

A & W Products Company, Inc. and Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 2-CA-15621

September 17, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO

On April 6, 1979, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions to the Administrative Law Judge's Decision; and the General Counsel and Respondent filed briefs in support of their exceptions.

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 briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.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, as modified below, and hereby orders that the Respondent, A & W Products Company, Inc., Port Jervis, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

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

2. Substitute the attached notice for that of the Administrative Law Judge.

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

¹ In par. 1(c) of his recommended Order, the Administrative Law Judge used the broad cease-and-desist language, "in any other manner." Inasmuch as Respondent has not shown a proclivity to violate the Act or to engage in egregious or widespread misconduct demonstrating a general disregard for employees' fundamental statutory rights, we shall modify the recommended Order to provide the narrow injunctive language, "in any like or related manner." See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

APPENDIX

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

After a hearing at which all parties had the opportunity to present evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice.

The National Labor Relations Act, as amended, gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choosing
- To engage in activities together for the purposes of collective bargaining or other mutual aid or protection
- To refrain from any such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT discharge employees because they file grievances or engage in other union activities.

WE WILL NOT warn employees not to file grievances or threaten employees with loss of jobs if they file or pursue grievances.

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

WE WILL offer Mariel Uhrig immediate and full reinstatement to her former position or, if that is not possible, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make Mariel Uhrig whole for any loss of pay suffered by reason of our discrimination against her, with interest.

A & W PRODUCTS COMPANY, INC.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard on December 14 and 15, 1978, in New York, New York, upon a charge filed by Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union, on May 11, 1978, as amended on July 3, 1978, and a complaint issued by the Regional Director for Region 2 of the National Labor Relations Board, herein called the Board, on June 30, 1978, as amended on November 21, 1978, and at

hearing. The complaint alleges that A & W Products Company, Inc., herein called Respondent, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, by discouraging the filing of grievances through warnings and threats of reprisal and by discharging two employees because of their membership in and support for the Union. Respondent's timely answers deny the commission of any unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed by General Counsel and Respondent.

Upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a New York corporation engaged at Port Jervis, New York in the manufacture, sale, and distribution of clipboards, thumbtacks, compasses, and related stationery supplies. The complaint alleges, Respondent admits, and I find and conclude, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. THE UNFAIR LABOR PRACTICES

A. Background

Respondent and the Union have had a collective-bargaining relationship for a number of years.¹ For some time, Respondent's business has been in a period of economic decline, due at least in part to the effects of foreign competition. At its peak, around 1968, Respondent employed 150 to 160 employees. In 1973, Respondent underwent reorganization under Chapter XI of the Bankruptcy laws. At the time of the hearing, it employed about 64 persons.

B. The 1977 Strike, Grievance Filings and Evidence of Animus

Upon the expiration of the last collective-bargaining agreement on March 14, 1977, Respondent's unit employees commenced a strike lasting until May 2, 1977. It was resolved with the execution of a contract effective until March 14, 1980. The Union's negotiating committee consisted of Mariel Uhrig and Jean Mineau, the alleged discriminatees herein, Pauline Morgan and Tony Sutera, the union stewards, and Gary Morgan. Gary Morgan, Pauline's son, was a supervisor at the time of this hearing. According

¹ Respondent, on brief, asserts that the relationship has existed for 18 years.

to Pauline Morgan's uncontradicted testimony, during April 1978, Karl Augustin, Respondent's vice president and manager, told her that he blamed the negotiating committee for the strike, for being outpriced and for having to give raises.

Respondent's employees work on an incentive system, being paid amounts above their base hourly rates for production in excess of established quotas, as determined by either the pounds or number of pieces produced. For many years, Respondent's employees were able to maintain their work assignments on particular machines on which they developed proficiencies and preferences. Following the strike, and at least partly in response to the adverse economic situation facing Respondent, Respondent instituted a cross-training program. Under this program, employees were assigned to different jobs. If, within a period of 30 days (approximately 21 working days), that employee was able to make the quota for that job on any single day, that employee would be deemed qualified for that job and would be eligible to bid on it in the event of a layoff. The senior employees would, thereby, be able to avoid layoffs.

On May 18, 1977, approximately nine employees, including Uhrig and Pauline Morgan, but not Mineau, filed a grievance protesting the job reassignments and bumping procedures. Karl Augustin's written response stated that he deemed the grievance unclear and insufficiently specific and requested that the employees handle the matter on an individual basis. The record does not reflect the future course of this grievance except that four of the employees who had signed that grievance withdrew their support for it on January 5, 1978. Neither Morgan nor Uhrig was among those four.

On June 8, 1977, Uhrig filed a grievance protesting a layoff when, she alleged, work was available for her (G.C. Exh. 14). About July 19, according to Uhrig, Karl Augustin came to her machine. She testified:

He said I should drop the grievances, that it wasn't going to do me any good, that if I wanted to get along with the company I should drop the grievances. And I said, '[N]o that I wouldn't. So he wanted me to sleep on it . . . think about it very carefully, that I was jeopardizing my job and I should let him know the next day what my answer was going to be. . . [H]e said . . . if it was going to arbitration it would cost him an awful lot of money and he could [u]se that money for something else.²

On July 21, 1977, while Mineau was working on a job that was new to her, Karl Augustin approached her and told her that she was not doing the work correctly. She disregarded his order to stop working. At this point, according to Mineau, Augustin suggested that she quit "and then he mumbled, 'You are a bitch.'" Mineau called over to her steward, Pauline Morgan, repeated what Augustin had said, and told Morgan that she wanted to file a grievance.³

² Karl Augustin denied that he told Uhrig, on or about July 19, 1977, "that she was jeopardizing her job as a result of filing grievances."

³ Karl Augustin did not specifically deny the uncomplimentary reference to Mineau. He testified that when he asked her to stop what she was doing because everything that she had produced on that job had been faulty, she ignored his direction and told Morgan that she was being harassed by Augustin.

Mineau filed a grievance on July 23, 1977, in regard to this incident. (G.C. Exh. 4). On the following day, Mineau went on a medical disability and remained out until some time in September or October 1977. After her return, Karl Augustin met with her to discuss her failure to make quota on her assigned job. He suggested that she take a layoff, but the union steward prevented that action. Mineau was again on medical leave from some time in November 1977 until January 3, 1978.

In November or December 1977, Uhrig was again approached by Karl Augustin. He told her that she should drop her grievances. When Augustin initiated a conversation in regard to increasing Uhrig's quota, Uhrig said that she did not feel like talking him about such things at the moment because of her concern for her husband who was seriously ill. To this, she said, Augustin told her that she was being punished by God and was jeopardizing her job by filing grievances.⁴

On December 30, 1977, Uhrig received a call from Respondent's office. She was wished a Happy New Year and was told not to report back to work on January 3, 1978⁵ (the end of a vacation period), as there was no work for her. However, after speaking to her union representative, Uhrig went to the plant on the morning of January 3. Mineau was already there. With Pauline Morgan they went into Kaethe Augustin's office where they were told that they were not expected as there was no work for them. They asked to speak with Karl Augustin. When he arrived, Uhrig asked him why employees with less seniority were working. He replied that seniority had nothing to do with it. He told Uhrig that he would call her if he had any work for her. Mineau then asked about work for herself. Augustin told her that he doubted that he ever would have any work for her. He suggested that they go to the unemployment office and that, if they found other jobs, they should keep on going. In the course of this conversation, Uhrig recalled, Augustin told them that they either work with the Company or against it.⁶

Both Mineau and Uhrig filed grievances contending that less senior employees were retained on January 3 while they were laid off. Uhrig's grievance recited the events essentially as set forth above, charged that Respondent had threatened her with layoff because she would not drop her grievances, and alleged that she was being harassed by Respondent. Respondent's reply, signed by Karl Augustin, stated:

If you read this grievance, you know who is being harassed [sic]. This grievance is not clear. Get in touch with Mr. Al Schueler [Union representative] and follow grievance procedures. YES, there is still very little work. (we are outpriced), and we are still on a three-day work week. YES, you did refuse to be trained on July 11, 1977 (see grievance dated 7/13/77). YES, if I

⁴ Augustin specifically denied that he made such statements or threats to Uhrig on or about July 19, 1977 (see fn. 2, *supra*), and denied that he told her "at any time" that she would lose her job if she continued to file grievances, but he did not deny that he said, in November or December 1977, that her husband's illness was divine punishment because of her grievance filings.

⁵ All dates hereinafter are 1978, unless otherwise stated.

⁶ Uhrig's testimony is essentially corroborated by that of Mineau and is uncontradicted.

get our clipboard business back you will be called; it could be soon, it could take months. YES, a top seniority girl is making #39 clips. NO, this company doesn't harass [sic] anybody and in the future I suggest you refrain from using words that are not true or the meaning is not clear to you.

On January 27, Pauline Morgan filed a grievance protesting that she was only given 3 days per week of work while a full 5 days was being worked in the thumbtack department, for which she had been trained. She asserted that on the basis of her position as steward, her 15-1/2 years with Respondent, and her prior experience on the job, she should have been offered the full workweek job. Upon receipt of this grievance, Augustin took it to employees in other departments, had them read it, told them that Morgan was "pulling rank" and that "this is the kind of thing I have to put up with." Morgan was recalled to a full workweek, but was not paid for the lost time.⁷

On February 8, Uhrig was recalled to work and was assigned to train on the production of items identified as the "1210 OPI." About 3 weeks later, she was called into a meeting with Augustin, Anna Kent, the leadwoman, and Morgan. Augustin charged that Uhrig was not making an effort to meet quota on the job; she denied it and was supported by Morgan. She was given an additional 5 days to attempt to make quota and was then assigned to another job when work ran out on the 1210 OPI.

Mineau also returned to work around February 8. On March 21 and April 21, she filed grievances alleging that she was being denied work or bidding rights in contravention of her seniority. The record does not reflect the disposition of these grievances.

Uhrig went on medical disability leave on April 26. After a period of hospitalization to treat an ulcer condition, she returned to the plant to pick up insurance forms and, while there, spoke with Augustin. He told her, "You know Mariel . . . your ulcers wouldn't be bothering you if you stopped making out these grievances and work with the company and you'd be better off." He told her that she should stop listening to Pauline (Morgan), Mineau and another employee, Margaret, who, he said, were putting ideas into her head, and that she should stop her "Welsh stubbornness . . . don't make out these grievances and just mind your own business." He told her that the grievances were costing him a lot of money he could use elsewhere and could cost her her job.⁸

⁷ Augustin denied telling other employees that Pauline Morgan was "pulling rank" but did not deny that he spoke with or showed other employees the grievance that Morgan had filed.

Morgan further testified that an unidentified assistant supervisor told her that she would be paid for the lost time and that if she did not agree to that, Respondent would devise a plan to get rid of her. When asked whether anything was said about Respondent's position towards employees who file grievances, she responded, "He said they don't need people working at A & W who file grievances and cause trouble." The record does not divulge whether the person to whom that statement was attributed was Karl Augustin (who denied so stating) or the unidentified assistant supervisor (about whom there was no evidence to establish statutory status). Accordingly, I give no weight to either of these alleged statements.

⁸ Augustin denied telling Uhrig "that she shouldn't be listening to other employees with respect to the filing of grievances," or that he ever told her that she could lose her job if she continued to file grievances.

From the foregoing, I must conclude that Karl Augustin harbored animus toward both the Union's negotiating committee and those employees who would file grievances under the contract. His statement to Pauline Morgan, blaming the negotiating committee for the strike, the contractual raises and Respondent's adverse pricing situation, stands undenied. His displeasure or frustration with the filing of grievances is shown, in part, by the written response to Uhrig's early January grievance wherein he refers to the filing of such grievances as harassment of Respondent. Moreover, my careful consideration of the record herein, with due consideration accorded to the demeanor of the witnesses, leads me to conclude that Mariel Uhrig's testimony, relating conversations with Karl Augustin in regard to her grievance filing activities, is more credible than his rather narrow denials thereof. Thus, while Uhrig described the conversations in detail, Augustin denied only specific portions thereof and did not deny that he spoke with Uhrig about the filing of grievances or present any contrary versions of the conversations. I therefore find that Augustin asked or told Uhrig, on several occasions, to drop her grievances, blamed her personal problems on her grievance filing activities, told her that the grievances were costing him money that he would rather spend in other ways, and told her that her grievance filing would jeopardize or could cost her her job. One of these conversations occurred around early May 1978, and, as alleged in the complaint, I find that by these statements Respondent warned its employees not to file grievances and threatened them with the loss of jobs if they did file grievances, in violation of Section 8(a)(1) of the Act.

C. *The Work Performance of Mineau and Uhrig*

Jean Mineau began working for Respondent in August 1968. The record does not indicate any problem with her work, in terms of either quality or quantity, prior to January 1977. At that time, she was placed on the blister line and on one occasion between then and the strike which began on March 15, 1977, Augustin criticized her work performance. She made quota on her job, the #591 assembly, in the week ending January 8, 1977, before she went on the blister line where she remained until July 22, 1977. She was absent, on disability, from July 25 to August 26, 1977. On her return, she returned to the #591 assembly where she worked for the most part until November 1977. She exceeded the quota for that job in the weeks of October 15, 22, and 29, and November 5, 1977. She was again on disability from November 1977 until January 3, 1978 and did not return to work until the week ending February 11, 1978. At that time, she was assigned to the job designated as 1210 OPI. Mineau remained on that job, and one other, the #2 clip, until April 28. She failed to make quota for any week.⁹

According to Augustin, Mineau was retrained on four jobs since the end of the strike and was able to make quota on only one, the #591 assembly. The records indicate that during that period, besides working on the #591, Mineau

worked only 3 hours on a job identified as the #39C assembly, a total of 11-1/2 hours on the #22 S & C job (in 3 different days), approximately 30 days on the #1210 OPI job and 11 days working on #2 clips. Except for a period of 3 hours on the #1210 OPI, it does not appear that Mineau made her quota on any of these jobs.

Mariel Uhrig began working for Respondent in March 1970, as a machine operator. For 7 years, while working on her regular job, she was deemed a good employee, meeting her quota and performing satisfactory work. Since the strike, Karl Augustin had complained to union steward Morgan about Uhrig's quantity of production on a couple of occasions. During that time, she was trained on three jobs and failed to make her quota on any of them. The production records covering the period of February 1 through the week of her discharge indicate that she made quota only on two jobs of 2 days' duration each and on a single 1-1/2 day job. Notwithstanding this, Pauline Morgan characterized Uhrig as an average worker who did not fail to make her quota any more often than other employees.

D. *The Discharges of Mineau and Uhrig*

On April 28, Jean Mineau's health problems caused her to go to her physician, Dr. Daniel P. Schultz. The doctor, she testified, prescribed rest, at home, until May 31, and he wrote a prescription for her to that effect. Mineau sent Dr. Schultz' note to the Company through a fellow employee and it was given to Augustin on Monday morning, May 1, by Pauline Morgan.

Augustin, puzzled by the duration of the prescribed absence, called Dr. Schultz and asked why Mineau would be out for another month. The doctor, he testified, replied, "What do you mean for another month? A couple of days; you're mistaken." When Augustin insisted that the note prescribed a month's leave, Dr. Schultz asked him to come to the office. Augustin immediately went to Schultz' office, which was nearby. He showed Schultz the handwritten note, which stated, "return to work on May 31." Dr. Schultz looked at it and stated, "That is not what I wrote down. I wrote down to the third." The doctor's nurse corroborated this, according to Augustin. Augustin returned to Dr. Schultz' office the following morning with Gary Morgan as a witness. At Augustin's request, Dr. Schultz repeated what he had said on the prior evening. He added that someone had changed his comma following the "3" to a "1." Dr. Schultz then took the note, scribbled out the "1" in "31" and placed a comma after the "3."¹⁰

Respondent had made a copy of the original doctor's note prior to Dr. Schultz' alteration of it. That copy, Respondent's Exhibit No. 1 (which was not of a quality which would lend itself to reproduction within this decision) showed Mineau's return date as May 31. There was no comma after the number and the appearance of the "1" was such that a non-expert observer might reasonably conclude that the "1" had been superimposed over a comma. Thus, the lower portion of the "1" appears slightly thicker than the rest and the bottom tails off sharply to the left as a comma might do.

⁹ The records from which the foregoing was drawn do not indicate daily production.

¹⁰ Augustin's testimony is corroborated by that of Gary Morgan.

Augustin returned to the plant and called Pauline Morgan into his office. He showed her the note and asked whether she had altered it. She denied doing so and Augustin told her of his conversations with Dr. Schultz. According to Morgan's uncontradicted testimony, Augustin told her that the note had been "doctored up" and stated, "I've got her now." Augustin next directed Morgan to call Mineau and ask her to resign on the basis of a violation of Respondent's "honor code."¹¹ Morgan subsequently reported back that Mineau would stand on the doctor's note and would not resign. Augustin then discharged Mineau. The discharge letter, dated June 2, to the Union, asserted that Mineau was "laid off" because she had failed, since June 1977, to qualify on a job and had falsified the doctor's note. It alluded to this as the third incident of falsified information to be attributed to Mineau in 3 months.¹²

Dr. Schultz initially testified that he prescribed a leave of absence until May 31 when Mineau first came to his office on April 28. He had no independent recollection of having done so, however, and subsequently testified that his original prescription was for a shorter absence, only until May 3. That was how he filled out the prescription form. Some time before May 3, he said, Mineau returned, asked that he approve a longer leave, and he extended it by a month. When asked about his conversation with Karl Augustin on May 1, Dr. Schultz recalled Augustin asking why Mineau would be absent for so long. He was then asked whether he told Augustin that he had only prescribed a few days absence for her and responded, "I may have said it, but I don't recall it." He thought the possibility "far fetched." However, he also admitted the possibility that he asked Augustin why the note Augustin showed him read "May 31" when he had prescribed a leave until May 3. And, while admitting to a degree of confusion brought on by Augustin's questioning, he testified that he did tell Augustin on May 2 that he never made the line on the note which made the date May 31. He crossed out the "1," saying, "That's not my note."

Mariel Uhrig returned from her disability leave on June 12 and was assigned to work on the #3 clip, a job she had performed without achieving quota for a total of 8 days in February and March. She worked on that job for an additional 13 days, still failing to reach the quota.

On the morning of June 26, a Monday, Karl Augustin told Pauline Morgan that that would be Uhrig's last day on the #3 clip because of her failure to make quota. Morgan told Augustin that perhaps she would make the quota and then told Uhrig what Augustin had said.

Shortly thereafter, Uhrig's production for the prior workday, Friday, June 23, was being weighed and Uhrig walked over to the scales to watch. She did so, she said, because an

acting floor lady, Margaret Leonard, was doing the weighing and she was concerned. When she got there, one barrel had already been weighed and the other was on the scale. She watched Leonard balance the weight but claimed that she could not read the scale from where she stood. She recorded the weight as Leonard gave it to her, approximately 188 pounds in one barrel, 153 pounds in the other. She totalled it up and found that she had exceeded the quota. It did not occur to her that an error had been made, she testified, as the barrels were of different sizes and she was not so familiar with the work as to be able to make accurate guesses of the weight of her production. She told Morgan of her success.

Morgan related the good news to Augustin. Augustin was suspicious, however, because in the prior 19 days, Uhrig had not come close to the quota. He checked the work himself. He could tell without weighing the barrels that the recorded weights were wrong; one barrel was only half full and could not have weighed nearly as much as the full one. Leonard, the acting floor lady, could not explain it. A series of meetings was held involving Augustin, Morgan, Leonard and finally Uhrig, in which it was concluded that there had been an error in the weigh-in, that error was Leonard's in calling out a weight of 100 pounds more than the actual weight, and that the error was obvious, at least to Augustin and Morgan. Augustin told Morgan that he believed that Uhrig had cheated by failing to report the obvious error. When the error was pointed out to Uhrig, she acknowledged that the weight she had claimed could not have been correct. In her defense, however, she pointed out her own inexperience on that job and that Leonard, not her, had made the mistake. Notwithstanding her defense, Augustin told her that she had breached Respondent's honor system. He asked her to resign and she refused. She asked him if he was accusing her of cheating and he replied, "Take it as it is . . . you no longer work here." She said, "This is on account of all the grievances I made out, isn't it?" and Augustin merely "sort of laughed and just shrugged his shoulders."

E. Analysis and Conclusions as to the Discharges

Respondent contended in its brief that Mineau was a generally unsatisfactory employee, but acknowledged that the incident with the doctor's note was the precipitating factor in causing her discharge.

Respondent, I have found, harbored animus towards those employees who served on the Union's negotiating committee and who filed grievances. In conversations with Uhrig (but not with Mineau), Augustin expressed that animus and threatened that reprisals would be taken against grievance filers. Mineau was both a member of the negotiating committee and a filer of grievances. She had filed four since the end of the strike, three of which challenged Respondent's training system and the application of seniority. The last two grievances were filed not more than 6 weeks before her discharge. In light of this protected activity and Respondent's animus thereto, the events leading to Mineau's discharge require close scrutiny to ascertain Respondent's real motivation.

¹¹ The "honor code" to which Augustin referred had allegedly been referred to in a bulletin to employees posted on February 24, 1978. That notice said that there was an "honor system," and pointed out that it was a violation to give faulty information needed for company records. It cited art. 15 of the contract, the "Discipline, Suspension and Discharge" article, which includes the provision: "The only cause for immediate discharge of an employee shall be for proven theft of money, goods or merchandise during working hours."

¹² The record contains only one other allegation of falsification by Mineau and the evidence does not support any contention that she had willfully falsified a production record in that instance.

In this case, Augustin had received a physician's note calling for an extended medical leave for a marginal employee who had previously taken long medical leaves. When he checked with the doctor, his suspicions were aroused by the doctor's response to the effect that he had not prescribed an extended leave. He investigated this thoroughly, twice going to the doctor's office. What Dr. Schultz said—that he did not write the prescription for a May 31 return—and what the doctor did—striking out the number "1" and changing the date to "May 3,"—coupled with the suspicious appearance of the note itself led Augustin to the only logical conclusion available, that the note had been altered. He checked further with Morgan, who denied altering the note. Thus, Augustin was left with the conclusion that Mineau must have altered the note herself in order to extend her leave.¹³ Checking no further, he discharged Mineau. In these circumstances, I cannot find that the discharge was motivated in any significant way or would not have occurred "but for" Mineau's earlier protected activities or that the suspected alteration of the note was a pretext for an otherwise unlawfully motivated discharge. See *Waterbury Community Antenna v. N.L.R.B.*, 587 F.2d 90 (2nd Cir. 1978), *Montgomery Ward & Co.*, 227 NLRB 1170 (1977). In so concluding, I have considered Respondent's apparent satisfaction at being able to terminate Mineau. That satisfaction, however, is consistent with both Respondent's general displeasure over her work performance and its union animus. Moreover, as the Board has stated:

If an employee provides an employer with sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory . . .¹⁴

Similarly, I have considered both Respondent's failure to question Mineau about the source of the apparent alteration and its assertion of multiple reasons for her termination. In light of Mineau's work performance since the end of the strike and Respondent's dissatisfaction with that level of performance, neither of these factors warrants an inference that Mineau's discharge was unlawfully motivated. *Zarda Brothers Dairy, Inc.*, *supra*. Accordingly, I shall recommend that the complaint, to the extent that it alleges that the discharge of Jean Mineau was unlawful, be dismissed.

Similar close scrutiny leads me to the opposite conclusion in regard to the discharge of Mariel Uhrig. In Uhrig's case, Augustin made a complete investigation of the weigh-in incident. The investigation revealed that the error was not Uhrig's but the floorlady's. He then disregarded the results of his investigation and discharged Uhrig. The floor lady escaped the incident unscathed. Such contradictory treat-

¹³ Mineau denied altering Dr. Schultz' note. That denial is difficult to accept although other less likely scenarios are conceivable. It is not necessary to resolve this credibility question as the only evidence available to Augustin at the time he made his decision pointed almost conclusively to Mineau as the one who altered the note.

¹⁴ *Kate Holt Co.*, 161 NLRB 1606, 1616 (1966); *Zarda Brothers Dairy, Inc.*, 234 NLRB 93 (1978).

ment, directed at an employee who had been the object of repeated threats and expressions of animosity because of her protected activity, together with Augustin's failure to deny Uhrig's accusation that he was discriminatorily motivated, leads to but one conclusion—that Uhrig's role in the weigh-in incident was but a pretext for a discharge which would not have occurred had the employee not been involved in that protected activity. See *Montgomery Ward & Co., Inc.*, *supra*. Accordingly, I find that by discharging Mariel Uhrig on June 26, 1978, Respondent discriminated against her because of her union and protected activity and thereby violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By warning its employees not to file grievances and threatening them with loss of jobs if they persisted in filing or pursuing their grievances, Respondent has violated Section 8(a)(1) of the Act.

2. By discharging Mariel Uhrig because she had filed grievances and engaged in other union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. Respondent has not engaged in any unfair labor practices not specifically found herein.

4. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged Mariel Uhrig, Respondent shall offer her immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and shall make her whole for any loss of pay she may have suffered by reason of the discrimination against her. Any backpay found to be due shall be computed, with interest, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁵

"A violation of Section 8(a)(3) goes to the very heart of the Act." It therefore warrants that Respondent be further required to cease and desist from infringing *in any other manner* upon the rights guaranteed employees in section 7 of the Act. *Pan American Exterminating Co.*, 206 NLRB

¹⁵ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962) General Counsel, in its supplemental brief, argued persuasively for an increase in the interest rate as set forth in *Florida Steel*, *supra*, pointing out that by pegging the interest rate to the "adjusted prime interest rate" the Board failed to accomplish an increase in the rate of interest attached to backpay awards. Thus, General Counsel argued, since interest rates have climbed, current Board orders fail to make employees whole. However, the Administrative Law Judge is constrained to follow Board precedent and, to date, the Board has not chosen to revise the formula set forth in *Florida Steel*. See, for example, *St. Regis Paper Company*, 239 NLRB 688 (1978). Accordingly, the General Counsel's request that the remedial interest rate be raised is denied.

298 fn. 1 (1973); *Entwistle Mfg. Co.*, 23 NLRB 1058 (1940), *enfd.*, as modified, 120 F.2d 532 (4th Cir. 1941).

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

ORDER¹⁶

The Respondent, A & W Products Company, Inc., Port Jervis, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Warning its employees not to file grievances and threatening them with loss of jobs if they file or pursue grievances.

(b) Discharging its employees because they file grievances or engage in other union activities.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

¹⁶ 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.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Mariel Uhrig immediate and full reinstatement to her former position or, if that is not possible, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the discrimination against her, in the manner set forth in the section of this Decision entitled "The Remedy."

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

(c) Post at its Port Jervis, New York, plant copies of the attached notice marked "Appendix."¹⁷ Copies of said notice on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

¹⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."