

Webasto Sunroofs, Incorporated and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Case 7-CA-43470

September 23, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On July 26, 2001, Administrative Law Judge Jerry M. Hermele issued the attached decision. Counsel for the General Counsel filed exceptions and a supporting brief. The Respondent filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.²

The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by distributing a memo to foreign-born employees with a provision entitled "Accepting NO for an answer." The judge found that the Respondent did not violate Section 8(a)(1) of the Act by distributing this memo to employees. We disagree for the reasons set forth below. The complaint further alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to change temporary employees to full-time permanent status during the union organizing effort.³ Applying the test established in *FES*, 331 NLRB 9 (2000), appeal after remand 333 NLRB 66 (2002), enfd. 301 F.3d 83 (3d Cir. 2002), the judge dismissed this allegation. We agree with the judge's finding that the Respondent did not violate the Act in this regard; however, we reach this conclusion by application of the Board's *Wright Line* test, rather than *FES*, as discussed below.⁴

¹ The judge included in his Decision a footnote observing that "[u]pon any publication of this Decision by the National Labor Board, changes may have been made by the Board's Executive Secretary to the original decision of the Presiding Judge." It is the Board's established practice to correct any typographical or other formal errors before publication of a decision in the bound volumes of NLRB decisions.

² We shall substitute a new notice to conform to our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), affd. 354 F.3d 534 (6th Cir. 2004).

³ The effort covered the period from May through August 2000.

⁴ The judge also found that the Respondent violated Sec. 8(a)(1) of the Act by telling temporary employees, from May through August 2000, that they would not be hired as permanent employees during the Union's organizing drive. There were no exceptions to the judge's finding, and we therefore adopt it.

Background

The Respondent manufactures automobile sunroofs at its Livonia, Michigan facility. There are 200 employees at this facility, many of whom are foreign-born temporary employees.⁵ From 1998 through May 2000,⁶ the Respondent worked with Olsten Staffing Services (Olsten) to obtain temporary employees for its Livonia facility. The agreement between Olsten and the Respondent stated that the Respondent "may hire any staffing service assignment employee directly after that assignment employee remains on staffing service payroll for a period of 520 working hours," or approximately 90 days. The Respondent also had the additional requirement that any temporary employees, in order to be eligible for permanent status, must exhibit good work performance and a permanent job opening must be available.

On May 1, the Respondent ended its relationship with Olsten and began working with Kelly Temporary Services (Kelly). The agreement between the Respondent and Kelly was the same as that between the Respondent and Olsten with the added requirement that Kelly would require potential employees to take an English proficiency exam before being hired as a temporary employee.

On May 17, the Union filed a petition to represent the Respondent's Livonia plant employees. During a regularly scheduled meeting with employees in May, the Respondent's human resources manager, Jeff Croff, told employees that no temporary employees could be legally converted to permanent status until the union drive was over and the Union was gone.⁷ Croff repeated this statement at subsequent employee meetings.

The 8(a)(1) Allegation

In November, the Respondent required its foreign-born employees to attend a training course entitled "Introduction to North American Business Culture for the Foreign Born." The course was ostensibly designed to acclimate foreign-born employees to the American workplace. The catalyst for this course was, among other things, an incident wherein several employees tried to persuade the Respondent to rescind the termination of a fellow employee. Included in the course materials prepared by instructor Kathy Emmenecker was a handout containing a provision entitled "Accepting NO for an answer." Under this heading, there were two "bullet points" stating: (1) Colleagues will not try to negotiate policies and deci-

⁵ Overall, the Respondent has approximately 1000 employees. A majority of those employees work at the Respondent's assembly plants in Rochester Hills, Michigan and Kentucky. The Respondent refers to its employees as colleagues.

⁶ All dates herein are 2000 unless otherwise indicated.

⁷ As noted above (fn. 4), Croff's statements violated Sec. 8(a)(1).

sions; and (2) Colleagues will understand that “no means no” and will drop issues even when they don’t get the answer they want. Other course topics included respect for authority and colleagues, relationships between colleagues and managers, American individualism and teamwork, the importance of good English, safety, attendance, commitment to quality work, personal hygiene, and housekeeping.

The judge found that neither the handout, nor the portion of the seminar that it addressed, violated Section 8(a)(1). According to the judge, that segment of the seminar was a small portion of the overall program, in which the instructor addressed a range of issues. The judge found nothing to suggest that the Respondent’s goal in holding the seminar was to combat the Union or undermine its employees’ Section 7 rights. The judge reasoned that the relevant portion of the seminar was aimed at discouraging workers from second-guessing managerial policies and decisions, and that it must be evaluated within the totality of the circumstances. He further found that even if the “Accepting NO for an answer” portion of the memo and seminar was evaluated in a vacuum, there is nothing therein that implicates employee rights under Section 7.

The General Counsel excepts to the judge’s findings. He argues that “Accepting NO for an answer” is equivalent to an overly broad rule that tends to restrain and interfere with employee rights under the Act. The Act contemplates just the sort of concerted activity that the employees engaged in when, as a group, they questioned management regarding the discharge of a colleague. The General Counsel further points out that unlike *Shen Automotive*, relied on by the judge, here, there is no ambiguity about the language in dispute.⁸ Finally, the General Counsel argues that it is immaterial that the instructor never considered the Union when preparing for the seminar.

We find merit in the General Counsel’s exception. Section 7 of the Act protects employees’ rights “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Concerted activities are those engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.⁹ The

⁸ *Shen Automotive Dealership Group*, 321 NLRB 586, 591 (1996) (Board found employer threatened employee in violation of Sec. 8(a)(1) when supervisor told employee he should make up his mind about the union because he could not sit on the fence. Due to the asserted ambiguity of the statement, the threat was assessed in the context of other violations committed during the pendency of the decertification petition.)

⁹ *Meyers Industries*, 268 NLRB 493, revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971, decision on

record is clear that the handout provision “Accepting NO for an answer” was inspired by, and in reaction to, employees’ group questioning of a managerial decision to terminate a fellow employee. Such activity is classic concerted activity and clearly falls under the Act’s protection.

We further agree that the “Accepting NO for an answer” provision is invalid on its face and would have the reasonable effect of thwarting concerted activity. When a rule is clearly invalid on its face, it is unnecessary to show that it is illegally motivated, discriminatorily enforced, or even enforced at all. *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976), citing *Congoleum Industries*, 197 NLRB 534, 539 (1972). As long as such a rule remains in existence, the possibility of its application against employees engaged in protected activity tends to coerce, restrain, and interfere with employees in the exercise of their Section 7 rights. *J. C. Penney Co.*, 266 NLRB 1223, 1224–1225 (1983).

For the foregoing reasons, we find, contrary to the judge, that through its handout provision “Accepting NO for an answer” and the subsequent explanation of it during the seminar, the Respondent violated Section 8(a)(1). The basic test for an 8(a)(1) violation is whether the employer engaged in conduct, regardless of intent, which reasonably tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959). Here, the Respondent’s prohibition on employees’ speaking as a group to management and questioning management policies would serve as a roadblock to classic concerted activity. The fact that the Respondent’s intent was not shown to include opposition to the Union is irrelevant. It is irrelevant for two reasons. First, intent or motive is not a necessary part of this kind of Section 8(a)(1) violation. Second, the 8(a)(1) violation is premised upon interference with concerted activity, not union activity.

The 8(a)(3) Allegation

The Respondent used three criteria when determining whether to convert temporary employees to full-time status: the employee must (1) work for 520 hours or 90 days; (2) display good work performance; and (3) there must be a permanent job available. This policy is clearly communicated to each temporary employee when they begin working for the Respondent.

In 2000, the Respondent converted approximately 64 temporary employees to full-time status.¹⁰ At the outset

remand sub nom. *Meyers Industries*, 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

¹⁰ Following are the total number of temporary employees that the Respondent converted to full-time employment at Livonia during 2000:

of the Union organizing drive in May, Human Resources Manager Croff was asked by temporary employees when they would be converted to full-time positions. He replied that “it’s against the law to do any hiring until the Union leaves.” At subsequent meetings, Croff repeated that he could not do any hiring until the Union left the company. In August, at an employee meeting, Croff announced that he had “good news, the union pull[ed] out.” Croff further informed employees at this meeting that the Respondent was “going to hire 24 people”—apparently meaning that the Respondent would convert 24 temporary employees to permanent status.

The judge found that the Respondent’s justifications for not hiring additional permanent employees in mid-2000 were lawful business decisions, unrelated to the Union, and therefore this failure to hire did not violate Section 8(a)(3) of the Act. Specifically the judge relied on the facts that a shift of employees had been eliminated and that the Respondent would be implementing an automated production plan, requiring less manpower. The judge found that the Respondent possessed anti-union animus. However, he also found that the Respondent’s hiring policy was not an open-ended permanent employment guarantee to temporary employees. Analyzing the facts under *FES*, supra, the judge found no violation. According to the judge, even if the General Counsel satisfied the requisite initial *FES* elements—that the Respondent was hiring or had concrete plans to hire; that the applicants were qualified; and that union animus contributed to the decision not to hire—the Respondent successfully rebutted the 8(a)(3) allegation with legitimate business justifications.

The General Counsel excepts to the judge’s findings. According to the General Counsel, *FES* does not provide the appropriate analysis for this case. The General Counsel argues that the *FES* requirement that actual job openings be established is virtually impossible to meet here because additional temporary employees could be secured to cover the Respondent’s needs. Rather, the General Counsel argues that the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the better analysis. It is the General Counsel’s position that, under *Wright Line*, the Respondent failed to rebut the General Counsel’s initial showing that the Respondent had an unlawful motive in refusing to make temporary employees permanent. According to the General Counsel, the Respondent failed to present evidence that a reduction in shifts and the impending implementa-

tion of automation would result in a loss of permanent positions.

We agree with the General Counsel that *Wright Line*, rather than *FES*, provides the appropriate analytical framework for reviewing the General Counsel’s 8(a)(3) allegations in this case. Nonetheless, we adopt the judge’s conclusion that the Respondent did not violate Section 8(a)(3) when it refused to convert temporary employees to full-time permanent employees in mid-2000.

The temporary employees in this case, as noted, were provided first by Olsten Temps and later by Kelly Temporary Services. The judge noted that these “temporary employees shared many terms and conditions of employment with the permanent employees.” In these circumstances, the Respondent was at least *an* employer of the temporary employees. Therefore, the relevant inquiry, unlike that posed by the General Counsel, is whether the Respondent unlawfully refused to retain or convert the temporary employees to permanent status rather than whether the Respondent refused to hire new employees. The Board’s analysis in *FES* is appropriately applied in cases involving a refusal to hire, or consider for hire, applicants for employment. Accordingly, as the instant case involves a refusal to convert temporary employees to permanent status, *Wright Line* provides the proper analysis for reviewing the 8(a)(3) allegation before us.

Under *Wright Line*, the General Counsel meets his initial evidentiary burden by establishing that: (1) the employee engaged in protected activity; (2) the employer knew of that activity; and (3) the employer demonstrated animus toward that activity.¹¹ If the General Counsel makes such a showing, the burden of persuasion shifts to the employer “to demonstrate that that same action would have taken place even in the absence of the protected conduct.” See *Wright Line*, supra at 1089.

Here, we find that the General Counsel met his initial evidentiary burden. The Respondent clearly knew that there was union activity. This fact is evidenced by Croff’s comments, during several employee meetings, that no hiring would take place until after the Union was gone. Croff’s statements also provide evidence of animus and were separately found to violate Section 8(a)(1). While we acknowledge that under *Wright Line*, the Gen-

¹¹ Member Schaumber would find that the General Counsel must also show a causal nexus between the Sec. 7 animus and the adverse employment action. See *Shearer’s Foods, Inc.*, 340 NLRB 1093, 1094 fn. 4 (2003) for further explanation.

eral Counsel met his burden, we further find that the Respondent proved a meritorious rebuttal.¹²

The rebuttal to the prima facie case includes the fact that a decrease in conversions began in April, i.e., before the Union's campaign. This suggests that the decrease was not related to that campaign.

Further, even if the decrease was related to the campaign, the Respondent has shown that it would have occurred in any event irrespective of the campaign. Significantly, the Respondent never guaranteed permanent employment status to its temporary employees, even before the union organizing drive. We agree with the judge that the Respondent's hiring policy was not an open-ended permanent employment guarantee to employees. In our view, the Respondent has shown that it would not have converted the temporary employees to permanent status, even if there had been no union campaign. More specifically, the judge credited the Respondent's testimony that, during the relevant period, there was a shift reduction and plans for automation. Further, the record establishes that the Respondent did, indeed, reduce the number of shifts from three to two in June. The reduction in shifts took the form of the elimination of a shift, in order to perform necessary maintenance operations. During that time, the Respondent outsourced work to other of its facilities.¹³ According to the Respondent's credited testimony, the elimination of the third shift resulted in a loss of permanent employee jobs at the plant involved herein. In addition, the Respondent presented credible testimony that it would be automating in early 2001, resulting in the need for fewer employees. Even if the Respondent's plans for automation were delayed, as suggested by the General Counsel, it would make little sense for the Respondent to hire permanent employees only to have to lay them off when automation was underway.¹⁴

Thus, we find no merit in the General Counsel's allegation that, but for the union campaign, the Respondent

¹² We recognize that the Respondent told employees that it could not hire permanent employees until the union campaign was over. There are no exceptions to the finding that this statement was unlawful under Sec. 8(a)(1). However, the statement was that the Respondent understood the law to be that it could not lawfully do any such hiring. Although this was a misunderstanding of the law, it violated Sec. 8(a)(1) and is an appropriate part of the General Counsel's initial showing under *Wright Line*. However, it does not take away the Respondent's *Wright Line* defense or, for that matter, the ability of Respondent to meet the General Counsel's prima facie case with contrary evidence. The latter is not relevant to the disposition of this case, however.

¹³ There are no allegations that the shift reduction and outsourcing were discriminatorily motivated.

¹⁴ We recognize that the Respondent said, in August, that it would hire 24 employees. However, as noted in fn. 10, the Respondent did not hire anywhere near that number.

would have converted temporary employees to full-time status during the relevant period.

Our colleague seizes on the fact that the Respondent converted some temporaries in October and December. In her view, this undermines the Respondent's defense that, because of a shift reduction and automation, there was no need for conversions in the period from May to September. However, the Respondent has credibly explained that, by October, there was a need to convert a few temporaries in order to motivate them to stay. Our colleague *presumes* that the same need would have existed in the period of May to September. The presumption has no basis in fact. To the contrary, the longer the period of nonconversion, the more likely it is that temporaries will leave, and the more necessary it is to take steps to retain them.

Our dissenting colleague also notes that the resumption of converting temporaries coincided with the end of the Union's campaign. She therefore finds it "utterly implausible" to find that the resumption was tied to the legitimate reasons set forth above. However, the fact is that the original cessation of hiring temporaries (no temporaries converted) began before the union campaign, and the number went back to zero in the month after the Union announced its withdrawal from the campaign. In sum, it is surely not "utterly implausible" that the need to resume was tied to the need to retain temporaries. Indeed, the judge who heard the Respondent's explanation credited it.¹⁵

We likewise find no merit in the General Counsel's argument that because permanent employees were working overtime during the 4-month period when the Respondent was not hiring, the Respondent had permanent positions available. The Respondent made clear that it did not want to have too many permanent employees, and then have to eventually lay them off due to automation and job shift reduction. The Respondent's policy was to maintain a flexible work force, which it could best accomplish by relying on the use of temporary employees.

Accordingly, we adopt the judge's finding that the Respondent did not violate Section 8(a)(1) and (3) by failing to convert temporary employees to full-time status. The Respondent has shown that a reduction in shifts and its planned automation would require fewer full-time employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

¹⁵ The dissent says that the Respondent followed a bi-monthly hiring pattern. No party to this proceeding has even suggested that this was so.

orders that the Respondent, Webasto Sunroofs, Incorporated, Livonia, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the remaining paragraphs accordingly.

“(b) distributing to employees a document entitled ‘Accepting NO for an answer.’”

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

MEMBER LIEBMAN, dissenting in part.

The Respondent employer here followed a practice of granting permanent status to some number of temporary employees, on a roughly bi-monthly basis. It told employees, unlawfully as now admitted, that it was suspending that practice because of the Union’s organizing campaign. After the Union’s campaign failed, the Respondent told employees that because the Union had “pulled out,” it was resuming the tenure practice. And it did so: some temps once again were made permanent. The majority rightly acknowledges that, under *Wright Line*,¹ the General Counsel has carried his initial burden of proving that the suspension of the tenure practice was unlawfully motivated. It errs, however, in finding that the Respondent has established its defense: that, regardless of its unlawful motive, it still would have not have granted permanent status to *any* temporary employees during the suspension period.

The Respondent made temporary employees permanent both *before* and *after* the Union’s organizing campaign, which lasted from May to September 2000:

January:	28	
February:	0	
March:	26	
April:	1	
May:	0	
June:	0	
July:	0	[Union Organizing Campaign]
August:	0	
September:	0	
October:	4	
November:	0	
December:	5	

It seems clear to me that the Respondent would also have granted at least *some* temporaries permanent status *during* the period covered by the campaign, if there had been no campaign in the first place. It certainly gave employees no

reason, other than the union campaign, for suspending its practice and then for resuming it.

The judge found that the late 2000 hires to permanent status were in part intended as an incentive to the temps to continue working for the Respondent. Supervisor John Reis admitted that “it is important to hire some temps so they are motivated to stay.” Even assuming a decrease in manpower needs based on a reduction of shifts and imminent automation—which my colleagues credit as completely explaining the failure to grant any temps permanent status during the Union’s campaign—the need to provide an incentive to the temps would presumably have remained a constant throughout the campaign, as well as before and after it. That the Respondent might well have granted permanent status to fewer temps (as it did after the union campaign ended) does not establish that it would have made no temps permanent during May, June, July, August, and September.

The majority seeks to explain away the significance of the fact that the Respondent resumed making temps permanent as soon as the union campaign ended. My colleagues recognize that some grants of permanent status were necessary to motivate the other temps to continue working for the Respondent. Rather than recognizing the obvious—that the Respondent’s suspension and resumption of the practice were linked to the union’s campaign, *just as the Respondent told employees they were*—my colleagues assert that the practice was resumed only because the need to do so mounted as the suspension period continued. The problems with this analysis are plain. First, it ignores the reasons that the Respondent gave employees for its actions. Second, it is utterly implausible that the need to resume what was an established practice reached a critical point precisely when the Union announced its withdrawal, but not before.

The majority asserts that the Respondent’s cessation of conversion of temporaries to permanent status was not determined by the union campaign because it began in April before the campaign started. But my colleagues’ assertion ignores the evident bi-monthly hiring pattern followed by the Respondent. Thus, the Respondent granted permanent status to 28 employees in January, 0 employees in February, 26 employees in March, and 1 employee in April. In other words, well before the Respondent’s loss of a shift and implementation of its automation plan, it regularly converted no employees to permanent status on a bi-monthly basis. Similarly, the fact that the Respondent hired no employees in the month after the Union announced its withdrawal simply reflects its established hiring practice, as the Respondent hired four employees the previous month and five employees in the subsequent month. The point is that the

¹ *Wright Line*, 251 NLRB 1083 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Respondent suspended this hiring practice as soon as the Union campaign began and expressly resumed it because the Union withdrew.

On this record, the Respondent has failed to establish its *Wright Line* defense. The only real issue, then, is how many temps would have been made permanent. I would remand that issue to the judge, to reopen the record if necessary and to make the findings necessary to determine an appropriate remedy for the Respondent's violation of Section 8(a)(3).²

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
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten temporary employees during a union organizing drive that they will not be hired as permanent employees, if jobs exist for them.

WE WILL NOT distribute to employees a document entitled "Accepting NO for an answer."

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

WEBASTO SUNROOFS, INCORPORATED

Amy J. Roemer, Esq., for the General Counsel.
Maurice G. Jenkins and *Ryan K. Mulally, Esqs. (Dickinson Wright PLLC)*, of Detroit, Michigan, for the Respondent.
Betsy A. Engel, Esq., of Detroit, Michigan, for the Union.

² For example, while it is clear from the judge's decision that 80 Kelly temporaries met the 520-day tenure requirement for permanent status in the period from May through December of 2000, there is no indication how many of these employees would have met the performance requirements. Moreover, additional evidence may be necessary in order for the judge to determine the effects of the loss of a shift in June and the preparation for automation on the numbers of permanent positions the Respondent would have granted during the relevant time period.

DECISION¹

I. STATEMENT OF THE CASE

JERRY M. HERMELE, U.S. Administrative Law Judge. In a January 31, 2001 complaint, the General Counsel alleges that the Respondent, Webasto Sunroofs, Incorporated (Webasto), violated Section 8(a)(1) and (3) of the National Labor Relations Act by suppressing a 2000 union organizing drive at one of its facilities in Livonia, Michigan. Specifically, it is alleged that the Respondent refused to promote temporary employees to full-time status during the brief union effort, and thereafter violated those employees' Section 7 rights. In a February 14, 2001 answer, however, the Respondent denied these allegations.

This case was tried in Detroit, Michigan, on April 23 and 24, 2001, during which the General Counsel called seven witnesses and the Respondent called four witnesses. Both parties then filed briefs on June 11, 2001.²

II. FINDINGS OF FACT

The Respondent, based in Rochester Hills, Michigan, manufactures automobile sunroofs. In addition to the assembly plants in Rochester Hills, there is one assembly plant in Kentucky and one manufacturing plant in Livonia, Michigan. Annually, the Respondent derives over \$500,000 in gross revenues, and sells and distributes over \$50,000 in interstate product (GC Exhs. 1(e), (f); Tr. 17–18, 282, 322). Overall, the Respondent has approximately 1000 employees, including about 200 at Livonia, of which many are temporary employees provided by a job service (Tr. 26–27, 283, 296).

In that regard, Olsten Staffing Service (Olsten) supplied its employees to the Respondent's Livonia plant beginning in 1998. Olsten's agreement with the Respondent provided that "Webasto may hire any staffing service assignment employee directly after that assignment employee remains on staffing service payroll for a period of 520 working hours," or approximately 90 days, which is a common threshold in the industry (GC Exh. 2; Tr. 44–45, 325). Because regular Webasto employees received better pay and benefits, the temporary employees sought to get hired by Webasto (Tr. 145–146). Webasto's policy, communicated to the temporary employees upon their commencement of work, was that Webasto would consider them for permanent employment if they accrued 520 hours, if they exhibited good work performance, and if a permanent job opening existed (Tr. 30–31, 136, 325, 332). One such temporary worker, Khaled Abdullah, was hired by Webasto in July 1999, after working at Livonia for 6 months and being rated favorably by management (GC Exh. 20; Tr. 105). Moreover, Matthew Travis started as a temporary worker in 1997, and advanced to the position of second shift superintendent in early 2000 (Tr. 278–281).

¹ Upon any publication of this Decision by the National Labor Relations Board, changes may have been made by the Board's Executive Secretary to the original decision of the Presiding Judge.

² Also on June 11, the General Counsel filed an unopposed motion to correct the transcript. It will be granted.

On May 1, 2000, Kelly Temporary Services (Kelly) succeeded Olsten as the provider of temporary workers to the Livonia plant. Again, the Kelly-Webasto agreement gave Webasto the option to hire any temporary worker who had worked for 520 hours (GC Exh. 3; Tr. 55). Approximately 12 Olsten workers had already accrued over 520 hours (Tr. 66). Kelly and Webasto officials told the temporary workers of the changeover and informed them that their accrued hours from Olsten would carry over to Kelly for purposes of benefits, including vacation and holiday pay. But Webasto's "Human Resource Manager" Jeff Croff added that all temporary workers would have to take an English proficiency test prompting a brief walkout by some, including Mosad Musa (Tr. 56-57, 136-139, 160, 206-207, 240-241). For the remainder of 2000, Kelly supplied 436 temporary workers to Webasto (Tr. 65, 73). Of those 436, 80 reached 520 hours in 2000, but only approximately seven of those were hired as regular Webasto employees late in the year (GC Exh. 4; Tr. 60-61). As for the other temporary workers who reached the 520-hour, or 90-day mark, they would often ask Webasto management when they would be hired (Tr. 110-111, 120, 210-211, 285).

On May 17, 2000, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, filed a petition, pursuant to Section 9 of the Act, seeking to represent the employees at 11 facilities of Magna International (Magna), which included the three Webasto facilities in Rochester Hills and the 220 employees at the Livonia plant (GC Exhs. 6-7). Shortly thereafter, the Union distributed leaflets, in English and Arabic, to employees at Livonia (Tr. 90, 115-116). Webasto likewise leafleted, urging employees to reject the Union (GC Exhs. 14-15). In a regularly scheduled meeting with employees in May, including the temporary workers, management was again asked about being hired as regular Webasto employees. This time, Jeff Croff said that no temporary employee could legally be hired until the union drive was over and the Union was gone. Croff repeated this answer in several subsequent employee meetings (Tr. 113-115, 140-141, 213-214, 243). Supervisor Travis was present at at least one such meeting (Tr. 142), and, according to Travis, Croff is no longer employed by Webasto (Tr. 297, 307). But according to Croff's successor, John Reis, management did not discuss any new hiring policy regarding the temporary employees during the union organizing campaign (Tr. 321, 324).

In June 2000, the Livonia plant dropped its third shift operation in order to be able to service several machines (Tr. 282). This loss of the third shift resulted in a loss of jobs at the plant and an outsourcing of that capacity elsewhere (Tr. 284, 338). Also contributing to a loss of jobs at Livonia was an automation proposal, which management began to implement sometime in mid-2000 (Tr. 314-315, 318, 337). In early June 2000, the Union dropped the Webasto facilities from its election petition because Webasto claimed it was no longer part of Magna. The Union then so informed the Webasto employees that the election was postponed but that it would try again in July (GC Exhs. 8-10; Tr. 91). Later, in August 2000, Croff told the employees in another meeting "good news, the union pull[ed] out" and that 24 temporary employees would be hired (Tr. 144, 244). But only seven temporary employees were hired in late

2000, in part to provide incentive to other temporary employees that they might be hired too. Indeed, Supervisor John Reis testified that "it is important to hire some temps so they are motivated to stay." (R. Exh. 1; Tr. 339-340). But in September, Musa and several other temporary workers quit after being told they would have to take yet another English test (R. Exh. 1; Tr. 160-161). And on December 4, Reis informed Kelly that Webasto "will no longer consider Kelly Services temporary employees for permanent positions at Livonia because of our planned introduction of automation" which would be implemented in 2001, and result in the reduction of 46 temporary employees. Reis also wrote that "the 520 hour assignment ceiling is lifted for your employees in Livonia and they may remain on assignment until such time as that assignment is ended with the onset of automation" (GC Exh. 5). Overall for 2000, Webasto hired 29 temporary workers in January for the Livonia plant, none in February, 27 in March, one in April, none from May to September, four in October, none in November and five in December (GC Exh. 21).

In late 2000, Webasto engaged Kathy Emmenecker to teach a course to the Arab employees on the American workplace. Emmenecker is a "cross-cultural" trainer who attempts to acclimate foreign employees to American employers. In the case of Arabs, she believes that they inappropriately attempt to negotiate too many nonnegotiable matters with employers, such as trying to persuade a supervisor to rescind the termination of a fellow employee (Tr. 123-127, 268-276). Accordingly, she prepared the course for the Livonia employees, which included the following written material:

Accepting NO for an answer
 Colleagues will not try to negotiate policies and decisions.
 Colleagues will understand that No means No and will drop issues even when they don't get the answer they want.

The rest of the course addressed such matters as respect for authority, respect for fellow colleagues, relationships between colleagues and managers, American individualism and teamwork, the importance of good English, safety, attendance, commitment to quality work, and personal hygiene, and house-keeping (GC Exh. 11).

III. ANALYSIS

Again, in 2000, after succeeding Olsten as Webasto's temporary employee service, Kelly supplied 436 temporary workers to the Respondent. While Webasto compensated its temporary work force less in terms of wages, temporary employees at the Livonia plant shared most other terms and conditions of employment applicable to the regular employees. Hence, Webasto's temporary employees enjoyed the same rights as any other employee under the Act. See *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001); *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000).

A. The 8(a)(1) Allegations

The General Counsel alleges that by repeatedly informing its temporary employees in mid-2000 that Webasto would not be hiring for permanent positions until the union drive was termi-

nated, and by disseminating a specific document at its American business culture seminar in November of 2000, Webasto twice violated Section 8(a)(1) of the Act.

1. Mr. Croff's statements

Mosad Musa, Mohamed Awad, and Salah Masrah all credibly testified that Jeff Croff, a supervisor no longer employed by Webasto, repeatedly told temporary employees in mid-2000 that they could not be hired until the Union left. This testimony is un rebutted, as Croff did not testify. As the General Counsel correctly notes, where a witness does not deny, or generally denies without further specificity, adverse testimony from an opposing witness, an adverse inference is warranted. *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995). Thus it is clear that Croff made statements to Webasto's temporary employees suggesting that such employees, regardless of their employment record, would not be hired during the Union's organizing campaign.

Croff's statements were similar to 8(a)(1) violations committed in *New Silver Palace Restaurant*, 334 NLRB 290 (2001), where the Respondent stated that it would hire employees only if the Union did not seek to represent them. In both, management associated a refusal to hire with the Union. Moreover, not only did Croff blame Webasto's hiring freeze on the Union, but he later told these same temporary employees that hiring would resume because of the Union's "pull out." Thus, Croff's statements "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights by unjustly associating the Union with Webasto's decision to freeze its hiring of temporary workers. Because Croff's statements violated Section 8(a)(1) of the Act, the Respondent will be ordered to post an appropriate remedial notice.

2. Accepting NO for an answer

The late 2000 seminar, headed by independent training specialist Kathy Emmenecker, was on American business culture and was designed to acclimate Arab employees to the American workplace. The "Accepting NO for an Answer" section of Emmenecker's program was a small section of a comprehensive seminar. Emmenecker also addressed a range of issues from respect for authority to personal hygiene and housekeeping. According to Emmenecker's un rebutted testimony, Webasto was well justified in hosting such a program designed for its Arab employees. As a "cross-cultural" specialist, she credibly testified that because of cultural differences Arabs often behave in ways inappropriate to the American workplace. Moreover, Emmenecker never considered the Union in preparing for the seminar, nor did she reference it during the seminar itself.

Unlike *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976), where the Board found that the Respondent's rule prohibiting employees from discussing their wages with other employees was invalid on its face, nothing suggests that Webasto's goal in holding the seminar was to combat the Union or undermine its employees' Section 7 rights. The portion of the seminar that aimed to discourage workers from second-guessing managerial policies and decisions was but one of the several cultural concerns that the seminar sought to resolve, and therefore should be evaluated within the totality of the

circumstances. *Shen Automotive Dealership Group*, 321 NLRB 586, 591 (1996) (citing *TRW v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981)). And even if the "Accepting NO for an Answer" portion was evaluated in a vacuum, there is simply nothing therein that implicates Webasto's employee's Section 7 rights, as the General Counsel alleges. Simply put, the "Accepting NO for an Answer" document is not an attempt, by Webasto, to make the waiver of Section 7 rights a condition of employment. Compare *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 952-954 (D.C. Cir. 1988) (where the court affirmed that it is a violation of Section 8(a)(1) to condition employee reinstatement on a waiver of Section 7 rights). For the above reasons, the presiding judge finds that Webasto's seminar, and its "Accepting NO for an Answer" portion, did not violate Section 8(a)(1) of the Act.

B. The 8(a)(3) Allegation

The General Counsel also alleges that, from May to August 2000, Webasto violated Section 8(a)(1) and (3) by refusing to hire temporary employees provided by temporary employment services to permanent employee status upon reaching the 520-hour mark. To sustain an 8(a)(3) charge, the General Counsel must show (a) that the Respondent was hiring or had "concrete plans" to hire, (b) that the applicants were qualified, and (c) that union animus contributed to its decision not to hire. *FES*, 331 NLRB 9 (2000). And if the General Counsel succeeds in establishing these three elements, the burden shifts to the Respondent to show that it would not have hired the applicants even absent any union activity or affiliation.

Webasto's arrangements with both Kelly and Olsten were such that Webasto *could* hire temporary employees to permanent status once workers had served at least 520 hours at the Livonia plant. The criteria with which Webasto considered temporary employees for permanent employee status were the hours requirement, work performance, and whether positions were available. Therefore, Webasto's hiring policy was in no way an open-ended permanent employment guarantee to temporary employees.

The Respondent's 8(a)(1) violation, evidenced by Croff's illegal statements, shows that Webasto possessed union animus. And surely at least some of the many temporary workers performed well enough to become permanent employees. But the General Counsel has failed to show that actual positions were available or that the Respondent had concrete hiring plans at the Livonia plant. First, Webasto's hiring history does not support such an inference. The Union effort began on May 17, 2000, and effectively ended in August 2000. In that 4-month period, Webasto promoted no temporary employees to permanent status, compared to 56 such promotions from January to March 2000. But only one hiring occurred in April, before the union drive began, and only a scant seven or nine occurred through the end of the year. Second, the General Counsel argues that because permanent positions were vacated at the Livonia plant and that the remaining employees were working overtime during the time period that Webasto was not hiring, Webasto had permanent positions available. However, this theory is nothing more than conjecture regarding Webasto's hiring plans. Third, Personnel Supervisor John Reis candidly

testified that “it is important to hire some temps so they [other temporary workers] are motivated to stay.” While Reis’ description of Webasto’s actual hiring practices may seem unscrupulous or misleading in its treatment of its temporary workers, his candor helps show that Webasto had no real hiring plan. Fourth, Croff’s August 2000 statement to the temporary employees that 24 of them would be hired in view of the Union’s failed effort is also not credible evidence of a hiring plan. Indeed, only seven or nine such hirings occurred and then only much later in the year.

On the facts of this case, the presiding judge recognizes the difficulties faced by the General Counsel in proving the first prong of the *FES* test. Indeed, Webasto’s hiring practices were unlike a traditional employer’s hiring effort through placing newspaper ads or seeking employment applications. See *Terry’s Excavating, Inc.*, 334 NLRB 596 (2001). Nevertheless, had the General Counsel satisfied the requisite *FES* elements, the Respondent still had sufficient legitimate business justification for not hiring additional permanent employees during mid-2000 to rebut the 8(a)(3) charge. Webasto maintains that it quit hiring because the plant was implementing an automated production system and had just recently gone from a three-shift to a two-shift schedule. While the Respondent’s evidence regarding automation is weak, Supervisors Matthew Travis and John Reis credibly testified that the elimination of the third shift in June 2000 resulted in a loss of jobs at the plant. In short, nothing in the record suggests that Webasto was stretching its work force thin in order to accommodate its hiring freeze; a hiring freeze based supposedly on union animus. Rather, Webasto’s hiring practices seem completely consistent with the justifications proffered for not hiring during the relevant time period. In keeping a relatively large staff of temporary workers, the Respondent employed a limber work force that could more easily adapt to how the proposed changes would affect the plant. Thus, Webasto’s justifications for not hiring additional permanent employees in mid-2000 were lawful business decisions, unrelated to the Union, and therefore did not violate Section 8(a)(3) of the Act. See *Laboratory Furniture Midwest*, 301 NLRB 819 (1991).

IV. CONCLUSIONS OF LAW

1. The Respondent, Webasto Sunroofs, Incorporated, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, 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 telling temporary employees, from May through August 2000, that they would not be hired as permanent employees during the Union’s organizing drive, as alleged in paragraphs 8 and 11 of the General Counsel’s complaint.

4. The Respondent did not violate Section 8(a)(1) of the Act by distributing a memo to employees in late 2000, as alleged in paragraphs 7 and 11 of the complaint.

5. The Respondent did not violate Section 8(a)(1) and (3) of the Act by failing and refusing to convert temporary employees to full-time status from May through August 2000, as alleged in paragraphs 9, 10, and 12 of the complaint.

6. The unfair labor practice of the Respondent described in paragraph 3, above, affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Accordingly, it is ordered³ that the Respondent, Webasto Sunroofs, Incorporated, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening temporary employees that they will not be hired as permanent employees during a future union organizing drive if jobs exist for them; and

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Do the following:

(a) Within 14 days after service by the Region, post at its facility in Livonia, Michigan, copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Livonia facility at any time since May 17, 2000; and

(b) 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.

IT IS FURTHER ORDERED that the General Counsel’s June 11, 2001 motion to correct the transcript is granted.

IT IS FURTHER ORDERED that paragraphs 7, 9, 10, and 12 of the General Counsel’s complaint are dismissed.

³ 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.

⁴ 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.”