

**Wisconsin Steel Industries, Inc. and United Steelworkers of America, AFL-CIO.** Case 30-CA-11504

August 3, 1995

DECISION AND ORDER REMANDING

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On August 5, 1993, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs, and the General Counsel filed an answering brief in opposition to the Respondent's exceptions.<sup>1</sup>

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

The 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,<sup>2</sup> and conclusions<sup>3</sup> as modified.

1. We agree with the judge, for the reasons he sets forth in section IV, that the Respondent bargained in bad faith. In affirming the judge's finding in this regard, we do not rely on his suppositions concerning the import of the Supreme Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), for the Respondent's bargaining on a union-security clause. Further, we note our understanding that his de-

<sup>1</sup>The General Counsel's motion to strike the Respondent's November 24, 1993 letter to the Board's Deputy Executive Secretary is granted.

On January 20, 1995, the Council on Labor Law Equality (COLLE) filed a motion for leave to file an amicus curiae brief. The General Counsel and the Charging Party filed oppositions to the motion, and COLLE filed a response. On February 14, 1995, the Board (with Member Cohen dissenting) denied the motion.

<sup>2</sup>The Respondent and the General Counsel have 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 they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and we find no basis for reversing the findings.

<sup>3</sup>Member Cohen concurs with his colleagues' adoption of the judge's dismissal of the 8(a)(5) allegation concerning the Respondent's unilateral sale of its trucks. In doing so, he notes that it has not been shown that this action concerned a mandatory subject of bargaining. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

Based on our examination of the record, we are satisfied that there is no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated any bias. Thus, we find no merit in the General Counsel's contention that the judge was biased against his position.

Member Cohen finds it unnecessary to decide whether production employees Reinke and Gray were discharged in violation of Sec. 8(a)(3). He agrees that these employees were laid off in violation of Sec. 8(a)(5). Any 8(a)(3) violations would not materially affect the Board's remedy.

scription of the substance of the Respondent's bargaining proposals was not intended to suggest that the Respondent acted unlawfully by failing to offer more favorable terms. The substance of proposals is merely evidence that may be considered, along with other evidence of a party's bargaining tactics, in the determination of whether the party has manifested an "intent to frustrate the collective-bargaining process." *Reichhold Chemicals*, 288 NLRB 69, 70 (1988), aff'd. in pertinent part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 726-727 (D.C. Cir. 1990). Accord: *Larsdale, Inc.*, 310 NLRB 1317, 1319 (1993).<sup>4</sup>

We also do not rely, in our consideration of any issue, on the judge's findings in sections III and XI,E (final par.) that the Respondent's president, Theodore (Ted) Dolhun, had "relatively mild" or "mild" union animus. We find that the record fully establishes Dolhun's union animus and adequately supports all the allegations of which proof of animus is an element.

2. The judge found in section V,A that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally *changing* (i.e., as opposed to shortening) employee shift hours in January 1992. The Respondent has excepted to this finding on the grounds that the General Counsel expressly disclaimed at the hearing any allegation that the Respondent independently violated the Act by unilaterally changing employee shift hours. We find merit in the Respondent's exception. On the final day of the hearing, September 25, 1992, counsel for the General Counsel stated on the record that he was not alleging that the Respondent unilaterally changed work schedules in violation of Section 8(a)(5), and that he was not amending the complaint to include such an allegation. Accordingly, we find that the judge erred in finding such a violation.<sup>5</sup>

3. We affirm the judge's credibility-based finding in section VIII,B that the Respondent violated Section 8(a)(1), based on employee Michael Gray's testimony that he overheard Dolhun shout to Supervisor Terry Patelski that if the Union got in Dolhun would sell the trucks, shut down the plant, and (personally) move to Florida.<sup>6</sup>

<sup>4</sup>Member Cohen agrees with his colleagues that the Respondent violated Sec. 8(a)(5) by bargaining in bad faith in negotiations for an initial collective-bargaining agreement. In doing so, he finds it unnecessary to rely on that part of their rationale which involves an assessment of the substance of the Respondent's bargaining proposals involving management flexibility, cost reduction, and union security. See *Larsdale, Inc.*, 310 NLRB at 1319 fn. 5.

<sup>5</sup>We agree with the judge's conclusion that the Respondent did not change work shift hours for discriminatory reasons.

<sup>6</sup>We note that, although Patelski was not asked at the hearing specifically about Gray's account of this incident, Patelski did generally deny that he had ever heard Dolhun threaten to sell the Respondent's trucks because of union activity. But Patelski's denial that he *heard* Dolhun make such a threat is not inconsistent necessarily with Gray's credited testimony that *he* heard Dolhun shout such a statement to Patelski.

Also, in section VIII,B, the judge dismissed, on credibility grounds, allegations that Ted Dolhun separately threatened employee truckdrivers Ronald Andresen and Thomas Cannon that if the Union won the election he would sell the Respondent's trucks and contract with outside companies to provide trucking, with a resultant loss of the truckdrivers' jobs. The General Counsel has excepted to these dismissals.

We find it unnecessary to pass on the General Counsel's exceptions because any resultant additional 8(a)(1) findings would be cumulative and would not affect materially the remedy for the 8(a)(1) violation found above.

4. We agree with the judge, for the reasons he sets forth in section VIII, that the General Counsel has made a prima facie showing that the Respondent violated Section 8(a)(3) and (1), by shutting down its transportation division (over-the-road trucking operations) in June 1991, shortly after the start of the Union's organizational campaign. We find, however, that the Respondent may have established that it would have discontinued these operations in any event for economic reasons at a later time. In this regard, we find the judge's decision ambiguous regarding the allegedly discriminatory shutdown. It is unclear whether the judge has found (1) that the Respondent would not have shut its transportation division down *at all* absent union considerations, or (2) that although the Respondent reasonably would have shut down its transportation division for valid economic reasons subsequent to June 1991, the Respondent *accelerated* the shutdown to June 1991 because of union considerations.

Certain of the judge's statements suggest that he has found only the latter, i.e., a *discriminatorily accelerated* June 1991 shutdown of the transportation division. Specifically, the judge found in section VII that (1) the Respondent's overall sales and profitability had substantially declined in the 5-month period prior to June 1991; (2) the Respondent had warned its employees in April 1991, prior to the onset of union activity, that it was encountering slower economic conditions that had already forced layoffs; and (3) "there is a great deal of evidence indicating that the decline in the level of WSI's business and the resulting layoffs were caused by the recessionary economy, not by WSI's union animus."

Similarly, the judge found in section VIII,C that the Respondent's accountant, Paul Runkel, advised Dolhun in July 1991 (1) that the Respondent's transportation division had lost approximately \$300,000 in the first half of 1991, and that he projected it to lose \$600,000

over the course of the year;<sup>7</sup> and (2) that the Respondent should sell all of its trucks and contract with trucking companies to provide the Respondent with transportation services.

Thus, although the judge's discussion suggests that the Respondent would have shut down the transportation division for lawful reasons sometime after June 1991, the judge did not make a specific finding in that regard. Moreover, while the General Counsel stated at the start of the hearing that he would seek a remedy requiring the Respondent to resume its over-the-road trucking operations, the judge found that the Respondent failed to prove when financial and operating considerations *alone* would have led the Respondent to shut down its over-the-road trucking operations. Consequently, the judge recommended that the Respondent resume its over-the-road trucking operations, and that any employees laid off as a result of the discriminatory shutdown be reinstated.

These remedies would be inappropriate, however, if the violation found were merely a discriminatorily *accelerated* shutdown of the transportation division.<sup>8</sup>

<sup>7</sup> As discussed in his decision at sec. VIII,C, the judge decided to receive into evidence a handwritten summary of the financial performance of the Respondent's transportation division for 1989, 1990, and 1991, which was prepared by Runkel and presented to Dolhun (R. Exh. 23). We affirm the judge's ruling. We note, however, that contrary to the judge's finding, the record establishes that Runkel prepared this summary in July 1992, using actual performance figures for all 3 years, rather than in July 1991, using actual figures for 1989 and 1990, and estimated figures for all of 1991, as found by the judge.

<sup>8</sup> *Bridgeford Distributing Co.*, 229 NLRB 678 (1977) (resumption of operations and reinstatement of employees not required where employer's basic decision to transfer operations in question was lawfully based on economic reasons but was thereafter unlawfully accelerated based on subsequent union activity); *Calcite Corp.*, 228 NLRB 1048 (1977) (where evidence establishes that employer might have conducted a lawful economic layoff subsequent to the date of its accelerated, discriminatory layoff, and therefore some doubt exists about whether and when any of the unlawfully laid-off employees eventually would have been laid off lawfully, the determination of (1) when such lawful layoff would have occurred, and (2) which employees would have been lawfully laid off is best left to compliance; employees will be entitled to backpay from date of accelerated unlawful layoff to date when they would have been lawfully laid off). See *Pacemaker Driver Service*, 290 NLRB 405 (1988), *enfd.* 914 F.2d 92 (6th Cir. 1990) (employer not required to reopen discriminatorily closed operation or to reinstate discriminatorily terminated employees in backpay proceeding where record establishes that employer subsequently would have closed operation and lawfully terminated employees); see also *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991) (seasonal employees whose scheduled, lawful, seasonal layoff was discriminatorily accelerated are entitled to reinstatement for next production season, but are only entitled to backpay from date of discriminatorily accelerated layoff to date that they would have been lawfully laid off). Cf. *Schwartz Mfg. Co.*, 289 NLRB 874 (1988) (employer failed to establish if, when, or to what extent employees would have been laid off and plant shut down for lawful reasons subsequent to date of discriminatory layoff); *Hemisphere Broadcasting Co.*, 290 NLRB 394 (1988) (employee whose scheduled discharge for lawful reasons was accelerated for unlawful

*Continued*

We disavow the judge's finding in fn. 30 that Dolhun's threat "says little" about his union animus, and that it did not "signif[y] anything more than a temporary irritation with the Union's organizing effort."

Hence, there is tension between the judge's apparent finding that there was an accelerated shutdown, and his recommended resumption-of-operations and reinstatement remedies. Under the circumstances, we cannot determine whether the judge has found: (1) that the Respondent discriminatorily shut down operations in June and established no defense; *or* (2) that the Respondent established a defense that it would have shut down operations for lawful reasons at some point subsequent to June (in which case the violation is only that the Respondent discriminatorily *accelerated* the shutdown to June).

If the judge found that the Respondent established this defense, then he has not articulated why this defense does not also apply to the "acceleration" allegation. That is, if the Respondent showed that it would have discontinued its over-the-road trucking operations for economic reasons at a later time, it may well be that this showing is applicable to the "acceleration" allegation as well. In this regard, we note that most (if not all) of the factors that might support this defense existed in late June.

Accordingly, we remand this aspect of the case to the judge and direct him to find, on the basis of the existing record and consistent with the foregoing discussion, whether the Respondent would have shut down its transportation division for lawful reasons in June 1991 or thereafter, and to determine the appropriate remedy, if any.<sup>9</sup> In light of our remand of the shutdown issue, we withhold judgment on the judge's finding that the layoffs of drivers Andresen and Can-

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reasons is not entitled to reinstatement and is only entitled to back-pay from date of unlawfully accelerated discharge to date of lawful scheduled discharge); *Landgrebe Motor Transport*, 295 NLRB 1040 (1989) (same); *Ohio Valley Graphic Arts*, 234 NLRB 493 (1978) (same). Also, cf. *Electronic Data Systems Corp. v. NLRB*, 985 F.2d 801, 807-808 (5th Cir. 1993), denying enf. in pertinent part 305 NLRB 219, 259, 263 (1991) (order requiring restoration of operations and reinstatement of employees was not tailored to union animus in question, because the Board had not considered whether, when, and how employer would have eventually consolidated operations; in fashioning remedy, Board should account for what employer eventually would have done in regard to consolidation of operations, absent union animus); *Mid-South Bottling Co. v. NLRB*, 876 F.2d 458, 463 (5th Cir. 1989), enf. 287 NLRB 1333 (1988) (resumption of discriminatorily curtailed operations is appropriate remedy where, inter alia, employer failed to establish that facility eventually would have been closed for lawful reasons); *NLRB v. Major*, 296 F.2d 466, 468 (7th Cir. 1961), denying enf. 129 NLRB 322 (1960) (restoration of operations is not appropriate where employer had legitimate reason to cease operations before onset of union activity and then accelerated cessation of operations because of the union activity).

<sup>9</sup>Member Truesdale joins his colleagues in remanding to the judge the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) by shutting down its transportation division. In light of the remand, however, he finds it unnecessary to characterize the applicability of specific evidence adduced by the Respondent at the hearing to the allegations remanded.

non violated Section 8(a)(3) as a consequence of the closing of the trucking operation.

5. We agree with the judge, for most of the reasons he sets forth in section IX, that the Respondent's discontinuance of its business relationship with Galland Henning Nopak, Inc. (GHN) was not motivated by knowledge that GHN's employees were represented by the Union and that some GHN employees had visited the Respondent's plant on the day of the representation election. We note that the dismissal of this allegation is also supported by *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968), which holds that an employer does not violate Section 8(a)(3) and (1) of the Act "by ceasing to do business with another employer because of the union or non-union activity of the latter's employees."<sup>10</sup>

In affirming the judge's dismissal of this allegation, however, we find it unnecessary to rely on his discussion in footnote 41 about whether the testimony of employee Margaret Komas was admissible as an exception to the hearsay rule under the Federal Rules of Evidence. Rather, we rely only on the judge's "more-over" rationale that Komas' testimony is not hearsay because it is relied on, not to prove the truth of the matter asserted, but only to prove what the Dolhuns knew about GHN's overdue payments.

6. We agree with the judge's finding in section X that the Respondent engaged in unlawful surveillance of employee union activity when Supervisor Dale Lewandowski drove slowly past the Ice House tavern, a known employee meeting place where a union meeting was actually underway, and peered at cars in the parking lot. We do not, however, rely on the judge's "crediting" of Cannon's testimony that in his opinion the only explanation for Lewandowski's actions was that he was trying to determine which of the Respondent's employees were engaged in union activity in the Ice House. Rather, we rely on the judge's *independent* finding (albeit in substantial agreement with Cannon's opinion) that under all the circumstances it was far more likely than not that Lewandowski was trying to determine which employees were at the meeting in the Ice House.

7. In section XI,B, the judge addressed, inter alia, several allegations that certain incidents involving Ted Dolhun and employee Paul Herbst during the days immediately following the Union's election victory on August 14, 1991,<sup>11</sup> violated Section 8(a)(3) and (1), and that Herbst's layoff a week later violated Section 8(a)(3) and (5).

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<sup>10</sup>In affirming the judge's dismissal of this allegation, Member Truesdale does not rely on *Plumbers Local 447 (Malbaff Landscape Construction)*, supra.

<sup>11</sup>All dates in this section and the following section are 1991 unless otherwise stated.

Herbst was an active supporter of the Union who also served as the Union's observer at the August 14 election. He was laid off on Tuesday, August 20. In the 6 days between Herbst's service as the Union's observer and his layoff, there were five workplace encounters in which Dolhun made hostile or threatening comments to him.<sup>12</sup> The judge found that one of those incidents constituted harassment in violation of Section 8(a)(1), but he dismissed the other four allegations. For the following reasons, we agree with the judge regarding the violation he found, and, contrary to the judge, we find that Dolhun's statements in the other four incidents also violated Section 8(a)(1).

Two of those incidents took place on Friday, August 16, 2 days after the Union's election victory. Around 8:30 a.m. that day, when Herbst was returning to his work area with a cup of coffee he had obtained on the plant premises, Dolhun approached him, ordered him to get rid of the coffee, and after Herbst had set it down, told him that employees would no longer be allowed to take coffeekbreaks. When Herbst responded, "Okay, Ted," Dolhun indicated that he was thereafter to be addressed as "Mr. Dolhun." Such restrictions on coffeekbreaks had not previously existed, and, as the judge reasonably found, "the only possible cause of Dolhun's behavior," so far as the record shows, "is Herbst's role as [election] observer for the Union on August 14 and the employees' vote in favor of the [Union]." We agree and affirm the judge's finding of an 8(a)(1) violation.<sup>13</sup>

Later that day Dolhun spotted Herbst in his work area without his safety glasses on. Dolhun conceded at the hearing that this was not something new—he had instructed Herbst "many times" before to wear the glasses. This time, however, unlike all previous occasions, he threatened Herbst that he would be fired "on the spot" the next time he was caught without the glasses. No such threat was directed at Herbst's supervisor, Burdick, who was working nearby and was also not wearing safety glasses. In dismissing the allegation that this discharge threat was unlawfully motivated, the judge relied on the fact that Herbst had been advised of the safety glass rule before and had suffered some eye injuries. But the only factors distinguishing this occasion from the "many" previous occasions when the eyeglass rule had been brought to Herbst's attention were that Herbst had recently appeared as a prominent representative of the Union and that this time he was threatened with discharge. Unlike the

judge, we infer from these circumstances that Dolhun was threatening discharge because of his anger at Herbst's union role, and the Respondent thereby violated Section 8(a)(1) of the Act.

Three incidents occurred on Monday, August 19. First, Dolhun ran up to Herbst with an improperly worked part, yelling that Herbst had "screwed up the job" and that "the next time you screw up the job I'm going to fire you." In fact, Herbst was not the employee who had worked on that part, but even more significantly, according to Herbst's credited and uncontradicted testimony, no employee in the past had been "warned so severely" about such work errors. That afternoon, Dolhun approached Herbst and brought up a brief conversation Herbst had had with a laid-off employee, Mike Gray, earlier in the day. (Herbst had gone to the employee locker room to get Gray the telephone number of a union representative to call concerning his layoff.) According to the credited testimony, Dolhun asked Herbst if his conversation with Gray had been about the Union, and when Herbst did not answer, Dolhun burst out: "I've put up with your shit for two years now. Union or no union, I'm going to run your damn ass out of the company." Finally, that same afternoon, after Dolhun saw Herbst talking to one of the Respondent's truckdrivers who had come in to make a pickup, Dolhun ordered Herbst "from now on" not to "talk to truck drivers or anybody else, or anybody on the street," and to "[j]ust stay in your work area." If Herbst disobeyed the directive, Dolhun warned, he would be fired "on the spot."

The judge dismissed the allegation concerning the defective part because he speculated that Herbst's past bad work record might have led Dolhun to lash out at him on the basis of the mistaken belief that he was responsible for the defect. He dismissed the allegations regarding the threats to run Herbst "out of the company" and to fire him "on the spot" for talking with others as the likely results of Dolhun's concern about employees violating the maxim "work time is for work." In our view, this improperly ignores the fact that in questioning Herbst about the discussion with Gray, Dolhun expressed no concern about where or when the discussion occurred (i.e., whether in or out of the work area or during or after the official workday); rather, he focused on whether Dolhun had been talking to Gray about the Union. Thus, the judge offered a rationale for Dolhun's threat that Dolhun, himself, did not express either at the time he made it or in his testimony at the hearing. The judge's analysis also fails to take adequate account of the fact, which the judge appeared to accept, that Herbst's brief conversation with the truckdriver occurred "in much the same way that Herbst had always chatted with drivers coming in for pick-ups." The only difference was that the other occasions had preceded the election and had

<sup>12</sup>A sixth incident alleged as unlawful by the General Counsel consisted of nothing more than Dolhun's directing Herbst to pick up a piece of steel scrap from the floor. We agree with the judge, for the reasons stated by him, that this cannot reasonably be construed as threatening or harassing, and it does not rise to the level of a violation of Sec. 8(a)(1).

<sup>13</sup>The General Counsel did not except to the judge's failure to find whether this conduct also violated Sec. 8(a)(3) of the Act.

not elicited warnings and threats of discharge. In sum, we find that all three of these August 19 incidents represented threats and harassment motivated by Herbst's service as the Union's representative at the August 14 election that the Union won. Accordingly, contrary to the judge, we find that the Respondent thereby violated Section 8(a)(1).

8. In section XI,B, the judge found that the Respondent laid Herbst off unilaterally, without advance notice to the Union, in violation of Section 8(a)(5), but the judge dismissed the allegation that the Respondent laid Herbst off in violation of Section 8(a)(3). We affirm the judge's finding that Herbst was laid off in violation of Section 8(a)(5). But we reverse his dismissal of the 8(a)(3) layoff allegation.

Preliminarily, the judge did find that the General Counsel had established a prima facie case that the Respondent laid off Herbst on August 20 because of his union activities. The judge relied on the fact that only a few days before ordering Herbst to be laid off, Dolhun had unlawfully harassed him because of his union activities (i.e., by criticizing him for taking a coffeekick, by prohibiting him from taking them in the future, and by requiring him to address Dolhun as "Mr. Dolhun"). Nevertheless, the judge concluded that the Respondent proved that it would have laid off Herbst off even in the absence of his union activities.

Our unfair labor practice findings in the preceding section of this decision concerning the four additional incidents of threats and harassment made not long before Herbst's layoff show that the Respondent's animosity towards Herbst's serving as the union observer and towards the Union's victory in the election was far more intense than the judge acknowledged. And, as discussed below, we find that the Respondent has not met its burden under *Wright Line*<sup>14</sup> of demonstrating that it would have laid off Herbst even in the absence of his union and protected activity.

In order to rebut the General Counsel's prima facie case, the Respondent must demonstrate by a preponderance of the evidence that it would have laid off Herbst on August 20 even in the absence of his union activity, which culminated in his service as union observer at the election on August 14.<sup>15</sup> The Respondent cannot simply present a legitimate reason for its action; it must persuade by a preponderance of the evidence.<sup>16</sup>

Dolhun testified that in deciding to lay off Herbst he took into account the recommendations of Supervisors

Lewandowski and Patelski.<sup>17</sup> Dolhun testified that he decided to lay off Herbst on the basis of his relative lack of skills compared to other employees, his poor attendance record (assertedly the worst in the Company), his poor attitude towards the Company and other employees, and "economic consideration of our business." The record establishes that Herbst's performance, attitude, and attendance problems were longstanding and substantially predated the late August incidents and layoff.

On July 22, Herbst was late for work, and was given a written warning by his supervisor, Brian Burdick. The warning notified Herbst that if he was absent or late without permission one more time, he would be given a 3-day suspension, and that a similar offense after that would result in termination.

On Thursday, August 1, Herbst was absent from work without permission, assertedly because he was sick. On Monday, August 5, Herbst was given a "temporary layoff" for 3 days, purportedly because of "economic conditions." But Herbst testified, without contradiction, that Burdick said to him "we both [Herbst and Burdick] know why you are being laid off, it is punishment for being sick for a day and missing work." Indeed, Herbst received a written warning from Burdick dated August 5, subject "Absence of 8-1-91," which stated in pertinent part:

Your attendance record is already serious enough to terminate you. If there is another incident, we will consider it a cease [sic] of your employment with Wisconsin Steel Industries, Inc.

There is nothing in the record to show that between Herbst's August 5 warning and his August 20 layoff he was absent, late, performed poorly, displayed a bad attitude, or engaged in any misconduct. The only significant events involving Herbst between the warning and the layoff were (1) his service as union observer at the August 14 election; (2) the Union's victory in the election; and (3) Dolhun's unlawful harassment and repeated unlawful threats to discharge Herbst on Friday, August 16, and Monday, August 19.

Dolhun testified that he also took into account "economic consideration of our business" in deciding to lay off Herbst. He did not, however, elaborate on that assertion or attempt to particularize it in the context of Herbst's layoff on August 20.<sup>18</sup>

<sup>14</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>15</sup> *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

<sup>16</sup> *Id.*, citing *Equitable Gas Co.*, 303 NLRB 925, 928 (1991).

<sup>17</sup> Lewandowski did not testify. Patelski testified that while he had told Dolhun about the negative aspects of Herbst's performance, he had never recommended that Herbst be laid off. In this regard, we note that in fn. 48 the judge refers to the contents of an affidavit that Patelski provided to the Respondent's attorneys (R. Exh. 27). But this exhibit was rejected at the hearing, and its contents are not in evidence.

<sup>18</sup> The record does show, and the judge correctly found, that the Respondent's business was suffering, losing money, and laying off employees during the August 1991 events in question here.

Based on all of the above considerations, we find that the preponderance of the evidence establishes that Herbst's union activities led Dolhun to lay him off on August 20, not Herbst's past performance, attendance, or attitude problems, or Dolhun's "economic consideration" of the Respondent's business. Accordingly, we find that the Respondent has not met its burden under *Wright Line*, supra, of showing that it would have laid off Herbst on August 20 even in the absence of his union activities. We conclude that the Respondent discriminatorily laid off Herbst in violation of Section 8(a)(3) of the Act.<sup>19</sup>

9. We affirm the judge's finding, in section XI,E, that the Respondent violated Section 8(a)(1) when Dolhun told Supervisor Burdick that "[t]hose are the assholes causing me trouble over here. I'm going to bury those fuckers." The credited evidence establishes that Dolhun was referring to employees Beamon and Perren, who were working about 10 feet away, and that Perren overheard Dolhun's remarks.

In affirming this finding, however, we note that the judge found that Dolhun did not testify about this incident. While the record confirms that Dolhun did not testify specifically about this incident, he did deny generally that he ever said in reference to Beamon and Perren that he would "bury those assholes." The judge's failure expressly to refer to this aspect of Dolhun's testimony does not affect our affirmation of the judge's 8(a)(1) finding.<sup>20</sup>

10. We affirm the judge's dismissal, in section XI,E, of the allegation that the Respondent violated Section 8(a)(1) when Dolhun ordered Supervisor Burdick to "write up" Beamon and Perren "for anything and everything." In affirming the judge's dismissal of this allegation, however, we note that, contrary to the judge's finding, Dolhun denied giving Burdick these instructions.

#### ORDER

This proceeding is remanded to Administrative Law Judge Stephen J. Gross for the purposes of (1) determining on the basis of the existing record whether the Respondent would have shut down its transportation division for lawful reasons at some particular time in June 1991 or thereafter, and (2) determining an appropriate remedy for any violation found in this regard.

Thereafter, pursuant to the applicable provisions of Section 102.45(a) of the Board's Rules and Regulations, the judge shall prepare and issue a supplemental decision containing findings of fact, conclusions of law, and a recommended supplemental Order in regard

<sup>19</sup> See *Norris/O'Bannon*, 307 NLRB 1236 (1992).

<sup>20</sup> We further note that, in any event, Dolhun's denial that he ever said that he would "bury those assholes" is not incompatible with Perren's credited testimony that Dolhun said he would "bury those fuckers."

to the issue remanded herein. Following service of such supplemental decision and Order on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

The issuance by the Board of an Order remedying the unfair labor practices found in this proceeding is held in abeyance pending completion of the action encompassed by this remand.

*Rocky L. Coe, Esq.*, for the General Counsel.

*Christine Z. Stonkus and Irwin J. Brown (Cosmos Consulting Group)*, for the Respondent.

*Robert Glaser*, for the Charging Party.

#### I. INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, Wisconsin Steel Industries, Inc. (WSI), is located in Milwaukee, Wisconsin. WSI is in the business of "heat treating" various kinds of steel products for the manufacturers of those products. (WSI's facilities and operations will be further described later in this decision.) WSI often provides pickup and delivery services for its customers using its own trucks. In addition, for a time WSI provided long-haul transportation services, again via its own trucks.<sup>1</sup>

WSI is a privately held, family owned, company. Theodore (Ted) Dolhun is the chief executive officer of WSI and an owner. His wife, Chris Dolhun, is executive vice president of WSI and is also an owner. While Chris Dolhun's authority at WSI is limited in comparison with Ted's, she very clearly has greater influence over the affairs of WSI than anyone but her husband.

The United Steelworkers of America, AFL-CIO (the Union or the Steelworkers) began an organizing campaign at WSI in June 1991.<sup>2</sup> WSI's employees voted in favor of representation by the Steelworkers at an Board-conducted election held that August.<sup>3</sup>

Bargaining between the Steelworkers and WSI began in September 1991. But as of the close of the hearing in this case (in September 1992), no collective-bargaining contract had been executed.<sup>4</sup>

According to the General Counsel, beginning in June 1991 and continuing at least through the close of the hearing WSI violated Section 8(a)(1), (3), and (5) of the Act in numerous respects.<sup>5</sup>

<sup>1</sup> WSI admits that it is an employer engaged in commerce.

<sup>2</sup> WSI admits that the Steelworkers is a labor organization within the meaning of the National Labor Relations Act (the Act). The Union's representation petition was filed in Case 30-RC-5273.

<sup>3</sup> The bargaining unit:

All full-time and regular part-time production and maintenance employees, including truck drivers, employed by WSI at its Milwaukee, Wisconsin, facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

<sup>4</sup> The hearing was held on July 21-24, September 10-11, and September 21-25, 1992.

<sup>5</sup> The original unfair labor practice charge was filed by the Steelworkers on September 6, 1991. The charge was amended on October 10, 1991, and February 13 and June 16, 1992. The original complaint issued on December 11, 1991. An amended complaint issued on June 25, 1992. The complaint was further amended at the hearing.

## II. TED DOLHUN

When all is said and done, this case is about Ted Dolhun. Just about every significant decision at WSI (down to, for instance, the layoffs of individual employees) has to be made or approved by Dolhun. WSI's employees sought out a union largely because of their unhappiness with the way Dolhun dealt with them. And Dolhun was directly involved in almost all the activity that the General Counsel claims violated the Act.

### A. *Ted Dolhun's Behavior*

"Smooth" is not the word one would use to describe Ted Dolhun. He is moody. He is inconsistent in the way he deals with people and situations. He has an explosive temper. Not infrequently he turns nasty, sarcastic, abusive, and loud. He tends to mishear what is being said to him and then to explode in anger over what he thinks (incorrectly) was said. He often jumps to conclusions—the wrong conclusions.

This is what employee Paul Herbst had to say (credibly) about Dolhun's way of expressing disapproval.

[H]e would come through the plant screaming that something was wrong, or this and that. He would never get to the point and actually find out what is going on. He would just throw a tantrum and then leave. . . . A lot of times we didn't know [what the tantrum was about] because we could never find out what he was screaming about. There were a lot of instances where . . . he thought he had the right to come in and yell and scream, and accuse, and point the finger and scream again, and then leave.

Employee James Reinke agreed that Dolhun "used to come up and holler for no reason at all." "And when [Dolhun] would holler," Reinke was asked, did Dolhun "sometimes use swear words like 'fuck, asshole'?" Reinke responded (credibly) that Dolhun did not "sometimes" use language of that ilk; rather, when Dolhun was doing his hollering, he used such language "most of the time."

It was this kind of behavior that was the main reason that WSI's employees sought out union representation, rather than unhappiness with wages, hours, or working conditions. As Herbst put it, WSI's employees contacted the Steelworkers because—

We were a little disappointed with the way we were treated by Mr. Dolhun. . . . He would sometimes ridicule us in front of customers. . . . Being called a moron in front of customers, being called stupid ass, just the way he treated you in front of people, yelling, screaming. He didn't treat you very fairly.

It is to Dolhun's credit, in a manner of speaking, that he does not reserve this kind of behavior for rank-and-file employees. Dolhun is democratic in the verbal abuse he hands out. Thus, WSI supervisory personnel face that kind of treatment, with the result that at least three of the Company's supervisors led the way in the unionization effort. And one of WSI's attorneys also was treated to exceedingly noisy criticism from Dolhun, replete with four-letter epithets—all during a lunch at a restaurant. That exchange led the attorney to tell Dolhun that he considered Dolhun to be paranoid and

out of control. (The scene at the restaurant will be further discussed later in this decision.)

But Dolhun's temper is the kind that, while it always produces a lot of noise, does not always produce much action. And the record evidences a number of occasions in which Dolhun put up with employee and supervisory behavior that would have led many employers to fire the personnel involved.

### B. *Ted Dolhun's Credibility as a Witness*

In some ways, at least, Dolhun's testimony is not to be trusted.

For one thing, when Dolhun testified about his oral communications with others, he almost always indicated that his manner was restrained and thoughtful. As the foregoing discussion indicates, many times that was not the case. Accordingly, in respect to those factual issues having to do with the tone with which Dolhun expressed himself, I have almost always assumed that Dolhun expressed himself loudly and abusively whenever any witness to an event testified that that was the case. This facet of Dolhun's testimony also means that his testimony cannot be counted on to be accurate.

Secondly, there is Dolhun's testimony about WSI's response to the Union's organizing effort. Dolhun was asked, "wasn't the intent" of WSI's campaign during the union organizing drive "to influence the employees to vote against the Union?" Dolhun answered: "No." That "no" was untrue. Chris Dolhun gave weekly speeches to the employees throughout the period of the Union's campaign and sent letters to each employee. The stated intent of her speeches and letters was to have the employees vote against union representation. Additionally, WSI hired a law firm to assist it in responding to the Union. Dolhun himself testified that he was "a little disappointed" with that firm "after losing the election." (Emphasis added.)

What I do not understand is what Dolhun had in mind in testifying the way that he did about WSI's response to the Steelworkers' campaign. He had to have known that the facts of the Company's position during the campaign would become clear in the course of the hearing.

At the other end of the scale, Dolhun limited himself in the denials that he uttered while testifying. Witnesses called by the General Counsel made numerous damaging assertions about Dolhun's statements and conduct. Dolhun did deny many of those assertions. But others he did not.

Additionally, my overall impression of Dolhun convinces me that he is not a manipulative or devious kind of person.

## III. UNION ANIMUS

As will be discussed below, the manner in which WSI chose to bargain with the Steelworkers constitutes evidence of union animus.

There are, however, degrees of animus. And the impression I got from the this as I listened to the testimony was that Ted Dolhun's version is relatively mild.

By way of example, consider Dolhun's relationship with WSI Supervisor Douglas Orlowski. As touched on earlier, at least three of WSI's supervisors led the way in the unionization effort. The three were Orlowski, Brian Burdick, and Terry Patelski. The record is clear that the Dolhuns learned about Orlowski's activity during the course of the Steelworkers organizing effort. WSI could have lawfully fired him

on the spot. But in fact the Dolhuns retained Orlowski in his existing job. (Orlowski was subsequently laid off for a while. But that was long after the election.) The General Counsel appears to contend that WSI did not fire Orlowski only because he was so important to production. But many employers would fire supervisors known to be handing out union authorization cards in the midst of an organizing drive, whatever the short-term cost for the Company.<sup>6</sup>

#### IV. DID WSI BARGAIN IN BAD FAITH

The General Counsel claims that WSI engaged in a pattern of conduct designed not to reach agreement at the bargaining table but instead to frustrate and undermine the Union as the collective-bargaining representative of WSI's employees. In particular, the General Counsel contends that WSI sabotaged the bargaining by: (1) using three different sets of negotiators; (2) demanding that the bargaining start "from scratch"; (3) insisting on contract terms to which the Union could not, as a practical matter, agree; and (4) never having any member of WSI's management present at the bargaining table.

##### A. WSI's Use of Three Different Sets of Negotiators

The election among WSI's bargaining unit employees was held on August 14, 1991. On August 22 the Board certified the Steelworkers as the exclusive collective-bargaining representative of those employees. By letter dated August 26 addressed to Ted Dolhun, the Steelworkers named its collective-bargaining representative (Robert Glaser) and asked that bargaining begin "very soon."<sup>7</sup>

To respond to the Steelworkers the Dolhuns could have used the law firm that had advised WSI during the union campaign. But the Dolhuns were disappointed in that firm's performance and WSI had no further dealings with that firm after the election.

The Dolhuns instead turned to their family attorney, David Hughes, to respond to the Union's request that bargaining begin. The Dolhuns did that within a few days after receipt of the Steelworkers August 26 letter. (WSI, that is to say, was commendably prompt in acting to get collective bargaining underway.) Hughes is not a labor law specialist, and the Dolhuns had no intention of using Hughes to negotiate the details of a collective-bargaining agreement with the Steelworkers. Rather, the Dolhuns' plan was to have Hughes handle WSI's initial response to the Union but to have "a specialist firm" handle the negotiations. The Dolhuns, however,

<sup>6</sup>Orlowski testified that Ted Dolhun told him to tell the employees that they should vote as though their jobs depended on the outcome of the election. Orlowski said that he did not follow that order. Dolhun denied saying that to Orlowski. I credit Dolhun, not Orlowski.

<sup>7</sup>Neither Ted nor Chris Dolhun personally responded to the Union's letter. In fact at no time did either of the Dolhuns ever respond to any letter or telephone call from a union official. Moreover, the record as a whole makes it clear that this unwillingness on the part of both Ted and Chris Dolhun to communicate directly with union officials was a deliberate policy by the Dolhuns. But I do not find anything inappropriate about that policy. Neither of the Dolhuns had much experience in dealing with unions. And given Ted Dolhun's personality, it is unlikely that the WSI-Steelworkers relationship would have been furthered by his directly communicating with the Union.

neglected to tell Hughes that his negotiating role would be that limited and, of course, did not inform the Union about the temporary nature of Hughes' role.

The result was that Hughes, in a September 5 letter, told the Steelworkers that he would be conducting the collective-bargaining negotiations on behalf of WSI. (WSI received a copy of that letter. The Dolhuns did not correct the erroneous information that it imparted.) Hughes then met with Glaser (and other persons representing the Steelworkers) on September 25. (Hughes was the only representative of WSI at the session.) The meeting was an amicable one during the course of which the Union gave Hughes the Union's proposal for the language of a collective-bargaining contract.<sup>8</sup> The Steelworkers negotiators and Hughes agreed that the next collective-bargaining session would be held on October 15 and 16.

But not long after the September 25 meeting, Hughes told the Dolhuns about the Union's contract language proposal, and the Dolhuns decided that it was time for a labor law firm to step in to handle all further negotiations on WSI's behalf. That led Hughes to notify the Union, on October 14 (1 day before the scheduled second collective-bargaining session), that "I no longer represent Wisconsin Steel Industries in negotiations with the Steelworkers." Neither Hughes nor the Dolhuns gave the Union any explanation for Hughes' withdrawal. That, in turn, caused Glaser (the Steelworkers chief negotiator) to conclude that WSI may have switched negotiators in order to delay the course of the contract talks.

With Hughes gone, the planned October 15-16 bargaining session had to be canceled. In the meantime (toward the end of October) the Dolhuns selected a Milwaukee law firm with a labor law practice (Reinhart, Boerner, Van Deuren, Norris & Rieselbach—hereafter Reinhart) to represent WSI in bargaining with the Steelworkers. That firm assigned the task to Attorneys Robert Sholl and David Sisson.

Sholl and Sisson met with negotiators for the Steelworkers on November 1. Neither Sholl nor Sisson had communicated with Hughes prior to the session. And, as previously mentioned, Hughes was WSI's only representative at the September 25 session. That meant that all the ground covered at the September 25 session had to be gone over again.

Either Sholl or Sisson or both met with representatives of the Steelworkers on a number of occasions in December and early 1992. Sholl and Sisson seemed to develop a good working relationship with Glaser. Considerable progress was made in resolving disputes about various contract terms.

In late February 1992, Sholl told Ted Dolhun that many bargaining issues between the Union and WSI had been resolved and that resolution of a limited number of remaining issues would produce a contract. The Dolhuns and Sholl decided to meet for lunch at a restaurant on February 28 to discuss the remaining outstanding issues. Because of the way Sholl had communicated about the situation, or because Dolhun once again jumped to an unwarranted conclusion, Dolhun assumed that a collective-bargaining contract embodying WSI's demands was just around the corner.

As lunch got underway it became clear that WSI and the Steelworkers were considerably farther from the kind of con-

<sup>8</sup>The General Counsel attacks the Dolhuns for referring to that proposed collective-bargaining contract language as "boilerplate." But I find that that "boilerplate" reference by the Dolhuns indicates nothing, one way or the other, about the Dolhuns' attitude toward the Steelworkers or toward collective bargaining.

tract that Dolhun wanted than Dolhun thought Sholl had described. Dolhun, who was already irritated with Sholl for miscellaneous other reasons, concluded that Sholl had lied to him. Dolhun went into a rage, screamed epithets at Sholl, loudly informed Sholl that WSI's relationship with Sholl and Sholl's firm was ended, and stalked out of the restaurant. In the days that followed Sholl tried to telephone the Dolhuns and, on March 9, wrote to Chris Dolhun about the incident and about Sholl's difficulties in dealing with Ted Dolhun. No one from WSI answered Sholl's letter or telephone calls. On March 12 Sholl again wrote to Chris Dolhun saying—

I have come to the conclusion that Ted's decision to terminate us as the Company's counsel on February 28 stands. Even if that is not the case, I have independently concluded that under the circumstances we can no longer continue to represent you.

On March 13 Ted Dolhun, being of the "they-can't-quit-I'm-firing-them" state of mind, wrote back terminating the WSI-Reinhart relationship "at once."

The General Counsel seems to contend that Ted Dolhun's eruption at the restaurant never happened or, if it did happen, was merely a ploy. The real reason that WSI ended its relationship with Sholl and Sholl's firm, the General Counsel argues, is that the Dolhuns were concerned about the progress that Sholl was making toward a collective-bargaining agreement. WSI fired Sholl, under this theory, in order to derail the negotiations. But as indicated by my description of the February 28 luncheon meeting and its aftermath, I am convinced that the General Counsel's contentions in this respect are wrong. The termination of the WSI-Reinhart relationship was entirely a function of misunderstandings between the Dolhuns and Sholl and of Ted Dolhun's tantrum.

On March 16 Sisson faxed a letter to Glaser advising that "our firm no longer represents Wisconsin Steel Industries for purposes of collective bargaining." No one from either WSI or from Reinhart explained to the Steelworkers why that was so. Glaser's response was to write to Ted Dolhun saying, *inter alia*, "A lot of language has been agreed to. Please supply me with the name of your latest bargaining representative." The Dolhuns now needed to find yet another negotiator to represent WSI at the bargaining table. They chose Irwin Brown of Cosmos Consulting Group (the firm that represents WSI in this proceeding).

Sholl's March 12 letter to Chris Dolhun (discussed above) included the following language:

I will, of course, cooperate to ensure a prompt transition. As part of that effort, I will be glad to discuss with your new counsel the approximately 30 outstanding issues at the bargaining table. . . . We also are prepared to transfer the files upon written request.

On March 20 Brown wrote to Glaser identifying Cosmos Consulting as WSI's collective-bargaining representative and stating, *inter alia*, that

We are . . . ankle deep in trying to understand key issues and unresolved charges of unfair labor practices. It appears that considerable preliminary work must be done in order to "bring us up to speed."  
 . . . .

We are hampered by not having any documentation indicating tentative approval of language which may have been agreed to subject to final agreement on all contract issues. Perhaps you will provide that information to us at your earliest convenience. A set of table notes would be equally helpful.

At Brown's first meeting with Glaser, on March 31, Glaser did provide Brown with copies of a considerable number of documents. They included the collective-bargaining agreement that Sholl had proposed on WSI's behalf. At the second Brown-Glaser meeting, on May 8, the Union took the position that since Brown could provide no proof of what contract terms Sholl and Glaser had agreed to, "we were bargaining from scratch." (The record is clear that Brown's "from scratch" meant that Brown would proceed as though no issues had already been resolved.<sup>9</sup>)

Brown has remained adamant about that bargaining-from-scratch position. Glaser, on the other hand, has insisted that Brown should honor the understandings that Sholl had reached with Glaser.

As indicated earlier, the Steelworkers and the General Counsel contend that WSI changed its negotiators from Hughes to the Reinhart firm, and from that firm to Cosmos Consulting, as a way of delaying the bargaining and preventing a collective-bargaining agreement from ever being executed. I do not find that to be the case. I find entirely credible the Dolhuns' testimony about the reasons for these changes in negotiators. And that being the case, I see no reason to find a violation of the Act based on the mere fact of WSI's twice changing its bargaining representative.

On the other hand, WSI's agent, Brown, reneged on all the tentative agreements WSI had previously entered into with the Steelworkers. Brown claimed that he did that because he could not be sure what those tentative agreements were. But in terms of furthering the purposes of the Act, it seems appropriate to impute to a bargaining agent facts known by prior bargaining agents of the same principal concerning the same round of bargaining. Under that approach, Brown's claimed lack of knowledge about the prior bargaining provides no excuse at all for Brown's insistence on bargaining "from scratch." Additionally, in the circumstances at hand, the Reinhart firm specifically offered to discuss the status of the bargaining with WSI's "new counsel" and to transfer its bargaining files to such new counsel. WSI, that is, could easily have ensured that Brown obtain from Sholl and Sisson all the information and documents that Brown needed in order to determine what tentative agreements had been reached. WSI chose not to do that.

<sup>9</sup>I asked Glaser what Brown meant when Brown spoke about bargaining "from scratch": did Brown mean that he was not going to accept any tentative agreements reached on behalf of WSI by Hughes or the Reinhart attorneys; or did Brown mean that the bargaining was going to proceed as though there were no existing terms and conditions of employment. Glaser testified that Brown's "from scratch" included both meanings. And Brown did not deny Glaser's interpretation when Brown testified. But the record indicates that all of WSI's negotiators did in fact premise their bargaining on the existing terms and conditions of employment at WSI. I thus find that Brown's "from scratch" remark meant only that he was going to treat all issues as though none had been the subject of tentative agreements between representatives of the Union and of WSI.

WSI's neglect regarding its switch from the Reinhart firm to Brown further delayed the bargaining because it left Brown without other information about the bargaining (apart from Brown's ignorance about the tentative agreements) and without documents he ought to have had (such as a 70-page partial contract proposal that Sholl had given to Glaser).

As for WSI's earlier shift from Hughes to the Reinhart firm, that caused only minimal delay. But again, WSI made the change without taking reasonable steps to ensure that the transition would be a smooth one. And I consider that the Dolhuns' failure to advise the Union at the start of the negotiations that Hughes was to be WSI's bargaining representative only temporarily is further evidence of the Dolhuns' lack of interest in reaching agreement with the Steelworkers.

#### B. WSI's Bargaining Proposals

Many of WSI's bargaining proposals can be thought of as an effort by WSI to ensure that, when it came to getting work done, management had as much flexibility with the Union in place as management had had prior to the arrival of the Steelworkers on the scene. The proposals in this category include:

1. In selecting employees for layoffs and recalls, employees have to be qualified to do the jobs available, and management, in its "sole judgment," determines that.
2. Management has the right to order any employee to work overtime without giving the employee any advance notice.
3. Management has the right to unilaterally change shift hours and work schedules.
4. Management has the right to assign any employee to any kind of work regardless of the employee's job classification.
5. A uniform wage rate, whatever the individual employee's seniority or skills.

As Glaser pointed out during the bargaining, to a considerable extent union agreement to these provisions would put the Union in a worse position than if there were no collective-bargaining agreement. Nonetheless, I do not consider WSI's insistence on these provisions to be evidence of bad-faith bargaining. The Dolhuns firmly believe that the survival of WSI depends upon the Company's ability to respond instantly to a customer's requests. Whether or not the Dolhuns are correct about that, the record shows that that belief is not an unreasonable one and that the above proposals would greatly assist WSI in ensuring that management retained the ability to respond in that manner. Additionally, by the time 1992 arrived, WSI's work force had shrunk dramatically due to the decrease in the level of customer demand. (I will discuss WSI's finances later in this decision.) Particularly because of this circumstance, it was important for any given employee to be able to handle several different jobs.

Two other proposals had to do with the three-way union-employee-management relationship: an open-shop proposal (i.e., no union-security clause); and no union-dues checkoff. The reason WSI gave to the Union for wanting an open-shop was that some of WSI's employees were unwilling to join the Steelworkers. But particularly since *Beck*,<sup>10</sup> that comes

close to being no reason at all. And WSI never tried to justify its no-checkoff proposal, either to the Union during the bargaining or to me during the hearing.<sup>11</sup> Having considered what the record as a whole tells us about Ted Dolhun, I believe that these two proposals represent nothing more than a venting of Dolhun's union animus.<sup>12</sup>

Two additional proposals represent WSI's effort to reduce the employees' pay and benefits: a pay reduction of as much as \$2.75 per hour; and a requirement that employees pay 50 percent of uniform costs (the Company had always paid all uniform costs).<sup>13</sup>

Let us first consider the proposed pay reduction.

WSI employees earn between \$8.75 and \$10.25 per hour. Throughout the bargaining WSI has insisted that these wage levels be reduced. The Company's first proposal was an across-the-board reduction of \$2 per hour. That changed into a proposal that all nonprobationary employees be paid \$7.50 per hour (which would have the effect of reducing wages between \$1.25 and \$2.75 per hour).

Prior to the arrival of the Steelworkers, WSI advised its employees that, due to the economic situation, layoffs might be necessary. (And indeed, many employees subsequently were laid off.) But prior to the Union's arrival WSI made no mention of any plan to reduce rates of pay. Nor does the record contain any indication that, before the arrival of the Union, WSI's management gave any thought to the possibility of reducing wage rates.<sup>14</sup> Moreover, WSI insists that its reduced-pay proposal is not a function of any inability to pay current wage rates. (Both Sholl and Brown made that clear during the course of bargaining.)

The Company's proposal requiring employees to pay half of their uniform costs presents circumstances similar to the wage decrease proposal. There is no hint that, prior to the union campaign, WSI's management had given any thought to requiring employees to share in the costs of their uniforms. And WSI makes no claim that it cannot afford to continue to pay for all uniform costs.

I consider it relevant that the bargaining of concern to us here is for an initial collective-bargaining agreement. Because of this, were the Union to agree to WSI's wage rate and uniform costs proposals, WSI's employees almost surely

<sup>11</sup> The record shows that WSI routinely deals with deductions from employee pay for child support and the like.

<sup>12</sup> Another WSI proposal affecting the union-employee-management relationship would preclude any union "committeeperson" from investigating or processing a grievance "during either his working time or the working time of the grievant ." (G.C. Exh. 43 at 18.) Since WSI sometimes works three shifts and often works two, that provision could have the effect of preventing any committeeperson who was a WSI employee from investigating or processing a grievance. Nonetheless, while the issue is a close one, I am not prepared to find that there was any antiunion motivation behind this proposal.

<sup>13</sup> WSI also proposed a 2-hour-per-day reduction in the length of employee shifts. While that would tend to reduce employee compensation, it seems directly related to WSI's decreased level of business. I accordingly consider it to be in a category different from the wage rate and uniform cost proposals.

<sup>14</sup> Ted Dolhun testified that a decade ago WSI cut wage levels in response to the recession that occurred at the start of the 1980s. But I do not consider that to be convincing evidence that the wage-cut proposal was merely a response to the financial circumstances facing WSI in 1991-1992.

<sup>10</sup> *Communications Workers v. Beck*, 487 U.S. 735 (1988).

would conclude that the most important effect of their vote in favor of union representation was a substantial reduction in their remuneration.

In sum:

There is no evidence at all that, prior to the Steelworkers' arrival, WSI gave any thought to reducing wage rates or requiring employees to share in the costs of uniforms.

WSI does not claim that its proposals in this regard are based on any inability to afford current wage rates and uniform costs.

No witness on behalf of WSI made any attempt to explain why the company has demanded that the Union accept these wage rate and uniform cost proposals.

The natural effect of the proposals is either to keep a collective-bargaining agreement from being reached or to drain support from the Union.<sup>15</sup>

#### C. *The Absence of any Member of WSI's Management from the Bargaining Table*

At no time did any member of WSI's management take part in the collective bargaining, ever appear at the bargaining table, or even return a telephone call or letter from the Union. WSI's end of the bargaining was conducted entirely by outsiders hired by WSI. Glaser credibly testified that the failure of any member of WSI's management to attend the bargaining sessions "slowed the process and made it difficult."

While employers generally want at least one member of management to be present during collective-bargaining sessions, the Act does not forbid employers from having their side of the bargaining handled entirely by outside attorneys or consultants. Moreover, one reason for Ted Dolhun's absence from the bargaining table is obvious: there is no doubt at all that, had Ted Dolhun had a seat at the bargaining table, he would have responded to the bargaining process by shouting insults at the Union's representatives. As for the absence of Chris Dolhun and all other members of WSI's management from the bargaining table, one possible reason for it is that WSI might have believed that the Company needed all of them at the plant.

On the other hand, the WSI-Steelworkers bargaining involved relatively few hours per month. And one consequence of the absence of all members of management was that WSI's negotiators had to spend considerable time with Chris Dolhun obtaining the information they needed in order to respond to the Union's queries and to bargain effectively. Surely the time that Chris Dolhun had to spend in that manner would have been reduced had she attended the bargaining sessions. Additionally, recall that when WSI retained Hughes as a negotiator, the Company knew that he would be serving only temporarily in that capacity. As the bargaining began it should have been obvious to WSI's management that the inevitable delay resulting from the forthcoming shift in negotiators would be lessened if someone from management participated in the bargaining with Hughes, so that such individual could brief Hughes' successor.

<sup>15</sup>The General Counsel argues that a broad management-rights clause proposed by WSI also evidences an intent to avoid reaching agreement. But I do not find that to be the case.

#### D. *Conclusion—Did WSI's Conduct of the Bargaining Violate Section 8(a)(5)*

An employer's refusal to abide by a tentative agreement regarding a proposed contract provision does not itself prove bad-faith bargaining. *Barclay Caterers*, 308 NLRB 1025 (1992). Nor does an employer's insistence on proposals by which the union would waive its statutory right to bargain about changes in employees' conditions of employment, *Tennessee Construction Co.*, 308 NLRB 763 fn. 2 (1992); *Colorado-Ute Electric Assn.*, 295 NLRB 607, 609 (1989); or by which employee compensation would be reduced. *Reichhold Chemicals*, 288 NLRB 69 (1988); see *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). Nor is an employer's refusal to accept a union's contract proposals for dues-checkoff and union-security provisions necessarily evidence of bad-faith bargaining. See *Langston Cos.*, 304 NLRB 1022 (1991). And as previously noted, there is certainly nothing inherently unlawful about changing negotiators (see *Newberry Equipment Co.*, 157 NLRB 1527 (1966), enf. denied 401 F.2d 604 (8th Cir. 1968)) or refusing to have any member of management present during bargaining sessions.

Moreover: (1) WSI promptly entered into bargaining with the Steelworkers; (2) at a number of bargaining sessions considerable progress was made in terms of reaching agreement about specific contract proposals; (3) by and large WSI's representatives agreed to meet at reasonable times.

Nonetheless my conclusion is that WSI bargained in bad faith, thereby violating Section 8(a)(5) and (1).

To begin with, we have Brown's insistence on "bargaining from scratch." It is one thing for an employer, during the course of bargaining, to change its position regarding a particular contract provision. One can even imagine a change in circumstances that might justify a withdrawal by the employer from its tentative agreements regarding numerous proposed contract provisions. But here Brown (and thereby WSI), without valid excuse, reneged on every tentative agreement the representatives of WSI and the Steelworkers had achieved over the course of months of bargaining. That alone constitutes bad-faith bargaining. See *San Antonio Machine Corp. v. NLRB*, 363 F.2d 633 (5th Cir. 1966); *Dayton Electroplate*, 308 NLRB 1056 (1992).

Second, we have: WSI's insistence on contract provisions concerning substantially reduced wages, employee payments for uniforms, no checkoff of union dues, and an open shop; a failure by WSI to provide for at least reasonably smooth transitions when it twice changed negotiators; and WSI's refusal to have anyone from management (and, therefore, with day-to-day knowledge of the thousand-and-one details that make up the terms and conditions of employment at WSI) attend any bargaining session or even to communicate in any way with the Steelworkers. I need not decide whether any other of these factors alone proves WSI's bad faith. What I do conclude is that these factors, added to Brown's bargaining-from-scratch position, make apparent that WSI has bargained in bad faith.

I have no doubt that WSI was and is willing to enter into a collective-bargaining agreement. But WSI is willing to do so only so long as the terms of the collective-bargaining agreement are such as to permit management to conduct WSI's business precisely the way it conducted WSI's business prior to its employees' choice of the WSI as their representative and only so long as the terms of the agreement

are such as to make it clear to WSI's employees that union representation leaves them worse off than they would be without it. Moreover, the record is clear that WSI has never accepted that the Union is in fact the chosen representative of WSI's bargaining unit employees. The record is also clear that WSI has honored the bargaining process only in respect to those terms and conditions of employment of its employees that are of no real interest to Ted Dolhun. Dolhun's position regarding the terms of employment that Dolhun does care about is that they are to be established by union acceptance of management fiat. See, in this regard, *Herman Sausage Co.*, 122 NLRB 168, 171 (1958), *enfd.* 275 F.2d 229 (5th Cir. 1960).<sup>16</sup>

#### V. DID WSI UNILATERALLY CHANGE ITS TERMS AND CONDITIONS OF EMPLOYMENT

##### A. Shift Hours

The complaint alleges that in January 1992 WSI shortened work shift hours, doing so unilaterally (thereby violating Sec. 8(a)(5)) and that WSI took such action in retaliation for the employees' union and other protected activities (thereby violating Sec. 8(a)(3)).

One employee, Dean Erickson, testified that around January 1992 WSI shortened his work hours and those of some other employees. But I do not credit any of Erickson's testimony. Glaser too testified that at some point during the bargaining WSI switched to 6-hour (rather than 8-hour) shifts. But Glaser could only have gotten that information second hand. I note, moreover, that the General Counsel provided no documentary evidence (such as timecards) of such allegedly shortened hours. I thus find that the record fails to substantiate the claim by the General Counsel that WSI shortened the shift hours of its employees.

On January 10, 1992, WSI did change the shift hours of a number of bargaining unit employees (although it does not appear that the change shortened the employees' work days). Glaser credibly testified that WSI did not notify the Union of the shift change. And no documentary evidence or testimony credibly refutes Glaser's testimony. I find, therefore, that WSI changed the shift hours of bargaining unit employees at a time when those employees were represented by the Steelworkers and that WSI did so without notifying the Union of the change.

Employees' hours of employment is a mandatory subject of bargaining. E.g., *Venture Packaging*, 294 NLRB 544, 556 (1989). While it is true that the complaint alleges that WSI unilaterally shortened shift hours in January 1991, not that the Company unilaterally changed shift hours without shortening them, the allegation of the complaint was sufficient to put WSI on notice that issues regarding unilateral shift hour changes would be litigated. See *Redd-I, Inc.*, 290 NLRB 1115 (1988). I accordingly conclude that WSI violated Section 8(a)(5) and (1) of the Act by unilaterally changing, in

January 1992, the hours of employment of bargaining unit employees. *Venture Packaging*, *supra*; see *NLRB v. Katz*, 369 U.S. 736 (1962).

I do not conclude, however, that WSI made the shift hours change for discriminatory reasons. I thus will recommend that the complaint be dismissed insofar as it alleges that the shift-hour change violated Section 8(a)(3).

##### B. Coffee and Doughnuts

In the autumn of 1990 an elderly couple asked Chris Dolhun if WSI might be able to employ them in some capacity. More to support the couple than for any other reason, Dolhun proposed that they provide coffee and doughnuts to the employees once a week—on paydays. The couple agreed, and on most paydays for the next 9 or 10 months the couple did serve coffee and doughnuts to the employees. (WSI paid the couple for this service, of course, and did not charge the WSI employees for it.) On those few occasions when the couple was unable to perform the service, the employees went without the coffee and doughnuts. Prior to the couple's arrival on the scene, WSI had not provided coffee or doughnuts to its employees.

Chris Dolhun credibly testified that in July 1991 the couple's personal circumstances changed. The couple found that, because of this change in circumstances, their coffee-and-doughnuts work became too great a burden for them to manage. The couple's last service of coffee and doughnuts to WSI's employees occurred about 1 week after the election at which the employees chose the Steelworkers as their collective-bargaining representative. WSI made no attempt to find another supplier for the coffee and doughnuts and provided no explanation to the employees about why the Company was ending the paydays' coffee and doughnuts.

The General Counsel contends that WSI stopped providing the coffee and doughnuts because of the employees' vote in favor of the Steelworkers (in violation of Sec. 8(a)(3)) and that by ending the coffee and doughnuts without bargaining with the Union WSI violated Section 8(a)(5).

Turning first to the Section 8(a)(3) claim, as my statement of the facts indicates, the record fails to show that there was any illicit motivation behind WSI's ending of the coffee and doughnuts. (As my statement of the facts also indicates, management's handling of the matter was surprisingly insensitive. Ending a benefit, however minor, within a week after an election in which the employees voted in favor of unionization, and doing so without explanation, obviously is likely to lead employees to conclude that the company stopped the benefit because of the employees' vote.)

Analysis of the 8(a)(5) contention is more complicated.

To begin with, Dolhun's testimony suggests that WSI's decision to end the service of coffee and doughnuts may have occurred in July 1991—that is, at a time when the Union did not represent WSI's employees. But the record is not clear in this regard.

Second, there is the issue of whether the cessation of the coffee and doughnuts was a material, significant, and substantial change in the employees' terms of employment. See, e.g., *Rangaire Co.*, 309 NLRB 1043 (1992). In *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978), for instance, the employer unilaterally ended a longstanding practice of providing coffee, at the employer's expense, for the employees' two daily breaks. The Board concluded that the change did not

<sup>16</sup>The General Counsel also contends that WSI sought to undermine the Union and prevent any possibility of achieving a collective-bargaining contract by unfair labor practices such as coercive statements and unlawful treatment of employees. While, as discussed below, I conclude that WSI violated Sec. 8(a)(1) and (3) in various respects, I do not conclude that WSI's motivation in respect to any of such violations was to undermine the Union or to prevent the achievement of a collective-bargaining contract.

violate Section 8(a)(5) because the change was not a material, substantial and significant one. Plainly *Weather Tec* supports WSI's contention that the coffee-and-doughnuts benefit was neither material nor significant nor substantial, given that WSI provided the coffee and doughnuts only once a week and WSI had been doing so for less than a year when it brought the practice to an end.

I nonetheless conclude that WSI's unilateral cessation of the weekly coffee and doughnuts violated Section 8(a)(5).

In letters to employees and in charts accompanying speeches by management during the election campaign, WSI chose to list the weekly coffee and doughnuts as a benefit that the employees were receiving. (The coffee and doughnuts were listed as a "miscellaneous fringe benefit" along with 14 other items, ranging from uniforms to "Thanks-giving turkeys and potatoes.") Where management chooses to point to a benefit as sufficiently material, significant, and substantial for the employees to take it into account in deciding how to vote in a representation election, it would be inappropriate for the Board to conclude otherwise. Cf. *Rangaire Co.*, supra.

As for the question of whether WSI decided to end the coffee and doughnuts prior to the representation election, I consider that to be an affirmative defense for which WSI had the burden of proof. Since the record is ambiguous about when the Company made the decision, WSI failed to carry that burden.

I accordingly conclude that by ending the provision on paydays of coffee and doughnuts for bargaining unit employees without notice to the Steelworkers, WSI violated Section 8(a)(5) and (1) of the Act.

#### VI. DID WSI UNLAWFULLY REFUSE TO PROVIDE INFORMATION TO THE UNION

As discussed earlier, Hughes represented WSI at one negotiating session, in September 1991. At that session, Hughes said that WSI's trucks were "bleeding the business" and spoke about WSI's need to get out of the trucking business. Not long thereafter Sholl too spoke of WSI's decision to leave the trucking business. But whether Sholl sought to explain that decision by referring to the Company's finances is unclear. (Glaser testified that Sholl, like Hughes, spoke of WSI's trucking "bleeding" the Company. But I do not credit that testimony.) No later than November 1 Sholl did tell Glaser that WSI was not claiming that it was unable to pay for the continuation of the trucking operation.

On February 26 1992 Sholl spoke of the "dire economic situation facing the company" as a justification for probable layoffs of employees and sale of "excess equipment." Two days later Glaser asked for WSI's financial records. And on March 3 the Steelworkers' chief economist wrote to Sholl listing specific WSI financial data that the Union wanted to see.

Sholl's response to the Union's demands for WSI's financial data was again to state that "the company is *not* claiming an inability to "pay." (Emphasis in original.) At no time has the Company provided financial data to the Steelworkers.

It is clear that the Steelworkers would be entitled to financial data from WSI if the Company had contended that it could not afford to continue its trucking operations, or could stay in business only if it reduced wages by \$2 an hour, or the like. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). But

there is no credible evidence that WSI ever raised that argument. And as for an employer's contention that its financial condition is bleak, or that it is suffering losses, or encountering economic difficulties, that is not enough to entitle a union to the employer's financial records. *Beverly Enterprises*, 310 NLRB 222, 223 (1993).

Because no WSI agent ever said anything more than that WSI was facing financial difficulties, I shall recommend dismissal of the complaint's allegation concerning WSI's refusal to provide the Union with financial information.

#### VII. WSI'S FINANCIAL CIRCUMSTANCES

The General Counsel alleges that because of the employees' union activities, WSI sold, or attempted to sell, its trucks. WSI, on the other hand, contends that WSI's departure from the trucking business was wholly a matter of the Company's finances. The General Counsel also contends that WSI laid off numerous employees because of the employees' protected activities. WSI, again, argues that the layoffs were caused by a decrease in the business available to WSI.

This proceeding, that is to say, squarely puts into issue WSI's financial circumstances.

The record contains WSI's financial data for the years 1989, 1990, and 1991. In broad brush they show that WSI enjoyed net profits of about \$200,000 on sales of about \$7 million in each of the years 1989 and 1990 and that WSI then lost about \$200,000 in 1991 on sales of about \$5 million.

| Year | Sales       | Net Profit (or Loss)  |
|------|-------------|-----------------------|
| 1989 | \$7,100,000 | \$200,000             |
| 1990 | 7,130,000   | <sup>17</sup> 220,000 |
| 1991 | 4,900,000   | (207,000)             |

The Steelworkers Representative Glaser firmly believes, and the General Counsel impliedly argues, that that decrease in sales in 1991, and the resulting decrease in profits stemmed from deliberate action by the Dolhuns. That is, the contention is that once the Union arrived at WSI, the Dolhuns' union animus caused them to deliberately turn business away from WSI. WSI's position is that the 1991 decrease in sales and profits, and the resulting impact on the size of WSI's workforce, was entirely a function of outside economic forces over which the Dolhun's had no control.

That brings us to what WSI's financials have to say about the Company's month-by-month sales. If the monthly figures show that WSI's sales nosedived sometime in the months of June, July, or August 1991, that would tend to support Glaser and the General Counsel. (Recall that WSI's employees did not seek out union representation until June and that the representation election took place on August 14.) If, on

<sup>17</sup> WSI's financial figures are not a model of consistency. (For example, some of the data appear to show that WSI's net profit for 1990 was not \$220,000, as listed here, but only \$150,000.) Additionally, the copies of WSI's financials in the record are hard to read. But the parties apparently consider the financials sufficiently accurate and readable for purposes of this proceeding. (No party called into question the exhibits from which the above numbers are taken or even bothered to question any witness about them except in the most cursory way.) I concur in the position that the financials are sufficient for present purposes.

the other hand, WSI's sales levels dropped prior to June, that would tend to throw doubt on Glaser's and the General Counsel's position.

| WSI Sales (in thousands)   |                |                |                |
|----------------------------|----------------|----------------|----------------|
| <i>January through May</i> |                |                |                |
| <i>Month</i>               | <i>1989</i>    | <i>1990</i>    | <i>1991</i>    |
| Jan.                       | \$687          | \$627          | \$474          |
| Feb.                       | 684            | 551            | 425            |
| Mar.                       | 677            | 579            | 441            |
| Apr.                       | 729            | 614            | 526            |
| May                        | 609            | 728            | 444            |
| <b>Total</b>               | <b>\$3,386</b> | <b>\$3,399</b> | <b>\$2,310</b> |

First 5 months of 1991 as a percentage of 1990: 68.0%

| <i>June through December</i> |                |                |                |
|------------------------------|----------------|----------------|----------------|
| <i>Month</i>                 | <i>1989</i>    | <i>1990</i>    | <i>1991</i>    |
| June                         | \$485          | \$627          | \$470          |
| July                         | 480            | 600            | 445            |
| Aug.                         | 583            | 608            | 427            |
| Sept.                        | 534            | 602            | 352            |
| Oct.                         | 639            | 619            | 354            |
| Nov.                         | 464            | 567            | 264            |
| Dec.                         | 506            | 411            | 327            |
| <b>Total</b>                 | <b>\$3,691</b> | <b>\$4,034</b> | <b>\$2,639</b> |

Last 7 months of 1991 as a percentage of 1990: 65.4%

| <b>Yearly</b> |                |                             |                |
|---------------|----------------|-----------------------------|----------------|
| <b>Total</b>  | <b>\$7,077</b> | <b><sup>18</sup>\$7,433</b> | <b>\$4,949</b> |

WSI's sales, that is, were substantially lower each month in the period January through May 1991, the period before any union activity at WSI, than for the comparable month in either 1989 or 1990. For the remainder of 1991 sales continued to be lower than for the comparable month of 1989 or 1990. The result was that WSI's sales were one-third lower in 1991 than in 1990—a calamitous decline. (WSI's sales in the second half of 1991 were slightly worse, relative to 1991, than sales in the first half of 1991. But I do not consider that drop of a couple percentage points to be significant.)

As for WSI's profits, the Company's financial reports show the following:

| WSI Profits (in thousands)   |              |              |               |
|------------------------------|--------------|--------------|---------------|
| <i>January through May</i>   |              |              |               |
| <i>Month</i>                 | <i>1989</i>  | <i>1990</i>  | <i>1991</i>   |
| Jan.                         | \$56         | \$63         | (\$94)        |
| Feb.                         | 14           | 1            | (30)          |
| Mar.                         | 153          | 107          | (63)          |
| Apr.                         | 68           | 72           | 104           |
| May                          | 50           | 66           | 49            |
| <b>Totals</b>                | <b>\$341</b> | <b>\$309</b> | <b>(\$34)</b> |
| <i>June through December</i> |              |              |               |
| <i>Month</i>                 | <i>1989</i>  | <i>1990</i>  | <i>1991</i>   |
| June                         | \$7          | \$29         | \$32          |
| July                         | 9            | 68           | (84)          |
| Aug.                         | 66           | (40)         | (123)         |
| Sept.                        | 39           | 11           | (43)          |

<sup>18</sup>Some data in the record show that 1990 revenues were \$7,135,000, not \$7,433,000. For present purposes the difference is not significant.

| WSI Profits (in thousands) |                |                |                |
|----------------------------|----------------|----------------|----------------|
| <i>January through May</i> |                |                |                |
| <i>Month</i>               | <i>1989</i>    | <i>1990</i>    | <i>1991</i>    |
| Oct.                       | 117            | 33             | 11             |
| Nov.                       | (1)            | (20)           | (91)           |
| Dec.                       | (379)          | (215)          | 124            |
| <b>Totals</b>              | <b>(\$142)</b> | <b>(\$134)</b> | <b>(\$174)</b> |

Relative to 1990, that is, the first 5 months of 1991 were much worse than the last 7 months of 1991.

Considerable other evidence supports the picture painted by the Company's financial data. On April 12, 1991 (before any unionization effort by WSI's employees), the Dolhuns sent a letter to "all employees" stating:

We are encountering slower economic conditions which have forced us to lay off employees in all of our plants."

Ted Dolhun held a meeting with employees in early April 1991 in which he made the same point. According to Dolhun's testimony, he told the employees that

With the level of work from the past 2 quarters and from the information we were getting and the amount of quotes we were getting in, things looked pretty bleak.

Dolhun testified that he went on to tell the employees that "if they had any other job opportunities . . . available to them it would be a wise decision" for them to leave WSI to take such jobs. No witness contradicted Dolhun's testimony about this meeting, and I credit his testimony in this regard.

With one exception, officials of the Company's customers testified about the decline in orders that they experienced in 1991, which decline affected their level of business with WSI. I found all of that testimony to be credible.

In sum, there is a great deal of evidence indicating that the decline in the level of WSI's business and the resulting layoffs were caused by the recessionary economy, not by WSI's union animus.

Employee testimony shows that at least some employees came to believe that WSI's volume of business did not decline until the unionization drive. But the evidence shows that these beliefs by employees were mistaken.

#### VIII. WSI'S TERMINATION OF ITS TRUCKING OPERATIONS

Almost all the events discussed in this part of this decision, and in all subsequent parts, occurred in 1991. Accordingly, I generally will not mention the year when referring to incidents that occurred in 1991.

##### A. The History of WSI's Trucking Operations

As touched on earlier, WSI is in the business of heat-treating various kinds of steel products. WSI's customers generally are the manufacturers of those products. The products arrive at WSI via truck. Then, after the heat treatments at WSI, trucks return the products to the manufacturer or deliver them to another business firm designated by the manufacturer.

Perhaps throughout its existence, and in any case for at least 30 years, WSI has provided pickup and delivery services for its customers free of charge. That is, for customers in the Milwaukee area, WSI hauls the product without charge to and from WSI's facility. But at all relevant times some customers have used their own trucks. And, again at all relevant times, still others use the services of trucking companies to get their products to and from WSI.

During much of that time WSI employed about five truckdrivers for that pickup-and-delivery purpose. During period 1960 to 1980, those five WSI's drivers were represented by a Teamsters local. That ended when that local union chose to cease representing the drivers.

In the mid-1980s, Ted Dolhun decided to create a "transportation division" within WSI by expanding WSI's trucking operations to include over-the-road (long-haul) trucking operations.<sup>19</sup> WSI added trucks and drivers, so that by 1990 WSI owned 10 trucks. Some of the over-the-road operations involved hauling products that had been heat treated by WSI. But much of the over-the-road hauling was for shippers that had no connection with WSI's heating treating business. By 1990, that is to say, WSI was solidly in the over-the-road trucking business. (At all times, however, the transportation division constituted a relatively small part of WSI's overall operation, whether measured in terms of revenues or the number of employees involved.)

At all times WSI's transportation division lost money. Initially Ted Dolhun's response was to try to increase the volume of business handled by WSI's trucks. Dolhun did that by hiring a dispatcher whose main job it was to find loads for WSI's trucks and by offering commissions to the drivers when they found loads for the trucks. But the transportation division's business remained below par. In fact, as Ted Dolhun credibly testified, the revenues produced by the trucks were less than the expenses associated with their operation (drivers' wages, fuel, insurance, and the like). Trucking revenues did not even come close to covering the fully allocated costs of the trucks.

By February 1991, with WSI as a whole operating at a loss (so that heat-treating profits could no longer subsidize the trucking operation), Ted Dolhun began to think about selling some of the trucks. But he took no action in that direction.

WSI's trucking business continued to be awful. For instance, in mid-June three of WSI's drivers (Andresen, Cannon, and Humsik) and WSI's truck dispatcher (Donovan) averaged less than 20 hours of work per week and WSI was operating only 6 or 7 trucks (down from 10 in 1990).<sup>20</sup>

At some point WSI brought the entire transportation division to an end. (WSI's pickup-and-delivery operations also greatly diminished, presumably in response to the reduced

<sup>19</sup>It is not altogether clear whether the Dolhuns considered all of WSI's trucking operations (including local, pickup-and-delivery, services) to be part of the transportation division or just WSI's for-hire over-the-road operations. In any event, I will use the term "transportation division" to refer only to WSI's over-the-road services and equipment.

<sup>20</sup>Laid-off WSI truckdrivers (and alleged discriminatees) Andresen and Cannon testified that there seemed to be enough work for all of the drivers. Cannon testified that he was not aware of the Company's trucks running a lot of empty miles. I do not credit either Andresen's or Cannon's testimony in this respect.

volume of heat-treating work.) The record is surprisingly murky about precisely when the transportation division shut down. But it does appear that in late June Ted Dolhun decided to stop operating most, or all, of the transportation division's trucks. With that decision made, starting on or about June 28 WSI began to wind down the over-the-road operation and began refusing requests for over-the-road trucking services. WSI put several of its trucks up for sale in August (after the election) and in September delivered three of its trucks to a truck manufacturer for sale on a consignment basis. By November 1 WSI employed only two truckdrivers. (The record suggests that they handled only local, pickup-and-delivery, loads.) By March 13, 1992, WSI employed only one truckdriver.

In February WSI notified the Union that it planned to sell "at least two semi-tractors and four to five trailers."<sup>21</sup> Notwithstanding this planned sale of trucks and trailers, according to WSI as of the hearing the company continued to own all of the trucks it had previously been operating (except for the three trucks delivered to the manufacturer on a consignment basis).<sup>22</sup> As of the hearing, then, most of WSI's trucks were parked on a more-or-less permanent basis.

#### B. Alleged Threats by Dolhun to Sell WSI's Trucks

Laid-off WSI truckdriver, Ronald Andresen, signed a union authorization card on June 17. According to Andresen, about 2 weeks later Ted Dolhun told Andresen that "if you vote for the Union I'm going to sell the trucks, you're not going to have a job, and you'll never work here again." Dolhun testified that he did have a conversation with Andresen about that time but that it was very different from the one described by Andresen. According to Dolhun, Andresen asked how Dolhun could afford to pay its drivers and operate its trucks when the trucks were running empty so much of the time. Dolhun responded, he testified: "I can't, and if we don't get some work we'll probably sell the trucks and you won't have a job." I credit Dolhun, not Andresen. Andresen's version sounds altogether unlike anything that Dolhun might say. At the time, moreover, WSI was suffering from a lack of business for its trucks.

Laid-off WSI truckdriver, Thomas Cannon, testified that in July Ted Dolhun told Cannon that "if the Union got in there . . . he [Dolhun] would sell his trucks and he could have outside help [i.e. outside trucking companies] to bring the stuff in." Dolhun denied saying that to Cannon and I credit Dolhun, not Cannon.

Laid-off WSI production employee, Michael Gray, testified that he heard Ted Dolhun shout to WSI Supervisor Terry Patelski that—

<sup>21</sup>The notification was via letter to Glaser from Sholl. The letter reads, in part:

[B]ecause of the dire economic situation facing the company, it is trying to sell more excess equipment, equipment that is simply not needed given the sparse amount of work we have . . . . [T]hese assets are merely sitting in the yard, gathering dust. . . . In particular, the company plans on selling at least two semi-tractors and four to five trailers. We will . . . fulfill whatever bargaining obligations we have with respect to this plan to sell excess equipment.

<sup>22</sup>WSI's statement about the number of trucks owned as of the hearing here was made during the course of the discussion about WSI's response to the General Counsel's subpoena duces tecum.

there won't be no fucking union in here. There hasn't been none for 50 years and I don't give a shit what nobody says, if a union get in here, I will sell the trucks, I will close the plant down, and I will move to Florida.

Dolhun testified that he never told Gray any such thing.

I think it is a close call as to whether Dolhun did voice the remark described by Gray. On the one hand, it is the sort of thoughtless sounding off that Dolhun seems likely to engage in. And it is likely that, during the course of the Union's organizing campaign, from time to time Dolhun had the thought that he wanted to sell WSI and "move to Florida."<sup>23</sup> Additionally, note that Dolhun's denial was peculiar. Gray testified that Dolhun made the remark to Patelski, not to Gray. Yet Dolhun was asked only if he had made the remark to Gray. Dolhun was not asked whether he made such a remark to Patelski.

On the other hand, as discussed earlier there had been a union at WSI not all that long ago—the Teamsters had organized WSI's truckdrivers. That casts some doubt on testimony about Dolhun having said that there had been no union at WSI in 50 years. Also, some of Gray's testimony calls into question his ability to recount events accurately.

I note that although Patelski appeared as a witness (he was called by WSI), neither WSI nor the General Counsel asked Patelski about Gray's testimony. I'm not sure how that cuts. Patelski is a supervisor. But he was instrumental in bringing the Steelworkers to WSI and thus could be expected to be sympathetic to the General Counsel's case against WSI.

All things considered, I credit Gray and find that on one occasion Ted Dolhun loudly proclaimed to WSI Supervisor Patelski, in such a way as to be heard by employee Gray, something close to—

There won't be any fucking union in here. There hasn't been any for 50 years, and I don't give a shit what anybody says—if the Union gets in here, I'll sell trucks, I'll close the plant down, and I'll move to Florida.

Dolhun's statement obviously violated Section 8(a)(1): *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Coronet Foods*, 305 NLRB 79 (1991), *enfd.* 981 F.2d 1284 (D.C. Cir. 1993). The fact that Dolhun addressed the remark to a supervisor rather than to an employee is beside the point since it was heard by an employee. E.g., *Nemacolin Country Club*, 291 NLRB 456, 460 (1988). In any event, the circumstances were such that Dolhun should have realized that an employee would overhear the statement.<sup>24</sup>

<sup>23</sup> Supervisor Brian Burdick testified that Dolhun "did say that, on occasion . . . 'if the union got in he would sell or close the place down.'" I credit that testimony.

<sup>24</sup> Employee James Reinke testified that on about August 7, while Reinke was working with Gray, Dolhun told them that "union or no union, I'm going to shut the place down." Dolhun denied saying that to Reinke and Gray did not testify to any such words by Dolhun (except for the statement discussed above). I do not credit Reinke. (It could be, of course, that Reinke was referring to the same incident that Gray testified about, but that Reinke's memory of the words that Dolhun used differed from Gray's.)

### C. *The Accountant's Advice to WSI*

WSI's in-house accountant left WSI in April. Thereafter, Ted and Chris Dolhun turned to an "outside" certified public accountant, Paul Runkel, whenever they wanted advice about the Company's finances. WSI called Runkel as a witness to testify about WSI's financial situation and about the advice that Runkel gave to the Dolhuns.

I will turn to Runkel's testimony in a moment. But first we must deal with an evidentiary issue concerning a document that Runkel testified about.

The General Counsel's subpoena duces tecum addressed to Ted Dolhun, as president of WSI, asked for, as item 24—

Any and all documents, including, but not limited to, reports and minutes of meetings showing that Respondent's trucking business was losing money or otherwise not profitable, during the period January 1, 1989 to present.

Additionally, the subpoena made it clear that—

it is intended to cover all documents that are available to you or subject to your reasonable acquisition, including . . . documents in the possession of . . . accountants.

The parties and I discussed the subpoena early in the hearing. The discussion about item 24 was routine, except that it focused on the "reports and minutes of meetings" language of the item. WSI advised that no documents covered by item 24 existed.

Runkel, however, testified that, based on figures routinely prepared by WSI's clerical staff, in July 1991 he prepared a one-page handwritten analysis of WSI's trucking operation and discussed that analysis with the Dolhuns. WSI sought to make that handwritten analysis part of the record. The General Counsel, pointing to WSI's earlier failure to provide him with Runkel's analysis pursuant to the subpoena duces tecum, demanded that all of Runkel's testimony be stricken. I advised the General Counsel that he was entitled to view whatever documents that Runkel used to prepare the analysis and to additional time to prepare for the cross-examination of Runkel. But I denied the General Counsel's motion to strike and admitted Runkel's analysis into evidence. The General Counsel thereafter opted not to cross-examine Runkel.

I could properly have granted the General Counsel's motion. See, e.g., *NLRB v. American Art Industries*, 415 F.2d 1223, 1230 (5th Cir. 1969); *Bannon Mills*, 146 NLRB 611 (1964). Accord: *Filene's Basement*, 299 NLRB 183, 204 (1990). But the matter is a discretionary one. *Nice-Pak Products*, 248 NLRB 1278, 1291 fn. 74 (1980). In the circumstances at hand, WSI had produced its companywide financial reports pursuant to the subpoena. Given those reports and access to the additional data that Runkel said he used, it would have been a relatively straightforward matter for the General Counsel to determine, through cross-examination, whether Runkel's analysis was consistent with the Company's financial reports (whose accuracy has not been questioned) and whether those reports and the additional data available to Runkel in July supported his analysis. And WSI's position from the start had been that it shut down the trucking operation because of financial considerations. I ac-

cordingly concluded that WSI's failure to provide Runkel's analysis pursuant to subpoena item 24 did not prejudice the General Counsel. Further, given the nature of the document and of the discussion about item 24, it seemed far more likely than not that WSI's statement, during the subpoena discussion, to the effect that no document covered by item 24 existed, was an unwitting mistake—the product of forgetfulness or confusion about the scope of the subpoena, not of an attempted coverup.

As I will discuss below, however, the fact that in July 1992 WSI's management had forgotten about Runkel's analysis arguably says something about its probable significance to WSI's decisionmaking 1 year earlier.

Returning to Runkel's testimony, which I found to be entirely credible,<sup>25</sup> Runkel testified that in July he told Ted Dolhun that WSI's trucking operations had already lost \$300,000 for the year and were likely to lose double that by year's end and that WSI would be money ahead if Dolhun sold all of WSI's trucks and contracted with trucking companies for all of the transportation that WSI needed. Runkel's figures (in the analysis that should have been, but was not, produced pursuant to the General Counsel's subpoena) supported that testimony and showed that for the past several years truckdriver wages alone cost WSI far more than the trucks were producing in revenues—a situation most business managers would consider catastrophic.

The figures shown by Runkel's analysis of WSI's transportation division are set out below. The 1991 figures are estimated, presumably on the basis of data from the first half of the year. For all 3 years the figures do not include any allocation of general or administrative overhead expenses and thus understate the losses generated by WSI's trucking operation.

(In thousands of dollars)

|   | 1989    | 1990    | 1991    |
|---|---------|---------|---------|
| Revenues                                | \$81    | \$111   | \$88    |
| Operating Expenses                      |         |         |         |
| Driver wages                            | 161     | 225     | 158     |
| Payroll taxes                           | 18      | 25      | 17      |
| Depreciation                            | 83      | 131     | 98      |
| Insurance                               | 35      | 38      | 55      |
| Fuel, maintenance +<br>other oper. exp. | 221     | 398     | 309     |
| Interest                                | 18      | 31      | 35      |
| Total Cost                              | \$535   | \$848   | \$656   |
| Operating (Loss)                        | (\$454) | (\$737) | (\$568) |

#### D. The July "Boycott"

Castle Metals (Castle) is one of WSI's better customers. Castle manufactures the metal plates that hospitals use in the construction of the rooms that house magnetic resonance (MR) diagnostic equipment. Daryl Aulembacher is Castle's sales manager. Ted Dolhun has had a business relationship with Aulembacher for more than a decade. Additionally, Aulembacher is related to one of WSI's sales employees. Prior to the summer of 1991 Aulembacher routinely arranged

<sup>25</sup> The General Counsel referred to the witness as "the fabricating Runkel." (Br. at 72.) As just indicated, however, I found Runkel's testimony to be wholly credible.

with Dolhun to have WSI heat-treat MR plates and to truck those plates to their final destinations. WSI provided that transportation for Castle without charge if the transportation was local and charged competitive rates if it was not.

Sometime around or before mid-June a Castle official asked Ted Dolhun if WSI could heat treat some MR plates and then deliver them to a hospital in New York on Saturday, July 6. Although Dolhun knew that the delivery date meant that the WSI driver handling the load would have to forgo his July 4 holiday and although Dolhun knew that it would be costly for Castle and/or the hospital if the MR plates did not arrive on schedule, Dolhun agreed to provide the service without first checking with the WSI drivers about the trip. Dolhun then arranged for a backhaul (from New York to Milwaukee), still without checking with any of WSI's drivers.

Dolhun testified, credibly, that he did not think to talk to the drivers about the New York trip because finding at least one driver to handle a trip over a holiday had never before been a problem. This time, however, all of WSI's drivers (there were seven or eight of them at the time) flatly refused to make the trip; each said that he did not want to be away over the July 4 holiday. The Dolhuns concluded that the drivers were "boycotting" WSI for unknown reasons. (The quote is from Chris Dolhun's testimony.) But each of the drivers who appeared as witnesses in this proceeding testified that his only reason for not agreeing to take the New York trip was because he wanted to be home for the July 4 holiday.<sup>26</sup>

By about June 20 the Dolhuns had learned that none of its drivers was willing to take the New York trip. Ted Dolhun responded by informing Aulembacher that WSI could not handle the trip to New York after all and that Castle had to look elsewhere for the truck transportation. In the course of that conversation Dolhun told Aulembacher that he wanted to get out of the over-the-road trucking business because he was having trouble getting drivers to take loads. Also in the course of the conversation Dolhun mentioned WSI's "union problems" (to quote Aulembacher's testimony).

Dolhun then asked Aulembacher to confirm their conversation (in writing). Dolhun meant that he wanted Aulembacher to confirm that WSI had notified Castle that WSI could not handle the July MR load to New York. (Dolhun was understandably concerned about the possible liability stemming from WSI's inability to fulfill its obligations to Castle.<sup>27</sup>) Aulembacher thought that Dolhun was asking Aulembacher to confirm that Dolhun had advised that WSI was leaving the interstate trucking business.

<sup>26</sup> WSI asked driver Thomas Cannon to provide a written statement about why he turned down the MR load to New York. (His statement, dated June 20, says that he did so "because of my scheduled vacation and family plans.") It is unclear to me why WSI asked for a written statement from Cannon. But the fact that WSI did so does not appear to me to have any significance in terms of whether the Company did or did not violate the Act.

<sup>27</sup> On brief the General Counsel argues that Dolhun's testimony about concerns of liability must be false since, among other things, there was no written contract and since Dolhun and Aulembacher had known each other for so long. I do not find that argument persuasive.

Nearly a month later Aulembacher did send a letter to WSI. But the letter did not at all reflect the Dolhun-Aulembacher conversation. It reads:

The purpose of this letter is to inform you that because of the lack of available trucks to deliver material to job sites in New York and Maryland over the July 4th week, as well as competitive pricing, you have left me no choice but to give my future business to alternate freight companies interested in serving Castle Metals.

Also, because of lack of available trucks, I will be picking up and delivering at your plant in the future.

The letter is all the more peculiar because, according to Aulembacher's credible testimony, at all material times Castle continued to be willing to use WSI's over-the-road trucking services. (WSI did not thereafter offer to provide over-the-road services for Castle, and Castle chose to use its own trucks for the haul between Castle's facility and WSI's. But Castle continued to use WSI for heat-treating work.)

Neither the General Counsel nor WSI asked either Aulembacher or Dolhun to explain the letter.

One possible explanation for the letter is that, notwithstanding the testimony of both Dolhun and Aulembacher, in fact Dolhun asked for such letter in order to justify WSI's termination of its trucking operation in the event of an NLRB proceeding such as the one at hand. If that is so, it suggests by implication that the union drive had something to do with Dolhun's decision to end the trucking operation. But the first Steelworkers unfair labor practice charge against WSI was not filed until September. Dolhun would have had to have been remarkably scheming and farsighted (in one respect, shortsighted in another) to ask Aulembacher, in June or July, to draft an entirely false letter for WSI to use as evidence in a case that was not even on the horizon. And Dolhun did not seem to me to be the type of person who would even envision a plot of that kind.

My only conclusion about the letter is that Dolhun did not ask Aulembacher to write anything like it; Dolhun simply wanted, as he testified, a letter confirming that he had given advance notification to Castle that WSI could not handle the July MR load. I make no other finding as to why Aulembacher wrote the letter.

In any case, the aborted New York load was the last over-the-road trucking service that WSI offered to provide to Castle. In early July, moreover, WSI's dispatcher told a WSI driver that WSI had quit "contract" hauling for Castle and two other customers of WSI's transportation division operation.<sup>28</sup> (By "contract" the dispatcher must have meant for-pay over-the-road services, as opposed to the local pickup-and-delivery services that WSI offered free of charge to its

<sup>28</sup>The record indicates that the dispatcher was a supervisor. He prepared a periodic evaluation of a driver and signed the evaluation as a "supervisor," and in the course of Chris Dolhun's testimony she referred to the dispatcher as a "supervisor." In any case, even if the dispatcher were not deemed to be a supervisor, the dispatcher's job was to relay information about trucking operations from management to WSI's drivers. As such, his remark to the driver was "a statement by [WSI's] agent . . . concerning a matter within the scope of his agency or employment, made during the existence of the relationship." Rule 801(d)(2)(D), Fed.R.Evid. See *Laboratory Furniture Midwest*, 301 NLRB 819 (1991).

heat-treatment customers.) I credit that testimony as an accurate statement of the circumstances at WSI.<sup>29</sup>

#### E. WSI's Shutdown of its Transportation Division— Conclusion

The first question is whether the record contains evidence constituting a prima facie case that WSI shut down its transportation division because of the union or other protected activities of its employees. See *Coronet Foods*, supra.

My conclusion is that the record does include such evidence. To begin with, Ted Dolhun's union animus is obvious. The way WSI chose to bargain with the Steelworkers alone makes that clear.<sup>30</sup> Secondly, the event that precipitated Dolhun's decision to get out of the trucking business was the unanimous refusal of the drivers to handle Castle's July load. Dolhun discussed this with Aulembacher and in that same conversation spoke about WSI's "union problems." Additionally, the Dolhuns assumed that the drivers' refusals to take the Castle load was a "boycott"; that is, they assumed that the drivers concertedly refused to handle the Castle load. Given Dolhun's union animus and the fact of an ongoing union organizational drive at the time of the "boycott," and given Dolhun's reference to union problems in his conversation with Aulembacher about ending WSI's trucking operation, the odds are high indeed that Ted Dolhun believed that the drivers' refusals were union related.<sup>31</sup>

There is, however, evidence that suggests that WSI would have shut down its transportation division even in the absence of the employees' union activity.

Plainly the financial results of the trucking operation virtually demanded its shutdown or, at least, some form of major change. And while the financial results of the trucking operation had been just about as horrible in 1989 and 1990 as they were in 1991, in 1991 WSI had no profits from its other operations by which it could subsidize the trucking operation. Further, in 1991, unlike previous years, WSI's accountant (Runkel) urged the Dolhuns to get rid of the trucks.

<sup>29</sup>A number of witnesses called by the General Counsel testified that trucks from other companies began appearing at WSI's facility once WSI shut down its trucking operation. It appears to be the position of the General Counsel that that shows the reduction in the scope of WSI's trucking operations was not economically motivated. But the only way items to be heat treated could arrive at the facility was via truck (and, similarly, trucks had to be used to return the items to WSI's customers). Thus, so long as WSI stayed in the heat-treating business, there of course would be truck traffic at the facility. The question is whether it was better for WSI to use its own trucks or instead to use outside trucking sources (or to require customers to handle their own trucking).

<sup>30</sup>On the other hand, I think that Ted Dolhun's outburst about, "if the Union gets in here, I'll sell the trucks, I'll close the plant down, and I'll move to Florida" as discussed earlier, says little about Dolhun's animus. Given Dolhun's personality, I have no reason to believe that the eruption signified anything more than a temporary irritation with the Union's organizing effort. Note that Dolhun directed the remark to a supervisor rather than to an employee, that Dolhun's decision to sell the trucks was made before the Union was voted in (not "when the Union [got] in here"), that he did not close WSI down, and that he did not move to Florida.

<sup>31</sup>That the Dolhuns may have been mistaken and that the refusals may have been unrelated to the union campaign is beside the point. See *Mashkin Freight Lines*, 261 NLRB 1473, 1476 (1982).

Additionally, if it was Dolhun's anger at what he perceived to be the union-related boycott that caused Dolhun to shut down the transportation division's operations, one would expect that Dolhun would have stopped the operations immediately. But he did not do that. Neither party provided evidence about when each of the transportation division's trucks stopped operating. But we do know, for example, that truck-driver Thomas Cannon was not permanently laid off until early August (as will be discussed more fully below).

I, thus, think that the evidence comes very close to proving the following scenario: By early 1991 it was starting to become very clear that Ted Dolhun's hopes about someday being able to operate a profitable transportation division within WSI were not going to work out and that every mile traveled by WSI's trucks would add to WSI's losses. Particularly because of the losses and plummeting revenues being suffered by the heat-treating side of WSI, Dolhun began thinking about shutting down the trucking operation. As WSI's revenues continued to stay at unfavorable levels, Dolhun's thoughts of that ilk grew stronger. By late June, not only were WSI's overall revenues remaining much too low to produce profits, WSI's accountant, Runkel, kept pressing Dolhun to get rid of the trucks. Then all of WSI's drivers turned down Castle's MR load to New York. Whether any union had been conducting an organizing drive at WSI, and whether there had been any reason to conclude that the drivers were acting in concert, those refusals by the drivers would have been upsetting to Dolhun. (Dolhun, in fact, had long been unhappy with the occasional refusals of various individual WSI drivers to take loads.) Under all these circumstances (this scenario continues) Dolhun thereupon made up his mind to begin winding down the trucking operation for reasons that had nothing whatever to do with union or other protected activity on the part of WSI's employees. Or, to put it another way, even assuming that it Dolhun's animus was a cause of the shutdown of the transportation division, Dolhun would have closed it down at the same time for legitimate reasons anyway. See *Ryder Distribution Resources*, 311 NLRB 814 (1993).

But given Dolhun's union animus, the Dolhuns' belief in a union-related "boycott" by the drivers, and the timing of the start of the shutdown, it was up to WSI to prove either that the employees' protected activities played no part in the decision to shut down the trucking operation or that, even if those activities did play a role, WSI would have acted the same way even absent those activities. I conclude that WSI did not carry that burden. In particular, apart from Runkel's one-page analysis, the record is devoid of operating and financial data on WSI's truck operations. And WSI presented only limited balance sheet information. For all anyone knows, therefore, the Company had a vast surplus by which it could have continued to finance the truck operations. Lastly, the significance of Runkel's advice to get rid of the trucks is lessened by the Dolhuns' apparent failure to remember (in July 1992) that Runkel had prepared a written analysis of the trucking operation's finances (in July 1991). If the trucks' profit-and-loss situation really was the basis of Ted Dolhun's decision to end the trucking operation, one would expect the Dolhuns to have focused with some care on Runkel's advice and on the analysis that formed the basis of that advice and thus to have thought of Runkel's analysis

when reviewing the General Counsel's subpoena duces tecum.

I thus conclude that, as of late June, while Ted Dolhun had for lawful reasons edged close to deciding to shut down the transportation division, the shutdown began as soon as it did in response to what Dolhun believed were the drivers' union activities.

#### F. WSI's Failure to Bargain About the Sale of Its Trucks

As noted earlier, in August, after the election, WSI parked several of its trucks on a part of its property that borders a public thoroughfare and put "for sale" signs on them. WSI did not notify the Steelworkers of the Company's decision to do this and, until October, did not offer to bargain about the matter. The record does not tell us whether WSI had been operating the trucks prior to their being advertised as "for sale."

As also noted earlier, in September WSI delivered three of its trucks to a truck manufacturer for sale on a consignment basis, doing so without bargaining with the Steelworkers. WSI did not, of course, replace those trucks with others. Again, the record does not show whether WSI had been operating the trucks or had had them parked, nor does the record tell us whether the three trucks delivered to the manufacturer were the same trucks that had earlier been advertised as for sale.

When WSI retained the Reinhart firm to handle the bargaining with the Steelworkers, Sholl offered to bargain about the shutdown of WSI's trucking operation (at a bargaining session on November 1 and then again by letter dated February 26, 1992). But Glaser, referring to the Union's unfair labor practice charge concerning the trucks, refused.

The question is whether WSI violated Section 8(a)(5) by its unilateral acts of putting trucks up for sale and delivering trucks to a manufacturer for consignment sale. My conclusion is that the record fails to add up to a violation of Section 8(a)(5) in these respects.

The question ultimately turns on whether the unilateral actions under consideration had an impact on employment at WSI. See generally *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). Here, for all one can tell from the record, the trucks at issue may have been parked and their drivers no longer employed at WSI since before August 14 (the date of the election).

I realize that this raises a burden of proof issue: why not leave it to WSI to prove that the trucks had not been in use? But doing so means that one proceeds on the assumption that a truck put up for sale had been in operation until that event, and it is not clear to me that, on this record, that is a reasonable assumption. (I note that, per Sholl's uncontradicted statements in his February 1992 letter to Glaser, as of the time of that letter, at least, some unspecified number of tractors and trailers were "sitting in [WSI's] yard, gathering dust."<sup>32</sup>)

#### G. The Layoffs of the Truckdrivers

As previously discussed, in June WSI employed about eight truckdrivers, although some of them worked much less

<sup>32</sup> See fn. 21, supra.

than full time. By November WSI employed only two drivers; by March 1992 WSI employed only one driver.

The General Counsel, however, presented evidence concerning the layoffs of only two of the drivers, Ronald Andresen and Thomas Cannon.

Andresen was permanently laid off on June 28. About 9 a.m. on that day, Andresen was in the middle of changing his truck's tires. He had been on the job for about 2 hours. At that point WSI's dispatcher told Andresen that he was through working for WSI, that he should clean his truck out. Andresen asked if he was being fired. The dispatcher said that he was not, that (as Andresen described the conversation), "Ted [Dolhun] had called him [the dispatcher] and told him he was getting rid of the trucks and I am laid off." Andresen never finished changing the tires.

Andresen thus was permanently laid off about 1 week after Ted Dolhun decided to bring WSI's trucking operation to an end because of the drivers' refusals to handle Castle's July loads to New York. Andresen was a junior employee (he had worked for WSI for less than a year), he was an over-the-road driver, and WSI often did not have enough trucking business to keep Andresen busy.<sup>33</sup> Thus one would expect Andresen to have been the first driver laid off, given the decision to end the transportation division.

It is remarkable that Andresen was told to leave while he was in the midst of a job (changing tires). There is no evidence that any other WSI employee was laid off in as abrupt a fashion as Andresen was. But WSI routinely laid off employees after they arrived at work. Because of that practice I do not find that the manner in which WSI laid off Andresen calls for any inference regarding the lawfulness of the layoff.

In that same regard, I do not find that the layoff was the result of any hostility directed at Andresen in particular. Andresen had signed a union authorization card on June 17. And there is evidence that WSI's management either knew or assumed that all or most of the drivers were prounion (as will be discussed below in connection with Cannon's layoff). But there is no credible evidence that Andresen was particularly active in the union campaign or that management for some reason was more irritated with Andresen over union-related matters than it was with the other drivers.<sup>34</sup>

On the other hand, I conclude that WSI's layoff of Andresen was the result of Ted Dolhun's decision to shut down the trucking operation. Since I previously concluded that that decision was a result of Ted Dolhun's union animus, I further conclude that WSI's layoff of Andresen violated Section 8(a)(3) and (1) of the Act.<sup>35</sup>

<sup>33</sup> Among production workers, seniority counted for little in terms of who WSI selected for layoff. But seniority played more of a factor in WSI's relationship with its truckdrivers.

<sup>34</sup> As discussed earlier, I do not credit Andresen's testimony that Dolhun threatened to fire him if he voted in favor of the Union.

<sup>35</sup> The complaint alleges that WSI's layoff of Andresen violated Sec. 8(a)(5). But since the layoff occurred long before the representation election, I shall recommend that that allegation be dismissed. Andresen also testified that an erstwhile WSI supervisor, Dale Lewandowski, told Andresen that: (1) Ted Dolhun ordered Lewandowski to flatten truck tires "to make it look like it was something to do with the Union"; and (2) customers wanted WSI's trucking services so badly that "one of [WSI's customers] offered the company \$100 more a pickup if [Ted Dolhun] would just send a truck over, and I guess Ted didn't want to do that." Even assuming that

Cannon was an "intermediate" driver for WSI. He handled some intra-Milwaukee loads and, in addition, made relatively short over-the-road runs (as to Chicago or Joliet, Illinois). Cannon signed a union authorization card on June 17. Ted Dolhun testified, credibly, that he considered Cannon's usefulness as a driver to be limited: Cannon refused loads that would keep him away overnight, and Cannon was unable to handle over-weight, over-length, or over-length pieces. WSI's most recent performance report on Cannon (dated April 1990) was mediocre.<sup>36</sup>

Cannon testified that in late July an attorney for the Company asked him "why the drivers wanted to bring in the Steelworkers?" I credit that testimony. (The attorney presumably was from the firm that WSI hired to oppose the unionization campaign. WSI did not call anyone from that firm as a witness and does not deny that the remark was made.) Cannon responded by denying that the drivers had anything to do with "bringing in the Union."<sup>37</sup>

Cannon went to work, as usual, on July 30. But during the day he received the following note from WSI's dispatcher (emphasis in the original):

Due to our continued slow-down in work, we are forced to temporarily lay you off due to lack of work.

Please contact your traffic manager *DAILY* . . . to be informed as to the status of loads the following day.

Ted Dolhun spoke to Cannon that same day, July 30, about the lack of work, saying

things are slow right now, [but] if you could hang in there another week and a half Sheffield Steel would be running about a million and a half pounds of Rexnord product . . . . [T]he regular customers are shying away from business right now. I'm trying to drum business up and they are shying away because of the union activities and the unionization, and they are afraid that their materials might get messed up by the union.

At least one customer of WSI, Maynard, did reduce its business with WSI because of Maynard's concern that the union drive at WSI might cause an interruption in services. But a Maynard official testified, credibly, that no one from his company spoke to anyone from WSI about Maynard's concern.

The layoff was for 4 days, July 30 (Tuesday) through August 2 (Friday). That Friday Chris Dolhun called Cannon and told him to report for work on Monday, August 5. Cannon

Andresen's testimony on these points is covered by Rule 801(d)(2), Fed.R.Evid., which I doubt, I do not credit it.

<sup>36</sup> The General Counsel contends that that report was in fact fraudulent, that it was created for the hearing. I find otherwise. When a company to which Cannon was applying for work subsequent to his layoff at WSI asked WSI for an evaluation of Cannon, WSI advised that Cannon was an "excellent" worker. But I do not consider that to be anything more than an effort on WSI's part to assist an ex-WSI employee to find a new job.

<sup>37</sup> The implication to be drawn from the attorney's query of Cannon is that, as of late July, WSI's management had concluded that the drivers as a group were prounion. I have considered whether this evidence makes it even more likely that Ted Dolhun's decision to get out of the trucking business stemmed from his union animus. My conclusion is that it does not.

did so. But about 11:30 a.m. on August 6 Donovan told Cannon that Ted Dolhun had ordered Cannon to be permanently laid off; Cannon was to park his truck; he was “all through.” Earlier that morning Dolhun had asked Cannon why Cannon was “sitting on a bundle of steel.” (That is, Cannon and his truck, which was loaded, were at the WSI facility, and nothing seemed to be happening.) Cannon explained that he was waiting for the facility’s crane to become available. But Dolhun responded, “You better watch it.”

Chris Dolhun testified that WSI laid off Cannon because of “lack of work.” The import of Ted Dolhun’s testimony about Cannon’s layoff is that the “economic condition” of WSI called for the layoff of a driver, and that Cannon was selected from among the drivers for layoff because of his performance limitations (as discussed earlier).

I turn first to the attorney’s question to Cannon about why did the drivers want to bring in the Steelworkers. The complaint does not allege that question to be a violation of the Act, nor does the General Counsel, on brief, claim it to be. On the other hand, the General Counsel’s brief does seem to argue that the attorney’s question suggests hostility towards Cannon. But I do not consider that to be so.

The General Counsel does contend that Dolhun violated Section 8(a)(1) when he uttered that statement about customers “shying away because of the union activities.” And it is true that the General Counsel can find support in *Gissel*.<sup>38</sup> But: (1) Dolhun did not suggest that the customers’ “shying away” might force WSI to close;<sup>39</sup> (2) there is evidence that at least one customer was indeed “shying away”—even though there is no evidence that any customer actually told WSI’s management that the union drive was a reason for the customer’s changed behavior; and (3) Dolhun uttered the remark to encourage Cannon about the job prospects at WSI, not to coerce him about union matters. I accordingly conclude that Dolhun’s statement did not violate the Act.

As for WSI’s layoffs of Cannon, I credit the Dolhuns to the effect that a “lack of work” called for the layoffs of a driver and that WSI chose Cannon for layoff based on performance considerations. But I have found that Dolhun in late June began to shut down WSI’s transportation division and, in connection with that shutdown, to turn away customers seeking trucking services. That suggests that the “lack of work” that Chris Dolhun testified about was self-created by the Dolhuns. I recognize that it is possible that WSI might have laid off Cannon when it did even had Dolhun not decided to shut down the trucking operation. It is also possible that by late July Dolhun would in any event have shut down the WSI’s transportation division for lawful reasons. But those possibilities were for WSI to prove. And WSI did not carry that burden.

<sup>38</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (“conveyance of the employer’s belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof”).

<sup>39</sup> Compare, e.g., *Pentre Electric*, 305 NLRB 882 (1991), enf. denied 998 F.2d 363 (6th Cir. 1993); *Crown Cork & Seal Co.*, 255 NLRB 14 (1981); but see *Hertzka & Knowles*, 206 NLRB 191, 194–194 (1973), enf. in relevant part 503 F.2d 625, 628–629 (9th Cir. 1974) (predicting loss of business and layoffs).

I accordingly conclude that WSI’s layoffs of Cannon (both the July 30 temporary layoff and the August 6 permanent layoff), like its layoff of Andresen, violated Section 8(a)(3) and (1) of the Act.<sup>40</sup>

As a last matter, as of the time of the hearing WSI apparently had only one truckdriver on its payroll. But the complaint, while alleging that the shutdown of WSI’s trucking operations violated Section 8(a)(1), (3), and (5), does not specifically allege that WSI unlawfully laid off any drivers other than Andresen and Cannon. Moreover, the record is very scanty about who the drivers were, whether they were laid off or left of their own accord, when they stopped working for WSI, and so on. On the other hand, given my conclusion about the reason for the shutdown of the transportation division, any WSI employee’s layoff that was caused by the shutdown of the transportation division presumptively constitutes a violation of Section 8(a)(3) and (1). As discussed in part XV, I recommend that the determination of the identity of such employees be left to the compliance stage.

#### IX. WHY DID WSI STOP DOING BUSINESS WITH GALLAND HENNING

Galland Henning Nopak, Inc. is located across an alley from WSI. Galland Henning is a manufacturer and some of its products need the kind of heat treatment that WSI offers. Its employees are represented by the Steelworkers.

All parties agree that as of early August Galland Henning was a customer of WSI (albeit a relatively insignificant customer in terms of the volume of business involved), that Galland Henning had been a WSI customer for many years, and that Galland Henning is no longer a customer of WSI. The General Counsel contends that WSI ceased doing business with Galland Henning because that Company’s employees are represented by the Steelworkers and because some of those employees visited WSI’s facility on the day of the representation election (August 14).

My conclusion is that in August relations between WSI and Galland Henning became strained through a series of mixups, none of which had anything to do with any union, and that WSI has never refused to do business with Galland Henning.

##### A. The Katerski Episode

Dangers abound at the WSI facility. For instance steel, sometimes at very high temperatures, is constantly on the move; and small particles are hurled from grinding and sandblasting equipment. WSI accordingly requires its employees and all visitors to the plant to wear hard hats, safety glasses, long-sleeved shirts, gauntlet gloves, and safety shoes. Those requirements apply to all truckdrivers who make deliveries to or pickups from WSI, whether or not they are employed by WSI. WSI routinely prohibits other companies’ truckdrivers from making pickups or deliveries at WSI if the drivers are not wearing the required safety clothing and equipment.

James Katerski is a truckdriver employed by Galland Henning. Ted Dolhun testified that sometime in early August

<sup>40</sup> As in the case of Andresen’s layoff, the complaint alleges that Cannon’s layoffs violated Sec. 8(a)(5). But Cannon’s layoffs, like Andresen’s, occurred long before WSI’s employees elected the Steelworkers to be their collective-bargaining representative.

he spoke to Katerski about his not wearing all the safety equipment and clothing that WSI requires.

Katerski agreed that sometime in early August Dolhun spoke to him. But according to Katerski, Dolhun said nothing about safety equipment and instead told Katerski “not to come back, that he no longer wanted” Galland Henning’s business. Dolhun denied that that he said any such thing to Katerski.

I do not credit Katerski’s denial about being talked to about safety equipment. I find that Katerski showed up at WSI without all of the safety equipment and clothing that he knew, or should have known, that WSI demanded and that Dolhun noisily pointed that out to Katerski and said something on the order of “don’t come back until you’re wearing what you should be wearing” or “get the hell out of here.”

Katerski proceeded to tell his supervisors at Galland Henning that Ted Dolhun had said that Galland Henning was “not to bring any more work into” WSI. That was either a lie on Katerski’s part or an expression of an honest misunderstanding about what Dolhun had said. One Galland Henning official, Ronald Bruettner, did in fact assume that Katerski’s report must be the product of “some confusion.” He thereupon telephoned WSI several times in an effort to reach Ted Dolhun. Each time Bruettner was told that Dolhun was not available. Dolhun did not return Bruettner’s calls. (While Dolhun’s failure to return Bruettner’s calls is peculiar, I do not consider it to be sufficiently suspicious to support a finding that Dolhun wanted to cease doing business with Galland Henning.)

#### B. Galland Henning’s Overdue Payments

That brings us to the next communication between personnel of WSI and Galland Henning. On August 23, or perhaps as much as a couple days earlier, WSI’s then-receptionist Kristin Kaufman turned to WSI customer-service employee Margaret Komars after Kaufman had completed a telephone call. Kaufman, looking and sounding upset, told Komars that she had just telephoned Galland Henning to inquire about that Company’s failure to pay several bills (totaling about \$400) on time. According to Kaufman, Galland Henning’s chief executive, Nunnemacher, responded to Kaufman’s inquiry by saying that Galland Henning would never make “the fucking payment” and that WSI “could go to hell.” Neither of the Dolhuns was in the office at the time. When the Dolhuns returned, Komars repeated to them what Kaufman had told her. The Dolhuns’ response was to tell Komars to refer the Galland Henning account to a collection agency. On August 23 Komars did so, by letter.

At the time of Kaufman’s call to Galland Henning, Nunnemacher was under the impression that Ted Dolhun had said that he did not want to do business with Galland Henning any longer. On top of that, documentary evidence coupled with Bruettner’s testimony suggests that, at the time of Kaufman’s telephone call to Nunnemacher, a Galland Henning check in full payment of the outstanding WSI bills may have been, literally, in the mail. Nunnemacher’s explosive response to Kaufman thus is not all that difficult to understand. In any event, the collection agency did proceed against Galland Henning, and that resulted in a payment by

Galland Henning that the collection agency delivered to WSI.<sup>41</sup>

#### C. Orlowski’s Testimony

Douglas Orlowski is a WSI foreman. WSI admits that he is a supervisor within the meaning of Section 2(11) of the Act. Orlowski, even though he was a supervisor at the time, was instrumental in bringing the Steelworkers to WSI (as discussed earlier).

Orlowski testified that on the day of the representation election at WSI he and several other supervisors saw 10 or 12 employees from Galland Henning walk across the alley from Galland Henning toward WSI’s facility and talk to a Steelworkers’ official. According to Orlowski, on that same day, in his presence, one of the other supervisors told Ted Dolhun about the incident. Dolhun’s response, Orlowski testified, was to say, “That’s it; we’re not going to do any more work for Galland Henning.”

I do not credit Orlowski’s testimony. To begin with, the record shows that Orlowski’s memory is not all that it might be. Second, the record is clear that Ted Dolhun was nowhere near WSI’s facilities on August 14. Third, I cannot conceive of Dolhun ending business with any customer merely because the customer’s employees are represented by the Steelworkers, particularly since WSI does business with at least two other companies whose employees are represented by the Steelworkers. Indeed, given WSI’s line of business (treating steel) and location (Milwaukee), WSI would be in big trouble if Dolhun was reluctant to accept business from companies whose employees are represented by the Steelworkers. Lastly, as for the fact that a dozen Galland Henning employees spoke to a union official at WSI’s facility on election day, no matter how one characterizes Ted Dolhun, there was nothing about that incident that could lead Dolhun to decide to cease doing business with a customer.

I accordingly conclude that none of WSI’s actions toward Galland Henning were related to the Steelworkers’ representation of Galland Henning’s employees or to any other protected activity of any employees.

#### X. SURVEILLANCE

Through much of the period of interest to us, Dale Lewandowski was a WSI supervisor. WSI fired him sometime before the hearing began. The question to be considered

<sup>41</sup> Kaufman did not testify about her conversation with Nunnemacher. Rather, Komars testified about what Kaufman told her and what she noticed about Kaufman as the telephone conversation came to an end. But the circumstances were such as to make it exceedingly unlikely that Kaufman was lying to Komars. (See, in this connection, Fed.R.Evid., Rules 803(1) and (2).) Because of this and because Komars seemed to me to be a credible witness, I find that Nunnemacher did indeed curse at Kaufman. (I thus do not at all agree with the General Counsel that Komars “fell apart” on the witness stand. Br. at 53.) I note, moreover, that even if Kaufman was lying or had somehow completely misheard Nunnemacher, the effect on WSI’s relationship with Galland Henning would be the same since the Dolhuns believed what Kaufman said as related to them by Komars. On brief the General Counsel makes much of the fact that WSI indicated that it would call Nunnemacher as a witness and then did not. But I attribute no meaning whatever to that circumstance.

here is whether Lewandowski engaged in surveillance of the union activities of WSI's employees.

Many of the organizational meetings of WSI's employees were held at a bar named the Ice House, a few blocks from WSI's facilities. According to the testimony of Thomas Cannon, sometime in June, at a time of the day when some WSI employees were meeting at the Ice House to discuss the Union and at a time when Lewandowski should have been at work at WSI, Cannon saw Lewandowski "driving real slow" near the Ice House, peering at the cars parked near the bar. WSI's employees park on WSI's property when at work. As a result, the Company's supervisors are able to identify the cars that WSI's employees drive. Cannon testified that the only explanation for Lewandowski's actions was that he was trying to determine which employees' cars were parked near the Ice House and, therefore, which employees were at the union meeting.

Lewandowski did not testify. Ted Dolhun credibly testified that he never asked Lewandowski to check on cars near the Ice House and that Lewandowski never reported that he had done so.

I found Cannon's testimony to be credible. And, notwithstanding Dolhun's testimony, there is no evidence in the record contradicting Cannon's testimony about Lewandowski. Moreover, I agree with Cannon that, given Lewandowski's actions, it is far more likely than not that Lewandowski was trying to determine which employees were at the meeting in the Ice House. I accordingly conclude that WSI thereby violated Section 8(a)(1) of the Act.

The General Counsel also alleges that WSI violated Section 8(a)(1) by creating the impression that employee union activities were under surveillance. In this connection employee James Reinke testified that on Monday, August 26, Ted Dolhun Dolhun sarcastically asked Reinke, "How was your weekend? . . . I hope you didn't spend it at some meeting." The previous day Reinke had attended a union meeting where he had been elected to be a steward. Thus, if Reinke's testimony is accurate, the most reasonable meaning to ascribe to Dolhun's comment is that Dolhun knew that Reinke had attended a union meeting that weekend. Dolhun, however, denied ever saying anything to Reinke about spending a weekend at a meeting.

The testimony on this point of Reinke and Dolhun seemed to me to be equally credible. And since the General Counsel has the burden of proof, I shall recommend that the impression-of-surveillance allegation be dismissed.<sup>42</sup>

<sup>42</sup> Burdick testified, without contradiction by Dolhun, about an incident soon after the representation election when the two were standing on the part of WSI's property where WSI's employees park their cars. According to Burdick's credible testimony, Dolhun, referring to the employees' cars, said that he had seen a few of the cars "over at the Ice House." Burdick is a supervisor and there is no evidence that Dolhun's comment was overheard by any employee. Thus Dolhun did not thereby violate the Act. It was no secret that union meetings were held at the Ice House. Moreover, the Ice House was so close to WSI that there is no reason to infer that Dolhun went out of his way to go past it. I accordingly conclude that Dolhun's comment adds nothing to the record, one way or the other, about the degree of Dolhun's union animus.

#### XI. ALLEGED DISCRIMINATORY LAYOFFS AND OTHER MISTREATMENT OF PRODUCTION AND MAINTENANCE EMPLOYEES

In this part of this decision I will be referring to WSI's nontrucking operations.

The General Counsel contends that WSI discriminatorily laid off employees. Some employees, argues the General Counsel, were laid off because of WSI's hostility toward their particular union activities. WSI allegedly laid off other employees as part of a broad plan to drastically reduce the size of the work force, thereby crippling the Union's presence at WSI, which plan included deliberately refusing business offered to it by customers.

##### A. *The Overall Decrease in the Size of WSI's Work Force*

I turn first to the contention that WSI reduced the size of the work force in order to cripple the Steelworkers presence at WSI.

As of July 7 (near the start of the Union's organizing campaign), WSI employed 49 bargaining unit employees (including truckdrivers).<sup>43</sup> By November 1 that number had dropped to 22 employees; by September 1992 WSI employed only 15 bargaining unit employees. In that connection, at some point in 1992 WSI ended operations in one of the three buildings at its Milwaukee facility (thereafter handling the work that had been done in that building in one of the remaining two).

The reduction in the number of employees was not accompanied by increases in overtime or by automation or the like.

I have discussed WSI's union animus. But notwithstanding *Wright Line*,<sup>44</sup> I know of no precedent that requires me to presume that, given such animus, an overall drop in employment levels was the result of management's animus. In any case, I find that WSI did not refuse business offered to it by customers, and I conclude, based on the evidence discussed in part VII, that the same decrease in employment would have occurred had there been no animus and had there been no unionization of WSI's employees.

##### B. *Paul Herbst*

WSI employed Paul Herbst as a production employee from July 1989 until August 20, 1991. Herbst handed out authorization cards (along with other employees and several supervisors) during the organizing campaign and was an observer for the Union at the August 14 election.<sup>45</sup> WSI laid Herbst off for a few days in early August and then permanently on August 21. The General Counsel contends that the layoffs were the result of Herbst's union activities and that, in addition, Ted Dolhun belittled and demeaned Herbst and otherwise acted discriminatorily toward him, because of Herbst's

<sup>43</sup> WSI laid off some employees between the start of the downturn in business (in late 1990) and the beginning of the organizing drive (in June 1991).

<sup>44</sup> *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>45</sup> The General Counsel contends that Herbst was a union steward. (Br. at 9.) But except for a vague reference to this effect by one witness (Herbst "was like a representative for the Union, he was like going to be a steward"), the record does not show this to be so. Herbst, for instance, does not claim that title.

union activities. According to the General Counsel, WSI thereby violated Section 8(a)(1) and (3) of the Act. The General Counsel claims, in addition, that because WSI's layoffs were made without prior notification to and bargaining with the Union, the layoffs violated Section 8(a)(5).

*The Relationship between Herbst and Ted Dolhun, and other background considerations:* Herbst is smart and articulate. He learns fast. On the other hand, he is cocky, argumentative, and easily riled and at WSI the quality of his work was inconsistent: sometimes excellent, sometimes awful. Herbst's personality is such as to create conflicts with those around him. Needless to say, Ted Dolhun and Herbst never got along well. And Herbst and a supervisor, Brian Burdick, had a longstanding feud. As of the summer of 1991 Herbst had the worst attendance record in the plant. (Problems with Herbst's attendance, in fact, had produced several warnings of discharge.)

Notwithstanding Herbst's drawbacks, early in 1991 Ted Dolhun promoted Herbst to supervisor. Dolhun's theory was that, given the additional responsibility and greater demand on his talents, Herbst might straighten himself out regarding his attendance and inconsistent work. Additionally, it was a way of separating Herbst from Burdick. Things did not work out as hoped. Herbst got into spats with the employees he was supposed to direct and the work Herbst and his crew were supposed to handle was not done properly. WSI moved Herbst back to his prior job.

An episode occurred during the summer of 1991 (that is, during the union campaign) that, I believe, says something about Herbst, Ted Dolhun, and their relationship. A customer had sent back some work that WSI had not done properly. Herbst was doing the rework. Herbst had concluded that the problem had been that the work had been done too fast. So Herbst handled the rework relatively slowly. Ted Dolhun happened by with a supervisor and a new employee in tow. Dolhun, without first talking to Herbst about the situation, loudly ordered the supervisor to lay Herbst off for a day because Herbst was goofing off. Herbst blew up, threw his hard hat across the room, and told Dolhun "he could take his job and do whatever damn he wanted to" (to quote from Herbst's testimony). At that Dolhun told Herbst to calm down, that he was a good worker, and that he was not going to be laid off. Herbst stewed in anger for 5 or 10 minutes, then retrieved his hardhat and went back to work.

*Herbst's August 5 layoff:* On August 1 Herbst did not show up for work at the start of his shift. Burdick, Herbst's supervisor at the time, tried to call him. The number Herbst had listed as his home telephone was inactive. Later that day Herbst's wife called in to say that Herbst was sick. Herbst returned to work on August 2, a Friday, with a doctor's note saying that he had been ill. On Monday, August 5, Herbst was given a memo telling him he was laid off because of "economic conditions." Herbst testified, without contradiction, that Burdick told Herbst that "we both know why you are being laid off; it is punishment for being sick for a day and missing work." The layoff turned out to be for 3 days.

My conclusion is that the layoff had nothing whatever to do with Herbst's union activity. Consider that, not long before, Herbst had given WSI a near-perfect excuse to fire him—his act of angrily throwing his hardhat. If Ted Dolhun wanted to rid WSI of Herbst, that was the time to do it. Even assuming that Burdick was correct and that the basis of

Herbst's layoff was his absence on August 1, as opposed to "economic conditions," given Herbst's horrible attendance record (by WSI standards, at least), I have no reason to deem the layoff to be discriminatory.<sup>46</sup>

*Ted Dolhun's postelection harassment of Herbst:* WSI does not have scheduled breaks for its employees (apart from the lunchbreak). But WSI permits employees to make trips to a coffee machine on WSI's premises at virtually any time the employees have a moment to spare. When employees do that, they are expected either to quickly down the coffee and then get back to work or to return immediately to their work area, cup of coffee in hand.

On August 16, 2 days after the representation election, about 8:30 a.m., Herbst, holding a cup of coffee, was headed back to his work area from the coffee machine. Ted Dolhun happened to be nearby. This is Herbst's testimony about the incident. It is undenied (Dolhun did not testify about the incident) and I credit it:

Ted stopped me . . . and asked me what I was doing. I told him . . . . And he . . . told me to get rid of the cup of coffee, which I did. I went back in the locker room and put it on the table. When I came back out he stopped me again, and he said, "From now on the only one in this company that is going to be drinking coffee or taking breaks is me, and only me." And that the only breaks we would be getting is lunch time and that's it. And I told him, I said, "Okay, Ted." He said, "No, my name is Mr. Dolhun from now on." I said, "Yes, sir," and he said, "Who?" And I said, "Yes, sir." And he said, "Who?" And I said, "Yes, Mr. Dolhun." Then he told me to get my ass back to my furnaces.

That is not your typical behavior by the head of a business firm, especially since Dolhun did not mean what he said. (Or, if he did mean what he said, he promptly changed his mind.) There was no change in WSI's coffee policy. WSI's employees continued to get coffee just as they always had.

That was just the start of Herbst's run-ins with Ted Dolhun on August 16.

The next incident involved a piece of steel on the floor. There is no doubt that small pieces of steel on the floor are safety hazards and that WSI's employees are expected to pick up such pieces in their work areas. There is also no doubt that employees do not always do so.

What happened was that Dolhun ordered Herbst to pick up a small piece of steel from the floor in Herbst's work area. Herbst was busy at the time preparing to load a furnace. Dolhun called Herbst over, pointed to a piece of steel a few inches from Dolhun's foot, and told Herbst to "pick that up." Herbst did. Dolhun walked away.

Dolhun testified about this incident. He did not claim that Herbst's portrayal of it was wrong. Dolhun did say that the piece of steel in question was banding steel, which can easily flip up and "cut your leg like a knife." Dolhun also said, credibly, that "on many occasions" he had spoken to Herbst about picking up pieces of steel and that Dolhun had talked to all of WSI's employees about doing so. Another employee

<sup>46</sup> The complaint alleges that Herbst's layoff on August 5 violated Sec. 8(a)(5). But it did not since it occurred prior to the representation election.

confirmed Dolhun's testimony, stating that several times Dolhun had ordered him to pick pieces of steel off the floor, although Dolhun generally directed the order through the employee's immediate supervisor.

The third, and last, incident on August 16 involving Herbst and Dolhun had to do with safety glasses. WSI's rules require that everyone in the plant, supervisors as well as employees, must wear safety glasses at all times. The rule is obeyed, most of the time. Dolhun and the other supervisors enforce the rule, most of the time. Like the enforcement of many rules at many plants, WSI's supervisors sometimes ignore violations of the safety glasses rule.

Herbst had often gone without safety glasses in the past and had suffered eye injuries several times—although Herbst testified that one of the eye injuries occurred when he was wearing safety glasses. Dolhun testified, credibly, that he had, "many times," ordered Herbst to put on his safety glasses.

At some point on August 16 Dolhun saw that Herbst was not wearing safety glasses. Herbst's supervisor, Burdick, was nearby. Burdick was not wearing safety glasses either. Dolhun told Herbst to put his glasses on. Herbst did. Dolhun then said that the next time he caught Herbst without his safety glasses on, he would fire Herbst on the spot. Dolhun had never before threatened Herbst with discharge for not wearing safety glasses.

August 16 was a Friday. The following Monday, August 19, Herbst had still more run-ins with Ted Dolhun.

One incident involved a "rejection." A rejection is a piece of steel that was heat treated by WSI and that a customer returns to WSI because WSI failed to do the work properly. Rejections, while not all that uncommon at WSI, are upsetting to management and from time to time the Dolhuns threaten that personnel whose mistakes cause rejections will be disciplined.

On August 19, while Herbst was at work, Ted Dolhun rushed toward Herbst waving a piece of paper and yelling that Herbst had "screwed up the job," that Herbst was "going to get a paper on this" (i.e., be disciplined in writing) and that "the next time you screw up the job I'm going to fire you." Given Dolhun's personality and his concern about rejections, one might think that there was nothing noteworthy about the incident. But there was. When Herbst checked into the matter (by looking at the underlying work order), he discovered that he had not worked on the piece of steel that the customer had rejected—the fault was with a third-shift employee. Additionally, according to Herbst, so far as he knew employees "were never warned so severely about" errors in their work. Dolhun did not testify about the incident.

A second August 19 incident had to do with a conversation that Herbst had had with employee Mike Gray earlier that day. Gray had just been laid off. (I will discuss Gray's layoff later in this decision.) About 9 a.m.—that is, during worktime—Gray sought out Herbst and asked whether the layoff was proper in view of the facts that Gray was senior to other employees who had not been laid off and that the employees were now represented by a union. Herbst suggested that Gray call a Steelworkers' official, Doug Drake. Herbst and Gray walked to Herbst's locker so that Herbst could give Drake's telephone number to Gray.

That afternoon Ted Dolhun approached Herbst and asked if Herbst had spoken to Gray earlier that day. Herbst said he had. Dolhun asked if the conversation was about the Union. Herbst did not answer. Dolhun, looking and sounding angry, then said, "I've put up with your shit for two years now. Union or no union, I'm going to run your damn ass out of the company." With that, Dolhun walked away. (The foregoing is based on the testimony of Herbst and Burdick. Dolhun did not testify about the incident except to deny that he uttered the "union or no union" statement. But I do not credit that denial.)

That same afternoon a WSI driver came into Herbst's work area for a pickup. Herbst and the driver had a conversation in much the same way that Herbst had always chatted with drivers coming in for pickups—"we talked about work, just saying hi, how are you doing, and stuff." According to Herbst, just as the conversation was ending, with Herbst directing the driver to a supervisor, Ted Dolhun came by. Dolhun responded to the situation, Herbst testified, by telling Herbst that, "from now on don't talk to truckdrivers or anybody else, or anybody on the street. Just stay in your work area." According to Herbst, Dolhun then said that if Herbst disobeyed that order, he would be fired "on the spot."

Dolhun did not testify about the incident.

In total Ted Dolhun had six run-ins with Herbst following the August 14 representation election; three on August 16 and three on August 19. My conclusion is that in one of them Dolhun violated the Act, in the others he did not. I will deal with the incidents in the same order I discussed them above. That brings us back to the coffee incident. Since Ted Dolhun did not testify about the incident, I have to assume that, out of the blue, Dolhun ignored longstanding company policy to criticize Herbst for getting coffee during worktime and then went on to further alter precedent by demanding that Herbst call him "Mr. Dolhun." There is no doubt that Herbst's personality and mannerisms had long irritated Dolhun (for reasons that had nothing to do with any activity the Act protects) and, of course, it was not uncommon for Dolhun to speak to an employee in an abusive way (again, for reasons that had nothing to do with protected activity). Still, there must have been something to produce Dolhun's outburst.

One might speculate that it could have been something as insignificant as an expression on Herbst's face or a belief on Dolhun's part that Herbst was taking more time than usual to get his morning coffee. But the record gives us no hint of anything like that. Rather, the only possible cause of Dolhun's behavior to which the record refers is Herbst's role as observer for the Union on August 14 and the employees' vote in favor of the Steelworkers. I accordingly conclude that that was why Dolhun made the statements to Herbst about coffeekes and "My name is Mr. Dolhun from now on." Since an employer obviously violates Section 8(a)(1) if the owner of the company harasses an employee because of the employee's pronoun stance or because of the protected activity of other employees (e.g., *Professional Eye Care*, 289 NLRB 1376, 1388 (1988)), I further conclude that WSI thereby violated Section 8(a)(1).<sup>47</sup>

<sup>47</sup> The complaint does not refer specifically to harassment of employees but does allege that WSI violated Sec. 8(a)(1)—"In about

Next is the piece-of-steel-inches-from-Dolhun's-foot incident. The record shows that that type of behavior by Dolhun is commonplace. However, distasteful that way of treating employees is and however upsetting it might be to an employee, there was nothing about it to suggest that it was motivated by the protected activities of Herbst or anyone else.

The safety glasses incident presents a closer case. Dolhun does routinely tell employees to put their safety glasses on. On this occasion, however, he told Herbst that he would fire Herbst the next time he caught Herbst not wearing them. Dolhun had never before said that to Herbst, and WSI introduced no evidence showing that Dolhun had ever made a similar threat to any other employee. When Dolhun said those words to Herbst, moreover, a supervisor who was not wearing safety glasses was nearby.

But Herbst had been warned often about not wearing safety glasses and he had suffered eye injuries at the plant. Under these circumstances a threat of job loss was inevitable, sooner or later, in response to Herbst's going without safety glasses. I conclude that Dolhun's remark did not violate Section 8(a)(1).

The incident involving the rejection is similar. It was totally in character for Dolhun to jump to an erroneous conclusion about who was at fault for an error. As for Dolhun's threat to fire Herbst, Herbst's work record at WSI was bad enough for that to have been a reasonable response by Dolhun—had Herbst actually been at fault in the first place.

The issue raised by incident concerning Herbst's counseling of fellow-employee Gray is largely one of the extent of the coverage of the Act. During worktime Herbst left his work area for reasons having to do with the Union, not with work worktime is for work. See *Magnetics International*, 254 NLRB 520, 529 (1981), enfd. 699 F.2d 806 (6th Cir. 1983). I conclude that Dolhun accordingly was entitled to ask why Herbst left his work area during worktime and to threaten Herbst with punishment (in this case discharge) for such behavior.

It is true, as the General Counsel points out, that WSI allows employees to leave their work areas, pretty much at the employees' discretion, to get coffee or to go to the bathroom. But those reasons for leaving work areas have to do with the employees' physical well-being. And nothing in the record suggests that WSI permits employees to leave their work areas for other nonwork reasons.

As for Dolhun's "union or no union" statement, that did not amount to a threat of discharge because of Herbst's protected activity. Herbst had been a problem for Dolhun since long before the Union arrived, as indeed Dolhun's statement specified ("I've put up with your shit for two years now"). Dolhun was in the midst of speaking to Herbst about leaving his work area for nonwork reasons during worktime. A reasonable understanding of that statement would be that because of Herbst's misbehavior, Dolhun was going to rid the Company of Herbst, and the fact that the employees were now unionized would not prevent that. I thus conclude that Dolhun's statement did not violate the Act.

August 1991 . . . in ridiculing and belittling employees because of their union sympathies and/or activities by requiring them to perform demeaning tasks and to observe demeaning obeisance to Respondent."

The final incident, the one involving Herbst's conversation with the truckdriver, is similar in some respects to the coffee break incident. Herbst behaved toward the truckdriver in the same way as he had behaved in the past in similar situations. Yet, without explanation, Dolhun criticized Herbst for that behavior and threatened Herbst with discharge if he thereafter talked with "truck drivers or anybody else." It is thus possible that Herbst's position as observer at the balloting and the prounion outcome of the election could be causes of Dolhun's response to Herbst's talking to the truckdriver. But earlier that same day Dolhun had learned that Herbst had left his work area to converse with Gray for nonwork reasons. It seems far more likely to me that that was the basis for Dolhun's outburst about Herbst talking to the truckdriver. I note, in this regard, that when telling Herbst not to talk "to truck drivers or anybody else," Dolhun concluded by saying, "just stay in your work area."

*WSI's permanent layoff of Herbst on August 20:* On August 20 Herbst received a memorandum from his supervisor, Burdick, that stated that: "Due to the economic slowdown we are now experiencing, you are temporarily laid off as of the completion of your shift today." As of the hearing, WSI had not recalled Herbst.

Burdick testified that on August 20 he laid off Herbst and another employee, Russ Stoll, because the afternoon before Ted Dolhun had told him to—testimony that surely is accurate. Burdick also testified that Dolhun said that by laying off Herbst and Stoll "he was getting rid of the . . . union ring leaders." I do not credit that testimony.

The question is why Dolhun ordered Herbst to be laid off.

As I add up the evidence, the General Counsel presented a prima facie case that Dolhun did so because of Herbst's union activities. I have found, after all, that only a few days earlier Dolhun harassed Herbst because of such activities.

That raises the question of whether WSI would have laid off Herbst even had he not engaged in any protected activity. I conclude that the record shows that WSI would have. Herbst, as I previously noted, had a terrible attendance record and had previously been threatened with discharge because of it. His work was inconsistent—sometimes it was very bad. Herbst could not seem to get along with Dolhun and he clashed frequently with his immediate supervisor, Burdick. WSI Supervisor Patelski told Dolhun that Herbst "had an attitude problem." Dolhun testified credibly that, relative to other employees, the breadth of Herbst's job skills was limited. And because of economic problems, WSI was in the process of laying off employees. Under all these circumstances, I credit Ted Dolhun's testimony that he took into account only Herbst's attendance record, attitude toward management and fellow employees, and job skills in choosing Herbst for layoff.<sup>48</sup>

<sup>48</sup>Ted Dolhun testified that he based his decision to lay off Herbst on the recommendations of Supervisors Lewandowski and Patelski. As noted earlier, Lewandowski, whom WSI fired prior to the hearing, did not testify. In an affidavit that Patelski gave to WSI's attorneys, Patelski confirmed that he did recommend that Herbst be laid off. When he testified, however, Patelski stated that while he had said some negative things about Herbst, he had not recommended that Herbst be laid off. There is thus a conflict between Patelski's testimony and Dolhun's which I have taken into account in evaluating Dolhun's testimony on point.

The discussion about whether WSI's layoff of Herbst on August 20 violated Section 8(a)(3) is perhaps beside the point, however, since the layoff did violate Section 8(a)(5).

Glaser (the lead negotiator at WSI for the Steelworkers) testified that WSI laid off employees without notifying the Steelworkers. The record shows that testimony to be inaccurate as to layoff dates subsequent to the arrival of Sholl as WSI's collective-bargaining representative. But I credit Glaser's testimony as to earlier layoffs, including Herbst's.

"[L]ayoffs are a mandatory bargaining subject about which an employer cannot act unilaterally after a union has prevailed in a representation election." *Adair Standish Corp.*, 290 NLRB 317, 337 (1988). That WSI had valid economic reasons for the layoffs does not excuse WSI's unilateral actions. *Adair*, supra. I accordingly conclude that WSI violated Section 8(a)(5) and (1) when it laid off Herbst on August 20 without first notifying the Steelworkers.

#### C. James Reinke

Reinke became an employee of WSI in October 1988. Reinke signed a union authorization card on June 17, 1991, and was elected a steward on August 25. (Dolhun testified that he did not know that Reinke was a union steward. I credit that testimony.) WSI laid Reinke off on August 27. The General Counsel contends that Ted Dolhun harassed and then laid off Reinke because of Reinke's support for the Steelworkers. The General Counsel further contends that Reinke's layoff violated Section 8(a)(5).<sup>49</sup>

*Cigarettes on the floor:* Reinke smokes two packs of cigarettes a day. At the plant Reinke threw his cigarette butts on the floor. Other employees do too, but the mess that Reinke made with his cigarettes was out of the ordinary. As Patelski put it, the floor of Reinke's work area often looked like "a large ashtray." Additionally, Reinke's work area is next to WSI's office. Customers going to the office often passed through Reinke's area. Patelski and Dolhun had long criticized Reinke about the cigarettes on the floor. At some point between the date of the representation election and Reinke's layoff Dolhun again spoke to Reinke about the cigarette butts littering the floor. According to Reinke, Dolhun asked Reinke if Reinke put his cigarettes out on the floor in his home. When Reinke responded that he didn't, Dolhun said, "Well, I don't want you putting them out on my floor here." Dolhun testified that his words were, "Could you try to keep this a little cleaner here and keep these cigarette butts cleaned up in this area." I credit Reinke's version, not Dolhun's.

Since WSI allowed other employees to throw cigarettes onto the floor of the plant, Dolhun's remark could, I suppose, be interpreted as discrimination against Reinke. But given Dolhun's approach to communicating with employees—blurting out whatever comes to mind, given the long-standing complaints that management had expressed to Reinke about the floor of his work area, and given the location of the area (next to the office), my conclusion is that

<sup>49</sup>Part X, above, discusses a claim by the General Counsel that Dolhun gave Reinke the impression that WSI was engaging in the surveillance of the employees' union activities. Fn. 24, above, refers to Reinke testimony about a statement by Dolhun in which he allegedly threatened to close WSI.

Dolhun's remark was unrelated to any protected activity on Reinke's part.

"Good little boy." Reinke was miffed about Dolhun's criticism about the cigarette butts. As a way of expressing his displeasure, the next time Reinke wanted to go to the bathroom he went over to Dolhun (who was with another supervisor) and asked permission to do so. Reinke knew that employees could, without permission, go to the bathroom whenever they needed to, knew that Dolhun knew that, and thus knew that Dolhun would thereby know that Reinke's purported request was in fact an expression of irritation via the vehicle of sarcasm.

It is unclear what kind of response Reinke expected from Dolhun. In any case things did not work out as Reinke hoped. Dolhun turned to Reinke and said: "I like that. You're being a good little boy."

Remarkably the General Counsel contends that Dolhun's words violated Section 8(a)(1). They were demeaning to Reinke, argues the General Counsel, and Dolhun uttered them because of Reinke's union activities. Of course that is not so. All there is to say about the incident is that Reinke directed a sarcastic remark at Dolhun which produced a like response from Dolhun.

*Reinke's layoff:* When Reinke arrived at work on Tuesday, August 27, a supervisor gave Reinke a note that read, in part: "Due to the economic slowdown we are experiencing, you are temporarily laid off."

As of the hearing, WSI had not recalled Reinke.

The General Counsel contends that, by laying off Reinke, WSI violated Section 8(a)(3) and (5) of the Act. As for the General Counsel's 8(a)(5) contention, I conclude that WSI did violate that Section of the Act by unilaterally laying off Reinke, for the same reasons I found that Herbst's layoff violated Section 8(a)(5).

As for the 8(a)(3) allegation, the record contains no credible evidence that WSI's management knew that Reinke actively supported the Union, or even that WSI knew that Reinke supported the Union at all. And since, at the time of Reinke's layoff, WSI was laying off employees for economic reasons, I conclude that the General Counsel failed to prove that WSI's layoff of Reinke violated Section 8(a)(3).

#### D. Michael Gray

WSI laid off Gray on August 19. The General Counsel alleges that the layoff violated Section 8(a)(3) and (5).

WSI's layoff of Gray did violate Section 8(a)(5) for the same reasons WSI's layoffs of Herbst and Reinke violated Section 8(a)(5). As for the General Counsel's 8(a)(3) contention, I conclude that WSI's layoff of Gray did not violate the Act in that manner.

Gray and Ted Dolhun got along pretty well. In May 1991 Gray's brother, Raphael, filed a discrimination charge against WSI. (Gray is an African-American.) Dolhun talked to Gray about Raphael's charge, saying that he did not have any problems with Gray, that Gray was a good worker. On June 17 Gray, along with numerous other employees, signed a union authorization card. Some time thereafter Gray discovered that, according to the rumor mill at the plant, it was Gray who brought in the Steelworkers. (That was inaccurate. As discussed earlier, it was three of WSI's supervisors who began the union drive at WSI.) According to Gray's credible (and undenied) testimony, Gray sought out Dolhun and asked

Dolhun if he had heard that rumor. Dolhun said that he had. Gray then said (untruthfully) that “I don’t want to have anything to do with the Union.” Dolhun responded, “OK, I don’t want to hear anything about it; I just want to get it over with and go back to work as usual.” Gray testified, nonetheless, that once the union campaign got underway, Dolhun started treating Gray “a little nasty,” gave Gray “dirty looks,” and made Gray do things that he had not previously had to do, such as picking up trash. I do not credit that testimony.<sup>50</sup>

Gray’s supervisor was Patelski. Patelski testified, credibly, that Gray had a tendency to leave his work area without permission (for reasons other than bathroom or coffeekes)—a tendency, in fact, to leave his work area and hide from supervisors in order to goof-off for 15 or 20 minutes. Patelski came to feel that he had to “babysit” Gray to make sure that Gray stayed on the job.

Ted Dolhun, Chris Dolhun, and Patelski all testified about Gray’s layoff. The Dolhuns both testified that economic circumstances warranted layoffs and that they chose Gray for layoff because Patelski and another supervisor advised that Gray would leave his work area for extended periods and because Gray’s skills were relatively limited. Patelski testified that he recommended Gray for layoff, despite the fact that he “was a fairly good worker” because of Gray’s tendency to wander off and because Patelski “had to push him to work.” I credit the Dolhuns’ and Patelski’s testimony on point.<sup>51</sup>

#### E. *Beamon and Perren*

Lay Clyde Beamon began working for WSI in 1970. As of the hearing in this proceeding he remained employed at WSI.<sup>52</sup> At all relevant times he was a crane operator. Beamon attended union meetings during the Steelworkers organizational drive. (That is all that the record tells us about his union or other protected activities.) Beamon’s supervisor was Brian Burdick at the time of the events here under discussion. Beamon was not called as a witness.

The crane that Beamon operates runs along overhead rails, far above the floor of the plant. The operator enters and leaves the cab of the crane via a 20-foot ladder. According to routine procedures at WSI, when the crane is not going to be used for 20 minutes or more, the crane operator is expected to leave the crane and help out on the floor of the plant. But given that 20-foot ladder, it obviously would make no sense for the operator to be ordered to leave the crane if it was going to be needed in a few minutes, even if that

<sup>50</sup> I previously discussed, and credited, testimony by Gray concerning a remark that Dolhun directed toward a supervisor and was overheard by Gray. See part VIII, above.

<sup>51</sup> Gray testified, and the General Counsel contends, that Gray’s layoff was suspicious because a fellow employee who was junior to Gray and who did the same work as Gray remained in WSI’s employ after August 17. Gray said that that employee was John Hanson. But seniority did not play a part in WSI layoff decisions concerning production employees. Moreover, Hanson was a truckdriver; he did not do the same work as Gray.

<sup>52</sup> WSI laid Beamon off on December 27 and may again have laid Beamon off in February 1992. (In February WSI advised the Steelworkers that WSI was considering laying off Beamon, along with a number of other employees.) But as indicated above, as of the hearing herein, Beamon was employed by WSI.

meant that the crane operator would be sitting idle for those few minutes.

Burdick testified that some time during the Steelworkers’ organizational drive Ted Dolhun ordered him to get Beamon “out of the crane when the crane wasn’t being used, even if it was only for a minute.” There are two facets of Dolhun’s personality that support the possibility that Burdick’s testimony is accurate. The first is that Dolhun impressed me as the kind of employer who absolutely hates to see employees sitting idle, even for a few minutes. The other is one I mentioned earlier: Dolhun sometimes blurts out orders without first giving thought to the matter.

The General Counsel, pointing out that Dolhun had never issued any such order prior to the Union’s arrival at WSI and that the order made no sense in terms of productivity, argues that Dolhun thereby violated Section 8(a)(3).

But Dolhun denied ever saying any such thing to Burdick. I credit Dolhun’s denial notwithstanding what I just stated about Dolhun. To begin with, I cannot imagine Dolhun issuing an order that obviously would reduce productivity. And having Beamon leave the cab of the crane every time the crane was going to be idle for a minute would do that since it would delay the operation of the crane. Second, as I watched and listened to Burdick testify, I was not impressed with his truthfulness. Lastly, the usual reasons for giving heavy weight to supervisors’ testimony against the interest of their employers do not apply here. Most importantly, WSI fired Burdick prior to his testifying. (In the following part of this decision I discuss why I have concluded that WSI had good cause for discharging Burdick.) Additionally, the nature of Burdick’s relationship with his company obviously was different from that of most supervisors given that Burdick was instrumental in bringing the Steelworkers to WSI.

Kenneth Perren began working for WSI in 1984 and as of the hearing was still employed at WSI. At all relevant times he worked as a furnace operator and inspector. He signed a union authorization card on June 17 and attended union meetings during the Steelworkers’ organizational drive. Perren was called as a witness by the General Counsel. Like Beamon, Perren worked for Burdick.

During the summer of 1991 Beamon and Perren began to work near each other much of the time. Ted Dolhun credibly used the word “inseparable” to describe their relationship at the plant. Other employees began calling Beamon and Perren “the Bopsey twins.” (The record fails to inform us how crane operator Beamon and furnace operator Perren were able to find work that kept them together throughout the day.)

According to Perren, during the morning of September 5, a truckdriver, John Hanson, asked Perren if Perren supported the Steelworkers. Perren said he did. Hanson responded: “you can get fired for that.”<sup>53</sup>

Perren testified that later that day, while Perren was working with Beamon and when their supervisor, Burdick, was about 10 feet away, Dolhun, looking very angry, went over to Burdick and said, referring to Beamon and Perren: “Those are the assholes causing me trouble over here. I’m going to bury those fuckers.” Burdick’s testimony about the event was similar except that he remembered that it occurred prior

<sup>53</sup> At the time of the hearing Hanson was no longer employed by WSI.

to the representation election. I credit Perren's version. Dolhun did not testify about the incident.

Burdick testified that Dolhun spoke to Burdick about Beamon and Perren three other times.

On one occasion, said Burdick, Dolhun ordered Burdick to write up Beamon and Perren "for anything and everything." Dolhun did not deny that he said that to Burdick, nor did Dolhun otherwise testify about the incident. I credit Burdick.

Burdick testified that Dolhun told Burdick that Beamon and Perren were going to "fuck you out of your job." Dolhun denied saying that and I credit Dolhun.

Burdick testified that Dolhun ordered Burdick to "keep the Bopsey twins apart." Dolhun denied saying that, claiming that he merely asked Burdick if Beamon and Perren needed to be working on the same job all the time. Dolhun denies ever referring to Beamon and Perren as the Bopsey twins. I found Burdick's and Dolhun's testimony about this incident equally credible. I thus conclude that a preponderance of the evidence does not support the General Counsel's position in respect to this incident.

In sum, I find that: (1) either during the Union's organizational drive or shortly after the representation election, Dolhun ordered Burdick to discipline Beamon and Perren "for anything and everything," and that neither then nor at the hearing did Dolhun give any explanation for that order; and (2) on September 5 Dolhun, referring to Beamon and Perren, told Burdick: "Those are the assholes causing me trouble over here. I'm going to bury those fuckers." Again, Dolhun provided no explanation for those words.

There is no direct evidence that WSI's management knew that either Beamon or Perren supported the Union.<sup>54</sup> But WSI's union animus has been proven. And the words that Ted Dolhun directed to Burdick about Beamon and Perren display obvious hostility. Nothing in the record indicates that there was anything about Beamon's and Perren's behavior in the plant that warranted that hostility on Dolhun's part. I accordingly infer that it was the two employees' support for the Union that caused Dolhun to speak to Burdick as he did about Beamon and Perren. See *Active Transportation*, 296 NLRB 431, 432 fn. 6 (1989).

Since Dolhun's statement about burying Beamon and Perren was uttered in such a way as to be overheard by the two employees, Dolhun thereby violated Section 8(a)(1) of the Act. As for Dolhun's order to discipline the two employees "for anything and everything," neither Burdick nor any other supervisor disciplined either Beamon or Perren for anything at all. Indeed, both Beamon and Perren were among the minority of WSI employees (relative to the number of employees employed by WSI through much of 1991) who were

still employed by WSI at the time of the hearing here (a fact that suggests that, as noted in part III of this decision, Ted Dolhun held only mild animus toward prounion employees). Since neither Beamon nor Perren overheard Dolhun's order to Burdick or were affected by it, I conclude that it did not violate the Act.

## XII. WSI'S DISCHARGE OF SUPERVISOR BRIAN BURDICK

On September 10 Burdick received the following memorandum from Chris Dolhun:

Due to your inability to carry out your duties as Supervisor and your constant insubordination, I am terminating you effective immediately.

Your negative attitude is causing increasing employee problems. You have been unable to follow orders relating to both the processing of material and the management of your men.

As a result Plant One and its employees are in constant disarray.

The General Counsel contends that WSI fired Burdick because Burdick refused Ted Dolhun's orders to keep Beamon and Perren apart (as just discussed) and because Burdick did not discipline Beamon and Perren "for anything and everything" (as also just discussed).

But Ted and Chris Dolhun testified that Burdick was fired because of misdeeds that had nothing to do with any employee's union activities. I found the Dolhuns' testimony on this matter to be entirely credible.<sup>55</sup> In summary, their testimony is as follows.

In February or March 1991 Ted Dolhun happened to overhear a telephone conversation between Burdick and another supervisor, Paul Krause. Chris Dolhun was standing next to Ted at the time. In the course of the telephone conversation Burdick: (1) said that he had falsified paperwork relating to the treatment given to the steel that customers had sent to WSI; (2) said that he had deliberately returned to customers as complete steel that had not been treated as ordered by customers; (3) referred to the Dolhuns as "stupid"; and (4) proposed that Krause pad overtime because the Dolhuns "will never find out." (Burdick denied much of the Dolhuns' testimony about that telephone conversation. I am certain that Burdick lied.)<sup>56</sup>

When the Dolhuns spoke to Burdick about the conversation, Burdick loudly and angrily contended that he was drunk at the time and did not mean any of it. Chris Dolhun wanted to fire Burdick. Ted Dolhun decided not to even though, in the weeks following the incident, one customer returned un-

<sup>54</sup> There is no evidence that employee Hanson provided information about union matters to management. On one occasion Dolhun pointed to three vehicles parked on WSI's property and asked Burdick who the owners were. Burdick advised Dolhun that one of the vehicles was owned by Beamon, another by Perren. Burdick and the General Counsel suggest that that conversation was connected to Dolhun's comment to Burdick about cars parked near the Ice House (see fn. 43, supra). But Dolhun testified, credibly, that his query about the ownership of the three vehicles was one of his routine checks with supervisors to ensure that all cars parked on WSI property belonged to WSI personnel. I see no basis for finding that Dolhun's two conversations with Burdick about parked cars concerned the same vehicles.

<sup>55</sup> At one point the General Counsel's brief refers to Chris Dolhun's testimony as "vacuous" (Br. at 71). It is possible that that word has never before been misused so badly. Chris Dolhun is intelligent, tough, and to the point. At all times her testimony was the same.

<sup>56</sup> Ted Dolhun had the telephone to his ear. Chris Dolhun could not hear what Burdick and Krause were saying. But Ted immediately told Chris what he had heard. Both of the Dolhuns testified about the Burdick-Krause conversation. That raises hearsay issues. Ted Dolhun, however, related to Chris what he had heard on the spot, and, given the circumstances, it is inconceivable that Ted would have lied to Chris about what he heard. I accordingly credit Chris's account of the conversation, as well as Ted's.

usually large numbers of pieces as having been treated incorrectly by WSI.

In the months that followed WSI continued to have problems with Burdick: he did not keep attendance records properly, he did not report accidents properly, and he was unwilling to discipline employees (except for Herbst).

Finally, about 8 a.m. on September 10, the Dolhuns noticed that most of the employees whom Burdick supervised were outside the plant talking instead of inside the plant working. (The shift began at 6 a.m.) Ted Dolhun told Burdick to order the employees back to work. Burdick refused, telling Dolhun to do it himself. Ted told Chris to discharge Burdick. At that point Chris typed out the memorandum quoted above and fired Burdick.

There are a number of related circumstances that warrant consideration in connection with WSI's discharge of Burdick. WSI did not contest Burdick's application for unemployment compensation even though Burdick, in his application, stated that he had been fired because he refused to harass employees about their union activities. During Burdick's employment at WSI, he received letters from the Dolhuns and customers of WSI commending him. (Those letters were not in the personnel file that WSI kept on Burdick and which WSI provided to the General Counsel. The General Counsel contends that WSI fraudulently withdrew such letters. I do not find that to be the case.) In addition, I agree with the General Counsel that it is surprising that the Dolhuns did not fire Burdick immediately upon overhearing Burdick's telephone conversation with Krause or, if not then, when Burdick responded angrily when the Dolhuns spoke to him about the conversation. My finding concerning the credibility of the Dolhuns' testimony about why Burdick was fired takes into account such considerations.

Lastly, I noted above that among the problems that the Dolhuns had with Burdick in the months following the Burdick-Krause telephone conversation was that Burdick was unwilling to discipline employees. I earlier found that Dolhun, because of Beamon's and Perren's union activity, ordered Burdick to discipline Beamon and Perren for "anything and everything." Logically, therefore, Burdick's refusal to do that may have been a reason for Dolhuns' decision to fire Burdick. I find, however, that even assuming that that was so, the record shows that WSI would have fired Burdick even absent Beamon's and Perren's protected activity.

### XIII. OTHER MATTERS

The complaint alleges that Chris Dolhun informed employees that it would be futile for them to select the Union as their collective-bargaining representative and that she threatened employees with the loss of jobs if the Union became their collective-bargaining representative. Herbst testified in support of these allegations. But I do not credit his testimony in these respects.

The complaint alleges that Supervisors Orlowski and Patelski advised an employee that a fellow employee had been laid off because of the employee's union sympathies or activities. Orlowski denied that any such event occurred. I credit his denial.

Orlowski testified that

after the election three or four times Mr. Dolhun came into my plant and started yelling out, "all you guys are

Ice House Marys, Union yes, Dolhun no." He came out with statement's of, "if you think things are bad now, the nightmare on 41st street is just starting."

Ted Dolhun denied uttering any such words. I credit Dolhun.

Employee Dean Erickson testified that he quit because he was being "harassed . . . all the time" by WSI's management. I credit Dolhun that the only "harassment" that Erickson suffered had to do with management's criticism of Erickson's personal hygiene failings and failures to abide by safety rules, all for reasons unrelated to any protected activity on Erickson's part.

The General Counsel's brief (but not the complaint) appears to contend that WSI violated Section 8(a)(3) and (5) by unilaterally withdrawing from employee use certain parking spaces on WSI property. The record shows, however, that at all times WSI provided parking spaces on its property for all of its employees. The location of some of the spaces did change at one point, when WSI rented out some of its property, but that change was by no means material, significant, or substantial.

### CONCLUSIONS OF LAW

1. WSI is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is the exclusive collective-bargaining representative of the following unit of employees:

All full-time and regular part-time production and maintenance employees, including truckdrivers, employed by WSI at its Milwaukee, Wisconsin facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

4. WSI bargained in bad faith with the Union, thereby violating Section 8(a)(5) and (1) of the Act.
5. Without notifying and bargaining with the Union, WSI changed terms and conditions of employment of bargaining unit employees, thereby violating Section 8(a)(5) and (1) of the Act, in that WSI: (a) changed shift hours; and (b) stopped providing coffee and doughnuts to employees,
6. WSI shut down its transportation division because of the union activities of its employees, thereby violating Section 8(a)(3) and (1).
7. Because WSI's layoffs of drivers Andresen and Cannon were the result of the shutdown of its trucking operations, those layoffs violated Section 8(a)(3) and (1).
8. By Supervisor Lewandowski's surveillance of the union activities of WSI's employees, WSI violated Section 8(a)(1) of the Act.
9. By Ted Dolhun's threatening and harassing of employees Lay Clyde Beamon, Paul Herbst, and Kenneth Perren because of their union activities, WSI violated Section 8(a)(1) of the Act.
10. By laying off employees Gray, Herbst, and Reinke at a time when the Union was the collective-bargaining representative of WSI's employees without giving prior notification to the Union of the layoffs, WSI violated Section 8(a)(5) and (1) of the Act.

11. By Ted Dolhun's threatening to sell the Company's trucks and to close the plant if the Company's employees voted in favor of union representation, WSI violated Section 8(a)(1) of the Act.

12. WSI did not otherwise violate the Act.

#### REMEDY

The most difficult question regarding the remedy to be imposed has to do with WSI's transportation division. Should WSI be required to resume that division's operations, as the General Counsel urges? See, e.g., *Coronet*, supra. My conclusion is that WSI should be required to do so.

Plainly a strong case can be made effect that WSI would inevitably have shut down its entire over-the-road trucking operation no later than some time in 1992 and perhaps as early as the summer of 1991, whether or not any union had appeared on the scene (as also discussed in part VIII). I am referring to the evidence of the drastic reduction in WSI's overall size (in terms of revenues and employment) as a result of the decrease in business available to WSI, the losses that WSI suffered in 1991, and the horrible results that WSI's trucking operations had been producing (as discussed earlier). Indeed, given that evidence, it is hard for me to conceive of WSI not bringing its trucking operations to an end in order to stem the losses those operations were producing.

But at the start of the hearing the General Counsel specifically stated that a resumption of WSI's trucking operations would be sought as a remedy. Yet WSI utterly failed to provide data relevant to determining when financial and operating considerations alone would have led the Company to end its trucking operations. I earlier mentioned the lack of data on the trucks' operations (apart from Runkel's analysis). There are no month-by-month data on the financial results of the trucking operations. There is no explanation for why WSI did not sell many of its trucks, choosing instead to park them. (One might speculate that WSI did that because the market for used trucks was poor; but since no witness testified about the matter one might equally speculate that WSI chose to retain the trucks because it planned to reenter the over-the-road business.) As to the horrific losses engendered by the trucking operations, that had been true in 1989 and 1990 too. And WSI's overall profit picture turned sour in late 1990. Yet, WSI's trucks kept rolling into mid-1991.

Finally, as to the burdensomeness of the remedy, WSI "bears the burden of production and persuasion on the hardship defense." *Coronet Foods v. NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993). And nothing in the record suggests that requiring WSI to resume over-the-road trucking operations would be unduly burdensome for the company. As just noted, as far the record indicates, WSI still possesses many of the vehicles it used for its over-the-road operations. Additionally, WSI presented only limited balance sheet information and no revenue or profit-and-loss information for any period subsequent to 1991. Thus there is no reason to presume that financing the resumed operations would be difficult for WSI.<sup>57</sup>

<sup>57</sup> WSI will be entitled, at the compliance stage, to submit evidence concerning the inappropriateness of requiring the company to reestablish its transportation division "so long as it is shown that the evidence was unavailable at the time of the unfair labor practice hearing." *Coronet*, supra at fn. 6.

In view of my conclusion that WSI's shutdown of its transportation division violated the Act, the recommended Order requires WSI to reinstate those employees whom WSI laid off as a result of that shutdown, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss or earnings and other benefits they suffered as a result of the layoffs. The employees include Andresen and Cannon and such other employees as may be determined at the compliance stage.

The accompanying recommended Order also requires WSI to offer employees Gray, Herbst, and Reinke immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges and to make them whole for any loss of earnings and other benefits they suffered as a result of their unlawful layoffs.

Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as prescribed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>58</sup>

#### ORDER

The Respondent, Wisconsin Steel Industries, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining in bad faith with the Steelworkers as the exclusive collective-bargaining representative of the employees in the following bargaining unit

All full-time and regular part-time production and maintenance employees, including truck+drivers, employed by WSI at its Milwaukee, Wisconsin facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Making changes in the terms and conditions of employment of unit employees without giving prior notice to and bargaining with the Steelworkers.

(c) Threatening to end the operations of the company in response to the employees' union activities and support for Steelworkers.

(d) Ending any part of the Company's operations in response to the employees' union activities and support for Steelworkers.

(e) Surveilling the union activities of its employees.

(f) Harassing employees because of the employees' union activities or support for the Steelworkers.

(g) Threatening employees with discipline or discharge because of the employees' union activities or support for the Steelworkers.

(h) 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.

<sup>58</sup> 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.

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

(a) Bargain in good faith with the Steelworkers.

(b) On request by the Steelworkers, restore the shift hours that had been in place prior to January 10, 1992, for those employees whose shift hours changed on or about that date and continue those shift hours in effect unless or until agreement is reached with the Steelworkers regarding shift hours or an impasse is reached in bargaining.

(c) On request by the Steelworkers, restore the distribution of coffee and doughnuts to employees on paydays as such distribution existed prior to August 1991 and continue such distribution unless or until agreement is reached with the Steelworkers regarding the cessation of such distribution or an impasse is reached in bargaining.

(d) On request by the Steelworkers, bargain with the Steelworkers concerning the decisions to lay off employees Gray, Herbst, and Reinke.

(e) Reinstate employees Gray, Herbst, and Reinke, and make them whole in the manner set forth in the remedy section of this decision.

(f) Reinstate the employees whom WSI laid off as a result of the Company's shutdown of its transportation division, including employees Andresen and Cannon, and make them whole in the manner set forth in the remedy section of this decision.

(g) Reestablish the Company's transportation division as it existed prior to June 28, 1991.

(h) Preserve and, on 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 determine the amounts due under the terms of this Order.

(i) Post at its facility in Milwaukee, Wisconsin, copies of the attached notice marked "Appendix."<sup>59</sup> Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt 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.

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

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

<sup>59</sup>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."

## 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 bargain in bad faith with your collective-bargaining representative, the United Steelworkers of America, AFL-CIO.

WE WILL NOT make changes in your terms and conditions of employment without giving prior notice to and bargaining with the Steelworkers.

WE WILL NOT threaten to end the Company's operations in response to your union activities and support for Steelworkers.

WE WILL NOT end any part of the Company's operations in response to your union activities and support for Steelworkers.

WE WILL NOT spy on your union activities.

WE WILL NOT harass you because of your union activities or support for the Steelworkers.

WE WILL NOT threaten to discipline you or discharge you because of your union activities or support for the Steelworkers.

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

WE WILL bargain in good faith with the Steelworkers.

WE WILL, on the request of the Steelworkers, restore the shift hours that had been in place prior to January 10, 1992, for those employees whose shift hours changed on or about that date and continue those shift hours in effect unless or until agreement is reached with the Steelworkers regarding shift hours or an impasse is reached in bargaining.

WE WILL, on the request of the Steelworkers, provide you with free coffee and doughnuts on paydays as we used to do prior to August 1991 and we will continue to distribute coffee and doughnuts to you unless or until agreement is reached with the Steelworkers regarding ending the free coffee and doughnuts or an impasse is reached in bargaining.

WE WILL reinstate employees Michael Gray, Paul Herbst, and James Reinke and we will make them whole for the losses they incurred as a result of our unlawful layoffs of them.

WE WILL reestablish the Company's transportation division as it existed prior to June 28, 1991.

WE WILL reinstate the employees whom we laid off as a result of our unlawful shutdown of our transportation division, including employees Ronald Andresen and Thomas

Cannon, and we will make them whole for the losses they incurred as a result of those layoffs.

WISCONSIN STEEL INDUSTRIES, INC.