

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

TRI-COUNTY INDUSTRIES, INC.

And

Case 6-CA-35476

DEBRA DEVERS, AN INDIVIDUAL

Gerald McKinney, Esq.,
Of Pittsburgh, Pennsylvania
For the General Counsel

Michael English and David Howes, Esqs.,
Of Pittsburgh, Pennsylvania
For the Respondent Employer

DECISION

Statement of the Case

Wallace H. Nations, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania on June 6 and 7, 2007. The charge was filed by Debra Devers, an individual, on January 24, 2007¹ and Complaint and Notice of Hearing issued on April 17, 2007. The Complaint alleges that Tri-County Industries (hereinafter Respondent or Employer) engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (hereinafter the Act). Respondent filed a timely Answer wherein it, inter alia, admits the jurisdictional allegations of the Complaint and denies that it has committed any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with its headquarters in Grove City, Pennsylvania engages in the business of providing commercial and residential refuse and recycling services. It annually, from its business operations, derives gross revenues in excess of \$500,000 and purchases and receives goods and services at its Grove City, Pennsylvania facility valued in excess of \$50,000 directly from points located outside of the Commonwealth of Pennsylvania. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (hereinafter Union) is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are 2006 unless otherwise indicated.

II. Alleged Unfair Labor Practices

A. Background Facts and the Alleged Unfair Labor Practices

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Respondent engages in residential, commercial and industrial waste pickup and disposal and recycling in and around Grove City, Pennsylvania. It employs about 170 employees, of whom approximately 117 are in a bargaining unit represented by the Union. The Union became the collective bargaining representative of these employees in December 2006 following an organizing campaign that began in or about late September 2006. Debra Devers is employed by Respondent in a position entitled Customer Service Supervisor and ostensibly supervises three other customer service representatives. Devers also works as a customer service representative alongside the three other employees in the customer service department. Debra Devers is married to Ronald Devers, who is employed by Respondent as tractor trailer driver and is a member of the bargaining unit.

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The Complaint alleges that at all material times, the following named individuals held the positions set forth opposite their names and were supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

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Ed Vogel	Vice-President
Margaret Vogel	Secretary-Treasurer
Collette Vogel	Asst. Secretary-Treasurer
Jerry Bowser	General Manager
Lee Rossman	Residential Supervisor
David Miller	Commercial Supervisor
Jay Knight	Safety Manager
Jeff Armstrong	Dispatcher
M. Laraine Frobe	Office Manager until 1-31-07
Shelly Matheson	Office Manger since 2-1-07

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The Complaint further alleges that between about October 9, 2006 and December 7, 2006, Peter List, Consultant in Labor Relations, was an agent of Respondent within the meaning of Section 2(13) of the Act.

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With respect to the alleged unfair labor practices, the Complaint makes alternative allegations. First, it alleges that on October 13, 2006, Respondent laid off its employee Debra Devers and failed and refused to recall her to work until March 13, 2007, because her husband Ronald Devers engaged in Union and other protected concerted activities and to discourage other employees from engaging in such activities.

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Alternatively, the Complaint alleges that Debra Devers has been a statutory supervisor and that Respondent's layoff of her and refusal to recall her were because of her husband's Union and other protected and concerted activities and to discourage other employees from engaging in such activities.

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Under either theory, Respondent is alleged to have violated Section 8(a)(1) and (3) of the Act. Respondent for its part admits that it laid off Devers on October 13, 2006 and did not recall her until March 13, 2007. It asserts that the layoff was voluntary and requested by Devers and further, that she is a statutory supervisor and not an employee protected by the Act. It further alleges that she engaged in improper conduct for a supervisor and denies that Devers'

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husband's protected activity played any role in the layoff and its duration or that it took any action to discourage employees from engaging in protected activity.

B. Evidence and Conclusions Related To Debra Devers' Supervisory Status

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1. Evidence Related to Supervisory Status

Debra Devers is currently employed by Respondent as its Customer Service Supervisor. She has worked in the customer service office for eleven years. The only break in her service is the layoff in question in this case. During her tenure, until April of 2007, Respondent's Office Manager Laraine Frobe has been her only immediate supervisor.² Devers gained the title of supervisor in 1999 or 2000, when Frobe told her to begin taking the customer calls handled by a supervisor. These are complaint calls from customers who are not satisfied with the response of the customer service representatives and demand to speak to a supervisor. Devers testified that she is the person who decided to call herself a supervisor after being assigned to take the supervisor's calls. No one in higher management objected to her taking this title. It carried no additional pay or benefits from those she was receiving at the time as a customer service representative. There is no showing that anyone other than Frobe had supervised the customer service department until Devers anointed herself.

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As of the date of her layoff, October 13, working with Devers in the office were employees Roshelle Hamilton, Robin Blank, and Karen Walters. As of October 13, these three had been working in the office for three years, one and a half years and one and a half years respectively.

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On the subject of Devers' supervisory status, she is listed on Company documents as Customer Service Supervisor. General Manager Gerald Bowser testified that Devers had the responsibility for directing the other service representatives on how to handle difficult calls and making sure those representatives were handling calls properly. Frobe described Devers duties as customer service supervisor thusly: She was responsible for the day to day operation of the customer service department, from scheduling for three different shifts, training new representatives, and dealing with customer complaints that other employees could not resolve. The evidence shows that Devers was a working supervisor, performing the same duties as other employees in the Customer Service Department, with some additional duties.

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The evidence is clear that Devers did train all new employees in the department. As part of her duties training new employees, she had input on whether or not to retain them at the end of their ninety day probationary period. She exercised that authority and on one occasion recommended that a probationary employee be let go and her recommendation was followed. This act is the only shred of evidence that would indicate Devers' possessed supervisory authority. The circumstances surrounding this recommendation were not developed at hearing and thus, in the absence of any other evidence of supervisory authority held by Devers, I am not disposed to give it serious weight.

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The Customer Service office was generally open from about 7:30 am to 5:30 pm. The employees in that office were constantly on phone calls from existing and potential customers and Respondent's residential drivers all day long. On an average day, the office fields about 300 phone calls. On some days, this figure rises to 400 to 500 calls. Existing customers would call

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² Frobe partly retired in January 2007 going on part-time status until she trained her successor. When that was accomplished, she fully retire in April, 2007.

with complaints about service and potential customers would call for new service and rate quotes. The residential drivers called in daily at the end of the run to see if they had missed a customer before they returned to the Respondent's facility. The drivers also report the names of customers whose trash was not put out for pickup on the driver's run. These and other problems encountered by the drivers are written in what amounts to a log upon the drivers return to the office. With respect to problems noted that require action, that action is taken by the customer service office.

Under normal circumstances prior to Devers' layoff, she and three other employees manned the customer service office. They worked variously on three shifts, 7:30 am to 4:30 pm for the first shift, 8:00 am to 5:00 pm for the second shift, and 8:30 am to 5:30 pm for the third shift. On the subject of assigning people to shifts, it may be that Devers can assign an employee to a particular shift, but the evidence reflects new employees are generally hired for the third shift as it is the least desirable for most employees. Devers has the first shift as part of her job. When someone is to be out on vacation or for other reasons, the remaining employees usually decide among themselves who will cover the shift left open by the absent employee.

According to Debra Devers, she performs performance evaluations for first year employees. Frobe testified that Devers actually was involved in the evaluation process for the employees under her supervision every year, not just the first one. Devers then discusses her evaluation with Frobe. Devers is not involved in the decision as to whether to give a raise to an employee or the amount of the raise. After Frobe reviews evaluations prepared by Devers, both women discuss the evaluation with the affected employee.

An evaluation of Devers by Frobe in September 2006, lists Devers' major job responsibilities as: "manage the day to day operations of customer service department and working supervisor, train new customer service representatives, maintains contacts with contractors, and schedules all bulk clean-ups." The evaluation form lists her job title as Customer Service Supervisor. After detailing many positive aspects of Devers' work performance, it concludes, "Deb is an asset to us, and I don't believe we could have selected a better person to head up customer service."

Another evaluation of Devers performance for the year 2004 lists as her major job responsibilities, "all supervisory functions of department, trains all new customer service representatives, troubleshoots account problems, with other department heads and handles Saturday dispatch rotation." She had the independent authority to price certain services and quote those prices to prospective customers, to give small credits to mostly residential customers, perhaps a month or two worth of bills, without approval of higher management. For higher credits she needed the approval of Frobe or someone above her. All of the customer service representatives can give some level of credit, Devers was allowed a higher level of discretion than allowed the three other customer service representatives.³

Devers has the authority to counsel other employees in the customer service department if they do not perform up to expectations. Devers has no apparent authority to hire, fire or

³ Frobe testified that Devers could give credits up to \$50 to \$75 without higher authorization whereas the other customer service representatives could only give about \$10 in credit without higher authorization. Though Frobe testified that Devers could give the higher amounts listed, she also testified that she, Frobe, had to sign off on these larger amounts. This testimony calls into question whether Devers really had any more authority than the other customer service employees.

discipline employees. Former customer service representative Roshelle Hamilton recounted a situation where an employee was doing a poor job and Devers complained to Frobe. Shortly thereafter, another service representative also complained to Frobe and on that day, the poorly performing employee was terminated. There was no evidence forthcoming from Frobe about this incident so I cannot be sure who was the person triggering the dismissal, Devers or the other complaining representative. I also cannot be sure that this is not the probationary employee who was terminated at the end of the ninety day probationary period.

Devers sits in on hiring interviews which are conducted by Frobe. According to the evidence, she says nothing in these interviews and the record is silent on what input she has in the decision to hire.

When a customer calling with a complaint is dissatisfied with the response of customer service representative and asks to speak with a supervisor, he or she is referred to Devers.

Devers was the conduit between the employees in customer service and Frobe for the processing of vacation requests though she had no input into whether the requests would be granted. Frobe testified that Devers initials an "okay" on employees' vacation requests signaling that she has noted the request on her calendar and was taking responsibility for covering the employees' work shifts. When Frobe received the vacation request, she checked to see if the employee had vacation time available and if so, approved it and sent it to Bowser for final approval.

Robin Blank worked as a representative in the customer service department of Respondent from July 2005 until March 20, 2007. She testified that her supervisors were Debra Devers and Laraine Frobe. She testified that Devers had the authority to direct her work and did so. She said that most of the time she could work without supervision but there were occasions that she had questions and needed direction from Devers. Devers also told her how to perform her job. This makes perfect sense as Devers was the trainer of the employees in the department.

Roshelle Hamilton was employed by Respondent in its customer service department from September 2003 until December 29, 2006. Though Devers had the title of Customer Service Supervisor, Hamilton viewed Frobe as her boss and Devers the person to go to with phone issues. When she could not satisfy a customer, she would refer the call to Devers stating that she was her supervisor. Hamilton believed there were some calls that Devers referred to Frobe. She stated that Devers directed her work during training, but not thereafter.

The work of the Customer Service Department appears from the evidence to be repetitive and does not require daily direction once an employee is trained, so the matter of directing work does not seem to make an important part of the job.

Jeff Armstrong is employed by Respondent as a dispatcher. His office is near that of the Customer Service department and he can hear what is said in that department. He testified that when he first took his current position in 2005, in a conversation with Devers, she told him that she was the customer service supervisor and could do employee evaluations and had input on pay raises. Devers denies having this conversation with Armstrong though it accurately describes some of her duties. Though Devers does not make the decision about an employee's pay raise, her evaluation of the employee clearly constitutes input into that decision. Armstrong also testified that during the union campaign, Respondent held meetings with its supervisors on how to handle the campaign and Devers was not present for those meetings. Whether that was because she was not considered a true supervisor by higher management or for some other

reason is not shown in this record. I find this to be significant as Devers had daily contact with Respondent's drivers and ostensibly supervised three other employees who likewise had daily contact with the drivers who would constitute the bulk of the proposed bargaining unit.

5 Debra Devers attended two seminars and received certificates vouching for her attendance. The first was one designed to help supervisors deal effectively with unacceptable employee behavior and the other was designed to help supervisors spot a troubled employee who is abusing drugs or alcohol. According to management testimony, these seminars were attended by Devers to help her successfully perform her supervisory responsibilities. Frobe testified that dealing with unacceptable behavior was part of Devers job as supervisor. The 10 second seminar was in response to a federal DOT requirement that all supervisors in companies like Respondent take two hours of drug and alcohol training annually. Though the testimony is that this is an annual requirement, there is only one certificate showing compliance for one year in Devers' file. Devers testified that she had attended only one Alcohol and Drug 15 training seminar in her employment with Respondent. Thus, based on the testimony of Frobe, Devers is not in compliance with the DOT directive if she is a supervisor, which I will find below that she is not. The other seminar is one that Devers asked to attend and paid for herself. If the subject of the seminar was necessary for Devers to perform her job, Respondent would have paid for the seminar.

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2. Conclusions Related to Supervisory Status

Under Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, 25 discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

30 Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee vested with this authority in the supervisory class. [Citations omitted] The exercise of that authority, however must involve the use of independent judgment. [Citations omitted] Further, the burden of proving supervisor status is on the party alleging that such status exists." [Citation omitted] *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000).

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I do not believe that Respondent has met its burden of proving Devers' supervisory status under the Act. Though almost every witness who could give detailed information about Devers duties and actions was called to the stand, they were only asked to provide 40 conclusionary testimony, not any details which would support the conclusions.

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"Section 2(11) does not include 'evaluate' in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory 45 supervisor." [citation omitted] *Harborside Healthcare*, supra. Similarly, "training" is not enumerated and is not in and of itself an indicia of supervisory status.

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Of all the indicia of supervisory status enumerated in Section 2(11), the only one that could apply to Devers is the one reading "responsibly to direct them." Initialing vacation request forms is not a supervisory function when it is not directly related to the granting of the request. In 50 Devers' case, it merely insures that she has noted the dates on her scheduling calendar and that no apparent conflict appears. The decision to grant the request ultimately rests with Bowser

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and/or Frobe.

Respondent in its brief notes that Devers was responsible for product and service pricing decisions, had authority to give credits in excess of the other customer service representative, “troubleshooted” customer account problems with the other department heads, was responsible for customer service representative scheduling to insure proper coverage of the telephones, and was responsible for customer service representatives call-offs and vacation requests. I have already found that her involvement in vacation requests does not rise to the level of a supervisory function, but is in fact, merely clerical in nature.

The giving of higher credits to customers than the other customer service representatives speaks more to Devers’ seniority and experience than to supervisory status. She has been with Respondent for over eleven years, whereas the other employees in the department had been there far less time. As I have noted above, the evidence about her authority in this regard is called into question by Frobe, who said she had to sign off on the larger amounts.

With respect to scheduling, the best evidence shows that this function was a matter of mutual agreement among the representatives and not something Devers did without their agreement. There is no evidence to demonstrate any “troubleshooting” by Devers with other department heads. Pricing is not a supervisory function, and her leeway in this area is clearly a matter of her experience.

Looking at Devers’ authority to direct others does not afford a basis for finding supervisory status. Robin Blank testified that Devers had the authority to direct her work and did so. But this conclusion was not supported by any evidence of any direction that Devers had ever given Blank other than when training her. I believe the truth is found in Roshelle Hamilton’s testimony that Devers directed her work during training but not after training was completed. Tellingly, she testified that Frobe was her boss and Devers was the person to go to with phone issues.

Conclusionary statements, without supporting evidence, are insufficient to establish supervisory status and authority. *Chevron Shipping Co.* 317 NLRB 379, 381 fn. 6 (1995) and *Sears, Roebuck & Co.*, 304 NLRB 193, 199 (1991). What Respondent omitted from the presentation of its case was Devers’ “particular acts and judgments that make up their direction of work.” See, *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995).

I believe and find that at best Devers might be called a “lead person,” but not a statutory supervisor. From the scant evidence of record, the only finding I can make is that Devers was the most experienced employee in the department and thus handled the most difficult tasks. There is no evidentiary showing that the other employees needed any direction to accomplish their work. If they could not resolve a problem, they simply handed it off to Devers. It is clear to me that Frobe is the true supervisor of the customer service department. She is in the customer service department several times a day and she makes all the decisions regarding the department that are not handled by General Manager Bowser. Devers, other than the day to day performance of her own work, only has what amounts to clerical duties with regard to the other employees in the department. I also find telling that Respondent required all of its supervisors to attend meetings where they were instructed how to handle the Union organizing campaign. Devers was not required to attend these meetings, even though she had day to day contact with other employees including many who would be in the bargaining unit. Respondent finds it convenient to call her a supervisor in the circumstance of this case, but not actually treat her like it treats all of its other supervisors in something as important as the union campaign. I

find that Debra Devers is not a supervisor within the meaning of Section 2(11) of the Act.

C. Evidence Related to the Layoff of Debra Devers

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1. Events leading up to the October 13 layoff

10 Gerald Bowser is employed as Respondent's General Manager and has been employed there for 25 years in a variety of positions starting as a helper and working his way up to General Manager. Prior to January 2007, the Employer had operated as a non-union company. On September 29, 2006, the Employer received a letter requesting voluntary recognition of the Union as the representative of a unit of the Employer's employees. The Respondent refused to extend such recognition. On October 2, 2006, the Employer received a copy of the Union's Representation Petition in Case 6-RC-12551 together with a notice of hearing in that case. This
15 correspondence was preceded in September by Union handbilling outside of the Company's gates, a practice that continued up to the election held in December.

20 In response to the Union organizing campaign, Respondent initiated in October a campaign of its own opposing the Union effort. This campaign continued until the election in December. As part of the campaign, the Respondent hired labor relations consultant Peter List. List and some members of Respondent's management held meetings with employees to present the Employer's position. Bowser disputes that these meetings were mandatory, but they were conducted on working time at the Employer's facility. Early on in the campaign, the Employer determined that certain employees were not welcome at the meetings and prevented
25 them from going to further meetings. Bowser testified that there were two categories of employees who were denied access to such meetings after attending one or two. The first were employees identified by List as disruptive and disrespectful. List asked that these employees not be allowed to attend further meetings. The other group included those employees who expressed a desire not to attend them. Apparently the most active pro-union employees were
30 among those denied access to the meetings. The Employer also held meetings with its supervisors to inform them what they could and could not do in the context of an organizing campaign. Respondent began in October to distribute pro-Employer literature to its employees.

35 Bowser remembered a telephone conversation in late September or early October with the wife of a supervisor or employee wherein she named one of Respondent's supervisors, Mike Forester, as being a person who helped obtain signed authorization cards for the Union. He could not remember if she mentioned employees Ronald Devers or Gary Bice as also participating in this activity on behalf of the Union. Through Counsel, Respondent filed an affidavit with the Board objecting to this activity by a supervisor. Following the filing of this
40 complaint, the Union withdrew its Petition.

45 Ronald Devers is employed by Respondent as a tractor-trailer driver and is the husband of Debra Devers. He has been employed by Respondent for over six years and is supervised by Dave Miller. The Union's organizing campaign was initiated by Ronald Devers and a fellow employee, Gary Bice. They went to visit the Union in late August and met with two Union officials, John Kloos and Jim Gladys. They had another meeting where they met Phil Ornot, the organizing director of the Union. Devers testified that the employees wanted Union representation because of concern over the safety of Respondent's equipment. The Union explained the organizing process and gave them authorization cards. Bice and Devers then
50 engaged in soliciting signatures and were helped in that regard by supervisor Mike Forester. Their efforts resulted in the filing of a Petition with the Board. This petition was withdrawn because of Forester's efforts in the signature gaining process. Devers and other employees got

new cards and more signatures and a new petition was filed.

Respondent's dispatcher Jeff Armstrong testified about an incident that took place on the Saturday before October 13. Gary Bice came into his office and was upset. According to
5 Armstrong, Bice told Armstrong that he could tell Bowser that he and Ron Devers were being
blamed for bringing in the Union and that they had no part in it. Bice then added, "We might as
well vote for the union so we can save our jobs because we are getting blamed for it anyhow."
According to Armstrong, Debra Devers had come into the room and said, "You guys should vote
10 for the union to save your jobs." Debra Devers testified about this incident. Her account of what
Bice said is essentially as related by Armstrong, except she did not relate the last sentence that
Armstrong attributes to Bice. Devers testified that when she entered Armstrong's office,
Armstrong was telling Bice he shouldn't be talking on the radio saying things everyone could
hear. Devers then said either to Bice or Armstrong, "Everybody has a right to their own opinion
15 and each person should listen to each side of the story and make their own decisions. So if they
want to say those things, they can say them." And then she told Bice he should just let it go.
She denied saying that Bice and other employees should vote for the union. Based on my
observation of the witnesses and especially having heard extensive testimony by Devers, I
credit her version of this incident over that of Armstrong. Moreover, if Bice were in the office to
20 disclaim his role in the union campaign it is highly unlikely that he would say he was voting for
the Union in a conversation with a member of management. If he did not say that there was
absolutely no reason for Devers to say it.

Ronald Devers testified that employees were instructed to attend small anti-union group
meetings held by Respondent and a consultant. The group meetings had about ten to fifteen
25 employees in attendance. Devers attended only one of these meetings, held October 12 on
Respondent's property on Company time. At the meeting he attended, Bowser and
Respondent's Vice President Edward Vogel introduced consultant Peter List. According to
Devers, Respondent's management then left. Again, according to Devers, List told the
assembled employees that he was there to "bust the Union." List compared Respondent with
30 other companies and then told the employees that the Union was not going to get them new
trucks. Devers spoke up and said "It is not about new trucks. It is about safer trucks for us
drivers." List continued comparing Respondent to other companies making the point that
Respondent's employees had a better deal. He again reiterated that the Union was not going to
get them new trucks. Devers again responded as he had earlier.

List then told the employees about a California company that had voted in a union and
the employee's wages were frozen at \$6.50 an hour for six years before the company and union
achieved their first contract. Hearing this, Devers spoke out saying that "I lived in California for
two years, and there isn't a fucking person that lives in California that makes \$6.50 an hour."
40 According to Devers, List responded "Dude, you better get your facts straight." Devers shot
back, "You are a fucking liar because there isn't anybody in California that makes \$6.50 an
hour."

According to Devers, List then repeated his statement that the Union would not get the
45 employees new trucks. Devers then said, "I don't know how many fucking times I have to tell
you. It is not about new fucking trucks. It is about safer fucking trucks." The repartee continued
until it reached a point when Devers again called List a liar and List said, "Compadre, you better
watch who you are calling a liar." Devers then responded, "My name is not dude. My name is
not compadre, don't ever fucking call me that again. My name is Ron. It is right here on my
50 shirt." Devers then asked List how much he was being paid to come and lie to the employees
and List ended the meeting.

While Ron Devers was at work the next day, he encountered Bowser. Bowser pulled up to Devers truck in his pickup truck and informed Devers that they had taken Devers truck to an independent contractor and had the steering checked out, finding no problem. Devers said that there was a problem. Then according to Devers, Bowser said that Devers had behaved

5 immaturely at the meeting with List. Bowser then left, saying "Be safe out there." Stating that he had had many conversations with Ron Devers, Bowser testified that he could not remember this particular conversation. To the extent that this lack of memory presents the need for a credibility determination, I credit Devers, who seemed to remember the conversation well.

10 Devers was not asked to attend any more of the anti-Union meetings. Some other employees were also not invited to more than one or two of the meetings. To Devers' knowledge these employees were Gary Bice, Tim Simpson, Ted Trobrack , Chad Baker, Doug Bennett and Roger Wilkison. According to Devers, these were all known Union supporters.

15 2. The Events of October 13

Dave Miller is Respondent's Commercial Supervisor and is responsible for ensuring that all commercial and industrial customers are properly serviced. He has been in this position for seven years. His office is very near that of customer service and he can hear what is said in the

20 department. At about 8 am on the morning of October 13, 2006, he overheard Devers telling the customer service representatives about what her husband had said in the anti-union meeting of the previous day. According to Miller, Debra Devers described how List had called Ron Devers "dude" or "boy," and Ron Devers had objected saying his name was Ron, not "dude" or "boy." Miller stated that he had heard Ron Devers' testimony and the description of the meeting that

25 Debra Devers gave the service representatives was consistent with Ron Devers testimony. Miller reported this incident to Bowser shortly after hearing it. Miller testified that he told Bowser because there was a lot of tension in the office because of union activity and he did not believe it should be talked about in the office. Debra Devers admitted that she had had this conversation with the other employees in the customer service department. She added that she

30 thought it was funny, especially the part about her husband being called compadre or dude.

Bowser testified that he was aware that Ronald Devers was involved in activity on behalf of the Union during the campaign, but was unaware of the extent of his involvement. He was aware that Ronald Devers attended a meeting called by Respondent to present its positions

35 on the Union. Bowser acknowledged being told by Miller about Debra Devers' conduct on October 13. Bowser testified that her conduct caused him concern because she was part of the management team and should not be discussing union activity with other employees. He was also concerned about disruptions to the office. He was aware that Ron and Deb Devers were husband and wife and that Ron Devers was pro-union. That concerned him because spouses

40 that both work for the same employer can have work issues that cause tension between them.

Bowser testified that he determined that he would meet with Deb Devers and explain to her that she cannot be discussing union activity with other employees in the office or any other employees because it is not allowed to be done by a supervisor. He also wanted to address

45 what he considered a change in her actions and tone that he felt was caused by stress arising from the situation between her job and the union situation. He believed taking a voluntary layoff for some time away from the stress would be the best approach.

He had Frobe get Debra Devers and the three met in the conference room. According to

50 Bowser, he noted to Devers that he had learned that morning that she had been discussing union activity with the service representatives. Bowser testified that she acknowledged doing so. She also acknowledged that she understood what was expected of her as a supervisor as it

related to the union issues. Bowser testified that her demeanor in the meeting was as it had been for a few weeks, describing it as "distant." Bowser testified that he had no intention of threatening her and told her so. Bowser testified that he also discussed Devers taking personal calls at work from her husband. He testified that he knew she had taken calls from him in the
5 past and assumed she was still doing it though he offered no proof of that assumption. On cross, he testified that Dave Miller had told him that he heard Deb Devers taking a call from her husband just before she had the discussion with the other employees about her husband's actions the day before. Miller did not mention any phone call, though it would have been important. I believe and find that Bowser got boxed in by General Counsel and made up this
10 story to get out of the box. On cross, he also testified that Devers told him in the meeting that she had received calls at work from her husband about the union. Again, he said nothing of the sort on direct and I do not believe him.

According to Bowser, Devers mentioned that things were getting rough because of the
15 Union activity and her position with the Company. He then told her if she needs to take some time off to deal with issues at home, he was offering her a layoff to help her get through the situation. He considered her a good employee, one who had not had any significant problems in her employment. He testified that he made the offer to help relieve her stress because of her unique position, adding that it had nothing to do with Ron Devers. He also told her that the
20 Company would not contest an unemployment compensation filing. He told her to take some time and think about the offer. As will be discussed below, Debra Devers gave Respondent a letter accepting the proffered layoff later in the day of October 13. When Bowser received her letter accepting the offer, he did not give her a timeframe for recall nor did he tell her that she would have to call and request a recall. He did not discuss with Debra Devers how the layoff
25 would end when she wanted to come back.

With respect to the October 13 meeting, Frobe testified that Bowser came to her with concerns that Devers was talking over the phone at work about union activity with her husband. He also was concerned about Devers talking about union activities with the customer service
30 representatives and/or residential drivers.

Respondent introduced a document Bowser testified that he prepared following this meeting. It is a memo to Devers' Personnel file and reads:

35 "I met with Deb this morning with Laraine Frobe as witness. I explained to her in a very non-threatening manner, that the company has concerns with the position she is in: She is our customer service supervisor and as such we do expect her to speak to residential drivers throughout the day. On the other hand she is married to one of our tractor-trailer drivers, Ron Devers, who is very involved in the current union activities. It seems that every time Ron hears
40 something new about the union, he is phoning Deb (on company time), and she in turn is having discussions with her customer service staff and other drivers. This is not acceptable to the company in view of Deb's supervisory authority.

45 I told her that we understand that she is in a very delicate and, most likely, emotional situation. She agreed that it has been difficult because she can see some of their issues but has explained to her husband there are issues she can't agree with. She said it is upsetting her.

I explained to her that I cannot let her continue to take calls from her husband unless they are of an emergency nature. She understands that she said. She also understands the
50 reasons why she should not discuss these activities with the staff she supervises.

I then explained to Deb that if she feels this is putting added stress on her and she is

being torn in different directions, the company was willing to offer her leave with unemployment benefits which we would not contest. I told Deb to take some time to think about it and let me or Laraine know her decision.

5 Deb was waiting for Laraine when she returned from lunch, and gave Laraine her timecard, the attached letter (Devers' layoff letter) and payout requests for vacation and personal leave.

I have accepted for the company and placed Deb on lay-off status for the present time."

10 At the meeting, Frobe remembered Bowser telling Devers that there were concerns about her making phone calls or receiving phone calls and discussing the results of those calls with her representatives or drivers. The calls and the discussions were about union activity. It was a concern because of her supervisory status. According to Frobe, Devers acknowledged doing these things. Frobe testified that no particular call or discussion was referenced.
15 She said the meeting was emotional and that Devers was on the verge of crying. Frobe testified that she felt that Devers was "torn," explaining that Devers agreed with some union positions and not with others and felt torn between the two. Frobe did not consider Bowser's statements or demeanor to be threatening.

20 Devers also testified about this meeting. According to Devers, the meeting began with Bowser stating that she (Devers) had gotten herself into quite a predicament. He stated that at the Company anti-union drivers meeting, " they had brought up problems with customer service, mainly directions. He stated that the drivers had been quite immature at that time. He said that
25 out of respect for me, it would be in my best interest to accept a layoff at that time. He told me that I could think about it, maybe that afternoon or the next week, and give him an answer." Devers testified that Bowser said that the drivers attending the meeting said that Customer Service did not give them complete directions for the drivers to serve the customers. According to Devers, Bowser added that she "should take a layoff during this highly sensitive time." She testified that Bowser told her that she should not "take this in a threatening way." Because of
30 Bowser's demeanor and his past actions toward other employees, she did not believe his disclaimer of threatening. According to Devers, she had seen him intimidate and threaten other employees. She has seen him push employees out of doors and slam doors in employees' faces. In an effort to support a finding that Bowser could be intimidating, General Counsel offered evidence through Gary Bice about an incident that took place the next day to show
35 Bowser had a short fuse. As it is fairly long and is not directly related to the matter at hand, I have put it in a footnote below.⁴

4 Gary Bice is employed as a driver for Respondent. In addition to corroborating Ron Devers testimony about their efforts on behalf of the Union, Bice related a story about trying to put up a
40 Union sign at the entrance to Respondent's facility on October 14. . He was with Union officers Kloos and Gladys. The two Union men got out and surveyed the area for a location for the sign, but did not put up the sign as they did not have needed material. Bice stayed in their vehicle in the back seat. According to Bice, Bowser drove up and tried unsuccessfully to prevent them from leaving the scene. When they did drive away, Bowser followed them closely though they
45 tried to dissuade him from doing so by making a series of meaningless turns. Eventually they ended up in Grove City, Pennsylvania about three miles from where they started and Bowser was still with them. They were attempting to pull into the town's police station parking lot, but mistakenly pulled in another one. This lot had only one entrance and they had to turn around. According to Bice, Bowser drove toward them and at the last minute swerved to avoid a crash.
50 The three Union men then drove back onto the street only to have to stop for a college parade. Bowser was behind them and pulled his vehicle off the road and drove up, stopping on the

Continued

Debra Devers accused Bowser of posting fake job listings to let the drivers know that they would decrease hours or lose jobs. She testified that Respondent' Commercial Supervisor, Dave Miller, told her this. Miller testified and did not dispute this claim. On cross, Devers admitted that Bowser did not raise his voice with her or point his finger at her during the meeting. During the meeting, neither Bowser nor Frobe stated that the purpose of the meeting was related to Ron Devers' union activity. She could not recall whether Bowser stated in the meeting his concern was that she was discussing her husband's or other employees' union activity with other customer service representatives on company time.

Devers agreed that her situation at work in October was a delicate and emotional situation, and was causing her stress. She admitted that Bowser told her in this meeting that, as a supervisory employee, she was expected not to engage in pro-Union activities and she stated that she understood this. She admitted telling Bowser that the situation she was in was upsetting her. She testified that no one in the meeting stated that she was going to be fired nor was she directly threatened in the meeting. She testified that she was relieved when she took the layoff. By this she said she meant that she was relieved not to be fired. She testified that she felt that unless she took the offer of a layoff, she would eventually be fired. Following her layoff, Ron Devers continue to engage in Union activities.

Devers also testified that Bowser told her that he knew she had taken phone calls at work from her husband, Ronald Devers, and other family members. Devers denied at hearing that she had taken calls from her husband, but admitted she had taken a call from her son about a personal problem he had about a week before the October 13 meeting.

passenger side. Kloos asked Bowser if he had a problem. According to Bice, Bowser said he did and he wanted to see who was in the "fucking" back seat. Kloos accused Bowser of surveilling union activity and Bowser responded, "Bullshit, I am on my way home." When the parade passed the Union men left with Bowser still following them for a while until they made a turn and Bowser continued on his way. Bice testified that he did not know if Bowser knew the identities of the two union officials.

Bowser testified that on the day in question, he was leaving the facility and noticed a vehicle parked partly on the road and partly on Respondent's property, which was marked with no-trespassing signs. The company had experienced problems with vandalism and arson and he was concerned. He testified that since the Union activity began, Company trucks had been vandalized, with hoses cut and foreign objects put in fuel tanks. He pulled along side the parked vehicle to see who was in it. The vehicle backed up. There were no signs on the car that would give a clue to who was inside. Bowser considered this suspicious and followed the vehicle as it drove away. He followed it into Grove City, which took about fifteen minutes. When he finally pulled along side the vehicle when it stopped for the parade, Bowser saw two men inside that he did not recognize. One of them rolled down the window and stated to Bowser that he was following them. According to Bowser, the man he later learned was Kloos began swearing at him. At some point, Bowser saw the men had Union insignia on their clothing. They accused him of harassment. Bowser denied this accusation and stated that the Company had suffered vandalism and he was simply trying to learn the identity of the men in the vehicle. He was also swearing. Though he asked the identity of the man in the back seat, he did not learn his identity at that point. After this conversation, Bowser went home. The Union officials filed a charge with the police which was later dismissed by a judge. The Union also filed and ULP charge over the incident and it was later withdrawn.

With respect to the October 13 meeting, she remembered Bowser saying "this is a tough situation to be in." She responded, "It is a tough situation. Maybe I am in the wrong department." Bowser responded by saying, "No, no."

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Devers denied that she acknowledged receiving phone calls at work from her husband about union activities. She denied that this had ever occurred. She denied saying to Bowser that she had talked about union matters with her staff or acknowledging that she had done so. She testified that the word "union" was never mentioned by Bowser or Frobe in the October 13 meeting. With respect to telephone calls, she testified that Bowser mumbled something to the effect "And we know that you get telephone calls." She ignored this comment and did not acknowledge the truthfulness of Bowser's statement. She testified that at the meeting she was not accused of talking to drivers about the union. She denied that Bowser accused her of talking about union activities on the phone at work. She testified that as she left the meeting, she said, "I want you to know I have never talked to the drivers about unions." She denies having ever talked with employees outside of customer service about a union or union activity. She testified that other than the discussion overheard by Miller, she had never discussed union activity with the employees in the customer service department.

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To the extent that there are credibility issues with respect to the testimony about the meeting, I believe the best evidence is that Devers was not confronted about the specifics of her discussion with fellow employees about her husband's actions of the previous day. She was accused however, of talking with them about what could be labeled union activity and was accused of talking on the phone with her husband about union activity. I find that Devers in fact, did discuss union issues with her fellow customer service representative, but that there is no proof that she talked with her husband on the phone at work about such issues.

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Following this meeting, Devers met with Frobe about 1:00 pm. The two women met in Frobe's office. According to Devers, the meeting began with Devers handing Frobe a typewritten letter that was dated October 13 and addressed to Respondent. The one line letter reads: "In response to the meeting held today, I am accepting your offer of a lay-off during this highly sensitive time." As she handed over the letter, Devers stated "I will take the layoff because I thought I was going to get fired." According to Devers, Frobe responded, "No, it is a layoff, and don't worry, we will try to get you back as quickly as we can." Devers testified that Frobe added, "[t]hat once they the NLRB vote for the union in or out, it should take about 30 days." Devers was ultimately recalled to work on March 14, 2007, though the election was held in December 2006. Prior to that date, no one from Respondent asked her to return to work. She testified that she did not ask to be returned, though, in my opinion, filing the charge in this case can only be viewed as a request to go back to work. It was filed on January 24, 2007 and as noted she was not recalled until March 14, 2007.

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With respect to the conversation she had with Devers when the letter accepting layoff was given, Frobe testified that both women were emotional about the situation. Devers told her she was afraid that she was not going to be called back. Frobe assured her that the layoff was temporary and in Frobe's opinion, she would be called back. She denied giving Devers any likely call back date. She heard Devers testimony in this regard and said she could not recall telling Devers that she would be recalled 30 days after the Union election.

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While on layoff, Devers received unemployment compensation benefits, which were lower than her previous wages. This disparity caused a hardship for her family. Ron Devers also testified that the layoff of Debra Devers adversely affected their lives as they had less money

and had difficulty making ends meet. Bill collectors began calling their home. This caused Ron Devers to slow his activities on behalf of the Union.

5 Debra Devers testified that she did not want to take a layoff on October 13, and that her layoff was not truly voluntary. Devers expected to be recalled from layoff after the election based on Frobe's comment at the time she turned her letter in. Devers was not replaced nor was anyone hired to fill in for her while she was out. Frobe testified that there is a seasonal aspect to their business and it is slower in the winter.

10 When there is a permanent separation of employment with Respondent certain paper work is issued, both Cobra documents and paperwork connected to rolling over a 401 K plan. Respondent did the paper work for the Cobra as Devers needed the hospitalization coverage. This would also indicate that Respondent expected Devers to be out for a long period of time. The work was not done on the 401 K documents as Devers was expected to be recalled
15 eventually.

20 In response to a series of quick questions from General Counsel, Devers made a number of denials, not all of which are accurate. Devers denied talking to her husband at work about the Union activity. I credit this denial in the total absence of any proof she got phone calls from her husband at work. It is clear that they talked about this subject away from work. She denied talking about the union activity of employees with other customer service employees at work. As will be shown below, this is not entirely accurate. Devers denied telling anyone at work, including Bowser and Frobe, that she had talked to her husband at work about
25 employees' union activities, or that she had spoken to other customer service representatives about that topic. This denial appears to be correct as it pertains to her husband, but it is not entirely accurate as she admitting having the conversation with other customer service staff testified about by Miller on October 13. She did admit talking about union organizing activities with her husband at her home. This began at end of September or the beginning of October
30 when the Union began handbilling. The other employees in the Customer Service department talked about the handbilling.⁵ Former customer service representative Robin Blank testified that Devers would ask her about her husband, who was also an employee of Respondent in the proposed bargaining unit. According to Blank, Devers inquired of her husband's union sentiments and what her husband had told her about the union. At one point Devers told Blank
35 that she had to stay out of the union business because she was a supervisor. Blank testified that Devers was not trying to get the employees in the customer service department interested in a union. Additionally, in early October, the Respondent decreased the employees' cost of health insurance. That decrease was a topic of discussion between Devers and the other customer service employees. Devers testified that the employees speculated that the decrease
40 was made because of the Union (organizing activities).

45 Ron Devers denied having conversations with his wife about the Union while she was at work, though he admitted they talked about it at home. He also denied talking to anyone else in customer service about union activities.

3. Events taking place after October 13

50 ⁵ Ron Devers testified that Union handbilling began on October 9 or 10. The location of most handbilling was the entrance to Respondent facility.

On October 16, Ron Devers had a conversation with his supervisor, Dave Miller. Devers went to find Miller and ask him the time of the next anti-union meeting he was to attend. Miller looked at his list of invited attendees for the meeting and told Devers that he was not on the list. Miller then called Bowser and reported to Devers that he was not invited to the meeting. Devers then asked that Miller have Vice President Edward Vogel call him. Miller said okay. That evening, Vogel called Devers at home. Devers asked why he was not invited to the meeting that day and Vogel responded that it was because of his behavior at the earlier meeting. Devers then asked Vogel why his wife had been laid off and Vogel responded that they were afraid that the Union would cause problems with the couple at home. Then conversation ended at that point. Gary Bice noted that he was taken off the list of employees invited to attend the anti-union meetings after attending two of them.

On October 19, Vogel issued a letter to employees concerning the Union. It noted that the Union's first petition had been withdrawn and the possibility that another one could be filed. It noted that management had learned from the employee meetings that two issues of concern to employees were the condition of the Company's trucks and a lack of communication between management and employees, noting that a union cannot fix either of these two things. It stresses a number of benefits the Company provides without having a Union and without the employees having to pay Union dues.

On October 24, the Union filed a second Petition for the same bargaining unit and a hearing was set. During the period between the filing of the second Petition and the election, Respondent filed a charge alleging that the Union invoked passages from the Christian bible in a defamatory way in its handbills and signs. At some point the Union put out a sign or handbill that stated: "We need to stick together as we are now. Management is trying to create dissension among us. Don't let it happen. A union is not the worst thing for this company. Look at Deb and her unprotected rights! Do not be afraid. Stand up for yourself. There's power in numbers. Better to be poor and honest than rich and dishonest. Proverbs 19:1." (Spelling is as appears in the sign.) The "Deb" referenced on the sign is Debra Devers.

Respondent also filed a charge alleging that the Union was blocking its trucks entering and leaving its facility by having members, while handbilling, move in front of the trucks. The Employer alleged this activity created an unsafe working environment.

On or about November 8, the Union and Respondent entered into a stipulated election agreement which described the bargaining unit as:

"All full-time and regular part-time drivers, mechanics/maintenance employees, welders, transfer station operators, painters and laborers employed by the Employer at its Grove City, Pennsylvania facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees."

On November 13, the Union filed a charge against the Respondent alleging certain violations of the Act, including the layoff of Debra Devers. Notwithstanding the filing of this charge, the Union advised the Region it wished to proceed to election. A stipulation was also made between the parties that Respondent's employee Mike Forester was a statutory supervisor. An election was held December 7 and the Union won. Respondent then filed objections to the election and the Region issued an Order Directing Hearing on Objections and Notice of Hearing. Thereafter the parties reached a settlement and the Respondent withdrew its objections and its appeal of the Region's decision not to issue complaint on some charges it had filed against the Union. Thereafter, the Region on January 5, 2007 issued an order allowing the

withdrawal of objections, canceling the hearing that had been set, and certified the election.

5 Though the parties seemingly agreed to settle all outstanding disputes, Debra Devers was not recalled to work at the time of the settlement and remained in layoff status until March 14, 2007. No replacement for Devers was hired during that period of time. During Devers' absence, no one was made a supervisor in the customer service office and those employees reported directly to Frobe. Frobe testified that the winter months are the slow ones for Respondent and it could handle the workload with one less customer service representative.

10 The parties then began negotiations for a first contract, but had not reached agreement as of the date of the hearing in the instant case.

4. Conclusions with respect to the Layoff of Debra Devers

15 As I have heretofore found that Debra Devers is not a statutory supervisor, the question of the legality of her layoff is governed by the Board's holding in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). Under *Wright Line*, the General Counsel has the burden of proving a prima facie case showing that an employee's protected activity was a motivating factor in the decision to take adverse action against the affected employee. Elements of this prima facie showing include a showing of animus, protected activity, knowledge by Respondent of that activity, disparate treatment and timing of the adverse action. I believe that General Counsel has made a prima facie case as required.

25 Beginning with animus, it is clear that Respondent did not want the Union. It hired a consultant to bring an anti-union message to the affected employees. Ron Devers testimony that the consultant said his mission at Respondent's facility was to "bust" the Union is un rebutted. Respondent kept known pro-Union employees from attending these meetings. And Vice President Vogel sent a letter to employees telling them in essence that a Union would just be a waste their money. I find that Respondent harbored animus toward the Union.

30 I fully believe and find that Ron Devers actions at the October 12 anti-union meeting were the cause of the action taken against Debra Devers. Ron Devers expressions of employee concerns at the meeting were accurate. Indeed the concerns about truck safety which he expressed are echoed in Vogel's letter to employees a week later. Though Devers swore during the meeting, I do not find that the swearing was serious enough for his activity there to lose the protection of the Act and find that his activity was indeed protected. As the Board stated in *Consumer's Power Co.*, 282 NLRB 130 (1986): "[We have] long held, however, that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours and working conditions are among the most likely to engender ill feelings and strong responses." In a number of cases, the Board has found that offensive language uttered by an employee engaged in protected activities did not render the employee's activities unprotected. As stated in *Heath Care Corp.*, 306 NLRB 63 (1992): "Not every impropriety, however, places the employee beyond the protection of the Act. For example, the Board and the courts have found foul language or epithets directed to a member of management insufficient to require forfeiting employee protection under Section 7." Also see, *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969); *Burle Industries*, 300 NLRB 498, 503-505 (1990); and *Marion Steel Co.*, 278 NLRB 897 (1986). That swearing is not confined to truck drivers at Respondent's facility is clear. I invite attention to Bowser's language during his confrontation with Union officials in Grove City on October 14.

Given the fact that Ron Devers actions on October 12 were protected, Respondent was fairly powerless to punish what it called his "immature" behavior because of Section 7. But his wife Debra, if a supervisor, could be punished and send a message to Ron Devers and the other Union supporters. I am convinced that this is what Respondent did. There is no showing that Debra Devers was ever told what she could or could not do in the Union campaign. There is no evidence that Bowser or Frobe had ever spoken to her about Bowser's assumption or perception that she was taking private phone calls from her husband while at work. No, it was only after Miller informed Bowser that Debra Devers was relating her husband's protected activity of the day before to the other employees in her office, that he felt compelled to take action.

Bowser's assertions that he was trying to help Devers through a tough, highly sensitive time just does not hold up given his subsequent actions. There is no contention that there were or have ever been job issues with Debra Devers' performance. There is no contention that her services are not needed. If Bowser offered her the layoff to help her get through the difficult time of the campaign, why was she not called back after the election? If Respondent would argue that there was still turmoil because there were objections and appeals pending, then why did they not recall Devers after a global settlement was reached with the Union in January 2007? Why was she not called back when her desire to return was made clear by the ULP charge she filed in January 2007? Respondent offered no credible reason for not recalling her at any one of those earlier dates and I believe the obvious answer is that they were still punishing her.

That at least some other employees believed that Debra Devers was laid off because of Union animus is made clear by the handbill or sign used by the Union leading up to the election. As noted earlier it stated, in part, "A union is not the worst thing for this company. Look at Deb and her unprotected rights! Do not be afraid. Stand up for yourself." Thus the message sent by her layoff had the desired effect of potentially chilling union support.

That the layoff was not truly voluntary is also clear. The layoff was not the idea of Debra Devers. It was Bowser's idea. Bowser's testimony also strongly suggests to me that a layoff of Devers was going to occur whether she volunteered for it or not. Suggesting that she take a layoff in the setting in which it was proposed would send a clear message to most employees. Take the layoff we are offering or be fired. Devers believed that she was going to be fired and told Frobe so that same day. One must remember that Devers knew Bowser well and could read him. She was also aware of Dispatcher Miller's statement to her that Bowser had made fake job postings to show the employees that they could lose jobs or pay at the hands of the Company. Debra Devers testimony in this regard is unrebutted even though Miller testified. She had also observed Bowser react strongly and harshly to actions of other employees. Though I have found Devers not to be a statutory supervisor, she thought she was one. Thus, she attended the October 13 meeting without any assurance that her job was in any way protected by the laws that protected her husband. It is small wonder that she felt relieved that she was offered a layoff rather than being terminated.

I find that General Counsel has established that animus toward protected union activity was not only a motivating factor in Respondent's decision to force Devers to accept a layoff, it was the only motivating factor. No one else in the customer service department was counseled not to talk about union issues, even though one other employee was in the same position of Devers, having her husband in the bargaining unit. Respondent has wholly failed to show it would have taken the same action in the absence of protected activity and thus, I find it violated Section 8(a)(1) and (3) of the Act by forcing the layoff of Debra Devers and thereafter failing to recall her to work until March 14, 2007.

Conclusions of Law

- 5
1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
 3. Debra Devers is not a supervisor within the meaning of Section 2(11) of the Act.
 - 10 4. Respondent violated Section 8(a)(1) and (3) of the Act when it forced its employee Debra Devers to take a layoff on October 13, 2006 and failed and refused to recall her until March 14, 2007, because her husband, Ronald Devers, engaged in protected union activity.
 - 15 5. The unfair labor practices engaged in by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

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

25 The Respondent having discriminatorily laid off its employee Debra Devers and unlawfully failed and refused to recall her to work until March 14, 2007, it must make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

30 Respondent must also remove from its files any reference to the unlawful layoff and notify Debra Devers in writing that it has done so and that the unlawful layoff will not be used against her in any way in the future. Respondent must also post an appropriate notice.

35 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

40 The Respondent, Tri-County Industries, Inc., Grove City, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from:
 - 45 a. Forcing an employee to take a layoff, because the employee or the employee's spouse, engaged in protected union activity.

50 ⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

NOTICE TO EMPLOYEES

5 Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

10 The National Labor Relations Board has found that we violated Federal labor law and has
ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- 15 Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

20 WE WILL NOT force an employee to take a layoff and fail and refuse to recall to work that
employee because the employee or the employee's spouse engages in union or protected
concerted activities.

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

WE WILL make Debra Devers whole for any loss of earnings and other benefits suffered as a
result of our discrimination against her for the period of her layoff from October 13, 2006 until
her recall on March 14, 2007.

30 WE WILL, within 14 days of the Board's Order, remove from our files any reference to our
unlawful layoff of Debra Devers and within 3 days thereafter, notify her in writing that this has
been done and that the layoff will not be used against her in any way.

35 TRI-COUNTY INDUSTRIES, INC.

(Employer)

40 Dated _____ By _____
(Representative) (Title)

45 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor
Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it
investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under
the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's
Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

50 1000 Liberty Avenue, Federal Building, Room 1501
Pittsburgh, Pennsylvania 15222-4173
Hours: 8:30 a.m. to 5 p.m.

412-395-4400.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 412-395-6899.

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