

West Irving Die Casting of Kentucky, Inc. and United Steel Workers of America, AFL-CIO, CLC.
Cases 25-CA-28585 and 25-RC-10159

January 31, 2006

DECISION, ORDER, AND CERTIFICATION
OF RESULTS

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On November 12, 2003, Administrative Law Judge C. Richard Miserendino issued the attached decision, finding that the Respondent had violated Section 8(a)(3) and (1) of the Act by terminating employee Joseph Shelton.¹ The Respondent filed exceptions and a supporting brief; the General Counsel and the Charging Party filed answering briefs; and the Respondent filed a reply brief.²

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and the parties' briefs and has decided to affirm the judge's rulings, findings,³ and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge that the General Counsel has met his initial burden under *Wright Line*⁴ of proving that animus was a motivating factor in the decision to discharge employee Shelton. Contrary to the judge, however, we find that the Respondent has successfully rebutted that initial case and proven that it would have termi-

nated Shelton pursuant to its established attendance policy even in the absence of Shelton's union affiliation or activities.

The facts are set forth in the judge's attached decision. Briefly, the Respondent's attendance policy is a strict, no-fault point system. Under that system, administered by Human Resources Generalist Sonya Hendrix, any employee who misses a day of work without properly reporting his absence accrues two points. The Respondent discharges any employee who accrues six points. Thus, an employee who misses 3 days without properly reporting the absences has accrued 6 points and is to be discharged. Only calls to a specific employer phone line (extension 400), made at least 30 minutes before the start of the shift, satisfy the reporting obligation. Hendrix terminated Shelton when, over the period of January 22 through 24, 2003, Shelton missed 3 days without reporting his absence over the identified phone line, and thereby accrued the requisite points for termination.⁵

The crux of this case is whether Shelton was treated disparately, i.e., whether the Respondent did not consistently discipline employees other than Shelton according to the letter of its attendance policy. The judge found that Shelton was treated disparately because the Respondent had accommodated employees who failed to follow proper absence-reporting procedures in at least two instances, by calling them before implementing the consequence (termination) dictated by the attendance policy. We do not agree that the Respondent treated the two employees (Meadows and Devine) in a materially different manner from Shelton. We find, to the contrary, that the record evidence establishes that the Respondent implemented the precise, published terms of its policy in a consistent manner.

Specifically, the record shows that the Respondent has penalized an employee's failure properly to report an absence under the established policy, even when the Respondent receives actual advance notice of the absence. In both May and July 2002, for example, the Respondent penalized employees who failed to follow proper reporting procedures when they missed work for court appearances, despite the Respondent's actual advance knowledge of the absences and their cause. The record also demonstrates that the Respondent applied its strict absence-reporting requirements to its supervisors. Moreover, there is no evidence that the Respondent ever coun-

¹ The judge dismissed allegations that the Respondent violated Sec. 8(a)(1) by interrogating and threatening employees Joshua Tipton and Rachel Roloson and violated Sec. 8(a)(3) and (1) by discharging Tipton. There are no exceptions to those dismissals.

On February 21, 2003, an election was held in a unit of the Respondent's production and maintenance employees. Out of approximately 93 eligible voters, 43 votes were cast for and 43 against the Union, with 8 challenged ballots, all of which have been previously resolved except for those pertaining to discharged employees Shelton and Tipton. The judge sustained the Charging Party Union's election objection pertaining to Shelton's discharge, but overruled the other election objections. He also overruled the challenge to Shelton's ballot, but sustained the challenge to Tipton's ballot. No exceptions were filed to the disposition of either the objections unrelated to Shelton's discharge or the challenge to Tipton's ballot. We adopt those dispositions pro forma.

² The Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

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

⁵ The Respondent refers to this as a constructive quit. Given that the Respondent strictly applied the point system without regard to the employee's intent or exigent circumstances, we need not consider whether the Respondent sincerely believed that Shelton had *intended* to quit or merely considered him to have quit under the terms of the attendance policy.

tenanced any variation from its rules. Regarding sick leave in particular, there is no evidence that the Respondent ever allowed an employee to remedy his failure to call extension 400 in a timely manner by providing a doctor's note at a later date.⁶

We now turn to employees Meadows and Devine. The judge found that the Respondent offered an accommodation to these employees, but offered none to Shelton. We find, however, that the Respondent's application of its attendance policy to former employees Meadows and Devine was characteristically strict. Meadows was discharged when he accumulated more than 6 attendance points after missing work without calling extension 400. The Respondent terminated him even though someone else had called his supervisor on his behalf to say he would miss work, and despite the fact that he himself came to work during his shift on the last day to explain the reason for his absence (family illness) in person. Devine, like Shelton, failed to comply with the attendance policy while he was ill. Although he had spoken to Hendrix about his illness during his absence, and had called extension 400 more than once over the course of his absence, the Respondent discharged Devine for points he accrued when he failed to call extension 400 on the same day that he had spoken to Hendrix about it.⁷

Finally, the fact that Hendrix attempted to contact both Meadows and Devine by phone before terminating them does not establish that the purpose of her call was anything other than to explain that they could not cure their failures to follow the Respondent's attendance policy.⁸

⁶ In her testimony, Hendrix answered in the affirmative in response to the question, "would you have accepted [Shelton's doctors' notes] or would you have looked at them had he offered them?" At most, that testimony demonstrates that Hendrix would have physically accepted or perused the doctors' notes. Nothing in the record suggests that she would have treated them as curing Shelton's failure to call extension 400 in a timely manner.

The judge noted what he characterizes as Hendrix' willingness to accept Shelton's doctors' notes and Respondent Controller Greg Byars' instruction that Shelton return to work with those notes. The judge contrasted this with Supervisor Donald Lightfoot's refusal to accept the notes when Shelton offered them after he returned to work the following week. But there is no evidence that Byars, unlike Hendrix, participated in the administration of the Respondent's attendance policy or knew that Shelton had not complied with it. Nor is there any evidence that Lightfoot had any reason to accept the doctors' notes once Hendrix had determined that Shelton had not correctly invoked sick leave.

⁷ Hendrix made a note to her file regarding the circumstances of Devine's termination. Referring to that note, the judge found that there is no evidence that Devine had offered Hendrix a doctor's excuse, which Shelton had done. However, Hendrix' note also specifically states that Devine had called to tell her that he was sick and had confirmed in response to her question that he would provide a doctor's excuse upon his return. Hendrix's testimony is consistent with her note.

⁸ The judge mischaracterized Hendrix' testimony as admitting that she had left Meadows a message offering to see if she could do some-

Indeed, there is no evidence in the record that the Respondent has *ever* allowed an employee to remedy retroactively an attendance-reporting failure. In sum, Hendrix's calls to those employees do not demonstrate disparate treatment toward Shelton, who received his discharge notification by certified letter.

For the foregoing reasons, we find that the Respondent rebutted the General Counsel's initial burden by demonstrating that it fired Shelton for reasons unrelated to his union activities. Accordingly, we find that the Respondent did not violate the Act by terminating Joseph Shelton and that the challenge to his ballot in Case 25-RC-10159 should be sustained.

ORDER

The complaint is dismissed in its entirety.

IT IS FURTHER ORDERED that the Charging Party/Union's objection to conduct affecting the results of the election conducted in Case 25-RC-10159 is overruled and that the challenges to the ballots of Joseph Shelton and Joshua Tipton are sustained.⁹

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for United Steel Workers of America, AFL-CIO, CLC, and that it is not the exclusive representative of the bargaining unit employees.

Michael T. Beck, Esq., for the General Counsel.

Jon Goldman, Esq. and *Jake Fulcher, Esq.*, of Evansville, Indiana, for the Company.

Everett C. Hoffman, Esq., of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Owensboro, Kentucky, on June 23-24, 2003. The charge in Case 25-CA-28585A was filed by United Steel Workers of America, AFL-CIO, CLC (the Union) on February 19, 2003, and was subsequently amended. On May 8, 2003, the complaint was issued against West Irving Die Casting of Kentucky, Inc. (Respondent) alleging that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating and threatening two employees because of their union support. It further alleges that the Respondent violated Section 8(a)(3) of the Act on January 10, 2003, by unlawfully discharging Joshua Tipton and on January 27, 2003, by unlawfully discharging

thing about his situation. Hendrix admitted only that she called him, stating that she had done so only because Meadows' supervisor had promised him that she would do so after rejecting his proffered doctor's note.

⁹ Accordingly, the revised tally of ballots remains a 43 to 43 tie, and the Union has not received a majority of the valid ballots cast. We therefore certify the results.

Joseph Shelton. The Respondent's timely answer denied the material allegations of the complaint.

In Case 25–RC–10159, the Union filed a representation petition on December 13, 2002, seeking to represent certain employees of the Respondent.¹ A stipulated Board election was held on February 21, 2003. The tally of ballots disclosed that 43 votes were cast in favor of the Union and 43 votes were cast against the Union. Eight ballots were challenged by the Employer, including the ballots of alleged discriminatees, Joshua Tipton and Joseph Shelton. Also, the Union filed four objections to the election, but subsequently withdrew two. The remaining two union objections are based on the 8(a)(1) and (3) violations alleged in the complaint.

On May 21, 2003, the Board's Regional Director for Region 25 issued a report on challenged ballots and objections, recommendations to the Board, an order consolidating the representation case and the unfair labor practice case and an order directing a hearing. The Regional Director sustained all of the challenged ballots, except for those cast by the two alleged discriminatees in this case. Their challenged ballots are sufficient to affect the outcome of the election.

The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and facility in Owensboro, Kentucky, is engaged in the manufacture of automobile parts. During the 12-month period ending April 30, 2003, it sold and shipped, from its Owensboro facility goods valued in excess of \$50,000 directly to points located outside the State of Kentucky. The Respondent 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.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Joshua Tipton

1. Alleged unlawful interrogations and threats

In May 2002, Josh Tipton was referred to the Respondent by a temporary employment agency and began working as a temporary employee trimmer on the second shift. He reported to Donald Lightfoot, the second-shift supervisor.²

¹ The Union initially sought to organize the Respondent's Owensboro facility employees in December 2001. A Board election was held on January 18, 2002, in which 49 votes were cast against the Union and 43 votes were cast in favor of the Union.

² Tipton was not an employee at the time of the first union election.

On October 14, 2002, the Respondent hired Tipton as a full-time employee. He remained a trimmer on the second shift, but Larry Beatty became his supervisor. (Tr. 128.) Over the course of the next several weeks, he was also supervised by John Tollfree and Bob Cobb.³ (Tr. 128–129.)

In December 2002, employee Bob Griffiths obtained a signed union-authorization card from Tipton in the men's restroom. Tipton testified that later that day he was working alone at his machine, when his former supervisor, Don Lightfoot, walked up to him and asked if he "signed that union card." (Tr. 130.) Tipton stated that he responded, "Yes."⁴ (Tr. 130.) Tipton testified that Lightfoot then replied:

He said that—do you not know what you are doing? He said, do not know that Dan Stocks will shut this plant down if you sign this—I mean, if you vote for union, you know, because—he said let us see. Yeah. That is what he said. [Tr. 130–131.]

Tipton further testified that Lightfoot also told him that Dan Stocks, the Respondent's owner, owned another plant in Chicago and that he would shut down the Owensboro plant, move everything to Chicago and everybody would be out of a job. (Tr. 131.) Finally, Tipton recalled telling Lightfoot in that conversation about his union family background:

Yes. He asked—in that conversation when I was—when he was telling me about what Dan Stocks would do and stuff, I told him because he was trying, you know, to say that. I said, well, I will believe in unions because my father, both of my grandfathers were all in unions. You know, my grandfather was the President of the Steelworkers. My dad is the Vice President of the Inland Container union and—the Paper Workers. So, I told him, you know, that is probably what I was going to vote and he got irritated and walked away. [Tr. 131–132.]

Tipton testified that after this conversation, Lightfoot never carried on another conversation with him, except once when they happened to take a smoke break together. According to Tipton, Lightfoot again told him that Stocks would close the plant if the Union got in. (Tr. 132.)

Tipton further testified that in late December, he was helping his girlfriend, Rachael Roloson, also a West Irving employee, at machine number 14, when Lightfoot walked up and asked her whether she was going to vote for the Union. (Tr. 133, 159.) According to Tipton, Lightfoot told her, "[I]f you chose to vote, you know, yes for the union, then Dan Stocks will probably shut the plant down and move all this stuff to Chicago and that will be the end of the story. You know, you would be out of a job. That was just kind of his—every time I heard him talk about it, that is always the story he would lay on us." (Tr. 133.)

Supervisor Donald Lightfoot denied that he ever asked Tipton if he signed a union card. (Tr. 360.) Lightfoot also denied

³ Bob Cobb started working for the Respondent on December 9, 2002. (Tr. 235.) He became the second-shift supervisor a few days later. (Tr. 236.)

⁴ Tipton testified that he did not know how Lightfoot found out that he had signed a union-authorization card earlier that day.

that he told Tipton or any other employee that if the Union was voted in, Dan Stocks or anyone else would shut down the Owensboro plant and move it someplace else. (Tr. 361–362.) In addition, Lightfoot denied asking Rochelle Roloson how she was going to vote. (Tr. 361.) Lightfoot was a very credible witness. He answered questions calmly, directly, and precisely.

In contrast, Tipton's testimony was vague and exaggerated at times. For example, in an effort to convey the impression that it was not unusual for he and Lightfoot to engage in casual conversation on the shop floor, Tipton testified that he and Lightfoot had become "really good friends" while he was a temporary employee and that they would talk every day about "the girls in our lives, cars, just—he would come up and talk to me while we were working all the time." (Tr. 131.) When pressed on cross-examination to elaborate about their daily discussions he had difficulty providing specifics.

Q. What did you talk about?

A. He would tell me about, you know—like, I like cars and—would tell us about—you know, I just got the job. So, cars we were going to buy and he would tell me about his wife and I would tell him about my girlfriend, you know, just things like that. You know, we kind of talked personal because we were pretty good friends.

Q. What did he tell you about his wife? [Tr. 142.]

A. I do not know, just about—we would get—let us see, just about things that they would do. You know, like if they went down—went to eat like, on the weekend or something. They went out. He would tell me, you know, that he went to a bar and had a few drinks or something. You know what I mean. I do not know. We would just tell each other what we would do on the weekends and stuff and just talk like friends would talk. [Tr. 142–143.]

Lightfoot viewed his relationship with Tipton quite differently. He stated that he and Tipton only discussed work-related matters. He specifically denied that he ever talked to Tipton about what he did on weekends and stated that he never took any breaks with him or any other employees. (Tr. 359.) It was against his policy to do so. Notably, Lightfoot testified that he is not married, and that he has been divorced for over 5 years. He specifically denied that he ever told Tipton about his married life.

In addition, Lightfoot appeared to be a gentleman in his early forties. Tipton is 20 years old. (Tr. 143.) Watching both of them on the witness stand and listening to them testify, I had doubts that a "40s-something" supervisor would discuss his personal life with a 20-year-old temporary employee.

Moreover, the circumstances surrounding the purported interrogation make it less, than more, likely that any interrogation took place. First, the evidence shows that Lightfoot was not Tipton's supervisor in December 2002, when the purported interrogations took place and had not been Tipton's supervisor for almost 2 months. Tipton testified that once he became a permanent employee in October 2002, he was supervised by Larry Beatty, John Tollfree, and Bob Cobb. (Tr. 128.) He stated that Lightfoot might have supervised him for a week sometime after he became a permanent employee, but was not certain about that, and never stated that Lightfoot was his su-

ervisor at the time of the purported interrogation. Next, there is no evidence that Tipton was actively involved in the union organizing campaign or that he and Lightfoot had ever discussed unions at any time in the past. To the contrary, Tipton testified that he and Lightfoot had never before discussed unions. (Tr. 142.) Thus, there was no reason for Lightfoot to single out Tipton—of all employees—and question him about signing "that union card" and then warn him about what would happen if the Union was selected.

For these, and demeanor reasons, I credit Lightfoot's testimony denying that he was "good friends" with Tipton, denying that he took breaks with him, and denying that he discussed his personal life with Tipton. I also credit Lightfoot's testimony denying that he questioned Tipton about signing a union authorization card and that he told him that the Respondent's owner would close the Owensboro plant, move all the work to Chicago, and everyone would lose their jobs.

In addition, Tipton's testimony about the interrogation of employee Rachel Roloson is uncorroborated. The undisputed evidence shows that Roloson is still employed by the Respondent. (Tr. 361.) She was not called by the General Counsel or the Charging Party as a witness. Nor was she subpoenaed to testify. No explanation was given for her absence. I decline to draw an adverse inference from Roloson's failure to be called as a witness because I do not know whether she favors or disfavors the Union. However, I do weigh as part of my credibility determination of Tipton's testimony the failure of the General Counsel to call a potentially corroborating witness. See *C & S Distributors*, 321 NLRB 404 fn. 2 (1996.) Thus, in the absence of any corroborating testimony, and for demeanor reasons, I credit Lightfoot's testimony denying that he ever interrogated or questioned Rachel Roloson.

Based on my credibility findings above, there is no evidence to support the allegations that Supervisor Donald Lightfoot unlawfully questioned and threatened Joshua Tipton and Rachel Roloson in violation of Section 8(a)(1) of the Act. Accordingly, I shall recommend the dismissal of the allegations contained in paragraphs 5(a) and (b)⁵ of the complaint.

2. Alleged unlawful termination of Josh Tipton

a. Facts

The Respondent had an ongoing problem with graffiti on the men's restroom walls. The problem became worse in the summer of 2002. In July–August 2002, the Respondent posted a notice for a \$250 cash reward for information leading to the positive identification of the individual(s) responsible for the graffiti.⁶ (Tr. 230; R. Exh. 21.) No information was provided.

On July 31, someone drew graffiti and smeared feces on the men's restroom walls. (Tr. 232.) The Respondent immediately posted a notice for a \$1000 cash reward for information leading to the positive identification of the person(s) responsible for

⁵ A motion was granted to withdraw the allegations of subpart 5(c) of the complaint. (Tr. 165.)

⁶ During the same time that the reward was posted, the Respondent terminated the temporary employment of temporary employee Travis Clark because he was found drawing inappropriate pictures on a work table. (R. Exh. 29.)

vandalizing the men's restroom stalls earlier that day. (Tr. 232; R. Exh. 22.) No one came forward with the requested information.

A week or so later, racial slurs were written on the stalls of the men's restroom. The Respondent promptly issued a memo to all employees stating that unlawful discrimination and/or harassment of any kind would not be tolerated. It also asked for help in identifying the person(s) responsible for writing the racial slurs. (R. Exh. 23.) The frequency and content of the graffiti abated for a while after the memo was posted. (Tr. 234.)

In December 2002, new graffiti, more graphic and sexual in nature, began appearing in the men's restroom. (R. Exh. 24.) It also included inappropriate references to the Respondent's human resources generalist, Sonya Hendrix. In early January 2003, the Respondent began monitoring the men's restrooms.

On January 9, there were no reports of additional graffiti on the first shift. Before leaving for the day, Hendrix gave second-shift Supervisor Bob Cobb specific instructions to call her at home if new graffiti appeared so she could return to the plant to take a photo. (Tr. 238.) That night, new graffiti sexual in nature appeared in a men's restroom stall. Because of its graphic nature and specific reference to Hendrix, Cobb called General Manager Al Aquino, who told him not to call Hendrix and to paint over the graffiti. When Hendrix came to work the next morning, she was told about the new graffiti and became extremely upset with Cobb for not following her instructions. She directed Cobb to make a drawing of the graffiti which he did. (R. Exh. 24.)

Hendrix suspected a second-shift employee, James Matchem, might be responsible for the recent graffiti. She and Matchem had several recent disagreements. (Tr. 330.) She told Cobb to arrange the breaks on the second shift so that Cobb could check the men's restroom before and after Matchem took his breaks.

The second shift on January 10 started at 2 p.m., Matchem's first break was scheduled for 4 p.m. One hour before (3 p.m.), Cobb checked the men's restroom stalls and found no graffiti. There are two versions of what occurred next.

Tipton testified that he started the shift and worked about 30 minutes before going to the men's restroom where he used a urinal. (Tr. 134.) He stated that he did not see anyone else in the restroom, but he thought he heard a few people in a connecting changing area.⁷ (Tr. 135-136.) He returned to his machine and continued working for another 20 minutes. (Tr. 137.) At that point, Bob Cobb approached him asking if he had a black marker.⁸ Tipton told Cobb that he did not have a marker on him. He looked on his table and found a marker behind some books. (Tr. 137.) He gave the marker to Cobb and returned to work.

⁷ Tipton then stated that he could not remember if he actually heard anyone and finally stated, "I do not think I did." (Tr. 136.)

⁸ The credible evidence shows that black markers are used by trimmers to mark parts cut by the machine operators. It also shows that these markers typically are found on the work floor and worktable. (Tr. 162.)

Cobb testified that at 3:45 p.m., he entered the restroom. (Tr. 330.) He first checked all the stalls for graffiti and found none. As he was washing his hands, talking to Larry Beatty, Tipton entered the room, walked into the second stall, and closed the door.⁹ (Tr. 331.) Cobb stated that there were two other people walking through the restroom from the breakroom. (Tr. 345.) He and Beatty waited until they left, then Beatty left, and finally Cobb left the room, leaving Tipton behind.

For demeanor reasons, I credit Cobb's testimony that he saw Tipton enter the second stall in the men's restroom.

Cobb stated that he came out of the restroom onto the shop floor, turned left, and walked down between two machines. He walked back up the floor, around the back of the building, back down the floor, and back to the men's restroom. (Tr. 332-333.) He could not recall whether he stopped to talk to anyone. He estimated that the walk took 2 minutes (120 seconds). Cobb stated that he returned to the men's restroom because it was close to 4 p.m. when Matchem was going on break and he wanted to check the stalls one more time. (Tr. 334.)

Cobb entered the restroom and began checking the stalls. He testified that when he looked in the second stall he saw graffiti that had not been there before Tipton entered the restroom. He immediately reported the situation to General Manager Aquino, who instructed him to go back out on the floor to see if he could find anyone who had a black marker. (Tr. 335.) Because he had seen Tipton go into the second stall, he started with him. Cobb testified that when he asked Tipton if he had a black marker, "Josh reached into his pocket and got his hand about halfway into his pocket and looked at me and then said, no. I don't have one." (Tr. 336.) He asked Tipton if he was sure, and Tipton looked around his table, felt around his bucket, and found a marker in his bucket. Cobb stated that he walked the shop floor asking each trimmer and operator if they had a black pen, and checked everyone's desk. Tipton's marker was the only one he could find on the floor at the time. (Tr. 337.)

In the meantime, Aquino went into the men's restroom and took a photo of the graffiti. After Cobb canvassed the shop floor, he reported to Aquino that he had found a black marker on Tipton. Aquino gave Cobb the photo and told him to meet with Hendrix to discuss the incident. (Tr. 337.)

Hendrix and Cobb compared the handwriting on Tipton's employment application to the handwriting on the graffiti. They concluded that it was similar. (Tr. 338.) Cobb was instructed to bring Tipton to the training room. Cobb asked Tipton to accompany him to the training room, but he did not tell him why.

Hendrix, Cobb, and Tipton met in the training room, where Hendrix confronted Tipton accusing him of drawing the graffiti. Cobb tape recorded the meeting. (Tr. 339.) Hendrix showed Tipton a camcorder image of the graffiti. Tipton denied drawing it. (Tr. 138.) According to Cobb, Hendrix told Tipton that drawing graffiti on company walls was grounds for discharge. Tipton insisted that he was not responsible. (Tr. 339.) He asked if he was going to be terminated, and Hendrix told him that he would be suspended until the following Mon-

⁹ According to Cobb's un rebutted testimony, on January 10, 2003, Beatty was no longer a supervisor. (Tr. 343, 347.)

day, January 13, while she further investigated the matter. Cobb took Tipton up to the front office and called his mother to come pick him up.

On Monday, January 13, Hendrix phoned Tipton around 1 p.m. telling him that he should not report to work because she had not completed her investigation. (Tr. 257–258.) Tipton came to work anyway and was sent home. On January 16, Hendrix sent Tipton a letter telling him that he was still suspended until further notice. (R. Exh. 27.)

In the meantime, the Respondent hired a certified graphoanalyst, Ada Meyers, to analyze the hand printing that accompanied the graffiti. (Tr. 267; R. Exh. 28.) Meyers was given handwriting samples of four second-shift employees for comparisons: James Matchem, who Hendrix initially believed was drawing the graffiti; employee Robert Griffiths; Maintenance Manager Mike Welsh; and Josh Tipton. Meyers concluded that Matchem, Griffith, and Welch probably were not the author of the questioned hand printing. Meyers also concluded that there was a possibility that Tipton was the author of the graffiti that was written in the stall on January 10.¹⁰ She recommended that “[a]dditional hand printing should be obtained from the author of K-4 (Tipton) with printing in the matching case as on the questioned.” Hendrix did not follow up on Meyer’s recommendation.

Hendrix decided to terminate Tipton. She testified that her decision was based on the fact that Tipton was seen going into the stall in which the graffiti was found, he had a black marker at his worktable, and that Meyer’s concluded that it was a possibility that Tipton drew the graffiti. By letter, dated January 30, 2003, she notified Tipton of her decision. (R. Exh. 33.)

b. Analysis and findings

The complaint alleges that Tipton was discharged because he supported the Union. The General Counsel argues that after defeating the Union in the first election by a 6-vote margin, the Respondent anticipated a close second election, and therefore it sought to eliminate a potential vote for the Union by discharging Tipton.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that union activity and/or support was a motivating factor in the employer’s decision.¹¹ Specifically, the General Counsel must establish union activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that the reasons for its decision

were not pretextual or that it would have made the same decision, even in the absence of protected concerted activity. *T & J Trucking Co.*, 316 NLRB 771 (1995).

Although there is no evidence that Tipton was actively engaged in the union organizing campaign, the undisputed evidence shows that Tipton signed a union authorization card. It also shows that his family members were union officers and/or officials and, as a result, he supported the Union.

There is no credible evidence, however, that the Respondent or any of its managers and supervisors had knowledge that Tipton signed a union authorization card, that he supported the Union, or that he had family ties with organized labor. In the absence of any credible evidence showing that the Respondent knew that Tipton supported the Union, the General Counsel has failed to satisfy its initial evidentiary burden under *Wright Line*. Accordingly, I shall recommend the dismissal of paragraph 6(a) of the complaint.

B. Joe Shelton

1. Facts

On October 15, 2000, Joe Shelton began working for the Respondent as a second-shift trimmer. Five months later, he was promoted to X-ray technician.

Shelton became an active union supporter in the first organizing campaign. He distributed union authorization cards and union buttons to other employees and regularly wore union paraphernalia at work. He handbilled outside the Respondent’s facility and asked questions during antiunion meetings conducted by Hendrix and her boss, Controller Greg Byars.

In January 2002, Shelton questioned Hendrix on the shop floor about a request he made to transfer to the first shift. He opined that the Respondent’s failure to keep him apprised of the status of his transfer had caused him to support the Union.¹² In a later conversation with Hendrix, Shelton told her that he was knowledgeable about unions because his father was a union business agent. The evidence shows that he also had a one-to-one conversation with Company President Adrian Walsh during which Shelton answered Walsh’s questions about what the employees hoped to obtain by unionizing. (Tr. 92.) After the first election, Shelton also told Hendrix that he and another employee had called the Union because they were upset about insurance coverage. (Tr. 228.)

Shelton was equally active in the second organizing campaign. In December 2002, he distributed union authorization cards to the employees and handbilled outside the Respondent’s facility.

a. The attendance policy

The Respondent has a written attendance policy, which states, in relevant part:

5. An employee is required to call in any absence as explained elsewhere in this handbook. Each unreported absence (no call + no show) will be counted as two (2) points. Three (3) days of consecutive unreported absences will be considered a voluntary resignation from the Company. [R. Exh. 1.]

¹⁰ A photo of another graffiti writing was also given to Meyer as an example. None of the four employees was linked to that example.

¹¹ In *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

¹² Shelton was transferred to the first shift in the spring of 2002.

Employees are expected to call-in at least 30 minutes before the start of their shift to report an absence or delayed arrival. In an effort to ensure accurate compliance with this policy, the Respondent established a “400 Extension” for the employees to call.

On April 15, 2002, the Respondent posted a memo to “All Employees” which stated:

We have now set up a voice mailbox for employees to call in and report off to. The extension to dial will be EXTENSION 400. On your message; leave your name, the date you will be out, supervisor’s name, and shift. Please remember that you must report off at least 30 minutes prior to your shift. If not, per the handbook, it is considered No Call No Show. We will use the time and date stamp on the voice message system as your report off time. If you have any questions please see your immediate supervisor.

The only number you can call and report to is this message box, (683-9001 ext 400)[.] If you call into a supervisor you will be transferred to the mail box!!! [R. Exh. 2.]

On April 25, the Respondent held training sessions to explain to the employees how to use the 400 extension system. (Tr. 175.) Shelton attended the second-shift training session. He subsequently followed the call 400 extension policy on several occasions (e.g., 7/18/02, 7/22/02, 8/28/02, 9/21/02, 10/4/02, 10/15/02, and 12/13–16/02). (Tr. 206–208; R. Exh. 10.) By January 20, 2003, Shelton had accumulated 1.5 points for absenteeism.¹³

b. January 22–24, 2003

During the week of January 19–23, 2003, the Respondent began holding group antiunion employee meetings in connection with the Board election that was scheduled to be held on February 21, 2003. (Tr. 281–282.)

On Wednesday, January 22, Shelton woke up ill and was unable to go to work. Shelton testified that his home telephone had been disconnected, so his wife drove him to a nearby pay phone to call in sick.¹⁴ (Tr. 95.) Shelton further testified that he called the 400 extension at “5:20-ish a.m.” and left his name, shift, and that he would not be reporting to work because he was ill. He also reported that he was going to see a doctor that afternoon. (Tr. 95–96, 113.) Shelton’s doctor excused him from work until Monday, January 27. (GC Exh. 4.)

Shelton testified that on Thursday, January 23, his home phone was working so he called the 400 extension from home at 5:15 am to report that he was sick, that he had been to the doctor, and that he would be off until Monday, January 27. (Tr. 98.) He testified that he also called Sonya Hendrix’s extension in the afternoon leaving a voice message that he had a doctor’s excuse and that he would be off until January 27. Shelton stated that it is his practice never to leave a voice mail message on the 400 extension without making a second call to confirm receipt of the first call and voice message. (Tr. 100.)

¹³ Contrary to the Respondent’s assertions, there is no evidence that any of these points resulted from failing to call the 400 extension.

¹⁴ Shelton’s wife corroborated his testimony that on January 22, he was ill and that their home phone was not working so she drove him to a pay phone before 5:30 a.m. (Tr. 119–120.)

Supervisor Donald Lightfoot was working the first shift the week of January 19, 2003. Lightfoot testified that he routinely checks the 400 extension at 5:30 a.m. to determine whether anyone on his shift has left a message. He stated that he checked the 400 extension for messages at 5:30 a.m. on January 22 and 23, but there was no message from Joe Shelton. (Tr. 363–365, 369.) He checked the 400 extension again a little later, but there was no call from Shelton. (Tr. 366.) Lightfoot filled out an attendance report on both days showing that Shelton did not call in. (R. Exhs. 4 and 5.)

On January 23, Lightfoot reported Shelton’s absences to Human Resources Specialist Sonya Hendrix, who determined that Shelton had accumulated 5.5 points, which warranted a 3-day working suspension.¹⁵ (Tr. 183.) Anticipating that Shelton would return to work on January 24, Hendrix gave Lightfoot a written suspension notice to give to Shelton when he came to work on January 24. (Tr. 368, 186; R. Exh. 6.)

In the meantime, on January 23, Hendrix checked her own voice messages and found a message left by Shelton. (Tr. 193.) She testified she did not listen to the entire message, but instead saved the message after hearing the part which identified the caller’s name, his shift, and that he was calling from a pay phone because his home phone did not work. (Tr. 193, 225.)¹⁶

On Friday, January 24, Shelton did not report to work and did not call the 400 extension, so Lightfoot returned the suspension warning to Hendrix.¹⁷ (Tr. 369.) Hendrix testified that she believed that Shelton had voluntarily quit so she had hired a replacement for him on January 24.¹⁸ (Tr. 197, 288.)

Instead, on January 24, Shelton rode with his wife to the plant to pick up his paycheck. He waited in the car, while his wife went into the office to ask for his check. (Tr. 101–102.) According to Mrs. Shelton, her husband stayed in the car because he was still sick, running a fever, and it was very cold. (Tr. 121.) When she entered the front office, a gentleman, identified at trial as Controller Greg Byars, handed her the paycheck and asked, “[H]ow Joe was doing.” (Tr. 122.) She told him that he went to the doctor and had a doctor’s excuse. Mrs. Shelton stated that Byars told her to have Shelton bring the doctor’s note when he returned to work.

c. January 27–February 4, 2003

On Monday, January 27, Shelton did not return to work. He testified that he called the 400 extension to report that he still was not feeling well and that he been seen by the doctor again. (Tr. 102.) He stated that the doctor wanted to do more tests so he extended Shelton’s excused absence to Monday, February 3.

¹⁵ Hendrix testified that a working suspension does not result in actual lost workdays. Rather, it serves as a final warning to the employee that another infraction could result in discharge. (Tr. 186.)

¹⁶ Hendrix testified that she did not listen to the entire message, but instead saved it. She later testified that she listened to the entire message “sometime during the week that it was left.” (Tr. 193, 223.)

¹⁷ Lightfoot apparently did not complete an attendance report reflecting a no-call/no-show on January 24. (Tr. 294, 300.)

¹⁸ Although Hendrix testified that she thought that Shelton had voluntarily quit on January 24, she nevertheless saved and kept the January 23 voice message, and another voice message of January 30, for at least 2 months, “because I figured I would get an unfair labor practice.” (Tr. 306, 314.)

(GC Exh. 14.) Shelton testified that in between January 27 and February 3, he tried to contact Hendrix at least three times and left one voice message in her voice mail on Wednesday, January 29. (Tr. 105–106.) He also stated that he left a voice message on the 400 extension on the morning of January 27, 28, and 29.

Hendrix was out of the plant on January 27. She testified that when she returned on January 28, Lightfoot told her that Shelton had called the 400 extension on January 27 and 28.¹⁹ (Tr. 195–196, 313.) She stated that she “wondered what he was doing,” but did not contact him to clarify matters. (Tr. 299–300.) Instead, she applied the points and terminated his employment. (Tr. 299.) Hendrix testified that the fact that Shelton had properly called in on January 27 and 28, had no impact on her decision to terminate his employment because he had “pointed out” on January 24. (Tr. 196.) However, she also testified that because he called the 400 extension on January 27 and 28, she felt it was necessary to send him a certified mail letter on January 28 telling him that he was terminated, effective January 27, 2003. (Tr. 197–198; R. Exh. 7.)

On Thursday, January 30, Shelton left a message on Hendrix’ voice mail indicating he had another doctor’s appointment and would be off work until the following Monday. (Tr. 223.) Hendrix testified that she saved the message without listening to it because she thought it was the original message of January 23. (Tr. 291–293.) She stated that she did not listen to the January 30 voice message until after an unfair labor practice charge had been filed in March 2003. (Tr. 224.)

On Monday, February 3, Shelton returned to work. He testified that when he got to work Supervisor Lightfoot told him that Greg Byars wanted to see him, but that Byars had not arrived. Shelton further testified he attempted to give Lightfoot his doctor’s statement, but Lightfoot would not take them. He testified that he worked for approximately 30 minutes at which time Lightfoot took him to the office of General Manager Al Aquino. (Tr. 108–109.) Aquino and Lightfoot discussed the fact that Byars had not arrived, and therefore told Shelton to go home and call Hendrix later in the day. (Tr. 109.)

Lightfoot testified that Shelton was not allowed to work when he arrived on Monday, February 3. According to Lightfoot, he told Shelton that he needed to leave and contact human resources. He did not deny taking Shelton to Aquino’s office to wait for Greg Byars nor did Lightfoot deny that he and Aquino sent Lightfoot home with instructions to call Hendrix later that day. Also, Lightfoot admitted that Shelton asked him if he wanted to see the doctor’s notes, but Lightfoot told him to show them to human resources. (Tr. 370.)

Shelton testified that after he got home, he twice called Hendrix and left messages on her voice mail, but she never returned his calls. (Tr. 109.) Hendrix denied that she received any calls from Shelton. (Tr. 200.)

On February 4, Shelton picked up his January 28 termination letter from the U.S. Post Office and learned for the first time

¹⁹ Hendrix testified that Lightfoot did not complete any attendance reports for Shelton on January 27 and 28, because Lightfoot thought that Shelton had quit. (Tr. 227.)

that he had been terminated on January 27, for failing to properly report his absence. (GC Exh. 9.)

2. Credibility determinations

Shelton’s testimony that he called the 400 extension on January 22 and 23 is unpersuasive. First, it was rebutted by the credible testimony of Supervisor Lightfoot, who stated that he checked the 400 extension voice messages twice on both days, and did not find a voice message from Shelton.

Next, Shelton’s failure to follow his own practice on January 22 makes it more, than less, likely that he did not call the 400 extension that morning. He testified that he never leaves a voice message on the 400 extension without following up with a second phone call later in the day to confirm that the first voice message was received and to offer more details if needed. (Tr. 100.) Shelton admitted that he did not follow his practice on January 22.²⁰ When asked why, he stated, “[B]ecause I did not want to get back out to make a call and I had not gotten my phone turned back on until late afternoon.” (Tr. 101.) His explanation was unconvincing. The evidence shows that Shelton had gone to the doctor’s office at 1 p.m. that afternoon, so conceivably he could have called from the doctor’s office or on the way home from the doctor’s office. He also could have called later that afternoon when his home phone was working again. (Tr. 101.) The evidence supports a reasonable inference that Shelton did make the second call because he never made the first.

In addition, Shelton’s testimony that he called in twice on January 23 was vague and contradictory. (Tr. 98–101.) He stated that on January 23, he called the 400 extension around 5:15 a.m. and that he called again “[i]n the afternoon” from his home phone stating that he “was off work, I had a Doctor’s excuse and gave the amount of time that I was off work, according to that.” (Tr. 98.) When asked to be more specific about the afternoon phone call, he contradicted himself by testifying that he “tried to call in, at around 10:00, I think.” (Tr. 100.)

Finally, Shelton’s testimony concerning the January 23 voice message was contradicted by Respondent’s Exhibit 35, a transcription of the voice message he left on Sonya Hendrix’ voice mail on January 23, 2003, at 10:57 a.m.,²¹ which states:

This is Joe Shelton on first shift. I’m gonna be off until Monday [1/27/]. I would have give you a call this morning but since my phone service is out that’s pretty unlikely that that would happen so I’ll probably bring my paperwork and stuff by Friday or have it brought by Friday to pick up my paycheck.

Thank you.

²⁰ Nor does the evidence show that Shelton made “followup” phone calls on January 27 or 28.

²¹ The voice message tape was played in open court to verify its content, date, and time. It was properly authenticated as the voice of Joe Shelton and admitted over the objection of the General Counsel. The content of R. Exh. 35 substantially comports with the contents of the actual tape. (Tr. 190–192.) The General Counsel did not call Shelton on rebuttal to dispute that this was his voice or the message that he left on Hendrix’ voice mail.

Synthetic Voice: "January 23 at 10:57."

Thus, contrary to his testimony that his home phone was working again in the late afternoon of January 22, his voice mail message states that his home phone was not working on January 23. Further, and more importantly, the voice message does not mention that he called the 400 extension earlier that day. Rather, Shelton's message explained that he did not "call this morning." Finally, if the purpose of the second phone call was to confirm that the first phone message was received, it is reasonable to expect that Shelton at least would have mentioned the first call in the second message to alert Hendrix that he called earlier and to let her know that he was calling to confirm receipt of his first phone call. Instead, the content of the second phone call as reflected above is what one would expect in a first phone call to the 400 extension.

For these, and demeanor reasons, I do not credit Shelton's testimony that he called the 400 extension on January 22 and 23, 2003.

Nor do I credit Shelton's testimony that he worked approximately 30 minutes on February 3. Here too Lightfoot, a more credible witness, denied that he allowed Shelton to start work. In addition, the Respondent's timesheets for February 3 do not reflect that Shelton punched in. (R. Exh. 37.) However, Lightfoot did not rebut Shelton's testimony that he was made to wait outside of Aquino's office while Lightfoot and Aquino decided on what to do with Shelton. Nor did he rebut Shelton's testimony that Shelton was told to go home and call Hendrix later. General Manager Al Aquino was not called as a witness at trial. Nor did Respondent's counsel explain why. The failure to call a witness whose testimony would reasonably be presumed to favor the Respondent warrants an adverse inference that had he been called as a witness his testimony would not have supported the Respondent's position. I find an adverse inference is warranted. Accordingly, I credit the aspect of Shelton's un rebutted testimony that on February 3, he was told by Aquino and Lightfoot to go home and call Hendrix later. I also credit Shelton's testimony that he attempted to give Lightfoot the doctor's notes, which was corroborated by Lightfoot.

Sonya Hendrix' testimony that she and Supervisor Don Lightfoot thought Joe Shelton had voluntarily quit on January 24 is disingenuous and unpersuasive. First, the undisputed evidence shows that on January 23, Hendrix received and listened to a voice message from Shelton on her voice mail that (1) identified the caller and his shift, (2) explained that he would be off until Monday (January 27, 2003), and (3) told her that his phone service was out. Although Hendrix testified that she did not listen to the entire message before saving it, she admitted that she heard the part which identified the caller's name, his shift, and that he was calling from a pay phone because his home phone did not work. (Tr. 190, 193, 225, 288–289.) However, in order for Hendrix to have heard the part of the message stating that Shelton's phone service was out, she also had to listen to the part stating that he would be returning to work on Monday, January 27. According to Respondent's Exhibit 35, the transcription of the January 23 voice message states:

This is Joe Shelton on first shift. I'm gonna be off until Monday [1/27]. I would have give you a call this morning But since my phone service is out that's pretty. . . .

One could not reasonably infer from that message that Shelton had quit or was planning on quitting. Moreover, that Shelton did not show up for work on Friday, January 24, should not have come as a surprise because the above-voice message clearly states that he would be off until Monday, January 27.

In addition, Hendrix' testimony that Supervisor Don Lightfoot also thought that Shelton had quit is unsupported by the evidence. Hendrix testified that when Shelton did not return to work on January 24, Lightfoot "assumed he had quit." (Tr. 187, 227.) She further testified that on January 28, when Lightfoot told her that Shelton had called the 400 extension on January 27 and 28, he told her, "[W]ell, I thought he quit." (Tr. 195.)

Lightfoot testified at trial after Hendrix. He never once, however, stated that he thought that Shelton had quit. Rather, Lightfoot testified he and Shelton got along great and that "I was worried because he missed those two days and this—" (Tr. 367.) Although Lightfoot explained that he returned the working suspension form to Hendrix because Shelton did not show up for work, he did not state that he thought that Shelton had quit or that he told Hendrix that he thought Shelton had quit. (Tr. 367–370.) The failure of Lightfoot to corroborate Hendrix' testimony that he told her that he believed Shelton had quit makes her testimony on this point suspect.

For these, and demeanor reasons, I do not credit Hendrix' testimony that she thought Shelton had quit when he did not go to work on January 24.

Finally, I credit Shelton's testimony that he twice called and left voice messages for Hendrix on February 3, but that she did not return his calls. The undisputed evidence shows that at no time did Hendrix contact or attempt to contact Shelton by telephone to confirm that he was sick or clarify when he was going to return to work even though she admitted she was unsure of his circumstances. (Tr. 298–299.) Her failure to return Shelton's February 3 telephone calls is consistent with her conduct of not having any direct contact with him throughout the events surrounding his termination.

3. Analysis and findings

The complaint alleges that on January 27, 2003, the Respondent violated Section 8(a)(3) of the Act by discharging Joe Shelton because of his union activity. The General Counsel asserts that the Respondent anticipated that the second election, which was less than a month away, would be close and that it sought to eliminate potential votes for the Union. The Respondent asserts that Shelton was terminated in accordance with its established attendance policy. It further asserts that Shelton, like several other employees, was terminated for failing to call the 400 extension on January 22, 23, and 24, 2003. The *Wright Line* analysis is applicable.

a. *The General Counsel's evidence*

The undisputed evidence shows that Joe Shelton was an active and open union supporter that was known to the Respondent. The undisputed evidence also shows that his union activ-

ity was known to Sonya Hendrix, who terminated him. Shelton's un rebutted testimony shows that he told Hendrix that he contacted the Union for purposes of organizing the Respondent's employees because he was displeased with many of the Respondent's policies.

Shelton was not terminated on January 24 for failing to call the 400 extension on January 22–24. Instead, Hendrix waited until Tuesday, January 28. The evidence shows that at no time did Hendrix attempt to contact Shelton, even though there were ample opportunities and ample reasons for her to do so.

First, Hendrix knew from listening to Shelton's detailed phone message on January 23, that his home phone was out of order, that he would not return to work until Monday, January 27, and that he had a doctor's note excusing him from work for those days. In addition, the evidence supports a reasonable inference that Hendrix' boss, Controller Greg Byars knew that Shelton was sick because according to the un rebutted testimony of Shelton's wife, Byars inquired about Shelton's health when she picked up his paycheck on January 24. At that time, Shelton's wife told Byars that her husband was still ill, that he had a doctor's note and that he hoped to return to work on Monday, January 27. Byars reminded her to have Shelton bring in his doctor's note when he returned to work.

Next, although Shelton did not report to work on January 27 and 28, he called the 400 extension to report his absences for those days. Hendrix admitted that she did not know what was going on when Supervisor Lightfoot informed her on January 28 that Shelton had called the 400 extension on January 27 and 28. Instead of phoning Shelton to confirm his return date or to clarify his status, Hendrix decided to terminate Shelton retroactively to January 27, and to inform him of the decision by certified letter.

In contrast, the undisputed evidence shows that two other employees, who failed to call the 400 extension, Brian Meadows and Greg Devine,²² were terminated, but before doing so Hendrix called them to discuss the reasons for their absences and their failure to call the 400 extension. (GC Exh. 12, p. 2; R. Exh. 11(a).) With respect to Brian Meadows, Hendrix admitted that she testified during Meadows' unemployment insurance hearing that she called him "and left him a message for him to come in and speak to her to see if anything could be done concerning this situation due to the reason he was last absent."²³ (Tr. 296; GC Exh. 12.) She then contradicted herself by denying that she called Meadows to see if anything could be done regarding Meadows' situation. Hendrix stated that had she actually talked with Meadows she would have explained to him that his doctor's note would not be accepted. (Tr. 297.) I find Hendrix' post hoc explanation to be contradictory, self-serving, and unpersuasive. Moreover, the point is that she called Meadows to discuss his circumstances which is an accommodation that was not extended to Shelton.

With respect to Greg Devine, the evidence shows that Hendrix called him twice prior to terminating him. The first

²² The evidence shows that Devine was terminated on April 25, 2003. (R. Exh. 11.)

²³ Meadows received the phone message, did not return the call, and was terminated.

time she called him she got no answer. She called him again later the same day to tell him that he was being terminated for not leaving a message on the 400 extension with a specific return date. (R. Exh. 11(a).) There is no evidence that Devine offered Hendrix a doctor's note.

Thus, the evidence discloses that on at least two other occasions involving terminations for not calling the 400 extension, Hendrix called and left a message and called and spoke to the employee before terminating him. In the present case, Hendrix made no attempt to call Shelton before or after his termination. This evidence, coupled with the fact that Shelton was the leading union advocate, and the fact that the second union election was less than a month away, supports a reasonable inference that Hendrix terminated him without giving him the opportunity to submit his doctor's notes and without giving him the opportunity to explain his absences because of his union activity and, in addition, because he was a sure vote for the Union.

Accordingly, I find that the General Counsel has satisfied his *Wright Line* evidentiary burden.

b. The Respondent's evidence

The Respondent argues, and the credible evidence shows, that Shelton did not call the 400 extension to report his absences on January 22, 23, and 24; that calling the supervisor's extension or the human resources generalist's extension does not satisfy the requirement of calling the 400 extension; and that, absent a doctor's note, Shelton had accumulated enough points to warrant termination under the Respondent's attendance policy. The evidence also shows that the Respondent has disciplined other employees for failing to call the 400 extension. (Tr. 209–221; R. Exh. 12–20.)

Regarding the termination of Brian Meadows, Hendrix testified that the only reason she called him and left a message was because Meadows tried to give his supervisor a doctor's note and the supervisor, instead of taking the doctor's note, told Meadows that Hendrix would call him. Hendrix further testified that she would not have accepted his doctor's note, even if she had spoken to him. (Tr. 296–297.) However, regarding Greg Devine, Hendrix did not explain why she called him twice before terminating him. (R. Exh. 11(a), pp. 4 and 5.)

The evidence shows that Hendrix knew from the January 23 voice message and Controller Greg Byars knew from talking to Shelton's wife, that Shelton had a doctor's note excusing his absence. Unlike Meadows, however, Hendrix did not call Shelton to discuss his circumstance before terminating him. Significantly, unlike Meadows, Hendrix testified that had Shelton turned in these doctor's notes, she would have accepted them:

Q. On February 3, did Joe Shelton mail to you or fax to you or transmit to you, in any way, any medical or other statements concerning his absences prior to Monday, February 3?

A. No.

Q. Would you have accepted those or would you have looked at them had he offered them?

A. Yeah. [Tr. 201.]

The un rebutted evidence shows that on January 24, Byars told Shelton's wife that Shelton should bring his doctor's note when

he returns to work and that Shelton unsuccessfully attempted to give Lightfoot the doctor's notes when he returned to work on February 3. The credible evidence also shows that Hendrix failed to return Shelton's phone calls on February 3, even though she knew he had the doctor's notes and stated at trial that she was willing to accept them.²⁴

Thus, based on all of the evidence viewed as a whole, I find Joseph Shelton was not treated the same as other individuals who were terminated for failing to call the 400 extension. I further find that the Respondent has not persuasively shown that Joseph Shelton would have been terminated, even in the absence of his union activity.

Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act on January 27, 2003, by terminating the employment of Joseph Shelton.

C. Challenged Ballots and Objections to the Conduct of Election

Based on the findings above, the portion of Objection 1 pertaining to the discharge of Joseph Shelton is sustained and the portion of Objection 1 pertaining to Joshua Tipton is overruled.

Based on the findings above, the challenge to the ballot of Joshua Tipton is sustained and his ballot should not be opened or counted. In contrast, the challenge to the ballot of Joseph Shelton is overruled and his ballot should be opened and counted. The representation case is severed and remanded to the Regional Director to open and count Joseph Shelton's ballot

²⁴ There is no evidence, nor did the Respondent argue in its posthearing brief, that Shelton would have been terminated, like Meadows, even if he turned in the doctor's notes.

and to prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

CONCLUSIONS OF LAW

1. The 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. The Respondent violated Section 8(a)(3) of the Act by terminating the employment of Joseph Shelton.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Charging Party Union's Objection 1 is sustained and constitutes objectionable conduct affecting the results of the representational election held on February 21, 2003.

REMEDY

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.

The Respondent having discriminatorily discharged employee Joseph Shelton, it must offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and make him 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).

[Recommended Order omitted from publication.]