman failed to remove nonwork related materials that were dated in accordance with his practice. The evidence therefore does not support the allegations of the complaint.

Accordingly, I shall recommend the dismissal of paragraph 5(j) of the complaint.

O. Changes in Terms and Conditions of Employment

1. Alleged onerous and less desirable work

Paragraph 6(a) alleges that between May 3 and June 3, 2002, Benefield was assigned more onerous and less desirable work. Benefield testified that after May 3, he “was left in the shop and Mike Karre was sent out on field work and I was up in the loft going through shop manuals.” (Tr. 198.) The General Counsel argues in its posthearing brief that between May 3–June 3, Benefield “spent a total 26.5 hours engaged in such activities as cleaning, sorting, and studying shop manuals.” (GC Exh. 21.)

Paragraph 6(b) alleges that between May 3 and June 17, 2002, Cook likewise was assigned more onerous and less desirable work. Cook testified that from May 6 to June 17, he performed cleaning tasks and read manuals, instead of being assigned mechanic work. (Tr. 111.) He testified that from May 3 forward Mike Karre was doing all the mechanic work. The evidence shows that Cook started doing general maintenance around the shop on April 30. The General Counsel argues in

her posthearing brief that during this time period Cook performed a total of 52 hours on nonmechanical work. (GC Exh. 22.)

Service mechanic Mike Karre credibly testified that work was very slow during May and June 2002. On many days, he literally did nothing, studied manuals, cleaned, and/or pulled weeds. (Tr. 471–473.) On one day, May 7, he leveled rock in the Company yard. An analysis of Karre’s green sheets (a Company document completed by the mechanic to record a specific job and the hours devoted to that job) shows that between May 3–June 3, he spent 19 hours doing “nothing,” 10 hours cleaning, 12 hours washing the truck, 10 hours studying manuals, and 2 hours leveling rocks for a total of 53 hours of nonmechanic work. (R. Exh. 43.) He also attended various training sessions, company meetings, and took vacation during this time period. Thus, he spent approximately the same amount of time as Cook doing nonmechanical work.

In addition, and contrary to Benefield’s assertions, Karre did not perform all or most of the field mechanical work. The evidence shows that Benefield performed field work on the following dates for the following customers: May 9—Shrock and Newton County; May 13—Majority; May 14—Shrock and Merrill Landscape; May 15—Shrock and Merrill Landscape; May 16—R&R Excavating; May 17—Clarks Farm and R&R; May 20, 21, 22, and 23—Reitt Riley; May 24—Brooks. (GC Exh. 21.)

Based on the evidence viewed as a whole, I find that the testimonies of Benefield and Cook on these points are not credible and that the arguments of the General Counsel are unpersuasive. Rather, the credible evidence shows that there was not much productive work available during May and June, and that Karre, along with Benefield and Cook, spent many hours doing nonmechanical work. The evidence also shows that Benefield continued to do field service mechanic work.

Accordingly, I shall recommend the dismissal of paragraph 6(a) and (b) of the complaint.

2. Alleged refusal to assign overtime

Paragraph 6(c) of the complaint alleges that between May 3 and June 3, the Respondent refused to assign overtime to Benefield. Benefield did not testify about this issue. Neither the General Counsel nor the Charging Party’s counsel addressed the issue in their posthearing briefs. The record shows that Benefield worked overtime on May 5, 19, and 26. In light of all of the above, I find that the evidence does not support the allegation in the complaint. Accordingly, I shall recommend the dismissal of paragraph 6(c) of the complaint.

Paragraph 6(d) of the complaint alleges that between May 3 and June 17, the Respondent refused to assign overtime to Cook. Cook testified that after May 6, he did not receive any overtime. (Tr. 112.) His testimony is corroborated by the Company’s timesheets. (R. Exh. 38.) Although the General Counsel did not address this issue in her posthearing brief, the Charging Party’s counsel argued that the Respondent unlawfully discriminated against Cook by assigning more overtime to Karre and none to Cook.

The evidence shows that Karre worked 2 hours of overtime in the month of May 2001, and 12.5 hours of overtime in June

²¹ Cook’s last day of work was June 17, 2001. The evidence therefore shows that the second posting could have remained posted anywhere from a day to over a month.

2001, 1 hour of which occurred during the week that Cook was on vacation. (R. Exh. 38.) Muraski credibly testified that overtime was dispensed on an as-needed basis, whereby the mechanic working on a particular machine at the time would work overtime on that equipment if the customer was willing to pay for the overtime in order to complete the job on that day. (Tr. 498, 500.) With overall business being light, there was simply not much overtime work and it happened to be on the equipment worked on by Karre.

Based on Muraski's credible and un rebutted testimony, I find that the Respondent has persuasively shown that its reason for assigning overtime to Karre after May 6, was not pretextual. Accordingly, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act and I shall recommend the dismissal of allegations in paragraph 6(d) of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct.
 - (a) Questioning job applicants about their union membership and affiliation.
 - (b) Promulgating, maintaining, and enforcing a written policy that encourages employees to report to management any employees who solicit support for a union.
 - (c) Threatening job applicants with plant closure if its employees choose to be represented by a union.
 - (d) Verbally encouraging employees to report to management any employees who solicit support for a union and stating that the Respondent would put a stop to such union solicitation.
 - (e) Prohibiting employees from wearing union buttons and union hats on the job during working hours.
 - (f) Verbally promulgating, maintaining and enforcing a rule that prohibits employees from discussing the Union during working time, while allowing nonunion and nonwork discussions during the same time.
4. The Respondent violated Section 8(a)(3) of the Act by staggering lunch hours and shortening lunch time in order to stifle union activity.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. The Respondent did not otherwise engage in any other unfair labor practices alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily changed lunch hours and lunch times in order to stifle union activity in violation of Section 8(a)(3) and (1) of the Act, I shall order the Respondent to restore the lunch hour and lunchtime practice that existed at its South Bend facility prior to May 8, 2002.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

ORDER

The Respondent, Brandeis Machinery and Supply Company, South Bend, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Questioning job applicants about their union membership and union affiliation.
 - (b) Promulgating, maintaining, and enforcing a written policy that encourages employees to report to management any employees who solicit support for a union.
 - (c) Threatening job applicants with plant closure if its employees choose to be represented by a union.
 - (d) Verbally encouraging employees to report to management any employees who solicit support for a union and stating that the Respondent would put a stop to such union solicitation.
 - (e) Prohibiting employees from wearing union buttons and union hats on the job during working hours.
 - (f) Verbally promulgating, maintaining, and enforcing a rule that prohibits employees from discussing the Union during working time, while allowing nonunion and nonwork discussions during the same time.
 - (g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, restore the lunch hour and lunchtime practice that existed at its South Bend facility prior to May 8, 2002.
 - (b) Within 14 days from the date of this Order, rescind and remove from its employee handbook the provisions which encourage employees to report to management other employees who solicit support for unions.
 - (c) Within 14 days from the date of this Order, rescind in writing its verbal policy prohibiting employees from discussing unions during working hours, while permitting nonunion and nonwork discussions to occur during work hours.
 - (d) Within 14 days after service by the Region, post at its facility in South Bend, Indiana, copies of the attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable

²² 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.

²³ 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."

steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current em-

ployees and former employees employed by the Respondent at any time since May 8, 2002.

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