

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

5

VAE NORTRAK NORTH AMERICA, INC.

and

CASES 10-CA-35690
10-CA-35886
10-CA-36000
10-CA-36227¹

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BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES DIVISION OF THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

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Gregory Powell, Esq., for the General Counsel.
Elmer E. White III, Esq., and Elizabeth Odom,
Esq., for the Respondent.

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DECISION

Statement of the Case

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LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me in Birmingham, Alabama, on September 11 and 12, 2006, pursuant to a complaint issued by the Regional Director of Region 10 of the National Labor Relations Board (“the Board”). The complaint alleges that Vae Nortrak North America, Inc. (“Vae Nortrak” or “the Respondent”) has violated the National Labor Relations Act (“the Act”). The complaint is based on a charge filed by Brotherhood of Maintenance Of Way Employees Division of The International Brotherhood Of Teamsters (“the Teamsters” or “the Charging Party”). The complaint is joined by the answer of Respondent wherein it denies the commission of any violations of the Act.

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Upon consideration of the testimony of the witnesses, the exhibits received at the hearing and the positions of the parties as contended at the hearing and set out in their briefs, I make the following:

¹ On September 7, 2006, Cases 10-CA-35690, 10-CA-35886, 10-CA-36000 and 10-CA-36227 were severed and Cases 10-CA-35690, 10-CA-35886, 10-CA-36000 were withdrawn by the Regional Director of Region 10 of the National Labor Relations Board leaving only Case 10-CA-36227 for resolution.

Findings of Fact and Conclusions of Law

I. The Business of the Respondent

5 The complaint alleges, Respondent admits, and I find, that at all times material herein
Respondent has been a Wyoming corporation with offices and places of business in Tarrant,
Alabama and Irondale, Alabama, where it has been engaged in the business of manufacturing
railroad equipment, that during the past year, a representative period, Respondent has, from its
Alabama facilities, sold and shipped goods and services in excess of \$50,000 directly to
10 customers located outside the State of Alabama and that Respondent has been an employer
engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization

15 The complaint alleges, Respondent admits, and I find, that at all times material herein,
the Teamsters has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Appropriate Unit

20 The following employees of Respondent, herein called the Unit, constitute a unit
appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the
Act:

25 All full-time and regular part-time hourly paid production and
maintenance, shipping and receiving, and lead employees working at the
Tarrant, Alabama, and Irondale, Alabama, facilities.

IV. The Alleged Unfair Labor Practices

30 As noted above, three of these four cases were severed by the Regional Director and
withdrawn leaving only Case 10-CA-36227 for resolution. This case involves the discharge
of Michael Shepherd who is also known in the workplace by the nickname of “Catfish.”
Shepherd was discharged for reaching a level of 25 points which is grounds for termination
under the Respondent’s No Fault Attendance Policy (“NFAP”). Shepherd had been employed
by Respondent since November 2002. His job was that of a welder. Shepherd was an active
35 union adherent on behalf of the Union in its election campaign to represent the above cited
Unit employees.

40 Respondent’s “No Fault” attendance policy was established in 1993. This policy was
revised on March 12, 1996 and provides as follows:

45 Every person who has been hired as a part of the Nortrak team is an essential part
of the operation of our plant. It is therefore essential that each and every person on
our team be present and on time whenever possible. Nortrak recognizes that there
may be times when an employee cannot or may elect not to report to work. It can
be extremely difficult for Management to distinguish between an excused and an
unexcused absence. Nortrak shall therefore adopt a plan commonly referred to as

To Start of the Shift.
E: Tardy More Than (4) Hours Late Without Contact 4 pt.
Prior to Start of the Shift.

5 **Absentee:**

A: Absent With Contact Within (4) Hours Prior to 2 pt.
Shift Start.
B: Absent Without Contact Within (4) Hours of 3 pt.
Shift Start, But Before Shift End.
10 C: Absent With No Contact Before Shift End. 6 pt.
D: Leaving Early With Notice (Includes OT) 1 pt.
E: Leaving Early Without Notice (Includes OT) 4 pt.
F: Absent With Vacation Day Agreed to By Supervisor 0 pt.

15 The reporting of an absence by you does not make the absence or tardy excused or unexcused, but it gives your supervisor the opportunity to plan work around your absence.

20 Each consecutive day of absence must be reported individually unless you have obtained an approved leave of absence or have submitted a doctor's statement beforehand as to the length of absence. Any employee traveling out of town will be excluded from the call-in requirement as long as written notification is given to the Production Manager before leaving the area. When an absence from work due to illness or injury exceeds one (1) day a return to work authorization from an
25 attending physician shall cause the absence to be recorded as only one occurrence. It is the employee's responsibility to provide such an authorization form.

Perfect Attendance

30 Employees with no tardy or Absences for three consecutive months will be rewarded with a (-1) points which will be applied to their "No Fault Attendance Policy" total if their cumulative point total is above Zero. In other words, you cannot accumulate negative points. Zero is the lowest point total obtainable.

35 **Disciplinary Action**

Unfortunatly poor attendance or excessive tardiness presents a severe problem in managing the production needs of Nortrak and some form of disciplinary action must be taken when an employee's absenteeism or tardiness exceeds acceptable
40 limits. The following guidelines shall be used:

Points given for tardiness and attendance shall be totaled and the total updated monthly or upon each attendance occurrence. The time frame for evaluation shall be a period of (12) consecutive months. The (12) month period shall be defined
45 as the previous (365) consecutive days.

Upon accruing a given number of points within the sliding (12) month window the following disciplinary action shall be taken.

	<u>POINTS</u>	<u>ACTION TAKEN</u>
5	7	Verbal Warning and Conference Between Employee and (2) Shift Supervisors.
10	12	Written Reprimand and Conference Between Employee and (2) Shift Supervisors.
	16	Suspension of (1) Day Without Pay, And Conference Between Employee, Shift Supervisor, And Production Manager.
15	20	Suspension of (4) Days Without Pay, And Conference Between Employee, Shift Supervisor, And Production Manager.
20	25	Termination for Poor Attendance And/Or Tardiness.

Records Keeping

Personnel shall be responsible for maintaining attendance records of the shop employees with the assistance of the Production Manager and Shift Supervisors. A Spread Sheet shall be maintained by Personnel for each employee as needed and updated only upon occurrence of absence or tardy. The sliding (12) month window shall be defined as the previous (365) consecutive days.

Example:

	<u>Date</u>	<u>Tardy</u>	<u>Points</u>	<u>Absence</u>	<u>Points</u>	<u>Total</u>	<u>Action</u>
	4/05/96	(A)	1			1	None
	5/05/96	(B)	1			2	None
	5/08/96	(C)	2			4	None
35	8/08/96		3 Consecutive Months = (-1)			3	None
	8/09/96			(A)	2	5	None
	8/10/96	(A)	1			6	None
	8/11/06			(A)	2	8	Conf./Warning
	8/25/96	(E)	4			12	Conf./Reprimand
40	9/25/96	(D)	2			14	None
	10/01/96			(E)	4	18	Suspension 1 Day
	11/01/96			(F)	0	18	None
	12/01/96			(A)	2	20	Suspension 4 Days
	3/01/97		3 Consecutive Months = (-1)			19	None
45	5/15/97			(F)	0	15	None
	6/01/97		3 Consecutive Months = (-1)			14	None
	7/15/97			(C)	6	20	Suspension 4 Days
	8/04/97			(C)	6	26	Termination

Although Nortrak shall attempt to communicate the number of tardy and absentee points, it is each employee's responsibility to be aware of their number of tardy

and absentee points. The appropriate disciplinary action will result regardless of prior notification.

5 As noted above the current policy has been in effect since March 12, 1996, and is a
 revision of a prior policy which was issued in 1993. Under the prior policy employees were
 subject to termination on accumulating 28 points whereas the current policy provides for
 termination upon reaching 25 points. At the time of this change in 1996, each employee's
 balance of points was set at zero. In excess of 40 employees have been terminated pursuant to
 the policy. The General Counsel has asserted that there have been several instances wherein
 10 the Respondent has not terminated employees upon their receiving 25 points. These
 assertions were addressed by the Respondent in the presentation of its case. Human Resource
 Assistant Jay Cobbs testified as did Human Resources Director Jeffrey Johnston that in the
 majority of these cases the employees were actually terminated after they reached 25 points
 but as a result of their accumulating multiple points on the last event leading to their
 15 termination they ultimately had in excess of 25 points such as (i.e. 29 points) prior to or on the
 effective date of their termination. In addition as a result of the time span between the date of
 the occurrence of the 25 points and the processing of it on Respondent's "KRONOS"
 attendance recording system which may take several days or more because of Cobbs' vacation
 time or some other absence by Cobbs, there may be a delay of several days between the
 20 occurrence of the 25 points and the termination date. Respondent uses a system called the
 KRONOS system, to electronically record employee's time and attendance. This system
 produces time and attendance reports. Employees are required to furnish notice of their
 absences or tardiness by calling in to the attendance mailbox. Human Resources Assistant Jay
 Cobbs, who reports to Human Resources Manager Johnston, monitors and maintains the
 employees' attendance at both the Tarrant and Irondale facilities. She maintains a written log
 of employees' call-ins. She receives the KRONOS report approximately once a week. She
 reviews the KRONOS report and the call-in log and determines the number of points to assess
 employees who have been absent, tardy, or leave early, and prepares attendance slips for the
 employees. The attendance slips contain the date of the attendance incident but not the date
 30 of the issuance of the attendance incident slip. Cobbs also lists the attendance incidents on a
 calendar maintained for each employee, including a cumulative tally of the total points
 assessed the employees. There are inevitable delays between the time of the occurrence of the
 attendance incident and the issuance of the attendance slip to the employees. Cobbs is the
 only person who performs the function of the administration of the attendance policy detailed
 35 above. There is an average of seven to ten days between the time of the attendance incident
 and the issuance of the attendance slip. Additional delays for holidays and Cobbs' absences
 for vacation, may also occur. In addition probationary employees are not subject to the
 attendance policy but are otherwise evaluated.

40 Respondent contends that in early March 2006, Irondale Production Manager Don
 Washburn, gave Shepherd his January 24, 2006, January 31, 2006 and February 6, 2006,
 attendance slips. Shepherd was due a four-day suspension since he had a total of 20 points as
 of his January 24th absence. Respondent contends Shepherd was not suspended because he
 claimed he had records that showed the January 24th points should have been excused under
 45 the Family Medical Leave Act (FMLA). Washburn withheld the issuance of the four day
 suspension for Shepherd to provide documentation supporting his contention. Shepherd

provided the documentation on March 14th, a day after March 13th, which was the date his suspension was to take place following the issuance of an ultimatum by Johnston to provide the information on March 13th, or his suspension would commence on March 14th. Additionally Shepherd incurred additional points on February 20, 2006, February 21, 2006 and March 6, 2006, resulting in his reaching 25 points subjecting him to termination. Shepherd was terminated on March 20, 2006, by Johnston in the presence of Production Manager Johnny Myrick. Johnston told Shepherd that Respondent was not going to execute the suspension but was proceeding with termination. Shepherd again contended he had documentation which would excuse some of his attendance points, Johnston told him to bring it and Respondent would consider it.

Subsequently Respondent's attorney Elmer White met with Shepherd and Union representative Gary Cox to provide Shepherd with another opportunity to present any additional information he had concerning his attendance record. At this meeting Shepherd presented seven insurance statements which he claimed related to a back injury which should have been classified as FMLA leave. Only three of these absences had resulted in the issuance of points. Respondent contends that the attendance points issued for August 1, 2005, September 14, 2005 and January 24, 2006, involved visits to a physician's office which could have been scheduled with Respondent as provided by FMLA regulations and consistent with Respondent's adjusted work schedule and that the tardiness associated with these visits would have been excused if he had worked an adjusted schedule. During this meeting Shepherd also contended that some of his tardiness was caused by a malfunctioning time clock. No system malfunction was established at the hearing. Under the terms of the policy only General Manager James Wilson, had the authority to prevent or rescind a termination once the employee accumulated 25 points. On one occasion an employee had received 25 points following the death of his wife and his depression following the loss. General Manager James Wilson reduced the employee's points by one point, thus preventing his termination. However the employee subsequently obtained an additional point and was terminated. In another case maintenance employee Keith Dutton was used as a dual purpose employee who could perform electrical work as well as his other duties, thus saving Respondent from having to use outside electrician contractors to perform electrical work. He was assessed points but he contended he had discussed the absence with his supervisor, John Medina, because of the illness of his child and the supervisor had approved this absence. The supervisor confirmed this to management and subsequently he was informed by the production manager that the points had been eliminated. Subsequently he was terminated half a year later when he was discharged for reaching 25 points after another employee who could also perform electrical work was hired and acclimated to the job.

This case involves the alleged unlawful termination by Respondent of its employee Michael Shepherd in violation of Sections 8(a)(3) and (1) of the Act on March 20, 2006. Shepherd was initially employed by Respondent in August 2002. He worked as a welder at Respondent's Tarrant, Alabama plant. On occasion he was assigned to Respondent's Irondale, Alabama plant because of production needs at the Irondale plant. Shepherd, who is also known by the nickname of "Catfish," contacted the United Steelworkers union to initiate a union campaign which the Steelworkers commenced in the Spring of 2004. The Steelworkers filed a petition for an election which was held on June 10 and 11, 2004, pursuant

to a May 10, 2004, stipulated election agreement. During this election campaign the Respondent opposed the Steelworkers and the Steelworkers lost the election. General Counsel presented evidence concerning the Respondent's conduct during the campaign. Keith Dutton, a former employee who commenced work with Respondent and who performed maintenance duties, was hired in the summer of 2003. Dutton testified that he worked at both the Tarrant and Irondale facilities. He generally worked at the larger Tarrant plant three days a week and two days a week at the Irondale plant. Dutton would also go from one plant to another as required. Dutton could also perform electrical work and was used by Respondent to remedy electrical problems permitting Respondent to avoid the use of outside contractors to perform the electrical work which would have been at additional expense to Respondent. When he was assigned to the Irondale plant, Dutton was assigned a desk in Production Manager Donald Washburn's office where he ordered parts and used the telephone to discuss matters concerning his work on the machines. Washburn had a speaker telephone. Dutton testified that in about June 2004, Washburn and various other managers and supervisors were on a telephone conference call with the use of the speaker telephone. Human Resource Director Johnston also participated in this telephone conference call. Dutton recognized Johnston's voice and his mention of "Catfish," the nickname of Michael Shepherd. Dutton testified he heard Johnston say on that occasion that Catfish was a trouble maker and was the reason the Steelworkers were organizing the employees and said Respondent needed, "to get rid of him." Johnston also said, "I want to get rid of him and get him out of the picture." He then repeated, "He is a trouble maker." I credit Dutton's testimony as set out above. I found him to be a credible witness. Respondent contends that Dutton's testimony should not be credited as Dutton is a disgruntled former employee who was discharged in September 2004, because he had reached the 25 point threshold under the Respondent's No Fault Attendance Plan. Dutton testified that he was called into the office by Johnston and was advised that he had received points under the No Fault Attendance Plan and would be subject to discipline. Dutton protested that his absence had been approved by his supervisor, John Medina, because of his son's illness and other matters. In Dutton's presence at that meeting Johnston called supervisor Medina who confirmed that he had excused Dutton's absence. Johnston then became involved in a heated discussion with Medina and then told Dutton to return to work and they would get back to him. Later Dutton was approached by production manager James Yaskowich who told Dutton his points had been taken of. Dutton continued to work without being subject to discipline for a period of half a year until Respondent hired a new employee, Jeffrey Bobbs, who could also perform electrical work. Dutton helped train Bobbs and after Bobbs became acclimated to the job, Respondent discharged Dutton in September 2004, for having reached the 25 point threshold requiring termination under the attendance plan.

King Kennedy, a former supervisor of Respondent's Shipping and Receiving department and subsequently its "Frog shop" and who is now a rank and file employee at Respondent, testified that about June 2004, two months after the Steelworkers had filed an election petition, he was instructed by Johnston to place the employees in the frog shop under surveillance and report back to Johnston. Johnston told Kennedy to stand in the middle of the frog shop and to observe which employees were gathering together and who was talking, and to obtain their names and report them to Johnston.

About June 18, 2004, a week after the Steelworkers election, which the Steelworkers lost, Plant Manager Bob Andress and Human Resource Director Johnston called Shepherd to Andress' office and Andress said they knew Shepherd was the leader of the employees and asked why the employees were pushing for a third party in reference to the Steelworkers. He also told Shepherd he had talked to some of the employees, that they didn't need to do this and that they should give him (Andress) a chance. Shepherd gave Andress his word that he would not use the Steelworkers again.

Shepherd did not utilize the Steelworkers again but instead contacted the Teamsters in another attempt to organize the employees at the Tarrant and Irondale plants. He began wearing a Teamsters tee shirt two or three days a week at the Tarrant plant shortly after the election. In approximately December 2004, Johnston, Production Manager Yaskowich and General Manager Andress told Shepherd they were aware he was again organizing Respondent's employees. They approached him in the welding area one or two times a week. Yaskowich accused Shepherd of starting up the campaign again. Shepherd denied this and Yaskowich called him a liar. The managers had apparently understood from Shepherd's prior limited statement in June, 2004 that he would not use the Steelworkers again, to constitute a broader promise not to attempt to organize the employees in any manner.

Shepherd testified that about May 16, 2005, shortly prior to the check-in time of 7:00 a.m., Yaskowich and Supervisor Jeff Howard called him to where they were. As he approached Yaskowich called him a "fucking asshole." Shepherd inquired as to why Yaskowich had called him this. Yaskowich replied, "you know what you did and you know what you are doing." Shepherd feigned ignorance and Yaskowich proceeded to call him a "fucking asshole" and "He continued to just call me asshole after asshole. Every word you could think of." This all took place in over three minutes and would have made Shepherd late but there was no evidence that Shepherd was disciplined for being tardy on this date. Shepherd testified that later on the same day Plate Shop Supervisor Jeff Howard and Supervisor Brian Ware rode by Shepherd's work area in Respondent's scooter and in the presence of Shepherd and co-employee Joe Spatta in their work area, Ware shouted to Shepherd that he had just received a raise but it would be two and a half years before Shepherd received one. Later on the same day Shepherd was approached by Johnston who asked him why he was heading up the Teamsters campaign.

Employee John Patton testified that on about May 17, 2005, he was wearing a Teamsters tee shirt. At that point Yaskowich asked Patton where he could put in his order for a Teamsters' tee shirt. Patton replied he did not know what Yaskowich meant and Yaskowich called Patton a "liar" and said he (Yaskowich) had never received a "fucking tee shirt." Yaskowich then called the Teamsters "mother-fuckers" and "sons of bitches." He told Patton to get a life and stepped within inches of Patton's face and told Patton to get out of his face. Patton said he was not in his face. Yaskowich then told Patton not to rely on a third party (i.e., the Teamsters) and that Patton should get a group together, consolidate their issues and discuss them with Plant Manager Andress. Patton testified that during this incident Yaskowich was irate, mad and yelling at Patton.

The Teamsters filed a petition for election on May 23, 2005, for the hourly production, maintenance, shipping and receiving employees in the Tarrant and Irondale plants. A Stipulated Election Agreement was signed by the Teamsters and the Respondent on June 3, 2005, with the first session of the election held on June 30, 2005. Shepherd actively
 5 campaigned for the Teamsters and on July 1, 2005, the unit employees voted for the Teamsters to represent them by a vote of sixty-six (66) employees for the Union and twenty-two (22) employees against the Union. Following the election the new local union elected Shepherd as its first president with responsibilities for the processing of grievances and negotiations. Shepherd had attended three of the seven negotiation sessions that the parties
 10 had prior to the session of March 8, 2005. Following the election of the Teamsters, Respondent's management discussed various matters with Shepherd as the president of the Local Union. Shepherd testified that on about November 11, 2005, Yaskowich approached him and told him he had threatened employee Steve Kulick with whom he had a misunderstanding the day before, that if Kulick went to the NLRB to report him, he would
 15 place Kulick on a rotating shift, ride him pretty hard and schedule him to work every Saturday. Shepherd told him to refrain from mistreating the unit employees and then expecting him to smooth things over.

Analysis

I credit the foregoing testimony of Shepherd, Dutton, Kennedy and Patton which was largely un rebutted as Yaskowich and Ware were not called as witnesses by Respondent and Johnston's testimony and that of Howard and Andress did not specifically address this
 20 testimony. Moreover I note that Kennedy and Patton remain as current employees of Respondent and find it is unlikely that they would fabricate their testimony in order to support allegations against their employer. I thus conclude that the Respondent's animus toward the Union and Shepherd, who was the leading union supporter, has been established.

Under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert.
 30 denied 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that:

1. The employees engaged in protected concerted activities.
2. The employer had knowledge or at least suspicion of the employees' protected activities.
- 35 3. The employer took adverse action against the employees.
4. A nexus or link between the protected activities and the adverse action underlying motive.

Once these four elements have been established, the burden shifts to the Respondent to
 40 prove, by a preponderance of the evidence that it took the action for a legitimate nondiscriminatory business reason. In *Fluor Daniel, Inc.*, 304 NLRB 970 (1991) the Board said that once the General Counsel makes a prima facie case that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In the instant case it is undisputed that Shepherd engaged in protected concerted activities having been instrumental in initiating a prior organizing campaign by the United Steelworkers of America and was questioned and threatened by management concerning his activities in spearheading the organizing campaign which resulted in the election won by the Teamsters Union. Additionally Shepherd became the president of the Local Union and served as a member of the negotiating team in the negotiations for the first contract then currently being negotiated by the Union and the Respondent. Moreover, I have credited the testimony of Dutton that Johnston had made the remark that the Respondent needed to get rid of Shepherd because of his support for the Union. Thus, not only was the Respondent aware of Shepherd's engagement in protected concerted activities as the leading Union supporter among the employees in the bargaining unit, but Respondent had also expressed its displeasure with Shepherd because of his engagement in protected concerted activities and had expressed its antiunion animus and its intention to get rid of Shepherd because of his engagement in union activities. It is also undisputed that Respondent took adverse action against Shepherd by discharging him assertedly because he had accumulated sufficient points to warrant his discharge under its No Fault Attendance Policy. I find a nexus has been established between Respondent's knowledge of Shepherd's role as a Union supporter and Respondent's animus toward the Union and its leading supporter, Shepherd, and the adverse action taken against Shepherd by discharging him. Accordingly under *Wright Line*, supra, the burden has shifted to the Respondent to demonstrate by the preponderance of the evidence that it would have discharged Shepherd even in the absence of his engagement in protected concerted activities.

On March 8, 2006, Shepherd attended a negotiation meeting in his capacity as a member of the bargaining team and as president of the Union along with Teamster representative Gary Cox. Present for Respondent at the meeting were Johnston and Respondent's attorney Elmer White. Shepherd became involved in a heated exchange with Johnston concerning whether or not Shepherd had been temporarily or permanently transferred from Respondent's Tarrant plant to its Irondale Plant. Shepherd contended the transfer was temporary and that he was entitled to mileage for the distance between the two plants. Johnston contended the transfer was permanent and that Shepherd was not entitled to mileage. According to Shepherd the very next day on March 9th, he was tendered six no-fault attendance reports dated January 6, 2006. This was a period of two months that Respondent had taken to tender some of these documents. Shepherd testified that on March 9, 2006, the next day he was summoned into the office of Production Manager Don Washburn and Washburn handed him a totaled of six (6) attendance reports dating back to January, 2006. Respondent's records show that Shepherd accumulated two (2) points on January 1, 2006, for an absence increasing his total points to nineteen (19). He received two (2) additional points on January 24, 2006, for absence increasing his total points to twenty-one (21). He received one (1) more point on January 31, 2006, for an absence increasing his total to twenty-two (22) points. He received one more point on February 6, 2006, for absence increasing his total to twenty-three (23) points. He received one more point on February 20, 2006, for tardiness for a total of twenty-four points. He received one more point on February 21, 2006, for tardiness for a total of twenty-five points. He did not sign any of these attendance slips. Shepherd testified he was given all of the attendance slips at the same time on March 9, 2006. He was terminated on March 20, 2006. He was not issued a one-day or a four-day suspension prior to

his termination on March 20, 2006, as required under the policy. He testified that Production Manager Washburn presented all of the six (6) attendance slips at the March 9th meeting. Shepherd also testified that he told Production Manager Ware the assessment of these points was incorrect and that Ware told him he would serve a four-day suspension on March 13th.
 5 He did not serve the four day suspension.

In the recent case of *Publix Supermarkets, Inc.*, 347 NLRB No. 124 (2006) slip op at 6-7, the Board stated that it has found that “in the absence of countervailing evidence, such as that of disparate treatment based on protected activity, the Respondent [can meet its *Wright Line* burden] by demonstrating that it has a rule . . . and that the rule has been applied to employees in the past,” citing *Avondale Industries*, 329 NLRB 1064, 1066 (1999) (quoting *Merillat Industries* 307 NLRB 1301, 1303 (1992). “However an employer fails to meet its burden where the evidence affirmatively shows a lack of consistency in the employer’s application of its disciplinary rules, and where the case for unlawful motive is substantial”
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 15 citing, e.g., *Septix Waste, Inc.*, 346 NLRB No. 50 slip op at 3 (2006). The Board further states in *Publix* at slip op 6. “In defending an allegation of discriminatory disparate treatment, the Respondent does not meet its burden,” by simply showing that examples of consistent past treatment outnumber the General Counsel’s examples of disparate treatment . . . citing *Avondale*, 329 NLRB at 1066. Rather “the Respondent must prove that the instances of
 20 disparate treatment shown by the General Counsel were so few as to be an anomalous or insignificant departure from a general consistent past practice” *Ibid*.

General Counsel contends that the timing of the delivery of all of these attendance reports, supports the inference that the issuance of these reports was discriminatorily motivated. General Counsel also contends that the Respondent’s failure to follow its attendance policy by issuing the suspension and warnings provided under the attendance policy supports the inference that the subsequent termination of Shepherd was discriminatorily motivated.
 25

General Counsel notes in brief that under the Respondent’s progressive discipline procedure contained in the attendance policy, “Shepherd should have been issued a verbal warning, a written reprimand, a one-day suspension without pay and then a four-day suspension. However on March 20, Shepherd’s supervisor (Washburn) simply handed him a host of attendance slip disciplines dating back to January, 2006. “As of January 2006,
 30 Shepherd had been placed on Notice that he only had accumulated 17 total points under the NFAP. . . . he (Shepherd) had never seen the progressive discipline prior to March 20.” General Counsel argues further that “once employees reach the 25-point threshold they are to be terminated unless one of the exceptions kicks in.” These exceptions are Jury Duty, Death of Immediate Family Member, on-the-job illness or injury, Military Reserve or National
 35 Guard leave of absence, temporary assignment to Off Premises worksite, absence due to The Family Medical Leave Act (FMLA). General Counsel further argues that, “According to the company, Shepherd reached the 25-point threshold on February 21, 2006, and he was therefore terminated.” However, Dutton tendered probative evidence that Production Manager Yaskowich approached Dutton and assured him that his slate had been wiped clean.
 40 General Counsel further notes that “Dutton was a valued employee, because in addition to completing his regularly scheduled duties, he could remedy the company’s electrical
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problems at both the Tarrant and the Irondale facilities. Before Dutton was employed, the company had to call in contractors . . . subcontract out the electrical work. With Dutton fixing its machines and handling its electrical problems, it was no longer necessary for the company to pay another company to perform these necessities.” General Counsel contends that
 5 Shepherd was terminated as soon as he “allegedly” reached the 25-point threshold in contrast to Dutton who had his slate wiped clean, thus supporting an inference of “blatantly disparate treatment,” and discrimination against Shepherd.

General Counsel also contends that the manner in which Dutton’s points were
 10 assessed is further evidence of the disparate treatment of Shepherd. According to Cobbs who monitored the company’s NFAP, “When employees violated the policy they were assessed points. It’s a zero tolerance policy.” However Dutton’s records show that he should have been “assessed points, on more than one occasion” General Counsel cites several instances of
 15 this.

General Counsel also contends that Supervisor Howard’s testimony, that prior to
 March 20th he had handed Shepherd the attendance slips, should not be credited. General
 Counsel relies on Shepherd’s denial that he received the slips. On direct examination
 20 Supervisor Howard testified he had given Shepherd the attendance sheets prior to March 20th, but did not remember on cross-examination “when” he had handed the slips to Shepherd or if he had handed them to Shepherd at one meeting or during separate meetings.

Respondent contends in brief that sometime in early March 2006, Don Washburn, the
 25 Production Manager at the Irondale facility, provided Shepherd with his January 24, 31 and February 6, 2006 attendance slips. Shepherd was not suspended when he accrued a total of 20 points for the January 24, 2006, absence although he was supposed to receive a four-day suspension under the terms of the attendance policy. Shepherd was not suspended because he claimed to have documentation which showed the points he received on January 24, 2006,
 30 should have been excused under the FMLA. Johnston testified that he told Shepherd he would not execute the suspension and gave Shepherd an opportunity to gather his documentation. Following repeated requests for the documentation, Johnston told Shepherd he had until March 13, to produce the documentation or his suspension would commence on
 March 14, 2006. Shepherd did not produce any documentation on March 13, but came to
 35 work on March 14, with his paperwork. Respondent permitted Shepherd to work while the documentation was reviewed. The paperwork was determined to be inappropriate because none of the dates in the documents correlated with January 24, 2006. In the meantime
 Shepherd’s attendance slips for February 20, 21 and March 6, 2006 were issued and it became
 40 clear that Shepherd had reached 25 points and would be subject to termination. Shepherd was informed of his termination on March 20, 2006, in a meeting with Johnston and Production Manager Johnny Myrick. When he was notified of his termination, Shepherd again said he
 had medical documentation which would excuse some of his attendance points. Johnston told
 him to bring it in and it would be considered. Subsequently, Union official Gary Cox
 45 contacted Respondent and claimed Shepherd had pertinent medical documentation. In response to this claim, Respondent’s attorney Elmer White wrote Cox encouraging him to expedite the presentation of the documents. On April 11, 2006, a meeting was held between
 Shepherd, White and Union official Michael Sellers. Respondent contends that along with

other irrelevant material Shepherd, “presented seven (7) EOBs or insurance statements which he claimed were related to a back injury which should have been classified as FMLA leave.” Only “three of the seven absences had resulted in the assessment of attendance points. They were August 1 and September 14, 2005 and January 24, 2006. Each of these involved visits
5 to a physicians office which could have been scheduled with Respondent as provided by FMLA regulations (29 C.F.R. § 825-204) consistent with Respondent’s adjusted work schedule procedure. On the August 1, 2005 and the September 14, 2005 and January 24, 2006 absences, Shepherd failed to work an adjusted schedule.

10 Respondent contends that Shepherd made a number of “unfounded arguments” in his attempt to show his discharge was discriminatory but that none of these arguments show he was incorrectly assessed points which he should not have been assessed because they were absences that should have been covered by the FMLA. Shepherd testified he provided Johnston with two doctor’s slips. However, the two doctor’s slips covered the same day,
15 January 23, 2006, which was a day when Shepherd took vacation and was not assessed points. Secondly, Shepherd testified that his performance evaluation had a different point total than his attendance slips. However, performance evaluations list occurrences, not points. Performance evaluations do not indicate the number of times an employee has left early and accumulated points. Third, Shepherd asserts he did not receive a one-day or four-day
20 suspension in 2006 prior to his termination. However, Respondent contends that Shepherd was not suspended because he contended there were doctor’s notes that would excuse his points. However, by the time it was determined his paperwork was unacceptable, he had already reached 25 points and Respondent moved ahead with his termination. Fourth, Shepherd testified that soon after the March 8, 2006 negotiation meeting, Washburn handed
25 him six (6) attendance slips on March 13, 2006, which dated back to January 6, 2006. However, Washburn testified he gave Shepherd his December 19, 2005 and January 6, 2006 attendance slips sometime in January of 2006 and gave Shepherd his January 24 and 31, 2006 and his February 6, 2006 attendance slips sometime in March 2006. Jeff Howard, Shepherd’s supervisor at the Tarrant facility, testified he gave Shepherd his February 20 and 21, 2006,
30 attendance slips sometime in March after Shepherd had returned to the Tarrant facility. Respondent contends that Shepherd’s contention that Washburn gave him all six attendance slips is not credible because the February 20 and 21, 2006 attendance slips were signed by Howard and not by Washburn.

35 Respondent contends further that on the second day of the hearing in this case Shepherd abandoned his claim that the absences should have been excused under the FMLA and alleged that he requested an emergency vacation from Washburn for his January 24, 2006 absence but was denied. Washburn testified that Shepherd never requested a vacation day emergency or was scheduled for January 24, 2006. Respondent argues that Shepherd’s
40 argument is not credible because on the first day of the hearing Shepherd was asked extensively about emergency vacation and he failed to mention that his absence should have been excused on that basis. Respondent further contends in brief that it has consistently enforced the No Fault Attendance Policy.

45 In the instant case I find that the Respondent has shown that it has consistently applied its No Fault rule with only limited and minimal exceptions which were adequately explained

by Johnston and Cobbs at the hearing. That evidence established that Respondent discharged over 40 employees when they reached the 25 point threshold. The employees involved were ultimately discharged within a relatively short period of time, typically within a matter of a few days thereafter except in the case of Dutton. I find that the forbearance of Dutton's attendance shortcomings was an isolated incident attributable to Respondent's need of his electrical skills and does not support the conclusion that the rule was not otherwise consistently applied. I also find that a review of Shepherd's attendance records shows a consistent pattern of absences and tardiness leading to the assessment of points under the No Fault rule. Shepherd began work on November 11, 2002. He received points through the months and weeks and in August, 2005. As he reached the 16 point level, he was due a one-day suspension as shown on the slip for July 24. At the end of the Year in December he had accumulated 19 points and to the side of 19 it shows that 2 points fell off of the prior year. By the end of 2005, he had 17 points. On January 6, 2006 he had 17 points. On January 6, 2006, he was absent with a call-in and received 2 points. On January 24, he was absent with a call-in and received 2 points. In addition there are "V's" (vacation days) on the exhibit. On January 31, he left early and at the end of January had 21 points. On February 6, he left early and received one point. On February 20th he was tardy with a call-in. On March 6, he left early that day and this brought his total points up to 25 points. Respondent's Exhibit 14 is a point slip for Shepherd for an occurrence on March 6, 2006, which brought his total to 25 points. Cobbs gave this slip to Johnston.² Shepherd testified he has a chronic back problem which may have contributed to his absences and tardiness occurrences. However the No Fault policy does not take into account the reasons for the absences. I found no evidence of any error or impropriety in the calculation of Shepherd's attendance record and note that Shepherd did not specifically challenge the accuracy of his attendance record or specifically set out the purported inaccuracies. As noted above I have credited the testimony of General Counsel's witnesses concerning Johnston's ordering supervisors to observe which employees were

² See Respondent's summary of Shepherd's attendance record for the 12-month period leading up to his termination.

<u>DATE</u>	<u>POINTS</u>	<u>DATE</u>	<u>POINTS</u>
April 14, 2005	18	October 18, 2005	17 (2 added/4 rolled off)
May 19, 2005	17 (1 added/2 rolled off)	November 4, 2005	16 (1 added/2 rolled off)
June 1, 2005	18 (1 added)	December 19, 2005	17 (1 added)
June 17, 2005	18 (2 added/2 rolled off)	January 6, 2006	19 (2 added)
July 13, 2005	16 (1 added/3 rolled off)	January 24, 2005	20 (2 added/1 rolled off)
July 22, 2005	15 (1 added/2 rolled off)	January 31, 2006	21 (1 added)
August 1, 2005	16 (1 added)	February 6, 2006	19 (2 added)
August 12, 2005	15 (1 added/2 rolled off)	February 20, 2006	23 (1 added)
August 30, 2005	17 (2 added)	February 21, 2006	24 (1 added)
September 14, 2005	18 (1 added)	March 6, 2006	25 (1 added)
September 26, 2005	19 (2 added/1 rolled off)		

engaged in discussions supporting the Union and the threat against Shepherd that was uttered to supervisors and members of management by Johnston concerning the need to get rid of Shepherd. I also credit the testimony of Shepherd and Cox concerning Johnston's agitated state concerning Shepherd's claim for expenses for travel from one plant to another and the timing of Shepherd's discharge a day after the bargaining meeting was held. I find that although Respondent may have welcomed the discharge of Shepherd, his discharge would have occurred in any event under the No fault Attendance Plan. Respondent also introduced evidence to show that Shepherd had reached and exceeded the threshold of the 25 points requiring his discharge under the policy.

The General Counsel did not show that the points accumulated by Shepherd as shown on Shepherd's attendance records were incorrect or the subject of any intentional miscalculation. General Counsel did not show that Shepherd was singled out for disparate treatment by Respondent's discharge of Shepherd for violation of the policy. Rather Respondent demonstrated through its records that virtually all employees who accumulated sufficient points under the policy to warrant their discharge, with the exception of probationary employees who were not subject to the policy, were, in fact, terminated. Respondent also refuted General Counsel's claim that some employees who had at or in excess of the 25 points which required termination were not terminated. Rather as explained by Johnston and Cobbs some employees had in excess of 25 points prior to their termination as the result of the final occurrence resulting in a multiple number of points on the final occasion. This resulted in their accumulation of a greater number of points (i.e. 29) which was in excess of the number (25) which required their discharge under the terms of the policy. There also have been instances where the most recent occurrences of points had not yet shown up on their records which can take up to a week or more until this shows up on the records and is processed by Cobbs who sends a discipline slip to the employee's supervisor.

I conclude that the General Counsel has established a prima face case that Respondent discharged Shepherd because of his support of the Union and his engagement in protected concerted activities and Respondent's animus against the Union and its supporters. However, I find that Respondent has demonstrated that it would have discharged Shepherd even in the absence of his engagement in protected concerted activities. Thus Respondent has rebutted the prima facie case by the preponderance of the evidence.

Conclusions of Law

1. Respondent is an employer within the meaning of Sections 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. Respondent's discharge of Shepherd did not violate the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:³

ORDER

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The complaint is dismissed.

Dated at Washington, D.C.

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Lawrence W. Cullen
Administrative Law Judge

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³ If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.