Zimmerman Plumbing and Heating Co., Inc. *and* Local 7, Sheet Metal Workers, International Association, AFL–CIO. Cases 7–CA–37323, 7–CA–37513, 7–CA–37599(2), 7–CA–37599(3), 7–CA–37599(4), 7–CA–37755, and 7–CA–37868

November 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 5, 1997, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision. The Charging Party filed a statement adopting the General Counsel's brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

The Respondent has excepted to the judge's supervisory and agency findings. Contrary to the Respondent, we agree with the judge's conclusion, for the reasons stated by him, that Robert Link is a statutory supervisor within the meaning of Section 2(11) of the Act. We also agree with the judge that Foremen Wayne Ware, Harold Bartholomew, Roger Wedig, and Mike Dennis had apparent authority to act on behalf of management and that they, therefore, acted as agents of the Respondent at all relevant times. Accordingly, we find it unnecessary to rely on his determination that they are also supervisors.[4]

It is well established that apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp*., 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is whether, under all the circumstances, the employees ''would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management.'' *Waterbed World*, 286 NLRB 425, 426–427 (1987).

Here, the judge found, and the record evidence supports, that these four individuals were the senior foremen on virtually all of the Respondent's projects, especially the major ones. As the senior foremen, they regularly exercised apparent and actual authority whenever they independently acted as the Respondent's spokesmen on the jobsites. As a part of their daily responsibilities, they acted as the conduits for relaying and enforcing the Respondent's decisions, directions, policies and views. All four, along with Link, participated in the Respondent's monthly management meetings known as the ''Circle Meetings'' and thus, were privy to the Respondent's policies and objectives. Therefore, we agree with the judge that given the position in which the Respondent had placed them, it was reasonable for the rank-and-file employees to believe that these foremen were reflecting company policy and acting for management when they engaged in the conduct found to be unlawful. *Victor's Cafe 52*, 321 NLRB 504, 513 (1996); *Great American Products*, 312 NLRB 962 (1993).

[1] 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.

In adopting the judge's findings that the Respondent violated Sec. 8(a)(1) by more harshly applying its absence rules to employees because of their union activities, we find it unnecessary to rely on the judge's references to the Americans With Disabilities Act and ''laws relating to family leave concepts'' in its application of the absence rules to Tim O'Brien and Joe Houseman. We find that the record evidence establishing the Respondent's unlawful motive for changing the way it administered the absence rules to all employees is sufficient to support the violations found by the judge, regardless of the particular circumstances pertaining to O'Brien and Houseman.

[2] In adopting the judge's conclusion that the Respondent created the impression of surveillance of employee Tim O'Brien's union activities as a result of Owner Mahoney's remark that he had heard O'Brien had been approached by the Union, we note that at no time during Mahoney's conversations with O'Brien did he give any type of assurance that he was not concerned or bothered about O'Brien's activities or that no retaliation by management would be directed towards him. We find no merit in the Respondent's contention that it was concerned only with the prospect that O'Brien would leave the Respondent's employ and that its statements to O'Brien were solely reflective of this concern and therefore not coercive.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] Member Higgins would adopt the judge's findings that all five of the Respondent's foremen were supervisors. He does not pass on whether they were agents under the theory of ''apparent authority.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Zimmerman Plumbing and Heating Co., Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

''(a) Within 14 days from the date of this Order, offer Andy Lytle, Todd O'Brien, and Steve Stone full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

''(b) Make Andy Lytle, Todd O'Brien, and Steve Stone whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.''

2. Substitute the following for relettered paragraph 2(g).

''(g) Within 14 days after service by the Region, post at Kalamazoo facilities and all current jobsites copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 1995.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by creating the impression that employees' union activities are under surveillance; instructing employees to consult with management before joining a union; implying that joining the union would result in unfavorable treatment compared to be benefits available to those who stay with the company; threatening employees with closure of the business, denying employees the privilege of bringing their tools home at night; limiting employees normal access to the onsite job trailer; and photographing its employees' union activities.

WE WILL NOT discriminatorily change the terms and working conditions of employees by transferring and isolating together known union organizers.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act, by promulgating an overly broad no solicitation, rule a more strict absenteeism policy and maintaining and enforcing a rule prohibiting employees from placing any union stickers on its hardhats or firm wearing their own hardhats.

WE WILL NOT discriminatorily issue warnings, suspend, or discharge employees for alleged violations of a more strictly enforced attendance policy and their display of union stickers on their hardhats, because of their engaging in union or other protected concerted activity.

WE WILL NOT discriminatorily remove employees from the apprenticeship program and otherwise terminate any employee because of their engaging in union or other protected concerted activities.

WE WILL NOT in any like or related manner infer with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Andy Lytle, Todd O'Brien, and Steve Stone full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Andy Lytle, Todd O'Brien, and Steve Stone whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order rescind the no-solicitation, no-hardhat sticker rule and rescind the attendance related disciplinary warning letters to Joe Houseman, Todd O'Brien, Steve Stone, Tim

O'Brien, Jeff Yearry, Jamie Fogoros, and Andy Lytle, issued in June and August 1995 and remove from our records any reference to them and notify these employees, in writing, that this has been done and that the warning letters will not be used as basis for any future personnel action against them.

WE WILL within 14 days from the date of this Order reinstate Tim O'Brien to the Respondent's Apprenticeship Program with no loss of credit and expunge any reference to his September 1995 removal from that program in our files and notify him, in writing, that this has been done.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful terminations, suspensions and warnings and within 3 days thereafter notify the employees in writing that this has been done and that evidence of these unlawful terminations, suspensions, and warnings will not be used as a basis for future personnel action against them.

ZIMMERMAN PLUMBING AND HEATING COMPANY, INC.

A. Bradley Howell, Esq., for the General Counsel.
Peter J. Kok and *Lisa Letarte, Esqs.*, of Grand Rapids, Michigan, for the Respondent.
Tinamarie Pappas, Esq., of Ann Arbor, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Grand Rapids, Michigan, on May 7–9, June 24–27, and September 18, 1996. Subsequent to an extension in the filing date, briefs were filed on November 26 by the General Counsel and the Respondent. The Charging Party has stated that it adopts the brief of the General Counsel. The proceeding is based upon a initial charge filed June 13, 1995,[1] by Local 7, Sheet Metal Workers International Association, AFL–CIO. The Regional Director's third amended consolidated complaint dated February 27, 1996, alleges that Respondent Zimmerman Plumbing and Heating Co., Inc., of Kalamazoo, Michigan, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by threatening closure or layoff, interrogating employees, indicating the futility of union representation, indicating union activities were under surveillance, granted a wage increase to discourage union support, threatening to withhold favorable recommendation and wage increases, photographing pickets, maintaining and enforcing an unlawful solicitation rule, prohibiting or directing the removal of union strikers on hardhats and shirts, and transferring, isolating and disciplining employees, changing work practices and programs and suspending, terminating and refusing to reinstate employees because of their union or other protected activities and in order to discourage such activities.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the fabrication and installation of sheet metal, piping and related materials at various construction sites in Michigan. It annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Michigan. It admits that at all times material is has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Charging Party Union and Local 337 United Association of the Journeyman and Apprentices of the Plumbing and Pipe Fitters Industry of the United States and Canada, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent was formed in 1976 by Dan Zimmerman and Richard Mahoney and began business as a union contractor performing commercial and residential plumbing and heating work and later added the sheet metal business. In 1978 the Company was reorganized and Bruce Link joined the business as a part owner. In the mid-1980s, the Respondent and the Plumbers and Sheet Metal Workers were unsuccessful in their attempts to renegotiate new contracts and it became an open shop company.

The Respondent performs construction work at various locations throughout Michigan and employs about 40 workers. In December 1994, apprentice plumber Todd O'Brien and another employee joined Plumbers Local 337, and sometime that month as they were driving to a jobsite, O'Brien told Foreman Mike Dennis that he had joined the Union. Dennis immediately stopped the car and called Owner Bruce Link, who made a note of this information and placed it in O'Brien's personnel file. Thereafter, in January 1995, Company President Zimmerman held a meeting with employees and showed an antiunion video.

In April, Plumbers Local 337 and Sheet Metal Workers Local 7 decided to combine their organizing efforts. They formed a joint organizing committee of Respondent's employees and on May 5, Local 337 faxed a letter to the Respondent naming Jeff Yearry, Todd O'Brien, and Andy Lytle as employees who were in this organizing committee. On May 15, Local 7 faxed Respondent a letter naming James Fogoros, Joseph Houseman, Timothy O'Brien, and Steven Stone as the sheet metal employees on the committee. Thereafter, these seven employees began to openly demonstrate their support for the organizing effort by wearing union stickers on their hardhats and by picketing the jobsites during their breaks and lunch. They also started an unfair labor practice strike on June 28 which ended when they made an unconditional offer to return to work on July 28.

The General Counsel presented evidence purporting to show that from April through September, when the organizing efforts intensified, the Respondent reacted by threatening employees with reprisals, interrogating employees about their

[1] All following dates will be in 1995, unless otherwise indicated.

support for the union campaign, implementing and enforcing an overly broad no-solicitation rule, photographing employees engaged in peaceful picketing, prohibiting employees from wearing union insignias on their hardhats, unlawfully disciplining, suspending and discharging employees, delaying the recall of one of the unfair labor practice strikers, and removing another from the apprenticeship program. The pertinent testimony and my factual findings based on the overall record will be set forth in more detail in the following specific discussion of the several issues and allegations involved.

III. DISCUSSION

A. *Supervisory Status*

Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, it 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.

It is not necessary that an individual possess all the indicia identified in Section 2(11) of the Act to be considered a supervisor. Otherwise, the Board in its expertise, has knowledge of and the record here show that in the construction industry it is a typical practice to designate one individual in a crew as foreman, leadman, or crew leader and that at various times, numerous employees have been assigned this function for the Respondent, included alleged discriminatees Joe Houseman and Jamie Fogoros. Although these employees occasionally did serve as the Respondent foreman on certain jobs, the record also shows that they were not regularly accorded any special trust by the Respondent and that they performed routine administrative roles as the most senior trade person on a jobsite in addition to their normal job functions. They were not endowed with any independent authority and I find that they were not statutory supervisors. I also find that their status is not indicative or determinative of the status of the five persons alleged to be supervisors by the general counsel.

The Respondent denies that at all material times Robert Link, Wayne Ware, Harold (Bart) Bartholomew, Roger Wedig, and Mike Dennis were supervisors within the meaning of Section 2(11) of the Act or were its agents within the meaning of Section 2(13) of the Act. It asserts that the only supervisors of its approximately 40 employees are the three owners, Richard Mahoney, Bruce Link, and Dan Zimmerman, and that the rest are merely tradesmen who sometimes work as job foremen. During 1994 and early 1995, Robert Link, the son of Owner Bruce Link, functioned generally as the sheet metal ''superintendent'' with duties and responsibilities far above the other foreman and, as ''field superintendent,'' prior to going to the Thornapple jobsite as the overall site foreman. Otherwise Robert Link served as Mahoney's intermediary with the jobsite foremen and he issued them work assignments, made staffing changes, issued employees verbal and written discipline, gave verbal and written authorization for employees to take time off, conducted periodic face-to-face evaluations of employees, and participated in getting employee raises. Like Mahoney, he reviewed employees' weekly timecards submitted by the foreman and initialed them in the lower left-hand corner as being approved. Until sometime in 1995, he also administered the Respondent's apprenticeship program, and authorized employees to take time off from apprenticeship classes. He reported directly to Mahoney, often acted as a spokesman for Respondent when dealing with foreman and other employees, and the employees' testimony shows the employees clearly believed that he spoke on behalf of Respondent with respect to enforcing work rules both on the jobsites and in the fabrication shop and they understood that failure to follow his directives would result in discipline. When Steve Stone was discharged, he made the report that was accepted by Owner Zimmerman without any further investigation and Respondent also asserted that part of the reason Stone was fired was because he had been dishonest with Link and Link otherwise suspended Stone and sent him home without conferring with higher management.

Bartholomew, Ware, Wedig, and Dennis virtually always served as foreman on Respondent's projects, and the record shows that they were given more authority than the other employees who only sometimes served as foreman on smaller jobs. They, along with Robert Link were higher paid than the other journeymen, and they clearly acted as Respondent's spokesman on the jobsite. They received additional benefits including a regular $10-a-day truck allowance, a gas credit card that allowed them to charge for gas; all benefits that were not usually available to the occasional foreman. These five also participated in monthly management meetings known as ''Circle Meetings,'' conducted by the owners at area restaurants, where upcoming projects, problems on the jobs, the staffing of the jobs, and other matters were discussed. They also were relied upon for their opinions and recommendations about temporary employees who Respondent was considering for future employment.

Ware was the senior foreman on the Thornapple job and both the sheet metal crew and the plumbing crew reported to him. When Fogoros arrived on that job on May 16 as sheet metal foreman, he challenged Ware's authority and Mahoney faxed a memorandum to the jobsite which stated that all employees on the jobsite were to report to Ware. The record shows that he issued work directives, issued discipline, approved time off which was placed in employees' personnel files, was responsible for the plumbing and sheet metal crews, and acted as Respondent's spokesman on the jobsite. Ware was unavailable to testify in the proceeding as he apparently left the Respondent's employment and moved from the area.

The record otherwise shows however, that when he interacted with employees during 1995 he generally was the most senior company representative on the jobsite and had the apparent and actual authority to independently act as a spokesman for Mahoney and management.

Bartholomew also generally supervised large projects for Respondent, including one of its largest, the Oshtemo Post Office project. He had similar authority and responsibilities to that of Ware and he regularly interacted with employees on behalf of Owner Mahoney.

Mike Dennis was a plumbing foreman but was responsible for directing the work of both the sheet metal crews and the plumbing crews on the Portage Northern site and he was the senior jobsite representative of management who directed the work of employees, issued discipline, and enforced the Respondent's work rules. When employee Joe Houseman was disciplined, his suspension letter indicated that it was because he had been insubordinate to Dennis.

Roger Wedig was the sheet metal foreman on the same Portage Northern job. He directed the work of only the sheet metal employees but authorized employees to take time off enforced Respondent's work rules on the jobsite, and otherwise acted on behalf of management in the absence of the owners.

While it appears that Wedig may have exercised lesser independent authority than the four other supervisors discussed above, he enjoyed the special trust and benefits given the other ''senior'' foreman and clearly acted with the empowerment of an agent for the Respondent. Otherwise, Wedig was considered by the rank and file employees to have the apparent authority to act for management.

Under these circumstances, I conclude that each of these foreman was a statutory supervisor under Section 2(11) at all material times in 1995 and, in addition, I find that at all material times in 1995 each acted as an agent of the Respondent within the meaning of Section 2(13) of the Act, such that their conduct in relation to rank and file employees is attributable[2] to the Respondent.

B. *Alleged Illegal Statements by the Respondent*

In January, president and part-owner, Dan Zimmerman, conducted a meeting with six or seven employees and showed a video which included a clip in which a union representative stated that the purpose of the union campaign was to ''put these scabs out of business,'' Tim O'Brien, Fogoros and Lytle each testified that Zimmerman followed the showing of the video with a statement that this was how unions operated and that the Union would never get in his Company, that they would close the doors. Lytle testified that some foreman others spoke up negatively about what union's did. Forman Wedig testified that Zimmerman said that the Respondent would not close the Company but would just struggle through but added that Wedig had made several comments (at unspecified times), about his own feelings that they would just close the doors.

In Wedig's sworn affidavit of July 1995, he stated that he could not recall making such a comment to employees. Robert Link, however, testified that he recalled that Wedig not Zimmerman, made such a comment after the video.

Here, this alleged statement was made prior to the 10(b) period and inasmuch as the evidence is inconclusive I find it unnecessary to rely on it as a basis for any formal finding and I will not find a separate violation in this respect, as alleged by the General Counsel.

The January meeting and the statements made at that time, however, clearly show that the Respondent was aware of and concerned about any union organizational efforts. Thereafter, in early April Tim O'Brien (the brother of Todd O'Brien, one of the lead union adherents), was approached by Owner Mahoney who said that he had heard that Tim had been approached by the Union. Tim denied that he had been approached but said that he planned to contact the Union within a few days to see what they had to offer. Tim, who was a sheet metal apprentice in the fabrication shop (and who served as shop foreman for a while), testified that Mahoney made some negative comments about unions. He added that they wanted to keep Tim there, and told Tim to let him know before making any hasty decisions. Mahoney did not deny that he questioned Tim O'Brien about the Union, but explained that his concern was that Tim O'Brien would leave Respondent's employ and go work for a union contractor and that before he made a final decision about joining the Union, he wanted to have another chance to convince him to stay with the Company.

Tim O'Brien joined Local 7 without further discussion of the matter with Mahoney and then was named as one of Local 7's organizers on the letter that Local 7 faxed to Respondent on May 15. Subsequently, after Tim did not receive the raise that he had been promised by Robert Link during his evaluation in early April, he asked Mahoney about it and questioned whether his not getting the raise had anything to do with his joining the Union. Mahoney replied, ''No, but you also told me that you would notify me before making any hasty decisions, the next thing I know I get a fax letter that you signed with the Union.'' Despite his expressed ''disappointment'' Mahoney thereafter approved a raise for Tim retroactive to May 15.

Contrary to the contentions of the General Counsel I cannot find that Mahoney's statement or action implied that the delay in approving the raise was because O'Brien had jointed the Union and I find no violation of Section 8(a)(1) in this instance. I do find, however, that Mahoney's earlier conversation with Tim gave the impression that he was engaging in surveillance of his union activities. I find that his request that Tim discuss the matter with him further, before joining the Union, also is violative of Section 8(a)(1) of the Act especially since the questions were by a top company official and, in context, were inherently coercive in nature and, in the circumstances, reasonably tend to interfere with, restrain, or coerce employees in the exercise of Section 7 rights, and I conclude that the Respondent is shown to have violated the Act in these respects, as alleged.

On May 4 Mahoney gave plumber apprentice Jeff Yearry his annual review. He mentioned that they knew that Todd O'Brien and Dan Thomas were union members (they both had earlier declared their support for the Union), and that he ''suspected that they might have gotten to Andy Lytle.'' (Lytle, at this point had not disclosed his union membership.) Mahoney admitted making these remarks about Lytle and that Lytle had not disclosed his union sympathies to him. Under these circumstances, I find that his statement to Yearry created the impression that Respondent was engaging in surveillance of its employee's union activities and it violates Section 8(a)(1) of the Act, as alleged.

As Mahoney continued with his evaluation he told Yearry that if he were in the Union he would be laid off a lot, and

[2] An employer also can be responsible for comments made by others if employees had ''just cause to believe [the person making the comment] was acting for or on behalf of the company.'' *Proctor & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 984 fn. 18 (4th Cir. 1981), cert. denied 459 U.S. 879 (1981) (quoting *NLRB v. Texas Independent Oil Co*., 232 F.2d 447, 450 (9th Cir. 1956)). In this context, attribution is even broader than the strict rules of agency law.

made other negative comments about the Union. Mahoney testified that he told Yearry that he had more opportunity with the Company, and that the would be further ahead to stay in Respondent's employment, and that Respondent had a better program to offer him than the Union did. Mahoney then showed Yearry his evaluation on the computer screen. The evaluation include a negative one by Foreman Ware and Yearry complained that he did not think that the evaluation was fair. Mahoney agreed with Yearry and changed it while Yearry watched. Yearry signed the evaluation and was given a raise of $1 an hour.

In the context of the impression of surveillance of union activities and Mahoney's other antiunion comments at the beginning of the evaluation, I find that a further impression was communicated to Yearry that Respondent knew who joined the Union, and those who joined the Union could expect unfavorable treatment but that management could respond to those who did ''stay with the company'' with positive evaluation and raises. This conduct also interferes with the employees' free exercise of their Section 7 rights and I find that the Respondent thereby violated Section 8(a)(1) of the Act, as alleged.

About May 2, Foreman Ware told Lytle that he had been acting differently and asked him to stay after work. When they met after work, Ware asked Lytle if the Union had gotten to him. Lytle admitted that the Union had contacted him. Ware asked what he thought about it, and Lytle said that it sounded pretty good to him. Ware told Lytle that Dan Zimmerman had told him that the Union would not be accepted, and Respondent would close its doors. Lytle was an apprentice plumber who had become involved in the union drive in April but at the time of this conversation he had not disclosed his views to Ware. As noted, Ware did not testify. Accordingly I find that Lytle's unrefuted testimony shows that the Respondent conduct reflects unlawful interrogation and a threat of closure, both in violation of Section 8(a)(1) of the Act, as alleged.

Joe Houseman was a sheet metal apprentice who joined Local 7 in early May. About a week before his union affiliation was disclosed to Respondent in the May 15 letter, Robert Link, who then was Respondent's sheet metal superintendent, approached him at the Thornapple jobsite and asked him if he had been contacted by the Union. Houseman testified that he said no and that Link then said that they would just close the doors and would not negotiate with the Union and everybody would be out of a job. A few days latter Houseman was approached by Foreman Ware who asked how he felt about what had been transpiring during the past 2 weeks. Houseman asked him if he was referring to the Union. Ware said yes and Houseman then said that he thought it was great that the plumbers had declared their support for the Union. Ware spoke about his own bad experience with union's and then told him to call Robert Link and to tell him that he supported the Union.

The next day Houseman telephoned Link and told Link that he had previously lied and he admitted that he had been approached by the Union and that he was going to support it. Link swore at him for having lied to him but added that he respected his decision as a man.

On May 11, apprentice sheet metal worker Steve Stone was approached by Bart Bartholomew, the foreman who oversaw the Oshtemo Post Office project where Stone was assigned (this was a prevailing wage project, which meant that Stone was receiving nearly $18 per hour rather than his normal $11-per-hour rate). Bartholomew said that there was union talk in the wind and that Stone was a good worker, and that he wanted to be able to recommend Stone for a prevailing wage supplement. Bartholomew explained that there was going to be a problem in the future with the requisite ratio of journeymen to apprentices, and to resolve this problem that they would have to pay either Stone or the other apprentice on the job, Leonard Orem, as a journeyman. Bartholomew added that he would not be able to recommend Stone to the owners for this journeyman's position unless he knew how Stone felt about the Union and he also added that he was speaking for Mahoney. Stone, who had not as of that point made his prounion sympathies known, said that he felt uncomfortable talking about the issue and that he chose not to make his views known one way or the other. Bartholomew testified that he had talked to Stone about being paid as a journeyman, and asserted that in a latter conversation he told Stone that he had given up his business to come work for Respondent and said that he was totally committed to them, and asked Stone, ''How about you?'' and that Stone said that he did not want to talk about it. Bartholomew reluctantly admitted on cross-examination that he was inquiring about Stone's union views for his ''own personal knowledge'' and that he had reported his conversation with Stone to Mahoney.

Here, my evaluation of witnesses Stone and Bartholomew leads me to conclude that Bartholomew tended to be somewhat evasive while Stone's testimony was more straightforward and persuasive. Accordingly, I credit Stone's recollection of the conversation.

The testimony by Houseman was denied in part, by Robert Link who testified as follows:

> Q. BY MR. KOK: Now, Mr. Houseman testified that you said that the company would not negotiate with the union. Did you say that?
>
> A. I don't think I said that, because the last time we had gone through something like this, my understanding was we were still in negotiating with the union—negotiations. I don't think negotiations were ever broke off.
>
> Q. Listen to the question again.
>
> A. No, I did not say that.
>
> Q. All right. Did you tell Mr.—Mr. Hausman also testified that you said that the company would just close its doors. Did you say that or anything like it?
>
> A. No, I did not say that.
>
> Q. And you testified that you said that everyone would be out of a job. Did you say that?
>
> A. No
>
> Q. Did you talk about how busy Zimmerman was when it was union as compared to how busy it was when it was non-union?
>
> A. Yes.
>
> Q. What did you say about that?
>
> A. That we had a lot more work being non-union than when we were in the union.
>
> Q. Now, Mr. Hausman testified—and I think this is his direct word. That you drilled him about the union. Did you ask more than one question about his interest in the union?

> A. It was more of a conversation and just my telling my experiences with him. I didn't—like I said, I asked him once or twice what his feelings were. That's when he offered that his father and mother were in the union, a union.

The record shows that Robert Link, until and even after he was advised to listen to and to respond directly to questions, gave rambling, indirect answers that often tended to beg the question or provided excessive, volunteered information. Link's testimony also shows that Link and Houseman perhaps had more than a casual work relationship and that they sometime engaged in friendly, afterwork conversations. Link and Respondent's counsel, however, pushed the subject of these other conversations into an attempt to discredit Houseman by recounting scandalous or embarrassing accounts of Houseman's personal life.

Here, the Respondent also attempts to minimize the nature of Link's alleged remarks as jokes relating anecdotes he heard when he was in the Union and as mere casual banter among friends. The Board, however, recognizes that statements which convey a threat but are spoken as a friend (and here coming from one who is part of management and closely related to ownership), are of greater impact in view of the source, see *Sage Dining Service*, 312 NLRB 845, 846 (1993).

Under these circumstances, I credit Houseman's recollection of his conversation with Link as the most believable. This is especially true since the conversation is closely tied to and interrelated with the unrefuted testimony of his conversation with Ware, which led to the second critical conversation with Link where the alleged statements were made. Accordingly, I find that both Link and Ware made the statements attributed to them by Houseman in their roles as both supervisors and agents of the Respondent. I further find that the questions by Ware and Link under these circumstances and their remarks about the company closing constitute unlawful interrogations and threats which are violations of Section 8(a)(1) of the Act, as alleged. I also find that Ware insisted that Houseman discuss his views with management is another violation of Section 8(a)(1), see *Albertson's, Inc*., 307 NLRB 787, 794 (1992); and I find that Bartholomew's unlawfully interrogated of Stone with respect to his union sympathies and his implicit offer of a journeyman's position or pay if Stone declared his opposition to the Union, also violate Section 8(a)(1) of the Act as alleged.

C. *Motivation*

In proceedings involving changes in conditions of employment and disciplinary action against employees, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees union or other protected concerted activities were a motivating factor in the employer's decision to change their conditions of employment or to discipline them. Here, the record shows that the Respondent was aware of the employees' union activity. The credible evidence also shows that it interrogated employees and speculated about the sympathies of others and knew of some expressed supporters prior to May and then it was specifically informed of the identity of seven named union organizers. It also engaged in several unfair labor practices, as discussed above, which included statements by Owner Mahoney and several supervisors or agents that clearly shows antiunion animus.

Other indicia of motivation including the timing of the Respondent's various reactions, several of which occurred shortly after the Union's identification of a union organizing committee and, under these circumstances, I find that the General Counsel has met his initial burden by presenting a prima facie showing sufficient to support an inference that the employees' union activities were a motivating factor in Respondent's subsequent decision to change the conditions of employment and to discipline certain of the employees who were among the active union supporters. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

D. *Transfer and Grouping Together of Union Organizers*

As noted, the Unions sent letter to the Respondent naming those on the organizational committees. They were as follows.

Plumbers Union—(May 5)	Sheet Metal Union–(May 15)
Jeff Yearry	James Fogoros
Todd O'Brien	Joe Houseman
Andy Lytle	Tim O'Brien
	Steve Stone

A few days after May 5, Mahoney abruptly and without explanation transferred Yearry to the Thornapple Manor jobsite where Lytle and Todd O'Brien had been working. On May 15, Respondent transferred Fogoros and Tim O'Brien to the Thornapple jobsite where Houseman had already been working. Stone was not transferred to Thornapple but was taken off of a prevailing wage Post Office job and was transferred to Portage Northern jobsite, before the Post Office job was completed.

Fogoros was abruptly transferred from the Portage Northern job (where he was sheet metal foreman) when the project was not close to completion. Respondent explained that at the Portage Northern school project, Fogoros worked an evening shift, and at Thornapple Manor he could work a day shift, what Fogoros usually preferred to work. However, at the time of his transfer normal day operation of the school were about to be end for the summer and there was no longer a need for an evening shift in lieu of day work and the work at the jobsite was completed by employees working on a day shift.

When Fogoros arrived on the Thornapple Manor jobsite on May 16, he was directed by Ware and Mahoney to take over as sheet metal foreman from Houseman and he was given a dollar-an-hour raise. However, unlike when he served as foreman in the past, he was not assigned to check and initial the sheet metal workers timecards; this job was given to Ware, the plumbing foreman. Fogoros' tenure as foreman on the job was also short lived and not long after assuming the job, Robert Link came on site and assumed the foreman's duties from Fogoros and his raise was taken away. No reason or explanation was even given directly to Fogoros for being

removed and Yearry also was transferred with no explanation.

Tim O'Brien was removed from his position as fabricating shop foreman and was transferred to Thornapple Manor on May 15 less than 6 weeks after receiving a pay raise and a favorable evaluation, and after he had implemented a number of improvements in the shop. Respondent maintains that the latter action occurred so that employee Tim (sometimes spelled Timm in Respondent's documents), Bartholomew (son of Foreman Harold Bartholomew) who was returning from a medical leave, could work a light duty assignment. The Respondent did not explain why they chose to replace O'Brien instead of the other shop employee Woody Gabbard (who was viewed as incompetent in the eyes of Tim Bartholomew). Others in the shop at that time were temporary employees, yet Bartholomew (who spent a week training under O'Brien before O'Brien's transfer), in response to Respondent's counsel's questions, began to gratuitously disparage not only the other regular employee but also Tim O'Brien and his control over the quality of work going from the shop to the field. These reasons were not given by management as a cause of Tim O'Brien's transfer at the time. This disparagement also is inconsistent with the contemporaneous evaluation and pay raise given to O'Brien and I find that the disparagement of O'Brien abilities at the hearing reflects a pretextual justification that suggest that the reason, as discussed below, was motivated by the union activities of Tim, his brother, and the other union organizers. Stone was not given a reason for his transfer off the Post Office job but it occurred shorted after Bart Bartholomew had interrogated him about his union views and implicitly offered him a journeyman's position on that job he if came out against the Union.

As pointed out by the Court, in *Transportation Management Corp*., supra:

> [A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the Respondent asserts that its employees are routinely transferred for a variety of reasons including decreased manpower needs, different phases of projects, and need for various expertise.

It points out that Yearry repeatedly worked at the Thornapple Manor jobsite from January through as recently as April 24 and 25 and then was merely transferred back to the Thornapple jobsite on May 10. It also states that Fogoros was transferred to Thornapple Manor to assume the foreman responsibilities previously held by Houseman and that Mahoney told him it was because Houseman's performance had not lived up to the Respondent's expectations. Fogoros was selected because Mahoney felt he could handle the project, also the phase of the Portage Northern job which Fogoros was currently working on was scheduled to come to a close and he felt Fogoros was not competent to handle the subsequent phase of that project. Third, Wedig, who replaced Fogoros as foreman at Portage Northern, had been requested by the general contractor at the Portage Northern jobsite and Fogoros lived only 20 minutes from the Thornapple Manor project, the closest of any of the possible foremen, also and these consideration were said to have contributed to Mahoney's decision.

The Respondent also contends that when Tim Bartholomew became available for light duty on May 10, he met with Mahoney who determined that the position of shop foreman (in lieu of O'Brien), would fulfill Bartholomew's light duty restrictions and that his field experience would be useful in solving some lingering problems in the sheet metal shop. It also states that in May, it was working at three major jobsites with the Post Office winding down and Portage Northern and Thornapple entering more intensive phases, so that Forgoros, O'Brien, and Lytle were sent to Thornapple and Wedig and Stone went to Portage Northern.

Here, the Respondent has offered a listing of seemingly legitimate business reasons for moving Yearry, Fogoros, and O'Brien to where three other union organizers already were working, however, the result of its moves effectively segregated six of the seven union organizers together and it occurred shortly after the Respondent's unlawful interrogation of these same employees, and almost immediately after the Respondent received official notification that they were members of the organizing committee (first Yearry after the May 5 letter, then Fogoros and Tim O'Brien after they were named in the May 15 letter). The transfers also were accompanied by the reassignment of the owner's son and supervisor, Robert Link, to the same jobsite (shortly thereafter), where he coincidentally was placed in a position where he could monitor and observe their action (and where the organizers would not have easy access to most other employees). Moreover, in mid-May, these employees were instructed by Foreman Ware that they would no longer be allowed to take their company tools home at night as they had been doing and they were told to lock their company owned tools in the gang box on the jobsite. Mahoney admitted that this was the only jobsite where employees were required to turn in their company tools at the end of work day (allegedly because this was the only site with problems where tools were stolen or left off site). Ware, however, told Houseman the reason for having them turn in their tools and leave them each night was because union bylaws would not allow it.

Shortly thereafter the Respondent had the job trailer locked on the Thornapple jobsite. Foreman Ware told the employees that they would no longer be able to go in the trailer and that he would get what they needed from the trailer. Before this time, the employees had been allowed to go into the trailer, to look at prints, to take breaks, and to get tools (where the first aid kit, and the phone were also located). No explanation was given to the employees at the time but the Respondent said it do so because some employees had apparently observed billing records in the trailer and reported suspected irregularities to the project owner. The Respondent asserts that this ''disloyalty'' would justify disciplinary action, however, it failed to act against any individual.

Ware's unrefuted statement shows that the employees were denied the privilege of bringing their tools home at night because they had become union members and that this is a violation of Section 8(a)(1) of the Act, see *Domsey Trading Group*, 310 NLRB 777, 785–787 (1993), and his unexplained action in limiting normal access to the job trailer also tends to interfere with their rights protected by Section 7 of the

Act, as alleged. See *Miller Group, Inc*., 310 NLRB 1235 (1993).

In view of these additional circumstances and the Respondent's overall pattern of reaction against these same union organizers on subsequent occasions (as discussed below), I find the Respondent's overall justification for its action to be weak and unpersuasive. Accordingly, I conclude that the Respondent has not shown that it would have transferred three employees and thereby isolated six of the seven[3] identified union organizers together on the same jobsite were it not for it belief and concern over the union organizational activities of a group of its employees and I find that the General Counsel has shown that this conduct violates Section 8(a)(1) and (3) of the Act, as alleged.

E. *Prohibition of Union Stickers on Hard Hats*

After the Unions identified the members of their organizing committees in the faxed letters to the Respondent, the named employees began to demonstrate their support for the Union by wearing stickers on their hardhats. On June 16, Robert Link told them that wearing such stickers was considered defacing company property and he issued verbal reprimands to Fogoros, Yearry, Houseman, and Lytle. This was the first time that they had been advised that they were not allowed to wear stickers on their hardhats. Link issued these same employees a second verbal reprimand on June 20 for the same reason and they complied with their directive the next day.

At this same time Mahoney held a meeting at the Portage Northern jobsite and told employees they were not allowed to put stickers on their helmets. Stone, who had started wearing union stickers on his helmet, took them off Mahoney's presence but he left large ''yellow arrow'' stickers on, stickers which he had worn on his hat since August 1994. Mahoney said nothing about the other stickers. During the meeting Stone asked if employees could buy their own OSHA approved helmets and place stickers on them and Mahoney said they had to wear the helmets provided by the Respondent.

Tim O'Brien reported to the Portage Northern jobsite on August 8 with Union stickers on his company-provided hardhat. Foreman Wedig told him to remove the stickers and when O'Brien declined, Wedig sent him home. O'Brien met with Owner Dan Zimmerman the following morning, and Zimmerman gave him a suspension letter and told O'Brien that he would be discharged if he did not take the stickers off his helmet. O'Brien agreed to comply but Zimmerman sent him home for the rest of the day. The disciplinary letter issued to O'Brien stated that the stickers were in violation of OSHA policy, that they were in violation of the Company's no-solicitation rule, and that the stickers ''disfigured'' company property.

A employee meeting was held on August 10th in which Mahoney again instructed employees not to wear union stickers on their hardhats. Houseman, who was wearing one of the union stickers on his shirt, asked if they were allowed to wear stickers on their shirts. Mahoney said, ''[N]o,'' that he considered that to be solicitation. Mahoney admittedly told Lytle on the day before the meeting with employees that he could not put stickers on his tool box but he denies that he told Houseman not to have one on his shirt. He admitted, however, that ''that day *or the next* (emphasis added) I became aware that he was permitted to wear—or have union stickers on his personal belonging.'' He then went to the jobsite and told Lytle that he had been wrong about stickers on cloths or tool boxes. Although Tim O'Brien said he never heard the remark to Houseman, it is not clear that he was there as Houseman merely testified O'Brien ''possibly'' was there when (he affirmative named several others), and I find that O'Brien testimony does not corroborate Mahoney's. On the other hand, Mahoney's testimony shows that he didn't become aware of the employees' rights until August 8 or 9 and his remark to Houseman would be consistent with his statement to Lytle. Accordingly, I do not credit his denial.

Houseman then asked if they could wear their own hardhats and pointed out that the Policy Handbook said that they were supposed to furnish their own. Mahoney said they were not required to furnish their own hardhats and they should not. Otherwise, Houseman testified that he had worn his own hardhat to work nearly every day from January 1990 until at least the end of May and only rarely had he been asked to wear the Company's brown helmet prior to June 1995.

The company helmets had stickers on them with the Respondent's logo. Stone testified that he wore nonunion related stickers on this hardhat for 2 years and no one ever said anything to him about it and, as noted, he left them on his helmet after Mahoney had directed employees to take the union stickers off and he was not disciplined for this. On brief the Respondent produced an OSHA regulation which does not prohibit the wearing of union or other stickers but provides only that the employer ''shall provide'' and the employee ''shall use'' and ''shall not physically alter'' head protection equipment. Moreover, it appears that Respondent was not concerned about it, until the employees began wearing union stickers on their helmets.

It is well established that an employee has the protected right to wear union insignia while at work. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945), and that in the absence of ''special circumstances,'' the prohibition by an employer against the wearing of union insignia violates Section 8(a)(1) of the Act, See *United Parcel Service*, 312 NLRB 596 (1993).

Here, the Company made a blanket prohibition regarding union insignia on hats and it adamantly insisted that the hats were company property, that could not be ''defaced'' with ''[u]nion'' stickers. On brief it also engages in an extensive argument which asserts that its rule was longstanding and was based upon a legitimate and not unwarranted concern about the threat to safety posed by the use of unauthorized decoration on the hardhats, citing *Standard Oil Co. of California*, 168 NLRB 153 (1967); and *Andrews Wire Corp*., 189 NLRB 108 (1971). The Respondent also relies upon the courts decision in *NLRB v. Windemuller Electric*, 34 F.3d 384 (6th Cir. 1994), in which the court found that:

> [E]mployees who are union supporters have no right to make use of an employer's personal property for the purpose of communicating union messages, as long as the employees can make effective use of their own property for that purpose.

[3] Although Stone was not included, he went to another jobsite as the helper/apprentice to foreman Wedig where he also would be somewhat isolated.

and that

> As a matter of law, therefore, the fact that the hardhats were Windemuller's property, provided justification enough for Windemuller's refusal to let the hats be stickered with Union insignia.

The last cited case is at odds with the Board's findings on this subject which flow from the Supreme Court's decision in *Republic Aviation*, supra, and under these circumstances, it would be improper for me to rely on a court of appeals decision instead of relevant Board decisions on the issues, see *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984), in which the Board emphasized that ''it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed'' citing *Iowas Beef Packers*, 144 NLRB 615, 616 (1963). Accordingly, I shall follow the Board's precedent on the issue and I find that the Respondent has shown no special circumstances (such as those discussed in *Northeast Industrial*, infra), that would justify its prohibition against union stickers in this instance. Otherwise, I find that the no sticker rule in this case was enforced specifically for the purpose of undermining the Union organizational efforts, see *Northeast Industrial Service Co*., 320 NLRB 977, 979 (1996); *Tualatin Electric*, 319 NLRB 1237 (1995); *Miller Group*, 310 NLRB 1235 (1993); and *Jordan Marsh Stores*, 317 NLRB 460, 461 (1995).

Otherwise, it is recognized that the Supreme Court, in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), said that

> [a] labor union has no right to make use of an employer's real property for the purpose of communicating union messages, as long as the employees are not ''beyond the reach of reasonable Union efforts to communicate with them'' by means that do not trespass upon the employer's property rights.

Here, however, union stickers on a hardhat at a construction site do not affect ''real property'' rights and, in evaluating a necessary balance between a conflict in fifth and fourth amendment rights, it would appear that the Board clearly is justified in allowing other property rights to dominate only upon a showing of special circumstances. Here, no persuasive marketing or safety considerations were offered that would tend to show any controlling special circumstances other than the mere claim of ''safety'' considerations and the indication that on some past occasions the Respondent had supported the wearing of color coordinated uniforms and hats. The employees' testimony, however, shows that this was not consistently applied and some employees regularly wore their own hardhats or hats of a different color, some with stickers or marking other than company or union identification. Here, the claim that the union stickers ''defaced'' or ''disfigured'' is unsubstantiated and appear to be merely spurious especially in view of the fact that they were removed on several occasions with no claim of damage, see the *Northeast Industrial* case, supra. Moreover, the Respondent inconsistently has maintained work rules that purport to require employees to provide their own hardhats and, after union stickers were applied, has denied employees the right to make use of their own property in lieu of the Respondent's hats even though it had been allowed in the past.

The record shows that several employees persisted in their attempts to openly display their support for a union by placing union stickers on their hardhats. The Company's attorney, however, had recently represented another employer before the circuit court and had secured a favorable ruling that appear to seriously qualify the longstanding Board precedent on this issue, see the *Windermuller* case, supra. Thereafter, the Respondent emphasized a policy seemingly consistent with the court's reversal and it strictly pursued enforcement of its policy. It appears, in effect, that the employees, believing that they were acting within their Section 7 rights, were set up by the Respondent to run afoul of its newly found justification for more strictly asserting an overriding property right in its hardhats.

Here, I find that the Respondent resorted to the use of its hardhat property rights not for any legitimate reasons but merely as a pretext to shield it actual reasons which embraced its antiunion motivations to interfere with restrain and coerce its employees' attempts to show and solicit support for union organization.

Support for this conclusion is demonstrated by the Respondent's actions on August 10, when Mahoney conducted a meeting for all employees and passed out an amendment to the Respondent's no-solicitation policy, which he asked employees to sign. (The same memoranda was passed out to employees on other jobsites.) The memo from Mahoney stated:

> HARD HATS ARE FURNISHED COMPANY SAFETY EQUIPMENT. THEY ARE COMPANY PROPERTY. THEY ARE NOT TO BE DEFACED IN ANY WAY.
>
> SOLICITATION IS PROHIBITED BY THE COMPANY POLICY.
>
> COMPANY PROPERTY IS NOT BE DEFACED IN ANY WAY WITH STICKERS OR SOLICITATIONS OF ANY KIND.
>
> THIS IS WRITTEN WARNING TO ALL EMPLOYEES. ANY VIOLATION WILL BE CONSIDERED AS INSUBORDINATION AND WILL RESULT IN IMMEDIATE TERMINATION.

The grouping together of hardhats being ''defaced'' with the clearly overly broad prohibition against ''solicitation of any kind'' together with an additional description as a ''written warning'' and a threat of ''immediate termination'' for ''insubordination'' for ''any violation,'' adds to support for the inference that the no sticker rule was enforced specifically for the purpose of undermining the Unions' organizational efforts and I find that the Respondent is shown to have violated Section 8(a)(1) of the Act in this respect, as alleged.

The Respondent's warning and threat immediately followed the Respondent's apparent decision to challenge the employees' use of union insignia on their hats and its verbal warnings and orders by Bob Link, Mahoney, and Wedig (who sent Tim O'Brien home on August 8 when he failed to remove the stickers), and it was not an idle one. The following morning, Owner Dan Zimmerman issued O'Brien a suspension letter and advised him that he would be discharged if he did not take the stickers off his helmet. Although O'Brien agreed to comply with this demand, Zimmerman effectively suspended him and sent him home for the rest of the day.

Fogoros was required to meet with Dan Zimmerman on August 11 and he received a disciplinary letter (similar to the

one issued to Tim O'Brien), for refusing to take off the union stickers from his hardhat. Zimmerman repeated that they were not allowed to wear stickers on the hardhats and also suspended Fogoros for the rest of the day.

On August 18, Lytle showed up at the jobsite at 7 a.m. with his own hardhat with union stickers on it and wearing a union shirt. Foreman Steve Zimmerman (son of the owner) asked him if he was trying to get him to send him home. Lytle said that he was there to work. Zimmerman asked where his company shirt was and Lytle pointed out that another employee on the job was not wearing a company shirt. After calling Mahoney, Zimmerman instructed Lytle that he could wear the shirt but that he had to take the helmet off. Lytle pointed out that the policy handbook provided that the employees were supposed to provide their own hardhats and Zimmerman called Mahoney again. He then told Lytle that Respondent had changed the policy, and that either he was going to wear the company hardhat or be sent home. Lytle replied that if Steve was going to send him home for following Respondent's policy, that he could do so. This was at about 7:30 a.m. Lytle asked Zimmerman to sign his timecard for the week, and after calling Mahoney one more time, Zimmerman signed the timecard and gave Lytle credit for one-half hour's work. About 7:45 a.m., Zimmerman then told Lytle to go wait for Rick Mahoney by his truck. Lytle waited by his truck until about 8 a.m. but as he was no longer on the clock, he walked back to the job trailer and told Steve Zimmerman that if Mahoney needed to talk to him, he could reach him at home and he left the jobsite.

Mahoney called Lytle about 11:30 a.m. and said that he wanted Lytle to come back to work. Lytle responded that he wanted to work but complained that he had not been treated fairly, and said that he would get back in touch with him. Lytle phoned Mahoney at 2 p.m. and left a message (Mahoney was not in), that he would return to work wearing the company hardhat but under protest. Mahoney called Lytle back on August 20 or 21 and told him that he no longer any work for him but said he was considering having him and Yearry work split weeks. Lytle said that he would rather have each of them work every other week. Mahoney said that he would call Lytle and get back with him but never did.

Instead, on August 22 Lytle received a discharge letter signed by Dan Zimmerman that indicated that he was being terminated for refusing to wear his company hardhat, for leaving the jobsite at 8:05 p.m., and not waiting for Mahoney, which the letter indicated was an absence in violation of the probationary terms of his employment. (As discussed below, he was placed on probation on June 7, for not complying with Respondent's new attendance policy).

As noted, prior to the onset of the union campaign, Respondent rarely insisted that employees wear the company provided hardhats or that they not have stickers and it was so unconcerned about this that it never bothered to change the provision in its work rules stating that employees must provide their own hardhats. I find that the Respondent's sudden concern with employees ''defacing'' company property or wearing the company's hardhat was simply a stratagem to prevent the employees from wearing union stickers and a pretext to allow a crackdown on union organizers. Its overall actions were motivated by its desire to restrict the employees exercise of Section 7 rights not only with the union stickers but also in the several other areas discussed herein, such as changes in the enforcement of its attendance policy. Otherwise, the Respondent has not shown any persuasive reason why it chose to implement and enforce a new hardhat (or attendance) policy at this time. The main intervening event, of course, was the publication of the names of the union organizers and the attempts of the employees to exercise their Section 7 rights. I also find that its claim that Lytle was fired in part for leaving the jobsite and not waiting for Mahoney is pretextual as Lytle in fact, waited for Mahoney for approximately 20 minutes after he was no longer on the clock. Thereafter, he also made phone contact with Mahoney and was told that Mahoney was considering having him work a split shift with Yearry. Under these circumstances, I find that the Respondent has not shown that it would have issued the hardhat warnings or issued suspensions to Fogoros, Yearry, Houseman, Lytle, and Tim O'Brien, and it would not have terminated Lytle by its letter of August from Owner Zimmerman in the absence of the protected union activity. Accordingly, I find that the General Counsel has shown, that the Respondent violated Section 8(a)(1) and (3) of the Act in these several respects, as alleged.

F. *Respondent's Attendance Policy*

In February 1993, Respondent established a so called ''no-fault'' attendance system. However, its policy was rarely, if ever enforced. The record shows that in June 1995, Respondent suddenly began applying the policy and all seven members of the organizing committee were given attendance warning letters. Todd O'Brien, Lytle, and Houseman were given ''final'' warning letters which stated that if they had any additional unexcused absences or tardiness within the next 90 days they would be terminated but Todd O'Brien was issued a revised final warning letter on June 26. (After his first warning letter, he missed 2 additional days' work, June 20 and 21. The revised June 26 letter incorrectly refers to these dates as June 21 and 22.) He came to work with the flu on June 20 and was so sick he was throwing up in the bathroom. He asked his foreman for the rest of the day off, and his foreman referred him to a doctor.

On brief, the Respondent explains that the no fault attendance policy means that the employee can be absent for any reason, or no reason, the company does not care at the policy does not take into account the reason. As a result the burden falls on the employee to determine whether or not they can afford to be absent (five unexcused absences in a 12-month period) and to judge their actions accordingly. It also notes that it provides its employees with paid vacation and personal days, that paid vacation time off must be approved at least 30 days in advance, that additional unpaid vacation time is also available, that employees are not required to request vacation time in order to receive vacation pay, what pay may be taken at any time (however, the receipt of vacation pay does not make an unexcused absence ''excused''), that personal days must be requested at least 2 days in advance (the foreman must be notified) that there is no limit on the number of personal days an employee may request, and that personal days and vacation time off are ''excused'' absences.

Wholly separate from this policy, is a requirement that the employee call in regardless of the reason they are going to be absent. Otherwise, the Respondent asserts that when it instituted its no fault policy in February 1993, it did not have

any system in place which could alert it to any significant abuse of its policy but first became aware that employee Dan Thomas had an attendance problem in November 1994. An audit of his records disclosed that he had 44 unexcused absences during a 1-year time period. As a result, he was placed on probation and told additional absences would resulting in a meeting with management. He again missed work a few days later and was terminated.

Thereafter in February or March 1995, Dan Zimmerman instructed office employee Theresa Hazard to start an extensive audit of all hourly employee time cards and personnel files in order to disclosed whether any other employees had attendance problems. She testified that the audit involved reviewing employee timecards and determining all absences. She then reviewed the employee's personnel file to attempt to match up any excused absences with those reflected on her initial report. The result of this audit was set forth in Respondent's Exhibit 43 which contains the unexcused absence history of hourly employees.

Bruce Link testified that management was stunned with the results of this audit, and that it disclosed that Zimmerman could have fired over half the company for attendance. He said that rather than firing all the employees who exceeded five unexcused absences, management chose to place the nine worst offenders on probation. It said Todd O'Brien, Lytle, and Houseman were the three employees with the worst attendance records with over 20 unexcused absences each in a 1-year time frame.

Respondent's attendance policy set forth in its policy handbook specifically provides:

> The company is instigating a ''No-Fault'' tardiness/absenteeism policy. This simply means the company will not evaluate any excuses or reasons when an employee calls the office to advise he will be late or absent. The employee must call prior to starting time for any reason. The employee should also contact his foreman when possible. Excessive tardiness/absenteeism (more than once in a 30 day period off 5 times in a 12 month period) is considered grounds for dismissal.
>
> . . . .
>
> Note that an absence without phoning the office prior to staring time is considered immediate grounds for dismissal.
>
> In addition, the Policy Handbook provides:
>
> ''PERSONAL DAYS'' are defined as days or partial days taken off without pay for what ever reason. In general, the employee recognizes the need for personal days and will strive to cooperate. The employee should make arrangements as far in advance as possible, or in the case of any emergency, call in prior to starting time. Less than two days advanced notice or lack of approval by the foreman or supervisor will result in the personal day being counted as an absence.

Here, the record shows that a great deal of ambiguity exists between the types and descriptions of absences, how different people interpreted then, and how they were applied. Clearly, the ''No-Fault'' absenteeism policy was not enforced and uncontroverted evidence demonstrates that prior to June 1995, the Respondent did not discipline or discharge employees because they were tardy or absent more than once within a 30-day period or five times within a year, as the written policy provides. Moreover, the most flagrant violator, with 44 absences, first had apparent verbal warnings by Mahoney and ''several job foreman'' then was given a final written warning on January 27 and thereafter terminated for a new violation.

The employees testified that the practice for requesting ''excused'' time off prior to June 1995 was generally that if an employee knew he needed the time off enough in advance he could make a written request, but if the employee needed a day or two off, or a few hours off, or did not know he needed to take the time off in advance, he would generally ask his foreman or supervisor for verbal approval. Their testimony shows that Respondent's claim that in order to be excused, all requests for time off, had to be in writing and approved by Mahoney was not accurate or was not followed. Thus, while written requests for time off were sometimes used, employees routinely made oral requests to their foreman for time off, were allowed to take this time off and were not disciplined for it when their absences exceeded five in a year.

As pointed out by the General Counsel, Todd O'Brien had at least 10 occurrences of absenteeism or tardiness, not including vacation time, from about the first of January 1994 until November 19, 1994, with only 4 written requests for time off in his file for this period. Stone testified that he never made a written request for time off, had about 20 occurrences of tardiness or absenteeism from January 1 until August 13, 1994, Yearry had about eight occurrences of absenteeism from January 8 until November 5, 1994, and two requests for time off during that period. Tim O'Brien had about 19 occurrences of tardiness or absenteeism from February 2 until October 22, 1994, for which he received no discipline. Fogoros had about 18 instances of absences or tardiness during the period from January 1, 1994, until January 7, 1995, and only two written requests for time off in his personnel file for that period. The warning letter issued to Houseman also lists 10 occurrences of absences in 1994.

Prior to June 1995 Todd O'Brien and Yearry had never received any prior written or verbal warnings with respect to their attendance. Stone did receive one in August 1991 and Lytle had received a warning letter in February 1993 for not calling in, and that discipline had been rescinded with a notation that no warning would be issued because the call in procedures were not clear. The only prior warning Fogoros had was an attendance warning dated February 16, 1993, but it was retracted when Fogoros explained the reason for his absence. Tim O'Brien had just one prior write up in his file for attendance, one he received in July 1993 for not showing up or calling in. The only other writeup that Joe Houseman had received for attendance was dated May 23, 1993, by Bob Link (as sheet metal manager), who expressed his concern that his current lifestyle and problems with alcohol caused him to miss a scheduled workday.

The record also shows that employee Bruce Sexton was shown to have 35 unexcused absences in the audit time period. However, Mahoney reached an agreement with Sexton whereby the Respondent agreed to allow Sexton an unlimited number of absences in order to accommodate his migraine headaches (assertedly in keeping with the Americans With Disability Act, 42 U.S.C. § 12101, et seq.). Zimmerman requested documentation from Sexton's doctor confirming that

he did in fact suffer from migraine headaches but was not concerned with and did not request documentation Sexton's individual absences (assertedly because of the provision of 42 U.S.C. § 12112).

Although the Respondent asserts a great surprise over finding out that it had an attendance problem with one employee and further asserts an extremely serious business concern in dealing with the problem, it sat on its hands from February or March, when it purportedly ordered a total audit, while its personnel clerk slowly took 2 or 3 months to review the records of 30 or fewer employees. The audit results blossomed in June, just a few weeks after the union organizer identification letters of May 5 and 15. This audit also counted as occurrences absences or late arrivals where the employee had given oral notice and had received verbal approval. No one was warned that their seemingly approved ''no fault'' absence would be considered to be unexcused and would count against them for disciplinary reasons. In fact, and despite the time purportedly taken to compete the audit, numerous entries were made for unexcused absences dates for which employees had obtained prior verbal and sometimes written approval. For example, Tim O'Brien testified that he periodically had to take time off to take his daughter to the hospital in Ann Arbor for treatment and test for her congenital liver condition. Sometimes he made a written request for this time off, but generally he just made an oral request and it was approved by his foreman. His weekly timecards for the weeks ending May 14 and 24, 1994, indicate that he took personal time off for this purpose. On August 2, he made a written request for taking August 22 off due to a court date (for child custody, apparently) and August 23 off because of his daughter's doctor's appointment. It was approved. He also took 2 weeks off prior to August 22 to take care of his children during the time of his divorce. He informed Bob Link at the time, and Link advised him to send a letter into Respondent explaining the situation, which he did. Before June 7 it was never indicated that he would be subject to any discipline for taking this time off and, despite the written and verbal approval that he had for taking these days off, these occurrences were included in the June 7 warning letter as unexcused absences.

Lytle's warning letters also included as unexcused absences for which he had received written or verbal approval and the audit counted as unexcused absences, September 1 and October 10, 1994, days for which Lytle obtained prior written approval to take off. Respondent also counted as an unexcused absence a day he left early because his mother was having emergency surgery and he received a verbal okay from foreman Ware to take this time off. (Ware wrote a note to this effect which was placed in his personnel file.) Similarly, the June 7 warning letter issued to Fogoros included as unexcused absences for which he had receive either verbal or prior written approval and his warning letter even listed 5 hours of unexcused absence for May 15. This was the day that Mahoney told him not to report to the Portage Northern job but to report to Thornapple Manor the following day. Houseman met with Dan Zimmerman on June 13 to discuss his June 7 warning letter and he refuted the statement in the warning letter that he had been warned verbally by Bob Link and his job foreman about his unscheduled absences, however Zimmerman merely replied, ''That's your word against ours.''

No special consideration was given to the circumstances surrounding the asserted absence occurrences for the seven union organizers, however, it did so for Sexton who was not a union supporter and who was allowed to provide a letter from his doctor dated March 1, which stated that Sexton had been under this doctor's care for migraine headaches, insomnia, and other problems, a letter which also stated, ''During this period, [Bruce Sexton] has not specifically asked for any notes off of work and has not been seen at this time where he has missed work.'' Sexton's personnel file contained eight notes from his foreman complaining about his absenteeism, and the scheduling problems he caused during the months of March, April, May, and June 1995, however, no discipline or warning was issued as it was to the alleged discriminatees herein, despite the fact that with one exception for Houseman, there were no reference to scheduling or other problems caused by their absenteeism.

Following his June warning letter and Stone's participation in the strike, Stone did not report to work the first day after the strike ended August 7, but called in sick that day. He then took off August 17 because he had to drive his brother to the Chicago Airport and told foreman Wedig on August 14 of this plan. Wedig said fine and that he would see him when he got back. On August 16 he reminded Wedig that he was going to take the day off and Wedig said that he had forgotten to tell the office. Stone then called Mahoney and explained the situation but Mahoney said that he could not sanction it, and Stone said that he had to take the day off. In an August 18 letter, Mahoney put Stone on final warning.

A final warning letter also was issued to Tim O'Brien on August 18, which listed as two unexcused absences for August 15 and 16, which he had again taken off to take his daughter to Ann Arbor for a doctor's appointment as he had often done in the past. On this occasion O'Brien advised Foreman Wedig before the week of August 12 and the Monday before he left that he would be taking these 2 days off for this purpose and he received verbal approval. The warning letter also listed as an unexcused absence August 8, the date that Tim O'Brien was suspended unlawfully for wearing union stickers on his hardhat.

Fogoros was issued a final warning letter for attendance on August 21. The only additional occurrences on that letter were for 15 minutes on August 7, when he left the jobsite with the permission of his foreman to make a telephone call, and for 4.5 hours on August 8 when he was sent home unlawfully for wearing union stickers on his hard, and on August 21 when he went home sick after Stone had been summarily terminated.

On August 22, 1995, the members of the organizing committee, including Todd O'Brien, went on another unfair practice strike to protest Stone's termination. The strike notice which was delivered to the Respondent indicated that the strike was to begin at 8 a.m. and named Todd O'Brien as one of the strikers.

On August 23, 1996, the second day of this unfair labor practice strike, Respondent discharged Todd O'Brien. Respondent's letter which referred to the fact that he had been placed on probation in June because of his attendance stated:

> On August 22, 1995, you were scheduled to report for work at the Wal-Mart site in South Haven at 6:30 a.m. You were not at the jobsite at that time, nor had your

> attendance been excused. Shortly after 8:00 a.m., Zimmerman received notice that you were on strike as of 8:00 a.m., August 22, 1995. However, this does not excuse your absence from the jobsite at 6:30 a.m. on August 22, 1995. As a result your employment with Zimmerman is terminated effective today. August 23, 1996.

Here, the Respondent asserts a legitimate concern over an attendance problem it suddenly became aware of in late 1994. It promptly acted against the single most serious violator and then conducted a leisurely audit of other employees and when the results came in June 1995, it responded with warning to nine employees, seven of whom had been identified by their Unions as union activists and it also imposed a much more strict interpretation and application of its attendance policy.

The timing of the initial warnings, a few weeks after the employee's public disclosure of their union sympathies raises the first indication that the Respondent's asserted reasons require closer scrutiny and it appears that the surrounding circumstances tend to support skepticism rather than any persuasive evidence that the Respondent would have followed this same course of conduct regarding so called employee ''attendance'' were it not for the union activities which developed in May. As noted above, the change in its attendance policy and its enforcement occurred at the same time it was pursuing an improper line of conduct relative to the employees' rights to display union insignia and its manager and senior foreman also had engaged in various other violations of employees Section 7 rights.

The Respondent's audit appears to be substantially inaccurate and unreliable as a real gauge of absenteeism with respect to many absences that had written approval or at least verbally approved and I am not persuaded that the Respondent would have so abruptly altered it past practices regarding what would be considered an absence ''occurrence'' that would count against its published five violations in a year policy. Its policy and past practices were ambiguous at best, yet the Respondent made no attempt to calmly assert application of an understandable policy but instead abruptly began to consider absences that employees thought covered by verbal permission as occurrences to be subject to discipline and it assertedly was ready to consider terminating half of its work force! Moreover, it allowed no explanations or review of the accuracy of its audit for any of the union supporters and just relied on its ''no fault'' language.

It did, however, give special consideration to employee Sexton and his 35 absence occurrences because of his migraine headaches. By the same token, it failed to give consideration the nature of the absences by Tim O'Brien who periodically took his daughter (O'Brien had at least joint custody of his children and his daughter was diagnosed with liver disease at age 3 months and periodically had to receive tests and monitoring at medical facilities in Ann Arbor), and such consideration would be consistent with the laws relating to family leave concepts. Moreover, although it accommodated Sexton's headaches out of concern for the Americans with Disability Act, it did not give that possible consideration to any of Houseman's absences, even though Robert Link sought to disparage Houseman with references to a problem with alcohol, a disability that would also appear to be covered by the same policy.

Instead, the Respondent harshly applied a most restrictive interpretation of its ambiguous ''absence'' rules in a manner inconsistent with its past practices. Under these circumstances the facts do not persuasively show that the Respondent would have issued the warnings in June or have taken the other severe actions discussed above related to enforcement of its attendance policy in the absence of the employees' protected union activity. Accordingly, I find that the General Counsel has carried its overall burden and shown that the Respondent has violated Section 8(a)(1) and (3) of the Act in these respects, as alleged.

G. *Apprenticeship Program*

In June 1995, part owner, Bruce Link, took over the administration of the apprenticeship program from his son Robert Link and on July 13, he sent a letter to the active apprentices which stated, ''[E]ffective July 24th, all Zimmerman apprentices will be required to attend school a minimum of 4 hours per calendar week. Failure to attend the minimum 4 hours per week will result in immediate expulsion from the program. There will be no exceptions.'' Bruce Link testified that with the exception of Tim O'Brien and Stone who were on strike at the time, he met with each of the apprentices individually to explain the new policy. Link explained that he chose 4 hours because he calculated that employees would have to attend 4 hours per week in order to complete the apprenticeship program within 4 years. Stone did not attend any additional apprenticeship schooling after receiving the July 13 letter; he was removed from the program (as were two others not involved in union organizing), and a charge filed regarding his removal was dismissed after investigation.

Tim O'Brien, however, called Bruce Link and asked if he would be allowed to take the summer off and not attend classes, as he had in the past. Link indicated that he was expected to attend the minimum of 4 hours a week and he began to comply. Thereafter, Link received printouts each week from the apprenticeship school which detailed the hours the apprentices had attended class. Employee Steve Randolf, who was not a union supporter, did not attend school at all the first 3 weeks following the implementation of the program. Bruce Link claimed that he tried to contact him by phone to see why he did not attend but he was unable to do so. On the other hand, Tim O'Brien met the minimum attendance requirements during the first 3 weeks of the program, but was unable to attend class during the week of August 14. On August 18, Bruce Link telephoned him and sent a confirming letter that stated that his failure to attend the minimum of 4 hours class time during the week of August 14 was unacceptable. The letter also indicated that Tim O'Brien had to sent a letter to Respondent by August 21 indicating why he had missed the previous week and ordered that he had to attend a minimum of 8 hours of class time during the week of August 21. The letter further provided that if he failed to meet these requirements he would be immediately terminated from the program. O'Brien sent the requested letter and went to the apprenticeship school for 8 hours the following week. No warning letter was sent to Randolf even though he had missed 3 straight weeks of the program. The attendance records also demonstrate that Leonard Orem did not attend for first 3 weeks of the program and his name did not appear on the records at all in August. Bruce Link requested that Orem get a letter from the school

verifying that he had attended class. However, the letter he obtained only stated that he attended school on August 16, 17, and 30. He did not attend the first 3 weeks of the new program and no disciplinary letter was issued.

During September, Tim O'Brien missed 15 minutes of class time during the week of September 4 and did not attend classes during the week of September 18 when he was on layoff. Bruce Link sent him a letter on September 27 terminating him from the program unless he documented that the information was wrong. On the other hand, Orem was allowed to take off 2 additional weeks from the program in September due to his honeymoon.

Here, the Respondent again has presented a reason for its action with O'Brien, however, other facts of record shown that he was treated in a disparate manner as compared to some others in the program. These others were given much greater latitude in bringing themselves into compliance with the requirements, they were not threatened with immediate termination if they did not make up lost weeks, and they were not terminated for their noncompliance with the strict letter of Link's policy. The inclusion of September 4 as a miss when O'Brien was credited with 3 hours and 45 minutes rather than a full 4 hours and the next week he was on layoff would seem to be subject to possible explanation, yet O'Brien was not given the opportunity to explain but was directed to do the impossible, provide contradictory ''documentation.''

Here, the Respondent's explanation of its treatment of O'Brien appears to be pretextual and I conclude that it has not persuasively shown that it would have taken the same hard line with O'Brien in the absence of his union activity. Accordingly I find that O'Brien's termination form the apprenticeship program on September 27 was illegal and was in violation of Section 8(a)(3) and (1) of the Act, as alleged.

H. *Other Allegations*

The record shows that on June 6 Bob Link took a series of pictures of the members of the organizing committee as they were engaged in peaceful informational picketing at the Thornapple Valley jobsite. Link testified that he told them he was taking pictures to document their location and what was on their signs. This explanation and the fact that these employees already had been publicly identified as union organizers does not refute the inherently chilling effect and tendency to intimidate that such picture taking conveys, especially in an instance when it was done by a supervisor and the son of the owner. There is no evidence that the Respondent could reasonably anticipate misconduct and I find that its own conduct interferes with the employees' rights to engage in union activity see *Casa San Miguel*, 320 NLRB 534, 538 (1995), citing *F. W. Woolworth Co*., 310 NLRB 1197 (1993).

On June 27, Houseman (a sheet metal worker) was working at the Portage Northern jobsite, and, as he generally did, was wearing his helmet backwards. Plumbing Foreman Dennis who was the overall foreman on the job, testified that he approached Houseman about 10 a.m. and told him to turn his hardhat around. Houseman told him to mind his own fucking business. Mike Dennis ''assumed'' that Houseman felt as plumbing foreman he should not be the one giving the sheet metal workers orders but he considered Houseman to be insubordinate and he called owner Mahoney (who told Dennis to send him off the job and to report to Dan Zimmerman the next day). Dennis wrote up a report and returned about 2:30 p.m. and sent Houseman home for the rest of the day. On the same day Dennis saw employee Craig Miller with no hardhat. Dennis considered it a first offense and did not write up a warning or a safety incident report but did note the incident in the daily log.

Houseman recalled that the conversation was minimal and that Dennis told him ''you ought to him your hat around'' and he replied, ''[Y]ou ought to mind your own business.''

Here, there is no indication that the employee in the other incident that day reacted to the jobsite foreman with an insubordinate type comment. Accordingly, no disparate treatment is shown and I am persuade that Houseman would have been sent home for this insubordinate conduct even in the absence of the union activity and I find that this allegation has not been proven and that it should be dismissed.

After the strikers presented Respondent with a written unconditional offer to return to work on July 28, plumber apprentice Yearry was not recalled to work until nearly a month later, on August 21 (when he replaced Lytle). The evidence on the record also indicates that there was pipe insulating work that Respondent used temporary, ''contract'' employees to perform. The Respondent explained that it often ''contracted with'' an insulation company to perform this type of work, especially for insulating special tanks or boilers and Mahoney) asserted that Yearry was not qualified to do the work. Timecards were introduced for four temporary employees who did insulation work at the post office job in August but the Respondent asserts these were to keep track of the hours on the job and that they would not hire temporary help on a prevailing wage job. Bruce Link also admitted that plumbers regularly performed insulation work, however, Yearry did not testify that he had performed such work. Under the circumstances I find the evidence to be too inconclusive to show a violation of the Act in this respect and, accordingly, this allegation also will be dismissed.

Shortly after 7 a.m. on August 21, Stone and Fogoros walked to the boiler room building (where construction supplies were stored), on the Thornapple Manor jobsite. Employee Tom Sulka was kneeling while he was working at the edge of the doorway leading into the boiler room. A half-empty plastic, Pepsi bottle was in the entrance, 2 to 4 feet from Sulka and as Stone stepped over the bottle, he gave it a backwards kick with the heel of his shoe and the plastic bottle went back into an empty parking lot. At the time, neither Fogoros or Stone said anything to Sulka and he did not say anything to them, however, Robert Link and foreman were Ware were standing about 40 feet away and saw Stone kick the bottle. Link and Ware immediately rushed over and Link told Stone that they had seen him kick the pop bottle. Initially Stone replied, ''What bottle?'' Stone testified that he initially didn't know what Link was talking about because he thought it was just trash so he just kicked it out the way as he often did. After Link persisted Stone said it was ''accidental (as stated in Link's incident report) he must not have seen it.'' Link believed what he had observed clearly was intentional and could not have been accidental and immediately told Stone to pack his tools and leave the job. He also wrote in his report that Stone became argumentative but finally left. At this time Fogoros said he was ill and that he would not stay and be accused of doing something he did

not do and that he was tired of all the ''Mickey Mouse bullshit.''

On August 23, Dan Zimmerman sent Steve Stone a letter informing him that he had been terminated for intentional misconduct against Sulka as well as for lying about it when confronted with his actions.

Here, the Respondent shows legitimate reasons that could justify Stone's termination. However, in the face of the *Transportation Management Corp*. decision, supra, and the General Counsel's motivation showing as discussed above (Stone was the subject of unlawful interrogation, orders to remove union stickers and attendance warnings), the Respondent has the further burden of persuading by a preponderance of the evidence that the same action would have been taken in the absence of the employees' protected activity.

Sulka did not see what had happened and did not testify. The Respondent, however, learned that at the start of the day Stone had yelled at Sulka to put his safety glasses on (enforcement of rules against the union supporters was a concern and Stone also was aware that Sulka was a witness whose report contributed to Houseman's discipline), and it seizes upon this information to contend that Stone attempted to intimidate Sulka and to ''goad'' Sulka into a ''fight'' about the safety glasses and to ''initiate a physical confrontation'' by kicking the bottle.

It asserts that Zimmerman was aware of both of these instances when the termination decision was made, however Dan Zimmerman did not testify and their is no indication in the termination letter that this was a consideration nor is there any showing how he might have became aware of this (the safety glasses incident was not mentioned in Link's report). Otherwise, however, the record shows that Mahoney was the member of management who normally evaluates employees and deals with disciplinary matters but that he was not involved in the Stone decision (although he was at work that week), because, as Mahoney testified, Dan Zimmerman wanted to, and requested to handle it.

According to Mahoney, firing someone was a rare occurrence that did not happen very often, however, Zimmerman apparently took this rare action solely on the basis of Robert Link's written incident report. There were several other witnesses, including Forgoros and Foreman Ware, yet no investigation was made of the circumstances and Stone was never interviewed or given an opportunity to explain his side of the story or to provide any information that might have mitigated the extent of his discipline. On brief and on the record, the Respondent provides an exaggerated picture of the seriousness of the incident, moreover, the record shows a rush to judgment and an attempt to add derogatory factors to the equation, factor not shown to be relied upon in its termination decision. These other factors lend no support to the legitimacy of its asserted reason and, despite an initial surface appearance of justification for the Respondent's actions, I find that occurring as it did in connection with a series of other antiunion and illegal actions against union supporters, the imposition of the most sever penalty, termination, with no investigation appears to be more pretextual than persuasive.

Under these circumstance, I am not persuaded that the incident was so serious that it could not have been investigated and handled in a normal way and I am not persuaded that the Respondent would have summarily terminated Stone in the absence of the protected union activities. Accordingly, I find that the General Counsel has carried his overall burden and shown that the Respondent's action in this regard was because of the union activities and was in violation of Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times pertinent Harold Bartholomew, Mike Dennis, Robert Link, Wayne Ware, and Roger Wedig were supervisors and or agents within the meaning of Section 2(11) and (13) of the Act such that their conduct in relation to the Respondent's employees is attributable to the Respondent.

4. By creating the impression that employees union activities are under surveillance; instructing employees to consult with management before joining a union; implying that joining the union would result in unfavorable treatment compared to the benefits available to those who stay with the Company; threatening employees with closure of the business, denying employees the privilege of bringing their tools home at night; limiting employees normal access to the onsite job trailer; and by photographing its employees' union activities on June 6, 1995, the Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By transferring and isolating together the all know union organizers (except one) because of their union activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. By maintaining and enforcing a rule prohibiting employees from placing any union stickers on company hardhats or from wearing their own hardhats, by prohibiting solicitation of any kind, and by discriminatorily issuing warnings or verbal reprimands to Jamie Fogoros, Joe Houseman, Andy Lytle, and Jeff Yearry on June 16 and 20, 1995, Fogoros on August 11, 1995, Lytle on August 18 by sending home and suspending Tim O'Brien on August 8, 1995, and Lytle on August 18, 1995, and by discharging Lytle on August 22, 1995, because of their display of union stickers on their hardhats and other union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By issuing disciplinary warnings for violation of its attendance policy to Jamie Fogoros, Andy Lytle, Tim O'Brien, Todd O'Brien, Steve Stone, and Jeff Yearry on June 7, 1995, and Joe Houseman on June 13, 1995; Todd O'Brien on June 26, 1995; Fogoros, Tim O'Brien and Stone on August 21, 1995; and by discharging Todd O'Brien on August 23, 1995, because of their union activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

8. By discharging Steve Stone on August 23, 1995, because of his union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

9. By removing Tim O'Brien from the Respondent's apprenticeship program on September 27, 1995, because of his union activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

10. Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

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

With respect to the necessary action, it is recommended that Respondent be ordered to reinstate employee Tim O'Brien to the apprenticeship program (with no loss of existing credits), to rescind the suspensions and attendance related disciplinary warnings given to Jamie Fogoros, Joe Houseman, Andy Lytle, Tim O'Brien, Todd O'Brien, Steve Stone, and Jeff Yearry and to reinstate Andy Lytle, Todd O'Brien, and Steve Stone to their former jobs or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned during their suspension or from the date of the discrimination to the date or reinstatement in accordance with the method set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

The Respondent also shall be ordered to remove from its files any reference to the warnings, suspensions, and discharges and notify all these employees in writing that this has been done and that evidence of the unlawful discharges and suspensions not be used as basis for future personnel action against them. Otherwise, it is not considered necessary that a broad Order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Zimmerman Plumbing and Heating Co., Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by creating the impression that employees' union activities are under surveillance; instructing employees to consult with management before joining a union; implying that joining the union would result in unfavorable treatment compared to the benefits available to those who stay with the company; threatening employees with closure of the business, denying employees the privilege of bringing their tools home at night; limiting employees normal access to the on-site job trailer; and photographing its employees' union activities.

(b) Discriminatorily changing the terms and working conditions of employees by transferring and isolating together known union organizers.

(c) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, by promulgating an overly broad no-solicitation, rule a more strict absenteeism policy and by maintaining and inferring a rule prohibiting employees from placing any union stickers on its hardhats or from wearing their own hardhats because of employees engaging in union or other protected concerted activity.

(d) Discriminatorily issuing warnings, suspending, or discharging employees for alleged violations of a more strictly enforced attendance policy and their display of union stickers on their hardhats because of their union activities.

(e) Discriminatorily removing an employee from the apprenticeship program and otherwise terminating any employee because of their engaging in union or other protected concerted activities.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Andy Lytle, Todd O'Brien, and Steve Stone immediate and full reinstatement and make them whole for all losses they incurred as a result of the discrimination against them, in the manner specified in the remedy section.

(b) Within 14 days from the date of this Order rescind the no-solicitation, no-hardhat sticker rule and rescind the attendance related disciplinary warning letters to Joe Houseman, Todd O'Brien, Steve Stone, Tim O'Brien, Jeff Yearry, Jamie Fogoros, and Andy Lytle, issued in June and August 1995 and remove from its records any reference to them and notify these employees, in writing, that this has been done and that the warning letters will not be used as basis for any future personnel action against them.

(c) Within 14 days from the date of this Order reinstate Tim O'Brien to the Respondent's apprenticeship program with no loss of credit and remove any reference to his September 1995 removal from that program from its files and notify him, in writing, that this has been done.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations, suspensions, and warnings and, within 3 days thereafter, notify the employees in writing that this has been done and that evidence of these unlawful terminations, suspensions, and warnings will not be used as a basis for future personnel action against them.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days service by the Region, post at its Kalamazoo facilities and all current jobsites copies of the attached

[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[5] 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.

notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''