

Wheeling-Pittsburgh Steel Corporation and United Steelworkers of America, AFL-CIO-CLC, Case 6-CA-10977

September 12, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO

On May 30, 1979, Administrative Law Judge Robert A. Gritta issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ In adopting the Administrative Law Judge's Decisions Chairman Fanning does not adopt the conclusion that Sec. 10(b) precludes a finding that certain conduct, alleged as background, took place since such conduct, if found, would constitute untimely unfair labor practices.

DECISION

Statement of the Case

ROBERT A. GRITTA, Administrative Law Judge: This case was heard on September 11, 12, and 13, 1978, in Wheeling, West Virginia, based upon a charge filed by the United Steelworkers of America, AFL-CIO-CLC (herein "the Union"), on charges filed on February 21, May 12, and June 13, 1978, and a complaint issued by the Acting Regional Director for Region 6 of the National Labor Relations Board on June 20, 1978.¹ The complaint alleged that Wheeling-Pittsburgh Steel Corporation (herein Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act by: (1) restricting the movements of prounion employees; (2) instructing employees to refrain from union

¹ All dates herein are 1977 unless otherwise specified.

activities; (3) threatening employees for engaging in union activities; and (4) discharging employees for engaging in union activities. Respondent's timely answer denied the commission of any unfair labor practices.

All parties hereto were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by General Counsel and Respondent and, if timely, were duly considered.²

Upon the entire record in this case,³ from my observation of the witnesses and their demeanor on the witness stand, and upon substantial reliable evidence considered along with the consistency and inherent probability of testimony, I make the following:

FINDINGS OF FACT

**I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—
PRELIMINARY CONCLUSIONS OF LAW**

The complaint alleges, Respondent admits, and I find that Wheeling-Pittsburgh Steel Corporation is a Delaware corporation engaged in the manufacture and nonretail sale of steel products in Pittsburgh, Pennsylvania, and Wheeling, West Virginia. Jurisdiction is not in issue. Wheeling-Pittsburgh Steel Corporation, in the past 12 months, in the course and conduct of its business operations shipped products valued in excess of \$50,000 from its West Virginia and Pennsylvania locations directly to points located outside the respective States. I conclude and find that Wheeling-Pittsburgh Steel Corporation is an Employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Relevant Business of Respondent

This case involves the operation of Respondent's Duvall computer Center in Wheeling, West Virginia. The center consist of several departments; however, the systems and data processing department, composed of the data section and systems section, is in focus here. The department develops, designs, prepares, and operates computer systems and programs for Respondent's entire manufacturing, sales, and administration as well as systems and programs of production for specialty customers. The two sections have the responsibility of development and revision of systems and procedures so that the computers can solve problems, store data, integrate and simplify methods of accumulating data for management decisions, and perform functions that otherwise would be done manually for inventory control, pur-

² Respondent submitted what is entitled a reply brief, duly opposed by General Counsel. Without regard for the title I have not considered Respondent's brief due to the unexplained 12-day late submission.

³ Respondent's unopposed motion to correct the record is granted and is received in evidence as Resp. Exh. 21.

chasing, production scheduling and control, and administrative programs. The computer functions are performed by computer operators, and its supporting operations are performed by professional employees classified as analysts, programmers, designers, and systems programmers. Much of the work is integrated between classifications and necessarily requires cross-trained experience. In addition, the normal progression may overlap classification lines.

B. *The Alleged 8(a)(1) Conduct*

1. Instructions to refrain from union activities

Charles English testified that he engaged in solicitation since sometime in June. He handed out cards in virtually all sections in the center including keypunch operation of data processing. English was working the night shift sometime in August and at lunchtime he went down to the lunchroom in the keypunch area, and one of the keypunch girls told him that another girl stated she intended to turn her card into her supervisor. English knew that the girl in question was Suzanne Templin. When Suzanne came into the lunchroom English confronted her with her intentions. English testified that Suzanne yelled at him that it was none of his business and to stop giving her dirty looks. Suzanne then became upset and started to leave the area. English told her it was his business, that he was trying to get her interested in organizing the union. Suzanne thereupon ran down the hall to her supervisor, Pat Freismuth, and complained of English's harassment. Freismuth came into the lunchroom and told English to shut his mouth and not to talk to the women in the area, that he had no right to talk to them. English told Freismuth that he thought he had every right since everyone was on lunchbreak, and he was trying to campaign for the Union.

Freismuth testified that the Templin incident occurred on August 11, and her involvement started with Suzanne coming to her crying and saying that English had harassed her. Suzanne stated that she did not have to take it, and that what she did with her own card was her own business. Freismuth then went to the lunchroom and told English not to upset the girls, "I told him a direct quote, 'You do not have the right to upset the girls.'" Freismuth did not ask English to leave the lunchroom, but when English told her that he had every right Freismuth got her girls together and went back to work. Freismuth then called English's supervisor and asked that English be kept out of her department because he upset the girls.

Graeb, English's supervisor, testified that Freismuth called him stating, "she was having a little trouble downstairs, that Ernie was causing—or he was disrupting the girls, he had one girl crying down there and she asked me to please try to keep him upstairs if I could. When Ernie came back upstairs I asked him, don't cause any waves or no problems, just try to stay away from the girls downstairs." Graeb further testified, "I think the impression that I had was that Ernie was down there trying to make out with the girls. That night I don't think why Ernie was downstairs came out in the conversation. Probably within the next day or so I talked to Pat again. I think that's when it came out that he had been passing cards out."

Discussion and Conclusions

The General Counsel argues that English's remarks to Templin were not of such an offensive nature so as to be outside the protection of the Act, but that Respondent's instructions to English were violative of Section 8(a)(1) of the Act. General Counsel overlooks the date of the occurrence, testified to by Freismuth as August 11. English could not fix a date nor could Graeb fix a date of the incident. In addition, the only variance in the total testimony of this incident is that English attributed to Freismuth "you have no right to talk to the girls." Freismuth said that she stated "no right to upset the girls." There is no dispute that English had frequented the keypunch lunchroom both before and after the incident with the knowledge of Freismuth and Graeb. I credit Freismuth on the use of the word "upset" as being more plausible under all the circumstances, noting that the edict as testified to by English has no support, prospectively, from the time of the incident. Additionally, I cannot assign to the incident any substance that approaches interference, restraint, or coercion.⁴ Further, the only testimony establishing the date the incident occurred places it outside the 10(b) period. Therefore, I conclude and find that Respondent has not violated the Act by its remarks to English through supervisors Freismuth and Graeb.

2. Threats of layoff

The complaint, in paragraph 7b, alleges "threatening to lay off employees if they selected the union as their collective bargaining representative," through supervisor Doepken. General Counsel offered the following through witness Goddard to support the threat allegation:

Q. Following your termination on September 1, did you ever have occasion to visit the plant again?

A. Yes I did.

Q. When was that?

A. On September 30 I went back to Duvall Center.

Q. Did you see anybody—Why did you go back to the Duvall Center on that date?

A. That was the day or the day after I received my severance pay and there was an error in my check. I went back and talked to the manager of the credit union about that and after I finished I went up and talked to Dave Doepken.

Q. What do you recall—what subject did you talk about with Mr. Doepken?

A. A lot of things, the project I was working on, but I asked Dave, specifically, I asked him what he thought—what was happening with the union at Duvall Center and Dave told me at that time that he thought there would be no union at Duvall Center.

Q. Did he say why?

A. He said if there is a union Carney will simply lay people off.

Doepken testified that he and Goddard go back a long way, to the sixth grade in school. In addition they have a

⁴ The case cited by General Counsel contains a much stronger set of timely facts and consequently was not dispositive of this issue.

common family relationship, and the conversation with Goddard was very emotional. Doepken denied threatening any employees with layoff if they selected the Union. The conversation lasted about 10 minutes and was mostly concerned with discussion of other fields for Goddard to go into based upon Doepken's appraisal of Goddard's skills and talents. It was a personal meeting between friends rather than a business meeting between subordinate and supervisor.

Discussion and Conclusions

General Counsel's single witness on the alleged threat did not impress me with his demeanor. His testimony was vague, and his manner was argumentative as though he had an axe to grind. Doepken impressed me as a man attempting to genuinely recall what was said and relate it in a straightforward manner. The conversation as stated does not contain a threat, either expressed or implied. Doepken responded with an opinion to a friend no longer employed by the Company at a time after the Union had filed its representation petition. In addition, the expression in substance related to a circumstance after a union has representative status. Doepken's opinion had been solicited by Goddard ostensibly because Goddard no longer was in the main stream and sought Doepken's appraisal of the current status. Only in response to a suggestive question did Goddard supply any suspect utterance relative to layoff. I do not credit Goddard's testimony as the truthful response of Doepken, but rather I find it to be a contrivance. Assuming the truth of the discredited utterance, General Counsel would have it applied retrospectively to the economic layoff which he is not disputing. I conclude and find that Respondent did not violate the Act through Doepken's remarks to Goddard on September 30.

C. *The Alleged 8(a)(3) Conduct*

1. Restrictions on movements

English testified that Knoyer called him in late in August and said that he had been called by systems development people and had been told to stay out of the system development area. English asked why, and he stated that Knoyer said because he was passing out cards. English told Knoyer he was not passing out cards, and Knoyer responded, "yes you are, we know what you're doing." English then said fine, and that he would stay out of the area.

Knoyer testified that Flenniken, the supervisor of the systems area, said to keep English out of the area because he was disturbing the professional employees. Knoyer told English to stay out, and he did.

Flenniken testified that an employee in systems reported to him that English was causing a disturbance by conducting loud discussions in systems. Flenniken stated that since systems was a separate building from English's work station that English had no business in systems, particularly if he was disturbing people there. On that basis he called Knoyer and asked that English be kept out of the area. Flenniken

did not investigate to determine what discussions were conducted by English.

Goddard testified that on August 9 Doepken told him not to go into the distribution area. Doepken said that the group in distribution was complaining because it had too much work to do and did not want anyone interfering. Goddard said that he had not interfered with anyone, and it was unfair and discriminatory to keep him out of the area. Goddard then went to Flenniken for relief from the restriction, but Flenniken said that since English was restricted from the systems area Knoyer no longer wanted Goddard in the distribution area. Goddard next saw Knoyer and asked why he was restricted from the distribution area. Knoyer responded, with a chuckle, "that's may revenge since Ernie (English) isn't allowed in the professional area."

Discussion and Conclusions

English and Goddard work in separate buildings and separate areas. They are not commonly supervised and did not always work the same hours. The credible testimonies of Knoyer and Flenniken established that English was disturbing another area's employees with loud discussions. It is reasonable that an employee would be denied access to other work areas where he does not belong during the working hours of other employees, particularly when the foreign employee causes disturbances. English seemed to seize upon the "passing out cards" phrase as a *carte blanche* to do whatever he desired, but according to his testimony when he was ordered to stay out of the systems area he did so without question. This was a considerably different tack from his encounter in the keypunch lunchroom where he advocated his rights of activity. The substance of English's testimony is an attempt to clothe all his actions in union activity.

I do not credit English's testimony that Knoyer kept him out of the area because he was passing out cards. I found his demeanor on the stand and his proclivity to tailor his testimony in keeping with his characteristics and conduct as testified to by other witnesses. I note particularly the discrepancy in his testimony as to when he started passing out cards. At one point he started soliciting 1 week after the wage reduction, admittedly in retaliation for the reduction. And at another point he stated that he was passing out cards the day after the reduction. Also, it is more plausible from all the testimony that Goddard was, in fact, kept out of the distribution area by English's supervisor in retaliation for English's restriction from the systems area. Simple jealousy among supervisors of different departments is all too common. I also note that at the time Goddard was restricted he was admittedly known as an antiunion employee. No evidence even suggests that Goddard's restriction was based on his nonexistent union activity. If, as General Counsel argues, Goddard was restricted because he was a "good friend" of English that fact, in and of itself, would not evince a discriminatory motivation. I conclude and find that the alleged movement restriction of English and Goddard was not based upon either employee's union activity but rather upon legitimate business considerations and therefore was not in violation of the Act even if the occurrence were within 10(b).

2. Background and discharges

a. *Charles E. English*

Early in January 1977 English was reclassified from tape librarian to computer operator and received an increase in wages. In June Respondent began a series of economic cuts throughout the corporation. One such cut came June 8 when four computer operators were terminated, and three were reduced in wages. The terminated operators were the least senior in computer operations. Those receiving cuts in wages were Charles English, Melvin Lees, and Roger Griffin.

English was informed of his reduction by Supervisor Knoyer. English questioned Knoyer about the reduction and was told by Knoyer that it was a forced reduction and that he was reduced for attitude reasons. English thereupon told Knoyer that Border and he were trying to force English out of the Company, and that he was not going to sit back and take the cuts like everyone else. English testified that he told Knoyer he was going to the Union. He stated to Knoyer that his involvement with union had been minimal, but now it would be up front, and they would know about it and that, he would be at the beginning at the head of the Union. English then left the area.

English testified that immediately thereafter he contacted the Union and discussed with the Union how much interest there was at the center for the Union; what to do to organize; the reasons why people were cut; and if there were going to be more cuts and what the employees could do in general to protect their jobs, because that seemed to be what the employees had to do. He received 100 authorization cards that day and took them to work the following day. He also enlisted the aid of several employees to distribute cards throughout the center in hallways, lunchrooms, and parking lots during nonwork time. In addition, he talked with employees Gooch and Barczak about the Union.

One week later English, Gooch, John Matyja, and Barczak met with the union representative downtown to discuss the campaign.

English attended several more union meetings for center employees held downtown.

English testified further that he had several conversations with Knoyer about the Union. The first occurred about 1 week after his wage reduction in which Knoyer asked what English was up to and called him a troublemaker. English said, "I don't know what you're talking about," and Knoyer said, "you know, the Union." English denied any union involvement. The second occurred sometime later in the hall, and Knoyer asked English how his Union was going. English replied questioningly, "my Union," and Knoyer then asked if English intended including the systems development people in the Union. English did not respond but rather walked off. The next confrontation occurred in late June or early or mid-July in Knoyer's office when English was confronted with nonconformance with the dress code. Knoyer said, "I was pressing the dress code that Mr. Border had instituted a couple months back and that Border didn't like it and he wanted me to clean up my act. These had been the same clothes I had been wearing to

work for that time." Knoyer again asked me how "my Union" was doing. English asked why it was "my Union." Knoyer said, "they knew that I was part of a coalition starting the Union." English again professed ignorance and left. On cross-examination English stated that Knoyer's opinion of the Union was that he had no opinion other than why would we want the Union in there. He did not see any need for the union in there. He thought that we had a good environment, good working area, and good conditions.

English also testified that on August 12 a meeting was held for night-shift computer operators and day-shift and night-shift keypunch operators in the center's conference room. Scalise, the manager of labor relations, chaired most of the meeting; however the meeting was opened by Howard, vice president of finance. Scalise opened the floor to questions, and English asked why the four computer employees were terminated on June 8 and if they would be recalled. Scalise said that they were terminated because the Company had to make costs cuts, but that the Company was going to try to keep from terminating any more personnel. Scalise stated that the four in question were terminated by seniority after evaluations showed everyone at the center to be equal.

On September 1 English was notified of his termination by Knoyer. English testified that Knoyer told him, "we had a cost reduction and I had an evaluation and I had come out low." "I really didn't let him finish his interpretation of why I was being fired. As I saw it, it was his interpretation." English stated that he was not aware of any evaluation, not was he ever counselled. English's testimony was, "No one ever knew whether there were any evaluations or how you stood there. You didn't know whether you were doing your job. No one told you that, whether you were or you weren't." Knoyer always acted friendly to English and seemed to like English, but Border had a distinct dislike for English and was always on Knoyer about English's performance. Knoyer did not want to discharge anyone but always said, "its coming from Mr. Border." English testified, "I had the feeling that it was inevitable, they were getting rid of people."

b. *Frank Barczak*

Barczak was informed by English that he had contacted the Union, and that they were in the process of starting another organizing campaign. In June, on either the 19, 25 or 26, the first union meeting was held to get everything together. In early July the second meeting was held, and the Union passed out 10 cards to everyone present with instructions to solicit employees and return the cards. Barczak distributed his cards in the computer section. Barczak stated that no supervisor saw him distributing cards or heard him discussing union cards or the Union. Neither did he wear any union insignia or see anyone else wearing union insignia. Toward the end of August Barczak attended a meeting of company officials where Scalise said that the four computer operators terminated in June were selected by seniority. Seniority was used because everyone in the computer department had been evaluated and found to be equal. Several days later Border met with employees in the break-room and said, "this is all the shake up and let's get back on

track here." Barczak again questioned the selection of the four, and Border replied that it was because of seniority. On September 1 Barczak was on vacation and Knoyer called him at home saying that he wanted to talk to Barczak. Barczak testified, "He never talks to me, so I knew what it was about, and I came right in, and he told me that I had been terminated, and I asked him why, and he said attitude, and that was basically the jest [sic] of the whole conversation, there wasn't many questions asked."

On cross-examination Barczak stated that he had been criticized and reprimanded by Supervisor Knoyer in the past for not doing what he was told to do and for shirking his responsibilities. In addition, at times he determined what was the most important job, contrary to what his supervisor told him, and was criticized for being argumentative with supervisors. At times Barczak lost his temper with supervisors.

Barczak did not know the job classifications in the computer section, but he did know that he and English were the least senior employees in the section prior to terminations, and that Lees was in a higher salary grade and classification than either of them. Classifications were not clear to everyone because in the last 1-1/2 years before his termination there was an effort to get everyone to do everything.

Larry Gooch attended the union meeting where cards were distributed. Gooch testified, "as Mr. Barczak stated, we were each kind of assigned a certain group of people to collect cards from, all of the cards were collected and turned in to one man, then he took them down to Mr. Bussa at the union building." In late August the inplant organizing committee was formed, and union buttons were distributed to each committeeman. That same day Gooch wore his button to work. His supervisor, Graeb, saw the button and asked what it meant. Gooch testified, "I told him that we had formed a committee of people within the Duvall Center to organize the union. Graeb said, 'well I think I can guess who is on the committee.' I said, well, who do you think is on it. He said, 'in addition to yourself, I believe John Matyja, Ernie English, and Frank Barczak.' I said he was wrong, that Frank was not on the committee." Gooch wore his button for about 1 week at work. The only other committeeman to wear his button to work was Matyja, who wore his on at least one occasion.

John Matyja stated that it was his belief that a meeting he attended for nonprofessionals in a local motel was held late in August. The following morning Knoyer asked him if he had gone to the meeting. Matyja responded, "Tom, you know I was there." Knoyer mentioned the question of the thrift plan being brought up and said, "I hope you also know that if you do become a union employee, that the thrift plan will no longer be available to union employees." Matyja testified, "He mentioned that he knew more or less what went on, and he was there. He seemed to know the questions and the answers what went on, and the people that was there."

On cross-examination Matyja acknowledged that he knew the thrift plan was from inception for nonunit employees as compensation for benefits negotiated by the Union for plant employees, also that the center was the only group of salaried employees that the Union did not represent.

c. John Goddard

Goddard worked as a programmer and analyst in the systems section since 1972. His most recent function was as an analyst. During the course of his employment he functioned as a project leader on several programs. Goddard was admittedly selected as project leader because of his ability to communicate and exchange ideas with others. A project leader has the responsibility of coordinating the separate efforts of several people engaged in putting the program together in workable fashion. Project leadership is not necessarily a function of seniority or knowledge but rather is a function of individual growth. Occasionally employees are project leaders on several programs at the same time. Goddard's last assignment as project leader was on "metrication" which was designed to install metrics throughout the corporation. Late in July and August Goddard attended two union meetings. At the second meeting Goddard received some authorization cards and later put them in his desk. Still later in August Goddard distributed several of the cards to employees in his office at the center. Between the two meetings Goddard discussed the Union with Manager Flenniken and informed Flenniken that he (Goddard) was totally opposed to the Union. Goddard stated that he did not think that the Union could do him any good, and Flenniken agreed. Goddard testified that Flenniken stated, "If we do have a union Carney will just do something to make our working conditions not so nice. . . . I specifically remember him mentioning, like moving Duvall Center to Steubenville." Goddard stated that Carney is president of the corporation. Sometime later in August Goddard changed his mind about the Union, deciding to support it. He felt that the center was being discriminated against by corporate management, and that the only recourse was to have a union. On August 25 Goddard told Supervisor Deopken of his new allegiance but could not recall any response from Deopken. Goddard then went to Flenniken and told him of his change toward the Union. Goddard testified, "Flenniken's response was very, very short. He said I don't think it will help us."

On September 1 at 1:15 p.m. Flenniken met with the group and said that he decided to cut 12 people. He said that no one deserved to be terminated, and that he had protected certain people because of their seniority and others because he thought they were necessary for the center or for his plans for the center. Goddard was one of the 12 selected for termination in the systems section.

Border, manager of the data processing section, was responsible to the assistant comptroller, Otto, for evaluation of data preparation and computer operations employees in preparing for cost cuts that were forthcoming. In mid-August Otto and Border discussed the evaluations and decided to use the same form as was used in 1975. Border instructed his supervisors that the period of evaluation was to be as long as each had known the subject. The evaluations were completed August 26. Border checked the evaluations for bias and prejudice of the supervisors. His technique was to compare the scores of each employee evaluated by a given supervisor to ascertain if any employee was suggestively lower or higher than others. Border stated that to him such a difference would indicate that the supervisor was not ob-

jective with the employee. All evaluations were checked, and none showed bias and prejudice. As a result of the cost cuts two computer operators and four support employees in data preparation were terminated, with selections based upon the evaluations.

Graeb made his evaluations of computer operations and turned them in to Manager Knoyer. Graeb's evaluations resulted in English and Barczak having the lowest scores. Graeb stated that he knew of English's union activity at the time of the evaluations but had no knowledge of any activity on the part of Barczak. Although Graeb knew what his evaluations showed he did not know who was selected for termination until September 2.

Kolvek also evaluated all employees in computer operations and submitted them to Knoyer. Kolvek's evaluations resulted in English and Barczak receiving the lowest scores among those evaluated. Kolvek stated that although he had supervised English and Barczak on several turns he had no knowledge of union activity by either employee. Kolvek did not know who had been selected for termination until September 1 after they were announced.

Knoyer, as manager of computer operations, had no input to the evaluations performed by his supervisors. He left the evaluations up to the men on the floor. Knoyer denied any interrogations of or threats to English; however, he admitted knowledge that English was engaged in card solicitation. Knoyer also admitted that he did admonish English for his sloppy appearance which he point out to English was not in keeping, nor had it been, with Border's recent dress code. The so-called dress code originated approximately mid-May and applied to the data processing section. English had always worn the same clothes and was the only employee Knoyer had said anything to about the code.

Carella stated that in June after the limited terminations the systems section began meetings of supervisors with Flenniken. The meetings centered around the department projects and what must be continued in any eventuality, which employees were absolutely necessary to maintain those projects; and which candidates were designated for termination, including a numerical list in order of termination prospects. The meetings began with a list of all employees. As a given employee was decided to be necessary to the department regardless of probable terminations his name was scratched from the list. Age, length of service, and experience were also considered in deciding an employee's need to remain. After scratching all employees necessary to the department the remaining names were the candidates for termination. The candidates were then rated by number based upon past job performances. Each supervisor had input to the discussions, and the final rating was by consensus. The first person on the list would be the first to go. The list was finalized on August 23 with 15 names. Goddard was sixth on the list. Carella stated that he did not have any knowledge of Goddard's union activity and did not know how many people were to be terminated until September 1.

Doepken participated in the meetings and contributed to the evaluations of candidates for termination. He did not disagree with Goddard's sixth position on the list. In June Doepken had lost two of his seven analysts through cost cut terminations and now more than ever was concerned with

keeping his best people. With regard to the metrication project team, three were terminated as a result of the latest cost cuts, and the project was shelved at the same time. Zwicker was the only metrication professional retained. Doepken knew that Goddard was against the Union in June, July, and most of August and also knew that on August 25 that Goddard had stated that he had changed his mind and was now for the Union.

Boyers also contributed to the evaluations of candidates for termination as well as those necessary to the future of the section. The yardstick used was who would contribute most to the section in terms of team effort. In addition, each had to be a person who could be assigned to handle any type of work that the section needed. Boyers' personal evaluation of Goddard placed him fourth on the list of terminations. Boyers had previously counseled Goddard in 1974 when Goddard had been slated for discharge but was given another chance under Boyers' supervision. Within six months Goddard was transferred to Carella's supervision. Boyers stated that he had no knowledge of union activity on the part of Goddard and did not know how many were actually terminated until September 1.

Kropp, supervisor of business programmers, attended the meetings of the systems section and participated in the evaluations of job performances of the professionals. Kropp had viewed Goddard's performance over the years and offered to the supervisors assembled that Goddard had gone up and down. He agreed with Goddard's placement on the termination list finalized on August 23. Kropp stated that he had no knowledge of union activity by Goddard. As a result of the September 1 terminations and reorganizations his programmer division was unsupervised. He was transferred to data as computer operations manager, and the incumbent Knoyer was downgraded to programmer in systems. Kropp as computer operations manager graphed the evaluations that had been made in that division specifically to check the status of English and Barczak. The result was that English received the lowest evaluation and Barczak the next lowest overall, even if the lowest intermediate score for each was deleted.

Flenniken, systems manager, stated that the cost cuts made by the corporation in late 1976 and early 1977 proved to be inadequate. In May the cost cuts were expedited and at the center culminated in terminations of three business analysts in systems and four employees in computer operations on June 8. The following evening Flenniken told his supervisors that with the expectation of more cuts he wanted a better selection method for terminations. He wanted his section to be aware, on a continuing basis, of who were the best performers so that they would always be prepared. The very next day Otto told Flenniken that Comptroller Klemens had said that the three prior terminations in systems would not be enough. Flenniken then met regularly with his supervisors to decide the critical programs and systematically to select the employees needed to continue performance of those programs. Flenniken told his supervisors that age and length of service should be factors, assuming that the subject had the ability to perform on the critical systems.

In mid-August Otto told Flenniken that some additional employees would be terminated, and since the sections

would in a critical operating stage he wanted all employees evaluated on job performance alone. Flenniken's group discussions did not include the use of past annual evaluations because many of the past programs were to be eliminated so evaluations had to be based on overall performance and limited programs. The evaluations were to be in list form from which terminations would be selected. Flenniken's supervisors finalized the list on August 23, and the next day Flenniken informed Otto he had the list. Otto requested 12 names, and Flenniken responded from the list. Flenniken did not revise the list arrived at in meetings with his supervisors before responding to Otto.

Flenniken admitted that Goddard informed him of his support for the Union on August 25, but Goddard's name had already been given to Otto. In addition, on several occasions prior to August Goddard had expressed to Flenniken his dislike for the Union and professed no support for it in the campaign.

As a result of the cost cuts, on September 1, 2 computer operators, 4 data preparation employees, 3 Steubenville plant support employees, 1 Benwood plant support employee, 1 Yorkville plant support employee, and 12 systems employees were terminated. In addition, Border and Otto were discharged the same day. On October 31 seven more supervisors were terminated and four were downgraded to nonsupervisory classifications. Knoyer, Boyers, and Hall were included in those downgraded.

Flenniken, at a meeting of the department, advised all terminated employees of any job openings he was aware of and instructed his supervisors to help those terminated to seek other employment if possible.

Discussion and Conclusions

General Counsel argues that several incidents occurring before the 10(b) period⁵ and alleged in the complaint constitute background to demonstrate Respondent's animus toward the Union and to place the alleged unfair labor practices in perspective. The background is alleged as interrogation, impression of surveillance, threats constituting interference, restraint, and coercion proscribed by Section 8(a)(1) of the Act. As background, incidents can supply motivation or intent for acts that occur timely and are alleged to be unfair labor practices. Here General Counsel's evidence is offered to prove untimely unfair labor practices involving the same employees named in timely unfair labor practices. If General Counsel's evidence on the so-called background incidents were credible it would be procedural error to make the finding he requests due to the fact that Section 10(b) is a statute of limitations. As such, a finding of an unfair labor practice is time barred. Notwithstanding the bar and assuming admissibility of the evidence offered it is either discredited or insubstantial.

English's testimony relative to the alleged interrogation and impression of surveillance is wholly discredited. English's recount of the events begin with his admitted determi-

nation to resist the undisputed economic cuts planned by the Company. His stated intent to his supervisor was one of leadership, yet on several occasions later in discussions with this same supervisor he professed ignorance of his own stated intent. English's testimony of his union activity is not consistent with that of other employees engaged in union activity nor with that of the union representative who chaired the employee meetings and planned the campaign strategy. English would have one believe that he received and distributed 100 authorization cards, whereas his fellow employees testified that each committee member received 10 cards to distribute in his own area. Additionally, English places the receipt of the authorization cards from the Union more strategically in time than the union representative and other employees. Based upon the patent inconsistencies which bear directly on the issues and English's over suggestive nature on the stand I discredit his testimony unless stated otherwise. Accordingly, the background allegations of interrogation and surveillance have no evidentiary support. English further testified that his supervisor singled him out of admonish him for nonconformance with the dress code instituted 2 months prior. English testified that Supervisor Knoyer was the only one who said anything to him about the code. He could not understand why because he had worn the same clothes since the dress code was established. I credit English as to what Knoyer said to him about the dress code, but I conclude and find that the remarks were based upon legitimate business considerations as reflected by all the evidence and not the union activity of English. Therefore, the incident does not constitute background as alleged by General Counsel.

Matyja's testimony to the incident alleging a threat of loss of the profit sharing plan reveals nothing more than a discussion of a known benefit for unrepresented employees that is not ordinarily available to bargaining unit employees. Neither the atmosphere nor the language suggests a threat but rather evinces a campaign conversation of little magnitude and no probative value. I conclude and find, therefore, that the incident is not background as alleged by General Counsel.

Goddard's testimony of his conversation with Flenniken alleged as threats to change existing working conditions to conditions less desirable and to move the computer center to a distant location creates an unusual setting. An admitted union antagonist discusses the futility of unionism with his supervisor, and during the discussion the supervisor opines what the president of the Company would do if he had a union. Later, when the same employee admits to the same supervisor that his mind has changed and now he supports the Union, the supervisor's only response is, "I don't think it will help us." Goddard admitted that periodically in the past a rumor of moving the center again surfaced, but employees always recognized its worth and disregarded it. Goddard's testimony as elicited was confused, and even though his assertion of Flenniken's opinion was positive I find his testimony so diluted and qualified by his other testimony as to render the total of no probative value. I therefore conclude and find that the background incident alleged is not supported by substantive evidence.

Absent the background as alleged there is no demonstrated animus by the Company toward either the Union or individual union supporters.

⁵ Sec. 10(b) of the act states, *inter alia*, that no complaint shall be based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

Company witnesses credibly testified to the need for economic cuts throughout the organization. General Counsel does not dispute the Company's financial straits but argues that English, Barczak, and Goddard were selected for termination because of their union activity.

The undisputed evidence shows that as a result of the first economic cut prior to any union activity English was one of three selected for a decrease in wages. English was chosen for the decrease due to attitude and job performance. English's admitted disregard for the dress code evinces somewhat the validity of the decrease. Contrary to General Counsel's argument of seniority, the record shows that English and Barczak were the least senior operators in their classification. The operators retained were in a higher grade with one operator having assumed the higher grade although hired after both English and Barczak. Although English did engage in some union activity, it was considerably less than he attempted to show in his testimony. English knew his job security was tenuous because of his job performance and his testimony reflects that he knew. It is obvious that his attempt at union activity was to forestall the inevitable. General Counsel offered no evidence to dispute the on going economic adjustments the Company was making at the time of the union campaign, nor did General Counsel offer any credible independent evidence of interference, restraint, or coercion. The record does show that other employees such as Gooch and Matyja with demonstrated union activity in the present and past union campaign were not selected for economic termination but rather were passed over.

Barczak's only union activity was to attend several union meetings and distribute several cards. Although Barczak was involved openly in the prior campaign, he was limited in his involvement in the current campaign and was secretive to the point of anonymity. The Company was, in fact, informed by the in plant organizing committee that Barczak was not one of them. No evidence was offered to dispute the Company's selection of Barczak for termination as a result of the program to implement the economic cut backs.

Goddard was not engaged in union activity prior to his selection for termination. The Company had made the selections before Goddard informed supervision that he supported the Union. In fact, when Goddard was selected for termination was known to the Company as antiunion. General Counsel argues that Goddard's selection is linked to his friendship with English, the alleged leading union adherent. The evidence shows that Goddard had previously been selected for discharge due to job performance but was given another chance under two separate supervisors in different areas of the center. In the instant terminations Goddard ranked sixth on the list of 15, which indicates that his job performance was in the midrange of professional employees

and additionally shows little or no improvement since his prior candidacy for termination.

General Counsel offered only a scintilla of evidence to support his theory of discrimination in the selection of English, Barczak, and Goddard for termination. Additionally, that evidence presented by General Counsel was too dependent upon suggestions and generalizations as to substance to be probative. I am not persuaded by General Counsel's evidence but rather am convinced that the overwhelming evidence supports a legitimate basis of selection by Respondent. From the evidence before me it is clear that employees more engaged in union activity than English, Barczak, and Goddard and with such activity known to management were retained as a result of the Company's reduction in force. Further, the total number of 23 employees terminated and the classifications comprising such group suggest legitimacy of all, rather than discrimination against three. It is not inconsequential that subsequent to the September 1 terminations several more cost reductions took place including terminations of three supervisors and the downgrading of four. Therefore, I conclude and find that Respondent has not violated the Act by terminating employees English, Barczak, and Goddard.

ADDITIONAL CONCLUSIONS OF LAW

1. The Company did not violate the Act by admonishing English to refrain from upsetting the girls in keypunch.
2. The Company did not threaten employees in violation of the Act.
3. The Company's restrictions on inplant movements of English and Goddard were not discriminatorily motivated and therefore did not violate the Act.
4. The Company did not violate the Act by discharging employees English, Barczak, and Goddard.
5. The General Counsel has failed to sustain his procedural and evidentiary burdens of proving the background allegations of paragraph 6 of the complaint.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record and pursuant to Section 10(c) of the Act I hereby issue the following recommended:

ORDER⁶

The complaint is dismissed in its entirety.

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.