

**Alpo Pet Foods, Inc. and/or Friskies Pet Care, a Division of the Nestle Food Company and Oil, Chemical and Atomic Workers International Union, AFL-CIO.** Case 6-CA-26669

March 20, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On October 13, 1995, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief in opposition to the Respondent's exceptions.

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>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Alpo Pet Foods, Inc. and/or Friskies Pet Care, a Division of the Nestle Food Company, Weirton, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(d).

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

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We have added the notification language that the judge inadvertently omitted.

*Sandra Beck Levine, Esq.*, for the General Counsel.  
*Steven R. Wall, Esq. (Morgan, Lewis & Backius)*, of Philadelphia, Pennsylvania, for the Respondent.  
*Larry G. Abel, Esq.*, of Johnson City, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on March 14 and 15, 1995, in Weirton,

West Virginia. The Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW) (the Union) filed the original charge on September 6, 1994, the first amended charge on October 25, 1994, and the second amended charge on March 8, 1995. A complaint issued October 31, 1994, and was amended on March 8, 1995. The amended complaint alleges that Alpo Pet Foods, Inc. and/or Friskies Pet Care, a Division of the Nestle Food Company (Respondent, Company or Employer) violated Section 8(a)(1) and (3) of the Act by laying off employees David Gamble, Earl Franklin Speerhas, and Mark Hager; by recalling Hager to a position that was not substantially equivalent to his prior position; by subcontracting work previously performed by Gamble, Speerhas, and Hager; and by engaging in the conduct described because the named employees supported or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. The Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT<sup>1</sup>

I. SUCCESSORSHIP

Respondent Friskies purchased the assets of Alpo Pet Foods, Inc. in December 1994, and continues to operate the Weirton, West Virginia facility without any significant change in plant management, operations, or plant personnel. Respondent Nestle was aware that an unfair labor practice complaint had been issued in this matter at the time of the purchase of the assets of Alpo Pet Foods, Inc., but has continued to operate the Weirton facility despite knowledge of the existence of the unfair labor practice complaint.

As Respondent admits that before the purchase it had been put on notice of its potential liability in the instant case, and has continued operation of the employing entity with notice of Respondent Alpo's potential liability to remedy its unfair labor practices, Respondent Nestle is a successor to Respondent Alpo and its potential liability.<sup>2</sup>

II. BACKGROUND

A. Plant Construction and Expansion

Respondent Alpo is a Pennsylvania corporation with an office and place of business in Weirton, West Virginia, where it is engaged in the manufacture and distribution of cans. Vincent Kirpsak is the general manager of the Weirton facility and has held that office since 1985.<sup>3</sup>

When Kirpsak was hired, he was placed in charge of setting up the new plant. His responsibility included the physical layout, the placement, and installation of the various pieces of equipment and the building of a wall to separate

<sup>1</sup> Jurisdiction and the status of the Union as a labor organization are admitted.

<sup>2</sup> *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

<sup>3</sup> It is stipulated that Kirpsak is a supervisor within the meaning of the Act.

Alpo from Weirton Steel that occupied part of the premises. Some of the equipment was newly purchased, some was moved from the Company's facility in Allentown, Pennsylvania, and some was already in Weirton. The initial setting up of the plant took approximately 30 months, beginning in September 1985.

As the plant gradually came into being, Respondent's complement of hourly employees grew. Kirpsak hired four employees in July 1985. This number increased to between 50 and 54 by the spring of 1987, then to between 55 and 65 by the end of that year. Initially there was only one maintenance employee, but this number increased to four, including the plant electrician by the latter part of 1987.

In 1987 Respondent made a decision to enter into the business of manufacturing cat food. This was actually undertaken in early 1989. It was decided, however, first to let the market determine what the sales would probably be, before investing capital in the can manufacturing end of the business. The Company, therefore, initially contracted to have the containers for the cat food made on the outside.

Once it was established that the Company was going to obtain a substantial part of the market, it was clear that the Weirton facility should be expanded to enable it to produce its own cans for the cat food line. This decision was also made in early 1989.

Once the expansion plan was decided on, it was determined that it would take about 4 years and would include the physical removal of a solid wall allowing for the acquisition of additional floor space from 89,000 to 104,000 square feet. The floor then had to be leveled to permit the equipment on it to be level. Trusses had to be built and wiring installed underground.

The plan provided for the relocation of the shearing line and other equipment during the first phase of expansion; the purchase and installation of a coating line where the original equipment had been located during the second phase; then, the installation of the newly acquired full panel easy-open system for the production of cat food cans; and finally the purchase and installation of two new ovens and the refurbishing and repair of a third, used oven.

When it was initially determined to undertake the expansion of the plant, it was recognized that a large amount of labor would be required to accomplish the job. It was decided, at that time, that as much of the work as possible should be done by Respondent's own employees. To that end, Respondent increased the complement of its maintenance department in 1989 and 1990 from four to eight employees. These seven maintenance employees and their supervisor physically moved and relocated the equipment as necessary, refurbished and repaired the used oven, physically installed the new easy-open line to the extent the maintenance employees were capable, and did whatever was necessary to accomplish the planned expansion of the plant.

Rearrangements in the plant were not limited to the production area. New offices for the electrician and supervisors, a quality control laboratory and restrooms were built as well. Most of the work, the laying of the block and plumbing were contracted out as a package but Respondent's maintenance employees were used as much as possible, to keep costs at a minimum. They laid the ceramic tile work on the floor, installed cabinets in the quality control room, and did whatever they were physically capable of doing. This work was per-

formed in late 1991 and early 1992. Company records reflect that the cost of maintenance outsourcing in 1991 was \$107,700 and in 1992 was \$100,705.

In the fall of 1992, in contemplation of the new easy-open line coming into production, Respondent began hiring additional employees. The complement of employees would eventually rise to 76 by the beginning of 1993 and stay at that level into 1994. The 76 would include 14 production employees for the new line itself, plus additional support people. The plan was to hire new people and train them for entry level positions while giving present employees the opportunity to move up to higher paying skill level positions. The total complement of 76 employees included 7 maintenance people by the time the new line came into production in early summer 1993.

In 1993 also, Respondent's expansion program was completed. Its maintenance outsourcing for that year decreased to \$89,075.

### *B. Respondent's Financial Situation*

The Weirton Alpo facility operates pursuant to a business plan or budget based on a fiscal year that runs from October 1 to September 30. The planning process for the forthcoming fiscal year begins in early April with the receipt of an estimated sales forecast provided by Respondent's sales staff. From the sales forecast, Kirpsak and his staff determine the amount and type of production required. This information is considered in terms of equipment capacity that in turn is considered in terms of the number of shifts required and staffing levels.

In September 1993, there was a restructuring of Respondent at the corporate level resulting in a change in the chain of command. Kirpsak, who had previously worked for Vice President of Manufacturing Chester Beavers, was henceforth required to report to Director of Corporate Engineering Ed Vanyo.<sup>4</sup> Vanyo, located at corporate headquarters in Allentown, Pennsylvania, was assigned the responsibility for directing the Weirton plant. As a result of the restructuring, Kirpsak had to deal with Vanyo concerning budgetary matters.

After Vanyo's appointment, Kirpsak had several conversations with him concerning budgetary matters. They became aware in early November 1993 that there was a significant shortfall in actual requirements of production because initial sales forecasts had been too optimistic. The scheduled overproduction was expected to impact poorly on the operating costs of the plant. There were also inefficiencies endemic to the Weirton facility. On November 3, Vanyo advised Kirpsak by E-Mail that the forecasted shortfall amounted to \$382,000.<sup>5</sup> He requested Kirpsak to provide an action plan to get back in line with plan costs. He noted that this would just be a necessary first step as the Company would be looking to reduce costs even further as the year progressed. Vanyo requested Kirpsak's action plan by November 5. Kirpsak complied though a little late.

On November 10, 1993, Kirpsak supplied Vanyo with the requested action plan. The plan consisted of a number of suggested adjustments designed to cut costs by \$373,000.

<sup>4</sup>It is stipulated that Vanyo is a supervisor within the meaning of the Act.

<sup>5</sup>Kirpsak testified that this sum represented gross costs.

One suggested adjustment involved the shutting down of the plant completely for three 5-day periods to save \$98,000. The second suggested adjustment involved a savings in energy costs designed to save \$25,000. The third suggestion involved an increase in the sale of shearing time (production time) to outside companies designed to earn \$45,000. These suggested steps plus changes in the volume/mix<sup>6</sup> in production valued at \$205,000 would equate to the \$373,000 total savings as calculated in Kirpsak's action plan.

Kirpsak's action plan was apparently approved but was never effectuated. As Kirpsak testified, "My predictions weren't any better than our salespeople's." When asked why his plan was not successfully implemented, Kirpsak named several factors. First of all, he explained that the winter of 1993-1994 was extremely severe. Two production days were lost due directly to terribly inclement weather, a production day equaling three shifts. Another production day was lost, due indirectly to the weather, when the Company was told by either the gas company or the electric company that due to an energy shortage it would have to shut down voluntarily or be shut down forcibly.

Another factor that adversely affected the proper implementation of his action plan according to Kirpsak was the union organizational drive that was in full swing during this period. Kirpsak explained that in order to counteract the Union's campaign, the Company conducted a number of informational meetings that resulted in a significant amount of production downtime, for which the employees were, nevertheless, being paid. The total cost to the plant of the union campaign was approximately \$50,000.

Kirpsak testified that the portion of his action plan dealing with the sale of shearing time also proved unsuccessful in that he was unable to sell the amount he had originally hoped. He was only able to sell a quarter of the time initially planned.

Kirpsak testified that the \$25,000 savings through a reduction in the use of energy never eventuated. His explanation as to why this part of his action plan failed is not clear except that for some reason it was delayed at the corporate level.

By April, Kirpsak testified, it was clear that his action plan could not be implemented and that the forecasted \$320,000 shortfall could not be completely avoided. Because of the factors discussed above, the plant was unable to shut down for a week in February and a week in April as planned. Rather, the only layoffs that occurred were the result of the shutting down of one coating line for 3 weeks in late 1993 and the laying off of four employees for that period of time.<sup>7</sup>

The changes in the volume/mix intended to save \$205,000 were never fully implemented because the requirements fluctuated and the way the product was scheduled to flow through the facility was never instituted in timely fashion. The \$205,000 in savings were, according to Kirpsak, never realized.

<sup>6</sup>Volume/mix refers to how the material flows through the plant. The savings were to be accomplished by decreasing the number of changeovers while increasing the length of runs and increasing the level of inventory.

<sup>7</sup>Actual layoffs were cut to 1 week for each of four employees because a number of employees volunteered to take their vacations during the layoff period.

Kirpsak testified that although he considered his action plan a good one at the time he submitted it on November 10, 1993, he regarded it as a failure by April 1994. Despite this testimony, however, the record reflects that by April 1994, the actual deficit was only \$115,000. Under cross-examination, Kirpsak appeared to concede that the \$115,000 deficit in April reflected some success in reducing the forecasted deficit and that additional drastic action would not be necessary.

Under further cross-examination, Kirpsak conceded that he had listed certain factors as reasons why his action plan had not already succeeded in erasing the forecasted deficit. He then admitted that in April 1994, these factors, i.e., severe winter weather, energy shortages, and an ongoing union campaign were no longer present. By this line of questioning, the General Counsel drew forth the implication that with the factors that had interfered with the total success of Kirpsak's action plan no longer present, there was no reason for Respondent not to continue with the action plan that had been successful, even despite these factors. When specifically asked by counsel for the General Counsel why he did not consider his November 10, 1993 action plan a good one, Kirpsak replied that the Company was so far in the hole, that the plan was not going to correct the problem. At the hearing, I found this reply inadequate, as did the General Counsel. Under further cross-examination Kirpsak finally admitted that Respondent was better off in April 1994 than it had been the previous November. Despite this admission, however, Kirpsak testified that by mid-April or early May 1994, he and the plant comptroller became increasingly aware that the November action plan was not going to succeed and by June it was decided something had to be done about it. As of early June, the deficit was still \$115,000 and Kirpsak, in his testimony, attributed this sum entirely to an overrun in labor costs, an alleged connection not made all that apparent.

### *C. The Decision to Lay Off Maintenance Employees*

Kirpsak testified that having determined that a new policy would be necessary to replace or supplement the November 1993 action plan, he gave consideration to numerous possible alternative plans in addition to reconsidering the ones he had already tried. He again looked into industry sources to see if he could sell additional shearing time. He again gave consideration to shutting down the whole facility for periods of time. According to Kirpsak, although he gave consideration to a dozen different scenarios that might increase income or reduce costs, the only one he could find that did not have drawbacks of one kind or another involved the layoff of three employees in the maintenance department. Kirpsak testified that there were no other means available to him to cut costs.

According to Kirpsak, prior to implementing any decision to lay off maintenance personnel, he first had to discuss the matter with the plant engineer, Paul Allamon, who was in charge of maintenance. He inquired of Allamon sometime prior to June 28 what the comparative costs would be of continuing to employ the three maintenance employees as opposed to outsourcing their work to local vendors. Allamon advised Kirpsak that laying off the three maintenance employees would result in an increase in the cost of maintenance outsourcing of between \$12,000 and \$18,000 per year. Kirpsak would eventually use the mid-figure of \$15,000 in

his recommended maintenance department reorganization memorandum.

On June 28, 1994, Kirpsak sent a memorandum to Vanyo proposing a maintenance department reorganization. In it Kirpsak stated that the reorganization was necessary to "ensure optimal organization." He explained that between the years 1990 and 1994 the maintenance shop had been utilized to a great extent for the projects described supra, including the site preparation and installation of new equipment. He pointed out that because the new projects had almost been completed and because of the experience gained through the history of maintenance and repair, reduction in the number of employees in the maintenance department would be possible and advisable to obtain "optimal organization."

Kirpsak, in this memorandum, then recommended that the maintenance department be reduced to four employees and gave justification for the retention of each:

- A. Plant Electrician—1
- B. Tool and Die—2
- C. Machinist—1

Justification for retaining these specific positions:

A. Plant Electrician—highly specialized position, no one else in department can perform the function as needed.

B. Tool and Die Positions—both Tool and Die Workers are more valuable to the department because they can perform Tool and Die functions and Machinist functions.

(1) Currently one Tool and Die Worker is 95 percent occupied with EZO work: (85 percent EZO Tool and Die, 10 percent general machinist work for EZO, and 5 percent General Plant Machinist work).

(2) The other Tool and Die Worker is occupied 50 percent with Tool and Die for Littell and Sanitary End Departments. The other 50 percent of his time is spent on general plant machinist work.

C. Machinist—will handle balance of projects, and training and support for Mechanic Operators.

The memorandum then noted that the reduced personnel needs in the maintenance department would result in the lay-off of two machinists and one machinist electrician with a saving of \$109,913 annually in wages and fringes.

The memorandum noted further that mechanic operators would be asked to take on more responsibility and upgrade their skills in the future, presumably to learn to service their own machines, to partially do the work of the three laid-off maintenance employees. To reward the mechanic operators for upgrading their skills, the memorandum stated, they and their leadpeople would receive a 20-cent-per-hour increase at an annual cost of approximately \$10,816.

Finally, the memorandum announced an anticipated additional outsourcing of an estimated \$15,000 in milling, lathework, and close tolerance grinding after the proposed changes. The net savings as a result of the reorganization, Kirpsak calculated to be \$84,097 annually. Kirpsak concluded his memorandum by stating that if Vanyo agreed with his proposal, the changes would go into effect on Monday, July 11, 1994.

Kirpsak testified at length with regard to his June 28 memorandum. He stated that the document was his own work and that he had not been instructed in advance by Vanyo to produce such a plan. He acknowledged, however, that prior to June 28, he had been receiving weekly statements containing information on the costs of operating the plant including labor costs, and that these costs had been the subject of discussion between Vanyo and himself.

As to why the particular plan described in the June 28 memorandum was chosen rather than some other one, Kirpsak explained that the \$115,000 deficit that existed in June was due entirely to labor costs implying that if there were to be savings, they would have to be in the area of labor costs. Since its inception the plant had been in an expansion mode and it had never been necessary to permanently lay off any employees.

Kirpsak explained that in 1993 management realized that it would shortly no longer be in an expansion mode and that capital investment would be decreasing significantly. At the same time it was realized, as well, that it was planned to maintain production at a constant level. As the number of employees in the maintenance department had been increased from four to seven for the specific purpose of engaging in the various expansion projects that were almost completed by June 1994, there was no longer any reason to maintain the higher complement of employees in that department. On the other hand, inasmuch as production was expected to remain the same, the number of employees engaged in production would have to remain constant as well. For this reason, it was determined to seek to save on labor costs within the maintenance department.

Having once decided that any layoffs decided on would have to be in the maintenance department, Kirpsak testified that he next had to determine which classifications of employees were most indispensable. He concluded that the plant could not operate without a plant electrician. There had always been one since the very beginning. The position was absolutely necessary because all of the equipment in the facility was electronically controlled, automated, and computerized. Muir, the plant electrician, though the maintenance employee with the least seniority, had to be retained because he was the only maintenance employee trained to maintain the equipment's computerized controls.

Kirpsak determined that the two tool and die makers also had to be retained. He testified that David Fernandez, one of the two, would be responsible for maintaining the dies on the Littell shearing line and the four prime end presses. This work would take between 50 and 60 percent of his time. He further testified that Thompson, the other tool and die maker, would be responsible for maintaining the tooling in the easy-open operation. This work would take 90 percent of his time. Thompson, who had been a tool and die maker prior to being hired by Respondent, received additional training after being employed by it.

Kirpsak testified that, when choosing which maintenance employees to retain, he felt that he could not operate the facility without the two tool and die positions. He explained that the tool and die makers were more skilled than the machinists. Whereas the tool and die makers work on designing, fabricating, and installing the pieces that form the finished product and work within tolerances of plus or minus one-half of one ten thousandth, a machinist must merely be knowl-

edgeable in operating the equipment necessary to manufacture those individual parts, need not work within tolerances quite as close as those required of the tool and die maker and has less responsibility for design.

Kirpsak determined to keep one machinist in addition to the plant electrician and two tool and die makers to round out the complement of employees in the maintenance department. He testified that he felt that the operation required one machinist to do the general fabrication of parts to replace worn parts and to produce any newly designed ones. He noted that management had always identified one machinist as being necessary and he wanted to bring the staffing level back to where it was prior to the recent major capital expansion, namely, four people.

Although production facilities had been expanded by the addition of the easy-open operation, the maintenance department could be rolled back to its original complement of four employees, Kirpsak testified, because Respondent had expended significant dollars in sending 14 mechanic operators to the easy-open equipment manufacturer in Chicago for training over a 2-week period. With this training, the mechanic operators of the easy-open line were enabled to keep the new equipment running. None of the operators allegedly sent to Chicago for training either testified or was identified.

In addition to the formal training, Kirpsak testified, the mechanic operators had, by June 1994, become more familiar with their equipment. By then, they could both run it and maintain it in a more efficient manner. This experience, Kirpsak stated, also made it possible for Respondent to reduce the number of employees in the maintenance department to their original complement.

In light of their special training and additional experience, Kirpsak felt justified in asking the mechanic operators to assume additional responsibility for maintenance of their equipment. This, he testified at one point, he eventually did.<sup>8</sup>

Kirpsak testified that at the time he composed his June 28 letter, he was dealing solely with positions, not with individuals. Be that as it may, since Respondent employed only one plant electrician and only two tool and die makers and Kirpsak knew he would keep the individuals in those positions, it would appear that the only question remaining was which one of the other four maintenance employees would be retained as the machinist. In any case, Kirpsak testified that it was only after determining what positions were to be retained, that he went into the question of which employees were going to be retained in those positions.

More specifically, Kirpsak testified that after he had composed his June 28 memorandum, he and Vanyo sat down and discussed it. They then took Kirpsak's maintenance department reorganization proposal to Vanyo's superior and told him, "Here is what we feel we can do to bring our costs back into line." Kirpsak testified further:

And at that point, when we got approval to proceed with this, we went to the policy manual and read it, and read it. And thought about it until we came up with exactly how we were going to proceed with what particular individual.

<sup>8</sup> At another point in his testimony, Kirpsak denied ever actually making such a request.

Prior to that, it was just jobs. There were no individuals. At this point, when this memo was written, it was jobs. It was not individuals.

Kirpsak went on to state that when he and Vanyo read the policy manual they noted that seniority was divided into plant seniority and departmental seniority with the maintenance department being considered a separate department. After studying the policy manual and comparing the seniority of the individual employees, Kirpsak and Vanyo concluded that Speerhas, and Hager, both machinists and Gamble, a machinist/electrician were "on the bubble." Kirpsak explained that the plant could not operate without the plant electrician and no one in the maintenance department other than Muir could perform the duties of the plant electrician. Similarly, Kirpsak testified that the tool and die makers, Thompson and Fernandez, had to be retained as necessary to the operation of the plant because Speerhas, Hager, and Gamble were incapable of performing the duties required of a tool and die maker. Artman was the most senior of the machinists.

In his June 28 letter, Kirpsak had stated that if Vanyo agreed with his proposal, he intended to make the changes on July 11, 1994. On that date, in keeping with his letter, employees Speerhas, Hager, and Gamble were selected for layoff. As of that date, there were three temporary employees working in the plant as cap packers. These workers were employees of an employment agency, not of Respondent. The employment agency was paid \$9 per hour for their services. These temporary employees had been employed in Respondent's plant since various times in mid-May 1994 when three of Respondent's regular production employees, Barrett, Wilson, and Zagula took medical leave due to accident or illness. According to Respondent's policies and procedures manual, the jobs of regular employees on leaves of absence, including medical leave are secure until they are able to return to work. For this reason, Respondent did not hire new employees to take their jobs permanently but chose to fill those jobs with the employees of the employment agency on a temporary basis.

Although Barrett, Wilson, and Zagula had not returned to work from their leaves of absence as of July 11, 1994, employee Zagula had submitted his resignation. On receipt of Zagula's resignation, his job became a permanent opening. For this reason, when Speerhas, Hager, and Gamble were told on July 11 that they were going to be laid off, Hager, the one with the most plantwide seniority, was offered Zagula's position and he accepted the offer. Kirpsak explained accurately that the job was offered to Hager rather than Gamble or Speerhas because, according to the Policy and Procedures Manual, "If there are no qualified bidders in the plant to fill the job, qualified employees on layoff will be recalled by plantwide seniority."<sup>9</sup> Hager lost no time whereas Gamble and Speerhas were terminated as of July 11 and paid through July 15, 1994. Kirpsak testified that it was management's intention to recall Speerhas and/or Gamble if a permanent vacancy occurred but none were foreseen at the time.

<sup>9</sup> Policies and Procedures Manual, p. 10. Zagula's job was not put up for bid prior to being offered to Hager. This fact, however, did not affect Gamble's rights.

Separate exit interviews were conducted on July 11. Gamble was working the day shift when a supervisor, Ike Webb, told him that he was wanted in Kirpsak's office. When he reported, as instructed, Kirpsak was there along with Andrea Buford,<sup>10</sup> the human relations manager. Kirpsak advised Gamble that he was being permanently laid off, that it was not for work reasons or absenteeism but for economic reasons due to a restructuring program. Buford then advised Gamble of his rights as a laid-off employee. Before Gamble left the office, he asked Kirpsak if he could use his seniority to take a less skilled job in the plant. Kirpsak replied that there was no job in the plant for Gamble. Gamble then returned to his work area and, after picking up some papers, was escorted from the plant.

Speerhas was the second employee sent to Kirpsak's office on July 11. There he found Kirpsak and Buford waiting for him. Kirpsak told him that due to economic decisions management was cutting down the size of the shop and he would be on permanent layoff. Speerhas had worked previously as a stacker and also as a packer and asked Kirpsak if he could return to one of those jobs. Kirpsak replied, however, that there were no openings in those departments. He then told Speerhas that Buford would go over the insurance, 41Ks, and other separation paperwork after which he would be escorted from the plant. Paul Allamon then escorted Speerhas to his locker. After cleaning out his locker, Speerhas left the plant.

Hager was the third employee sent to Kirpsak's office on July 11. Once there, Kirpsak informed Hager that Respondent was eliminating three jobs in the maintenance shop, but that there was an entry level job open for him as a packer.<sup>11</sup> Kirpsak explained that the packer's job was being offered to him because he was the most senior, in plant seniority, among the three laid-off maintenance employees, Gamble, Speerhas, and himself. He advised Hager that if he chose to accept the packer's job, he would lose his departmental (maintenance) seniority, but keep his plant seniority.

Hager then asked Kirpsak if he could use his seniority to bump back into his previous job that was press operator. Kirpsak replied that the handbook did not allow him to do that. He then mentioned that Speerhas had asked the same question during his exit interview and that he had told Speerhas that he could not bump back to his previous department either. He then read the relevant part of the rule book to Hager that prohibited employees from bumping back into jobs held earlier in other departments.

Kirpsak then told Hager that he could take his toolbox and his tools home, that they did not have to be checked by anyone. He said that Hager could bring them back anytime that he moved up into a position that he might need them. To Hager, Kirpsak's remark meant the possibility of his filling a position in maintenance or as an operator if one opened up.

After their visits to Kirpsak's office, Speerhas and Hager returned to their work area and told Fernandez that their jobs

had been eliminated. Fernandez was then called to Kirpsak's office. Once there, Fernandez was assured by Buford that he still had a job and that he had just been called to the office so that Kirpsak could explain what was going on. Kirpsak then explained that there was a downsizing going on at all Alpo plants and that Respondent had to lay off three people because there were not going to be any more major projects going on and the Company no longer needed the services of the three laid-off maintenance employees. He noted that this was the first permanent layoff at this plant. Fernandez asked why it was that just the shop, the maintenance department, got hit and not, for instance, the relief people or the temporary employees. Kirpsak explained that the Company employed six relief people and had a plan to train one of them per shift to maybe become stackers so that one of the stackers, on each shift, could train to become operators. As to having the laid-off employees take the place of the temporary employees, Kirpsak said, "If I've got to cut somebody's fingers off, I'd rather do it all at one time rather than a little at a time" meaning, apparently, that if they were given the jobs of the temporary employees, they would still be laid off when the employees on sick leave returned. Fernandez then asked Kirpsak what would happen if work in the maintenance shop began to build up, and the maintenance employees were backed up; since Hager was still in the plant, would he be able to come back into the shop (to help out). Kirpsak replied that if that became necessary, since Hager was already trained, he would be able to come back in the shop. Fernandez then testified that he was a person who tended to be pretty objective but told Kirpsak, at one point during the discussion, that he knew how the three layoffs would be perceived on the floor, and to him it looked like Kirpsak was out to get somebody and if Fernandez felt that way, he did not know how the rest of the plant was going to feel; "how this was going to carry over the rest of the day." Kirpsak's reply was, "Dave, believe me, it was nothing personal. It wasn't me against anybody. We just had to make some cuts." He emphasized, at this point, that Alpo, in general, was making cuts at all its plants and that the way it was being done at this plant was the least disruptive way of laying people off as far as efficiency was concerned.

#### *D. The History of the Maintenance Department*

One of the first maintenance employees hired for the new Alpo facility was Bob Reynolds. He did not have a West Virginia electrician's license in 1985 but none was required at the time for an employee to perform the duties assigned to an industrial electrician. Reynolds, despite not having a West Virginia license was, nevertheless, skilled in the duties required of an industrial electrician. In 1985, when the first line of equipment, a shear line with programmable controls was installed, Reynolds was capable of operating, maintaining, controlling, and testing this equipment.

Reynolds was made the plant electrician in 1989. By this time he had between 3 and 5 years' experience with programmable controls. He was capable of using microprocessors and computers to interface and troubleshoot. He was able to get in and use ICOM language and had experience with Allen-Bradley language and used that in his work. In April 1994 Reynolds retired.

In August 1985, Respondent hired Paul Allamon as assistant plant manager. In 1990 he was made plant engineer. By

<sup>10</sup> Andrea Buford was, at this time, a stipulated agent of Respondent.

<sup>11</sup> I will find, *infra*, that the elimination of Hager's job in the maintenance department and his layoff were violative of the Act. The complaint alleges that the offer to him of the packer's job was a separate and distinct violation. I do not agree. Following his discriminatory layoff, if the packer's job was the only opening and Hager was entitled to it, it would have been a violation not to have offered it to him.

that time he had had 18 years' experience working with Respondent, other companies, and on his own as a general contractor. As plant engineer, Allamon was responsible for all capital projects from their inception, including budgeting, capitalization, and monthly reporting on the progress of the projects undertaken. He was also responsible for general overall plant maintenance other than minor maintenance. As plant engineer in charge of maintenance he worked side by side with employees in the maintenance department. As such, he also had input into personnel matters within the maintenance department.

In or about March 1994, Allamon became aware that Bob Reynolds intended to retire sometime in April 1994 and that a replacement had to be found. Allamon knew that the job of plant electrician would have to be posted and that one of his responsibilities would be to identify the requirements for the job to potential bidders. In March, the plant electrician's position was posted for bidding. The requirements on the notice included a current electrician's license<sup>12</sup> at a journeyman's level, at the minimum, although a master's level was preferred. The notice stated that a Pennsylvania or Ohio license would be considered an equivalent. The second requirement listed was 3 to 5 years' experience with programmable controls, microprocessors, Allen Bradley computer logic, ICOM program language, and AC/DC drive motors and controllers. The third requirement was the ability to diagnose/troubleshoot electrical/electronic equipment. The fourth requirement was the ability to use analytical instruments as required in the maintenance and repair of equipment such as volt-ohm meters, oscilloscopes, and amp probes. The fifth requirement was the ability to read and lay out electrical schematic blueprints.

No employee of Respondent bid on the plant electrician's position. Gamble, Respondent's machinist/electrician, did not bid, according to Allamon, because he could not meet the requirements. Allamon testified that Gamble did not have a West Virginia license and could not apply even for a temporary electrician's license because he could not meet the necessary requirements to submit an application that included:

At least four (4) years of experience in performing electrical work at the level of the requested temporary license, and

1. Completed a U.S. Department of Labor/Bureau of Apprenticeship and Training registered electrical apprenticeship program, or
2. You have completed an electrical vocational education program of at least one thousand eighty (1080) hours in length and approved by the State Board of Education.

Allamon testified that Gamble was not able to meet the requirements listed on the job posting notice, did not interview for the job, and did not sign the bid for the job, though the notice was posted in the plant. He testified further that, listed requirements aside, Gamble could not do the job required because all he had was a basic knowledge of electricity and had only attended vocational training classes in Hancock County for residential wiring. He had no experience with

computers or programmable controllers, but could only perform a very small part of the necessary requirements of the job. Gamble's duties as machinist/electrician did include machinist's work. He worked, at other times, with the plant electrician, helping him run conduit or pull wires. If there was a problem with an electrical circuit such as a motor burning out, Gamble would replace the motor rather than make the necessary repairs.

As none of Respondent's employees bid on the plant electrician's position, it sought to fill the job with someone from the outside. Bob Muir was interviewed by Allamon at a time when he was engaged in residential and industrial electrical contracting on his own, although he had had prior experience working for a medical company that packaged medicines using computer-controlled equipment. Prior to that, Muir had experience as a mine inspector in Pennsylvania.

Allamon believed that Muir could eventually fill the requirements of the position of plant electrician although at the time of his interview, he did not yet have a West Virginia electrician's license. During the interview, it was decided that during his probationary period, he was to obtain the required license. In the meantime, his Pennsylvania mine inspector's license was to be considered an equivalent.

Kirpsak testified that Respondent was most interested in downsizing and cutting costs in April 1994, but knew that the plant could not operate without a plant electrician and for that reason, hired Muir. When it was suggested that he should have kept Gamble, the machinist/electrician in the plant electrician's slot, he objected that despite his title, Gamble was not qualified to fill the job of plant electrician. He noted that Gamble had no formal training in industrial electronics and that he was aware of his performance in the plant in his position as machinist/electrician and that it was not adequate for filling the plant electrician's position. Muir, on the other hand, Kirpsak testified, had functioned both as an industrial and residential electrician, owned his own business, and had taken and passed the West Virginia electrician's license test since being hired. He testified that Muir has all of the qualifications necessary to fulfill the requirements for journeyman electrician under the West Virginia Fire Marshall's standards. He added that he did not believe that Gamble has these qualifications.

As of the time of the hearing Muir, according to Allamon, was working with blueprints both in repair and with the installation of new equipment. His duties include upgrading modifications of equipment.

Gamble was called as a witness to testify, among other things, with regard to the layoff of July 11. He testified that Muir was the youngest in seniority of any employee in the maintenance department and that he was hired specifically to fill the position left vacant in April 1994, with the retirement of Bob Reynolds. Gamble admitted that the position of plant electrician had been posted for bidding with the necessary requirements listed. Gamble further admitted that he was aware, at the time, of the bidding procedure but did not bid for the job. At no point during his testimony did Gamble challenge the statements of Kirpsak and Allamon that he was not capable of performing the duties of plant electrician.

After fully reviewing the record concerning the retirement of Reynolds and the hiring and retention of Muir in his place, I find that Gamble was not unlawfully injured thereby. Muir was qualified as plant electrician, Gamble was not and

<sup>12</sup> In 1993, the State of West Virginia made it a requirement that all industrial electricians be licensed.

Respondent was justified in retaining Muir in that position over Gamble.

Dave Fernandez had more departmental seniority than Gamble, Hager, or Speerhas and Thompson was hired the same day as Gamble. Fernandez and Thompson were the two tool and die makers in the maintenance department.

Allamon testified that the tool and die makers are machinists who have the responsibility of working with tool sets rather than with just individual tools as do the machinists. A tool set is an assembly of parts that stamps and fabricates an item or shears a sheet of metal to a certain tolerance and a certain profile. A tool and die maker is a more skilled position than a machinist, according to the credited testimony of Allamon.

Thompson had been a machinist before bidding on and getting the tool and die makers' job in 1990. With the installation in March 1992 of the easy-open conversion line, he became the tool and die maker on that line. Allamon, in his position as plant engineer, had observed both Gamble and Thompson perform their particular duties. Based on his personal observations, Allamon testified that he did not believe that Gamble could do the tool and die work that Thompson was doing because he never saw Gamble ever assemble tool sets, make jigs or setups, or demonstrate that he knew anything about tool and die type work. Kirpsak supported Allamon's testimony by noting that Thompson was a qualified tool and die man who got his job by bidding for it and since establishing himself in that position, had spent 80 percent or more of his time working on a particular piece of equipment that demands specific skills.

Gamble testified concerning Thompson's tool and die position that the job had opened up several years ago when Thompson was a machinist and he was machinist/electrician. The opening was posted and Thompson bid on it successfully. Gamble did not bid on the job, nor did Speerhas or Hager. None of these machinists were interviewed for the job. At no time during his testimony did Gamble dispute Allamon's or Kirpsak's testimony that Gamble had never performed tool and die type work, had no experience with it, and therefore could not do Thompson's job.

Based on the above facts, I conclude that Respondent did not discriminate against Gamble by choosing to retain Fernandez and Thompson rather than him.

Once it had been determined that the plant electrician and two tool and die makers were too valuable to lay off, there remained just four employees in the maintenance department as of July 1994, from which to choose the three destined for layoff. These were machinists Artman, Hager, and Speerhas and machinist/electrician Gamble. All four performed similar duties, making parts by using lathes, boring mills, surface grinders, and presses. There is no contention that any of these employees were not qualified machinists.

Of the four maintenance employees being considered for layoff, Artman had the most departmental seniority and along with six others, the most plant seniority. He therefore kept his job as machinist and the others were laid off. Once they were on layoff, however, and a position opened up in the production department, where their maintenance department seniority no longer was a factor, plantwide seniority became the basis for bidding purposes, according to the job bidding procedure section contained in the policies and procedures manual. Since Hager had more plantwide seniority than

Gamble or Speerhas, having previously worked in the plant before transferring to maintenance, he was offered and accepted the job.

The procedure followed by management in determining to keep Artman in the maintenance department based on his departmental seniority within that department and offering the job in the production department to Hager based on his plantwide seniority closely follows and does not appear to deviate from the policies and procedures manual.

### III. THE UNION ORGANIZATIONAL CAMPAIGNS

#### A. 1990

David Gamble was hired by Alpo in September 1989 as a machinist/electrician. In 1990, the Graphic Communications International Union (GCIU) undertook an organizing campaign among Respondent's employees. Gamble participated in this campaign by distributing union authorization cards and setting up meetings. He did not hide his prouion sympathies from management but wore a baseball cap with the GCIU logo on it and helped with the campaign by distributing union literature. Gamble was known to Respondent's management as a supporter of GCIU. The GCIU lost its 1990 campaign but Gamble continued his employment with Respondent through 1993 without repercussions.

Charles Artman was another employee who actively campaigned for the GCIU in 1990 and was vocal about his support for the Union. Although his union activity was well known to Respondent, he also continued his employment with Respondent over the next several years. Charles Artman, it has been noted, was allowed to bid up to a tool and die maker position at the end of 1990.<sup>13</sup> Mark Hager, though employed by Respondent in 1990, and aware of the GCIU organizing campaign, did not get involved.

#### B. 1993-1994

In late November 1993, Gamble contacted the OCAW by phone to schedule an organizational meeting for the employees of Respondent. The meeting was scheduled and Gamble brought several other employees including Hager along with him to the meeting. After some discussion, petitions were distributed to the employees to sign and to take back to the plant to have other employees sign to obtain representation from the OCAW. Hager was one of the employees who signed a petition.

After the first meeting that had been held in the union lodge in Chester, West Virginia, Gamble openly identified himself as a union supporter by displaying union insignia on his truck and toolbox. He met with fellow employees before and after work and during breaks, discussed with them the earlier campaign, and had them sign one or more of the petitions that he had obtained at the meeting. Hager too had conversations with fellow employees about the Union, trying to get them to sign the petition that Gamble was passing around on their shift. He also attended a number, if not all, of the union meetings that followed the initial one, and that were

<sup>13</sup> Subsequently, Artman requested permission to bump back down to the machinist position. This request was also granted. The record is unclear as to when this occurred but it is clear that Artman was again a tool and die maker by 1992.

organized by Gamble. He did not, however, participate in the distribution of union literature.

Among the employees that Gamble approached was Speerhas. He told Speerhas that the OCAW was organizing and that employees were signing petitions as part of the organizing drive. Speerhas agreed to sign a petition. Thereafter, Speerhas joined in the organizing effort, speaking on behalf of the Union to other employees during breaks and at lunchtime. He was not, however, one of those who handed out union literature outside the plant.

At some point early in the organizing effort, Gamble organized an in-plant committee. He was the chairman of this committee and although the committee had about 10 employees in its membership, neither Hager nor Speerhas was among them. Charles Artman, however, did serve on the committee and testified that he was active in the 1993-1994 campaign and more vocal in his support for the Union during that one than he had been during the 1990 campaign.

The members of the in-plant committee, including Gamble and Artman, handed out literature after work, in the roadway and in the parking lot, each on his own shift. They held meetings, composed letters, and communicated information to the other employees concerning the scheduling of meetings.

Kirpsak testified that he was aware of both Gamble's and Hager's union activity and that Gamble was an outspoken union leader. He stated, however, that he had no idea, pro or con, as to Speerhas' feelings about the Union.

Bruce Polansky, human resources manager<sup>14</sup> during the period of the campaign, testified that he came to know through conversations with the various employees who were and who were not strong supporters of the Union. He knew Gamble's sympathies also because of his use of union stickers on his lunch pail or toolbox and his handing out of pronoun literature outside the plant.

After the first union meeting, several others followed. According to one witness, Gamble continued to be the most active employee in the campaign. This witness described Gamble as the spearhead of the campaign, setting up the meetings, making the necessary contacts between the OCAW and the employees, continuing to circulate the petitions, and doing whatever had to be done. Other witnesses confirmed Gamble's role as coordinator between Respondent's employees and the OCAW.

By December 22, 1993, the Union had a sufficient number of signatures for a showing of interest and filed a petition with the Board. About the time the petition was filed with the Board and, quite likely before, management learned about the ongoing organizing campaign and brought in a labor relations consultant. He undertook to educate the supervisory staff about what they could and could not do during the campaign, supplied a large amount of antiunion literature for distribution to the employees, and arranged for the scheduling of a number of company-held meetings that eventually numbered about six.

Separate meetings were held for the different shifts and stretched out from sometime after the time the Union filed its petition with the Board up until February 16, 2 days before the election was held. The format of the company meet-

ings with its employees included an address by a member of management followed by questions or comments from the employees present, and brief discussions afterwards. Antiunion literature was distributed by Respondent between January 1 and February 16, 1994. From mid-January through February 16, 1994, the members of the in-plant organizing committee distributed pronoun literature. Some of the Union's literature was supplied by representatives of the International, some by employees of Respondent and signed, "Concerned employees for a free choice" or similar non-particularized signature. No employee of Respondent signed a piece of union literature.

Kirpsak testified that he, personally, was against unions and did not feel that their representation was necessary. He agreed that his staff had been instructed in how to get that message across to employees and that this was the purpose of the captive meetings held on companytime.

At the first such meeting, the production manager or superintendent, Stanley Dulemba, commented as the meeting was just getting started, that the union organizing effort was like a knife in his back. The employee who testified concerning Dulemba's remark was not contradicted and is credited. Dulemba did not testify.

The record is not replete with information as to the specific dates of the company-run meetings and what was said by whom during and after the meetings. It is clear that certain employees were more involved than others in challenging statements made by company officials.

At one meeting where Jeff Miller was the company official, he was discussing the subject of union promises. After listening for a while, Gamble raised his hand and, after being acknowledged, commented that he had been to every union meeting and had not heard the Union promise anything but the best representation possible. Miller did not respond to Gamble's comment but went on to discuss other matters. Gamble testified that he spoke up at other company meetings as well.

Polansky testified that he was in charge of organizing and scheduling the meetings and did so in such a manner as to prevent the meetings from interfering with production. He attended them all. When examined as to how much Gamble got involved in these meetings he testified that although Gamble is not, at all, a quiet individual, he did not speak up at the meetings. Most of Gamble's talking was done after the meetings, and in response to the meetings. Polansky acknowledged that in meetings with Kirpsak and other members of management, the names of employees who spoke out against the Company would be discussed.

Speerhas attended all of the company meetings conducted for his shift. These meetings were different from the ones attended by Gamble who worked a different shift. Speerhas did not speak out at the meetings he attended.

Artman testified that he attended the company meetings and spoke out. No specific incidents were the subject of testimony.

On January 7, 1994,<sup>15</sup> Respondent conducted a captive meeting, attended by Gamble and Polansky, among others. The record is silent as to what exactly occurred during and immediately after that meeting but an incident happened later that day that raises the implication that Gamble may have

<sup>14</sup> Stipulated supervisor and agent of Respondent through May 18, 1994.

<sup>15</sup> All dates are in 1994 unless noted otherwise.

brought up the subject of workmen's compensation during or immediately after that meeting, and Respondent's failure to promptly pay his medical bills. Inasmuch as Respondent called this meeting specifically to combat the Union's organizational drive, Gamble's statements concerning his workmen's compensation bills, if made, were made in the context of the union drive.

After the January 7 meeting, Gamble went back to his work station in the machine shop where he joined Hager and another employee. As the three were standing by the lathes, Polansky walked up and, referring to Gamble, said, obviously to needle him and in jest, "I'd like to see the chief shop steward."<sup>16</sup> Hager, apparently joining in the joke, interjected, "He's not the chief shop steward, he's the president."<sup>17</sup> Polansky laughed. Polansky's explanation that he referred to Gamble as "chief shop steward" merely as a joke is credited. He testified that the incident occurred during the campaign, that there was a lot of tension in the plant because of the campaigns of both parties, and that he was just trying to loosen things up a bit. I find his testimony credible.

Although Polansky, on this occasion, had referred to Gamble as the chief shop steward in jest, he also acknowledged that he knew that he was involved in the Union's campaign as an organizer and a leader and for this reason also, he referred to Gamble as the chief shop steward.

Having found Gamble, Polansky invited him to his office where, he testified, he intended to discuss with him some workmen's compensation problems that Respondent and Gamble had been having, workmen's compensation being one of Polansky's responsibilities. He explained that the problem was in getting the bills paid. Bill collectors had been calling the company for payment but were not being paid, then calling Gamble for payment stating that he was responsible for the bills because no one else was paying them.

As soon as they entered Polansky's office, Polansky stated, "I've got a job to do, you have a job to do," just as though he were continuing a conversation which had begun earlier and just as if he expected Gamble to know what he was talking about. Polansky admitted making the comment and testified that he had made it out of frustration. He explained that there was a stack of overdue bills on his desk that he was trying to get resolved and needed Gamble's help to accomplish this since they involved an injury that Gamble had suffered to his knee the previous December. The injury had occurred when Gamble fell off a forklift. The problem arose when he filed a workmen's compensation claim and there was some confusion about getting bills paid on that claim, due apparently to problems with the state workmen's compensation people. Polansky testified that he made the

statement because he did not want Gamble to think that Polansky was refusing to pay the bills in retaliation for Gamble's union organizing activities. More specifically, Polansky explained that when he said, "I have a job to do," he meant that he had the responsibility to get the bills paid, presumably in a manner satisfactory to management that might require time for processing by the state workmen's compensation people. By "you have a job to do," he meant that Gamble had his beliefs and those required that he continue his pursuit of union representation. Taken together, Polansky was trying to tell Gamble that his failure to have his claim processed had nothing to do with his organizing for the Union.

Polansky did not, however, explain to Gamble what he meant by the statement, "I have a job to do. You have a job to do," but just assumed that he understood. Gamble, who had not apparently shared Polansky's humor in referring to him as "the chief shop steward," said, "If this is about unions, I want someone in here to listen to this." When Polansky repeated his original statement, ignoring Gamble's remark, Gamble asked him what he meant. Finally, when Polansky failed to answer Gamble and just laughed, Gamble walked out of his office. Apparently, Polansky called Gamble back into the office because Gamble testified that Polansky assured him that the reason he had been called in had nothing to do with unions and Polansky testified that he did, in fact, explain to Gamble what he meant by his opening statement.

After these extended preliminaries were over, Gamble and Polansky got down to discussing the various bills and working out the problems interfering with payment. A good deal of time was spent in trying to contact the workmen's compensation people to obtain the information necessary to pay the bills. Through persistence, Polansky and Gamble worked out the workmen's compensation payment problems that day.

The General Counsel went into this incident in far more detail than was warranted. Its sole value, as far as I can see, is to show that Polansky was aware that Gamble was a key figure in the union campaign and that some friction existed between them because of it. Polansky's refusal to explain certain of his remarks to Gamble when requested to do so manifests a delight in toying with his concerns.

On or about January 21, Gamble reported to work for the afternoon shift, carrying a tape recorder in his hip pocket. He was standing near the coating line talking to fellow employees when a supervisor, Randy Quiken came by and asked him what he had in his pocket. Gamble replied that it was a tape recorder. Quicken said that he had one too, then pulled the lapel of his shirt toward Gamble and asked, "Here, do you want to talk into mine?" Gamble replied, "Well, here, you can talk in mine." They then both laughed at the joke. Gamble then left the area of the conversation and proceeded to his work station on the easy-open production line.

After his conversation with Gamble, Quiken went to Polansky's office and informed him that Gamble was walking around the production floor with a microcassette on his person. He said, "I don't think that he should have that on the floor," then asked Polansky to get involved.

After receiving Quiken's report, Polansky proceeded to the back of the building where he found Gamble working along side fellow employee, Andy Fair. Polansky said to Gamble,

<sup>16</sup> According to Polansky.

<sup>17</sup> This conversation appears in the text as reconstructed by me in order for it to read logically. According to Gamble and Hager, Polansky said, "I'd like to speak to the president" and Hager then said, "He's not the president, he's the principal." Clearly, Polansky and Hager were referring to Gamble's union activity. Hager's referring to Gamble as "the principal," in this context, makes no sense. Their joint effort to recall the sequence of comments is clearly in error. More likely, when Polansky referred to Gamble as chief shop steward to acknowledge his importance in the union campaign, Hager basically agreed with him but attempted to increase his apparent importance by referring to him as the "president [of the Union]."

“I’d like to speak to you.” Gamble replied, “Well, Andy’s standing right here, go ahead and speak.” Polansky rejoined, “This is not Andy’s business. It’s you I want to talk to.” Fair then walked away.

Polansky asked Gamble if he had a tape recorder on him. Gamble replied that the tape recorder was in his toolbox. Polansky then told Gamble that at no time was anyone allowed to bring a recorder onto the production floor. He asked Gamble why he had brought it with him. Gamble replied that he had bad ears and that he had trouble hearing things. He added that he liked to record conversations and be able to play them back if he needed them. He explained that when he and the other employees were called into the captive audience meetings, he wanted to tape them so that he would not forget anything. Polansky testified that he had been involved in certain hearing tests that had been given to the employees several months before and so said to Gamble, “There’s nothing wrong with your hearing. There were no threshold changes. So the bottom line is, you’re not allowed to have a recorder here, because technically, it’s illegal to record people’s conversations without their knowledge. You need to get rid of that right now.” Gamble stated that he understood that taping people’s conversations without their knowing it, was against the law.

Gamble and Polansky then walked together from the back of the plant toward the front to where Gamble had his toolbox. As they walked, Polansky commented, “We know that you are a union leader because we have six people that have seen you hand out union petitions.” As they walked down the floor, Polansky added, “You know, also, this could be a very big financial burden on your family.” Gamble asked, “Are you threatening me?” then stated, “I fought for this country. I have a wife and children, I need to provide food for.<sup>18</sup> How far does this company have to go to scare people?” Gamble then told Polansky that he was going to write their conversation down. Polansky laughed and walked away. Gamble apparently removed his tape recorder from the premises and never used it to record any conversations or meetings. Concerning the removal of the tape recorder, Polansky described Gamble as “pretty much cooperative with it.”

As noted by Polansky in his conversation on or about January 21, Gamble had been distributing union petitions and had been seen doing so by at least six people. Gamble, himself, testified to distributing various pieces of union literature within 10 feet of the plant. On more than one occasion he noticed Polansky watching him engaged in this activity.

David Fernandez testified that on one occasion he observed Polansky out in the parking lot while union literature was being distributed. On this occasion, Fernandez was leaving the plant at the end of the shift, walking out of the door into the parking lot when he noticed Polansky. He said to Polansky, “I don’t know why you do this (watch the distribution), because this only aggravates some of the people that don’t know which way they really want to vote at this point.” Polansky replied that he was just making sure things were being done legally.

<sup>18</sup>Polansky testified that these statements were made by Gamble in reply to his order to get rid of the tape recorder. I find, however, that the conversation occurred more logically as described in the text. I therefore do not credit Polansky’s additional testimony on the subject of this conversation.

Employee Joseph Grieco testified that 1 day during the campaign he drove his truck to work and parked it facing the side of the building, in such a way that in order to see into it, one would have to walk around the truck to look in to see anything. Grieco had some union literature that he had obtained from the International representative lying on the seat. It was his intention to give these flyers to Gamble to distribute later.

Later that day, Polansky and Grieco met in front of the employee lunchroom. Polansky commented to Grieco, “You know, that doesn’t look good, having the union papers on the seat of [your] truck.” Grieco testified that although Polansky said it with a smile, and knew anyway that Grieco was involved with the Union, at the time, he did not care for the fact that Polansky had been looking into his truck.

One day during the campaign, Artman was outside the building, standing in the middle of the road that runs along side it, handing out union literature when Polansky happened to walk by. He was on his way back from his car after retrieving some articles that he had taken to read the night before in preparation for a staff meeting. When Artman noticed Polansky, he walked up to him and, handing him one of the flyers, said, “Here, you’re gonna probably get this anyway, so I’ll save you the trip.” Polansky thanked Artman and walked back into the building to attend the staff meeting. Polansky testified that he had to walk past Artman to get from his car to the entrance.

Polansky testified that he became aware that someone was distributing literature when the literature appeared all over the plant, usually when shift changes occurred and employees were walking into the timeclock area with flyers in their hands. When Polansky observed this, he went outside to see what was going on, how many people were involved, and whether the distribution was by Respondent’s own employees or by business representatives who were not employees of Respondent. To determine the answers to these questions, Polansky would sometimes station himself in the foyer just inside the entranceway from where he could see individuals handing out flyers while standing either in the parking lot or right in the middle of the road that ran immediately along side of the building. Polansky testified that aside from identifying who it was that was distributing union literature, he watched the distribution to make sure that no one was injured by the traffic on the road since he felt that under the workmen’s compensation laws, Respondent might be held liable for the individuals who were either coming to or leaving work and on company property. He admitted to observing both Artman and Gamble distributing union literature, Gamble possibly twice.

Although Polansky testified to having observed Gamble distributing union literature on only two occasions, Gamble testified to having distributed a number of union flyers, some dated, others undated. These flyers are presumed to have been distributed on the dates appearing thereon. Thus, the record indicates that Gamble distributed undated flyers on at least two occasions and additional flyers on January 21, 22, and 31 and February 4, 8, 9, 11, 14, and 16.

On February 14, Gamble punched out after completing his shift and went to get petitions and union literature to distribute to other employees leaving or coming to work. He testified that Polansky was already out in the parking lot, before the employees checked out, as he usually was, to watch the

distribution. As Gamble started to hand out flyers, he noticed Polansky watching, and asked, "Bruce, what are you out here for?" Polansky replied, "The plant smells like shit," apparently an oblique reference to Gamble's activity at the moment, distributing union literature. Gamble, picking up on the harassing remark, retorted, "Bruce, You smell like shit." Polansky continued to watch while Gamble continued to hand out pamphlets and other union petitions and literature while standing in the middle of the roadway in front of the entrance. Gamble testified that he felt intimidated. Polansky was no more than 10 feet from Gamble when he walked out the door and began watching Gamble. The incident is one of several wherein Gamble, though perhaps intimidated, demonstrated that he was determined to stand his ground.

This incident occurred 4 days before the election. Gamble admitted that he was not disciplined for his remark to Polansky, received no warning, and was not fired for making it although Polansky held the position of human resources manager at the time. Gamble testified that he was not joking when he made his remark to Polansky. He was serious and made it because he was pretty upset that Polansky was there while he was handing out the pamphlets. Gamble testified further that he had observed Polansky watching him handing out literature before on the day shifts, but not on the off-shifts, two or three times.

On February 16, there was another captive audience meeting at the plant that was attended by 25-30 employees. By this time, it was clear to Gamble that he had been recognized as one of the main union leaders. This fact was once again confirmed when, during Kirpsak's opening statement, he came over to where Gamble was sitting in the second row, put his foot on the rung of a chair in the first row, his face close to Gamble's face, looked over his glasses down at Gamble, and said in a very loud voice and with a very angry tone, "We don't need a union here." After doing this, Kirpsak paused for a little while, then straightened up, and continued with the meeting. Gamble testified that he felt that Kirpsak's actions were intimidating and his tone of voice surprising but that the statement itself was not surprising.

The election was conducted on February 18. The Union lost 50 to 25 but filed neither unfair labor practice charges nor objections at the time as to any conduct that had taken place during the election campaign. The Board certified the results of the election on February 28.

Sometime in March, management called a meeting of employees and announced that the Company was going to conduct a survey or poll and that thereafter there would be a series of one-on-one meetings of all employees with Ginny Shope,<sup>19</sup> of corporate human resources.

Thereafter, employees were called in for interviews with Shope. Among them were Speerhas and Gamble. Speerhas met with her on March 8. They talked about problems in the plant and why the employees felt that they needed a union. During the interview, Speerhas told Shope that he had voted for the Union and felt that the Company needed a union. His interview lasted about an hour.

Gamble met with Shope in April. He knew in advance that the purpose of the meeting was to determine why the employees felt they needed a union. Shope worked from a list of subjects and she and Gamble went down the list, one by

one. One of the subjects concerned disciplinary actions. Gamble, on this subject, said that he had no ideas because he had never been involved in any disciplinary matters. Shope then wanted to know if Gamble had seen management act in a mean manner toward any of the employees. Gamble then laughed and described to Shope the incident that had occurred at the captive audience meeting on February 16. Shope made no response concerning this incident. When Shope once again brought up the subject of unions, Gamble commented that he could not bring a union into the plant by himself. Shope acknowledged this to be the case. As Gamble got up to leave after the interview, Shope commented that he was a different type of individual than she had been told.

In May the Union was engaged in an organizational campaign among the employees of Ball Metals, a company which shares the same building in which Respondent's Weirton plant is located. A representation election had been scheduled for the Ball Metals employees that had come to Gamble's attention. On May 9, Gamble contacted the Daily Times of Weirton, West Virginia, and placed an ad in that newspaper to appear on May 11. He paid for the ad himself. The ad pictured a ballot with a box on it and a check mark in the box. The ad read:

BALL METALS  
VOTE:  
YES FOR UNION  
  
GOOD LUCK  
FROM  
ALPO EMPLOYEES FOR A FREE CHOICE

Before placing this ad in the newspaper, Gamble told several employees that he intended to do so. He did not, however, advise management of his intentions.

According to Polansky, he first heard about the ad after its publication when one of Respondent's rank-and-file employees, named Adams, brought it to his attention. Adams complained that she had found the ad posted in the lunchroom and did not believe that it belonged there since its message did not represent her views and as an Alpo employee she did not want to be "lumped in" with those employees whose views the ad reflected.

Polansky testified that he did not do anything about the ad immediately. He did not call the newspaper or ask around the plant to determine who had put the ad in the newspaper. According to Polansky, he never did find out who was responsible for the ad.

Kirpsak was out of town the week of May 11 and did not hear about the ad until he returned. At that time Polansky came up to show Kirpsak a copy of the ad because he was worried about the Alpo name being used. They then contacted corporate headquarters to advise them of its existence. Polansky stated that this was the last he heard about the ad and thought that that was as far as it went. He did not know whether or not Adams pursued the matter. On May 18 Polansky left the employ of Respondent.

Kirpsak testified further concerning Gamble's Ball Metals ad, that on return from his business trip he was advised that Eileen Klakos, Ball Metals' plant manager, had called during his absence, that she was angry, and had registered a complaint about the ad. The record contains nothing further con-

<sup>19</sup> Shope was stipulated an agent of Respondent.

cerning Klakos' dissatisfaction with Gamble's ad. It says nothing about whether any steps were taken to identify Gamble as the individual who placed the ad. Kirpsak testified that the ad did not bother him one way or another except that it did not reflect the feeling of all of Respondent's employees.

#### IV. ECONOMIC EFFECTS OF THE LAYOFF

##### A. Continuation of Projects

Hager testified that prior to the OCAW campaign he and Gamble worked together on various projects and continued to do so after the union campaign. The projects they worked on together included the installation of the new easy-open (EZO) department, quality control lab, shower room, rest rooms, electrician's office, and supervisor's office. The type of work they did included the laying of tile, some electrical work, and a little of everything.

Kirpsak admitted that the fitting out of the new locker rooms, laboratories, and offices continued beyond the date of the layoff and was not completed until the latter part of 1994. As of the time of the hearing, however, there were no new plans for additional capital expansion.

##### B. Operator's Duties

Joseph Grieco, a mechanical operator working on the Littell machine in the shearing department, testified that it has always been his responsibility to do some maintenance work on his machine in order to keep it running. Prior to the July layoff, however, whenever there was a breakdown, or a problem arose that was too involved for him to solve himself, for example if a piece of machinery had to be fabricated, or something had to be brought within certain tolerances, or in other cases where welding, grinding, or polishing were required, work which he had not been trained to do, he would rely on Gamble, Hager, or another machinist to do this type of work. Operator mechanics generally depended on machinists to do this type of work.

Since the layoffs, however, Grieco testified, there have been occasions when there have been breakdowns with resulting downtime because there was no one in the shop, no machinist to remedy the problem. One such occasion, according to Grieco, occurred on July 19, a few days after the layoff of the three maintenance employees. On that date, his machine was down for 2 hours and 15 minutes on his shift and 40 minutes on the next shift because of a small 15-minute polishing job that had to be done before production could continue but Grieco was not trained to perform the operation and there was no machinist in the shop to do it. As a result, the line sat idle for approximately 3 hours while Grieco kept himself active, cleaning up, and doing other busywork.

Fernandez testified that he has seen operator mechanics repairing things on their machines, which might otherwise have been done by a machinist if one had been available. In some cases these were leadmen who had been operator mechanics and who were responsible for the area of the line being repaired, but not in all cases.

##### C. Overtime

Kirpsak testified concerning studies made by Respondent with regard to the amount of maintenance overtime worked

by its employees since the layoff as compared to the amount worked prior to the layoff. His conclusion was that there was no significant change. The records on which this conclusion was based covered the period 1992-1994 and indicate that for the 6 months following the layoff, August 1994 through January 1995, the maintenance employees worked, on the average, 4 hours of overtime per month more than they had worked during the same period a year before, not a significant increase, Kirpsak concluded.

Hager testified that both shortly after the layoff and at the time of the hearing he was working overtime along with other packers, apparently performing the duties of a packer but that some of the packers did not want the overtime so the work was offered to operators and employees in other departments including maintenance employees who accepted the offer of overtime. The availability of the overtime, according to Hager, was occasioned by employees taking vacations, others who were ill and the availability of Saturday work generally. This was apparently not maintenance-type work, however.

Fernandez testified that since the layoffs, he has worked overtime, maybe four or five times on Saturdays, but that it was normal for him to do so. He explained that Artman would usually come in to do preventive maintenance work on Saturdays but if he refused the work, then either Fernandez or Thompson would perform that work.

Charles Artman testified that since the beginning of 1995<sup>20</sup> through the date of the hearing, March 14, he worked overtime, mostly on Saturdays, about 44 hours. Artman agreed that this figure equaled 4 hours per week, which, on average, was consistent with the amount of overtime he had generally worked during his career.

Joseph Grieco testified that he works in production on a regular basis and that it has been his experience that the amount of overtime he works varies throughout the year, depending on what is being produced. Production picks up as does overtime certain times of the year when particular types of cans are in production.

Grieco testified that production tends to slacken in spring and summer but that, nevertheless, he was scheduled to work 2 weeks in March 1995, 12 hours per day. He explained, however, that there were only three operators in his department and one of them was going on vacation. In these circumstances, it was customary for the other two operators to cover for the one on vacation by working 12-hour shifts until his return. Grieco testified that this was normal procedure that had been carried out before the layoff of July 1994 as well as after and had nothing to do with the maintenance department. On the other hand, Grieco also testified that since the July 1994 layoff of the machinists, he has been engaged in doing routine preventive maintenance such as changing oil on weekends, work which, but for the layoff, would have been done presumably by maintenance department employees.

Jeff Allamon testified that he has been working overtime, but that the amount has varied depending on the production schedule for the week and whether it happens to be a busy season or a light one. Allamon identified the fall as a busy season during which Respondent produces and sells cans to other canning companies. At the time of the hearing, produc-

<sup>20</sup> Hereinafter all dates are in 1995 unless indicated otherwise.

tion was normal. Allamon's testimony concerning overtime was not tied in with the layoff of the maintenance employees in July 1994.

In sum, I find that there is evidence that some overtime was assigned to employees to do work ordinarily performed by the laid-off maintenance employees but that the amount was minimal.

#### *D. Training of Operators*

The record contains some suggestion that part of the work performed by the laid-off maintenance employees was subsequently done by mechanical operators who were specifically trained for that purpose. Kirpsak denied giving the operators any formal training, however, defining "formal training" as "taking an individual aside on a one-on-one basis and physically showing him how to do every portion of his job."

Fernandez testified that at the time of the hearing he was still employed by Respondent in its maintenance department as a tool and die machinist. As of that time, he had been working in maintenance for 8 years. According to Fernandez, as of the time of the hearing, there were 27 operator mechanics and leadmen working in the plant on the coating line, presses, and Littell machines. When examined as to whether or not these operators had been given any training to take over the responsibilities for machine repair that had previously been done by Fernandez and the laid-off machinists, he stated that there had been no formal training, no training of machine operators to take over all the responsibilities to repair all of the parts for all of the machinery. Fernandez explained that what he meant was that the machine operators were not called in and taught about the safety of the equipment and the safest way of operating machines. He denied that he had been training any of the machine operators, or that he had observed any of them receiving training. Under cross-examination, however, Fernandez admitted that he had seen some on-the-job training of operator mechanics.

Charles Artman testified that since the layoff of Gamble, Speerhas, and Hager, he has not been engaged in training machine operators to do machinists' work on their machines. Moreover, he stated that he had no knowledge of anyone training the machine operators to do machinists' work.

Grieco testified that since the layoff of the machinists, he has not received any training to perform new duties associated with maintenance work. He has received no formal training to do preventive maintenance or repairs on his machine and no training of any kind from anyone from the maintenance department.

Grieco explained that he got on-the-job training from the other operator mechanics on how to operate his machine but no formal training. When machinists would come out of the maintenance department to work on Grieco's machine, Grieco was aware of a line that separated him and his abilities from the machinist and his abilities and knew when not to get in over his head. Depending on the particular operator and his abilities, however, he might take that extra step to keep his machinery running.

Before the July layoff, according to Grieco, in case of a breakdown, he would sometimes call Hager and they would spend 5 or 6 hours together while Hager worked on Grieco's machine. On other occasions, if Grieco was unsure of something and he needed Hager's expertise with some procedure or information about parts he would call for his assistance.

He admitted that it was hard to say specifically where his responsibility ended and that of the maintenance people began. In any case, Grieco appeared to be testifying to the effect that there has been no changes in the relationship between the operators and machinists since the layoff. They continue to do their own jobs. The operators have not taken over the machinists' duties.

I conclude on the basis of record testimony that machine operators have not undergone any degree of training that might enable them to perform the work of the laid-off maintenance employees. They have not done so to any great degree.

#### *E. Amount of Maintenance Work Available*

Although Fernandez testified that he had been told by Kirpsak that if the work backed up in the maintenance department it was possible that Hager might be called back in from the production department, he also testified that the work has not backed up, since the layoff, to the degree that would necessitate his transfer back into maintenance. On the other hand, Fernandez testified that since the layoff in July, he has come in on at least one occasion to find the Littell line down. He stated that he had to repair it so that the operators could continue to run it. I find this testimony evidence that Respondent's layoff of the three maintenance employees has left it with a shortage of personnel but that it has chosen to suffer the shortage rather than recall them.

#### *F. Machine Efficiency*

Kirpsak testified concerning the subject of machine efficiency at the plant since the layoff and before. He defined machine efficiency as the percentage of scheduled hours that a machine should run as opposed to the hours a particular machine actually runs. He testified that failure to reach 100 percent of a machine's productive capacity may be caused by any of several factors including mechanical failure, changeovers, and a lack of raw material.

Respondent periodically measures the downtime of each of its machines and notes its efficiency. Graphs or charts are published indicating the changes in efficiency and these are both posted in the facility and forwarded to corporate headquarters. It is obvious that machine efficiency is considered extremely important by management.

In order to establish that the layoff of the three maintenance employees was firmly grounded on legitimate economic considerations rather than on discriminatory antiunion motivation, Respondent, during the hearing, offered into the record a set of charts reflecting the efficiency of each of its machines, on a month-by-month basis, covering the period January 1993 through February 1995. Kirpsak was requested to analyze these charts and draw conclusions as to the efficiency of the various machines over the period covered.

As to the efficiency of the EZO END machine, Kirpsak concluded that, as a whole, there was an upward trend in machine efficiency over the entire period from the EZO END's inception in April 1993 through February 1995. This appears to be correct.

Kirpsak was also requested to testify as to the trend in the efficiency of the EZO END machine since the layoff of the maintenance employees in July 1994. He testified that, on

the average, the chart showed a steady upward trend in that machine's efficiency and his assessment appears accurate.

Kirpsak then testified, concerning the 300 DIA END machines, three in number, that since the layoff, these machines had steadily increased in efficiency each month except for one and that exception was due to a conversation in the use of certain compounds that necessitated taking down, then re-assembling the machines.

Kirpsak testified concerning the 307 DIA END machine that, unlike the other machines, its chart indicates that it is cyclical and operates only on demand. He concluded, based on its chart, that since July 1994, this machine has undergone no significant change in its efficiency. He testified that the ups and downs on the chart coincide with the cycles in which requirements vary.

Kirpsak testified that the chart entitled "decorating efficiency" represents the three coating machines. Requested to analyze the chart, he stated that it reveals no significant changes, upwards or downwards, in the efficiency of these machines. Comparing the months of January and February in 1993 to 1994 and 1995, Kirpsak testified that he could see no significant change in the efficiency of the coating machines.

In Respondent's brief, based on the charts as analyzed in his testimony by Kirpsak, it is concluded that the machines at the plant are operating at steadily increasing levels or at the same levels as compared to the time period prior to the layoffs. The brief concludes further that the efficiency ratings indicate quite clearly that the loss of maintenance workers has not resulted in increased downtime on machines.

Kirpsak's analysis of the machine efficiency charts did much to enlighten the reader as to the recovery or failure of

recovery of machine efficiency following the layoff of the three maintenance employees. His analysis, however, does not educate the reader as to the apparent immediate and direct effect on machine efficiency of the layoff itself. I have therefore used the same documents, myself, in order to analyze machine efficiency at Respondent's plant, both as it was immediately affected by the July 1994 layoff and as it was affected over the periods 6 months prior to the layoffs and 6 months following the layoffs.

Concerning Kirpsak's analysis of the EZO END chart, I found it accurate. Unlike the efficiency of the other machines, the machine efficiency of the EZO END machine remained level immediately following the layoff of the maintenance employees in July 1994, then increased throughout the year and on into February 1995. The answer as to why the EZO END machine should not have been affected by the loss of the maintenance employees as were the other machines probably lies with the fact that it was a new line requiring little, if any, repair by maintenance employees because it was being operated by mechanics who had recently received special training over a 2-week period, in Chicago, from the manufacturer. The EZO line was in a separate category from the other machines.

Be that as it may, a comparison of the machine efficiency tendencies of each of the five types of machines is enlightening. First, there should be a comparison of machine efficiency immediately before and after the layoff. Then, a comparison of efficiency during each of the first 6 months of 1994 when there was a full complement of maintenance employees, with the machine efficiency of the same machines during each of the last 6 months of 1994, after the layoff. The statistics are Respondent's own:

	1994		MACHINERY		EFFICIENCY	
300 DIA END	JAN	FEB	MAR	APR	MAY	JUN
	78%	84%	85%	88%	90%	81%
	JUL	AUG	SEP	OCT	NOV	DEC
	77%	82%	85%	85%	87%	79%
307 DIA END	JAN	FEB	MAR	APR	MAY	JUN
	88%	64%	83%	88%	88%	85%
	JUL	AUG	SEP	OCT	NOV	DEC
	78%	70%	82%	81%	82%	74%
307 EZO END	JAN	FEB	MAR	APR	MAY	JUN
	52%	56%	53%	49%	50%	53%
	JUL	AUG	SEP	OCT	NOV	DEC
	53%	57%	60%	56%	58%	59%
SHEARING	JAN	FEB	MAR	APR	MAY	JUN
	76%	76%	80%	82%	80%	78%
	JUL	AUG	SEP	OCT	NOV	DEC
	70%	73%	79%	79%	82%	84%
DECORATE	JAN	FEB	MAR	APR	MAY	JUN
	74%	73%	80%	80%	79%	80%
	JUL	AUG	SEP	OCT	NOV	DEC
	73%	74%	73%	71%	75%	70%

Analysis of this table indicates that four of the machine lines listed lost machine efficiency with the layoff of the three maintenance employees. Machine efficiency dropped

between 4 and 8 percent between June, when there was a full complement of maintenance employees, and July, when the layoff occurred. Lest this precipitous 1-month decrease in

machine efficiency be thought to be unrepresentative of the entire picture, a month-by-month comparison of the first 6 months of 1994, when the maintenance crew was at full strength, with the last 6 months of 1994, following the layoff, is instructive. Thus, a comparison of the first month of the year with a full complement of maintenance employees (January), with the first month of the year with the reduced complement of maintenance employees (July), reflects a decrease in machine efficiency in four out of the five machine lines. A similar comparison of the following months, February with August, March with September, etc., reflects that, with the exception of the 307 EZO END machine line, every other machine line's efficiency decreased on a monthly comparison basis over the last 6 months of 1994, following the July layoff. Thus, the 300 DIA END machine line's efficiency decreased 5 out of 6 months, the 307 DIA END machine line's efficiency also decreased 5 out of 6 months, the shearing line's efficiency decreased 4 out of 6 months and the decorating line's efficiency declined 5 out of 6 months. A comparison of the sixth month of each period (June for the full complement of maintenance employees and December for the reduced complement) reflects that three of the four machine lines, EZO excepted, had not yet recovered from the layoff. The machine efficiency of the 300 DIA END had been 81 percent in June but only 79 percent in December, the 307 DIA END had been 85 percent in June but only 74 percent in December, the shearing machine, the exception, had increased in machine efficiency from 78 percent in June to 84 percent in December but the decorating line had fallen in efficiency a full 10 percent from 80 percent in June to 70 percent in December.

Although in 1995, the efficiency tendency of some of the lines improved over the last months of 1994 after the layoff, except for the EZO END line, the machines never recovered the efficiency they had achieved during the most successful months in 1994 prior to the layoff. Thus:

<i>EFFICIENCY</i>	<i>4/94</i>	<i>5/94</i>	<i>1/95</i>	<i>1/95</i>
300 DIA END	88%	90%	83%	85%
307 DIA END	88%	88%	81%	77%
307 EZO END	49%	50%	59%	61%
SHEARING	82%	80%	80%	81%
DECORATE	80%	79%	73%	72%

Despite the undeniable evidence that Respondent's machine efficiency has declined following, and as a result of, the layoff of the three maintenance employees, Respondent has neither recalled them to their jobs in the maintenance department, nor replaced them.

The sudden decrease in machine efficiency following the July layoff clearly caused concern among Respondent's management because just before the beginning of the new fiscal year on October 1, 1994, Respondent put into effect a new incentive program called "gain sharing." The program was designed to encourage an increase in machine efficiency and included, as part thereof, the posting of efficiency ratings for

the machines, which ratings are collected on a daily basis by the supervisors.

Grieco testified that, because of the "gain sharing" program, he kept close watch on the posted efficiency ratings. In response to a suggestion that the efficiency of his machine had stayed the same or gotten better over the course of the last year, he stated, "We have made an effort because we've had some rough times. . . . and with the gain sharing program that they've implemented, we've made more of an effort to keep the thing running a little better." Grieco acknowledged that through these efforts he has been able to run his machine better, do a better job and get a little quicker on some of the jobs he does. This has had the effect of having the efficiency rating of his particular machine go up. Grieco testified that as of March 1995, his machine, the Littell machine in the shearing department, was running at about 80 percent and management was hoping to increase its efficiency to 83 percent, on average, by the end of the year. An increase of this dimension, management promised, would result in an incentive award if the other elements factored in also prove successful.

#### *G. Raises and Profit Sharing*

Following the July 11 layoffs, but still sometime in July, according to Fernandez, he received a 20-cent-per-hour raise. He testified that he received still another raise in October, amounting to 3.5 percent. The latter raise was for all hourly employees throughout the plant and was expected since they had received raises every October in the past. Fernandez testified to also having received a check for about \$3900 gross in November.

Kirpsak confirmed that he gave a 20-cent-per-hour raise to all operators, maintenance machinists, and to all skilled positions within the facility within a week or two of the layoffs. Kirpsak admitted that granting raises in the middle of the year was not normal but he granted the raises at this time "because we were going to ask particular individuals to assume more responsibility for the maintenance and operation of their equipment." There is no evidence, however, that the employees were ever actually requested to assume such additional duties.

Kirpsak also confirmed that Respondent granted a 3.5-percent raise in October, a raise which had been granted annually since the plant first opened.

Kirpsak also testified as to the existence of a profit-sharing plan. He explained that the amount received in profit sharing by each employee varies and depends on the individual's base wage, the number of hours he worked during a given period, and the amount of corporate profit available for division. The profit-sharing plan, according to Kirpsak has been in existence since 1992 with the most recent payments being distributed in the summer of 1994, a 10- to 11-percent payment, then another in February 1995.

#### *H. Subcontracting*

Charles Artman testified concerning outside contracting since the layoff of Gamble, Speerhas, and Hager. He identified Valley Manufacturing as a Company that did some work for Respondent involving shafts for magnetic wheels on the conveyor system used in loading and other work involving the making of knives. Prior to the layoff, Speerhas and

Fernandez had done the work on the magnetic wheel shafts while Hager had made the knives. Hager, a packer in the press department since his demotion, confirmed that he had manufactured cutoff knives when he had been a machinist.

Other contractors, whose names Artman did not know, he identified as having installed ceilings, tile, and lockers in the new section of the plant. This work was also done after July 11.

Fernandez testified to being aware of subcontracting of machinists work since July 15, some on a regular basis. He confirmed Artman's testimony that Valley Manufacturing regularly began to make the cutoff knives beginning July 15 and that on that day, Respondent contracted out the job that Speerhas had been doing on aluminum shafts for the presses, also to Valley Manufacturing. Respondent also sent to Valley Manufacturing another job previously done in its own plant for the coating department, according to Fernandez. The job consisted of shrink fitting a hub onto a shaft and assembling it. Other subcontracting performed after July 15, such as work by R and R Electric and Greco Plumbing, had been going on before the layoffs.

Kirpsak testified generally on the subject of maintenance outsourcing that in 1993 it amounted to \$89,075 and in 1994 to \$72,900. From July 10 through December 31, 1993, the maintenance outsourcing amounted to \$52,600 whereas during the same period in 1994, that which immediately followed the layoff, the amount was \$43,300. The difference in the amount of maintenance outsourcing amounts to a decrease of approximately \$9000.

Kirpsak freely admitted that since the layoff, Respondent has subcontracted certain high tolerance work that would have been done by the employees who had been laid off. In particular, he agreed, much of work had been sent out to Valley Manufacturing but all of the subcontracting to Valley Manufacturing since the layoff amounted to just \$4900. He testified that this compares to between \$84,000 and \$89,000 in savings resulting from the layoffs. Respondent, at the time of the hearing, was still contracting out maintenance work. Paul Allamon was called as a witness to corroborate Kirpsak's testimony with regard to the amount and cost of subcontracting and credibly did so.

#### I. Recent Events

In August, employee Barrett, one of the two remaining employees still on sick leave returned to work and the second of the three temporary employees was released. Employee Wilson, the third and last employee on sick leave, returned from sick leave, and the last temporary employee was released. Respondent hired no additional temporaries after that.

#### V. CONCLUSIONS

The above factual account reveals that although Respondent's financial condition in November 1993 may have required some adjustment in its operations, by April 1994, the necessity for any drastic change was no longer present. Whereas Kirpsak's November 1993 memorandum and recommendations came about as the direct result of his superior's request, his June 28 letter recommending that three maintenance employees be laid off did not result from any particular problem brought to his attention by his superiors

but appears to have been spontaneous as well as precedential in the sense that Respondent never before permanently laid off any of its employees.

I find Kirpsak's testimony concerning the reasons why he retained the plant electrician and the two tool-and-die makers quite credible. I find his testimony, however, that at the time he composed his June 28 letter he was dealing solely with positions, not with individuals, patently untrue. Likewise, I find untrue, his statement that it was only after determining what positions were to be retained, that he went into the question of which employees were going to be retained in those positions.

Kirpsak testified that after he composed the June 28 letter he discussed it with Vanyo. They then took the proposal to Vanyo's superior. He testified, as cited supra:

And at that point, when we got approval to proceed with this, we went to the policy manual and read it, and read it. And thought about it until we came up with exactly how we were going to proceed with what particular individual.

Prior to that, it was just jobs. There were no individuals. At this point, when this memo was written, it was jobs. It was not individuals.

I find this testimony pure nonsense and a deliberate attempt on the part of Respondent to mislead the administrative law judge and the Board. It is obvious from a casual reading of the letter that Kirpsak knew when he wrote it that Gamble was going to be laid off because it states on page two: "III. Unfortunately, the reduced personnel needs in the department will result in the displacement/layoff of two Machinists and one Machinist Electrician." Since David Gamble was the only machinist/electrician in the plant, it is clear that he was chosen for layoff before the June 28 letter was composed. The fact that Kirpsak would deny that he was scheduled for layoff all along, when this in fact was the case, warrants the adverse inference that the true motivation behind Gamble's layoff may have been unlawful. Indeed, in this case, I so find.

Far from being surprised, after the issuance of the June 28 letter, that Respondent's manual required the layoff of Gamble, Hager, and Speerhas as the maintenance employees with the least departmental seniority, it would appear obvious that Respondent's management was fully aware of the seniority positions of these three individuals before the June 28 letter was composed, and tailored the letter to this advanced knowledge. In other words, if management determined to rid itself of Gamble but still remain within the seniority rules contained in the manual, it would first have to lay off Hager and Speerhas. That required the layoff of three maintenance department employees in all and so the June 28 letter was composed as it appears, following the letter of the layoff by seniority rule.

The conclusion that Respondent was anxious to get rid of Gamble even if it necessitated the laying off of two other less senior employees is supported by the following facts, more fully covered in previous sections of this decision. Thus, Gamble was exceedingly active in the 1990 efforts of the GCIU to organize Respondent's employees, and his activity was well known to Respondent's management. In November 1993, Gamble personally contacted the OCAW and

began to organize once again. Gamble was the initiator of the new campaign, the most active of Respondent's employees and was admittedly well known as the campaign's prime mover by management. Although Hager also was active for the Union, it was Gamble who took Hager to the initial meeting and got him interested in the campaign. At captive audience meetings, Gamble openly challenged statements made by speakers for the Company and spoke up after meetings concerning what had been said at the meetings.

Kirpsak's testimony was that he was personally against unions, while the holding of antiunion captive-audience meetings and the distribution of antiunion literature adequately demonstrates general antiunion sentiment. Further evidence of animus includes the statement of Respondent's production manager during the first captive-audience meeting, that the organizing effort was like a knife in his back.

Although the General Counsel placed in the record a series of incidents involving Gamble and various members of management designed quite clearly to show a pattern of deliberate harassment of Gamble and the existence of friction between them, most of these incidents could not have been considered, each by itself, serious enough to warrant the finding of a violation, even if timely filed, until January 21, 1994. When, on that date, during the conversation that followed the discussion about the tape recorder, Polansky commented to Gamble, "We know that you are a union leader because we have six people that have seen you hand out union petitions. . . . You know, also, this could be a very big financial burden on your family," Polansky committed a violation of Section 8(a)(1). Had that statement been alleged in timely fashion as a violation of the Act, I would have found it such. In the absence of the allegation, I find it to be a threat of termination because of Gamble's union activity, a threat that was eventually carried out. Though not alleged or found, it is still evidence.

Other incidents of harassment continued to occur throughout the remainder of the campaign as did incidents of surveillance. Although sometimes the occurrences were accompanied by a smile or laugh, they nevertheless were frequently abrasive and often interfered with Gamble's activities on behalf of the Union. Gamble was clearly annoyed with both Polansky's remarks and his surveillance, and sometimes felt intimidated. Again, these incidents were not alleged as violations because of the prohibitions of Section 10(b).

The incident that occurred during the captive-audience meeting of February 16 was not merely one more case of harassment but a matter of sending a message to Gamble and to everyone present that Kirpsak was fully aware that Gamble was the person responsible for the organizational campaign, the ringleader, the individual who cost the Company \$50,000. He was special, not just one of several moderately active pronion people such as Grieco or Artman. Kirpsak's action that day was also another way of stating that the struggle was personal, Kirpsak versus Gamble, and that eventually Kirpsak would get even. After all, Kirpsak did not go nose to nose with anyone else in the room that day nor any other day. And Kirpsak and Polansky did not harass any other employee throughout the campaign nearly as much as Gamble.

The series of meetings held by Shope with the employees in March and April, following the election, during which she asked employees why they felt they needed a union, clearly

indicated that Respondent had not put aside the organizational effort as a thing of the past but was still pursuing means of preventing similar campaigns in the future. When Speerhas admitted to Shope that he had voted for the Union, it made even more obvious what was already known, namely that the core of the employee organizational effort was the maintenance department. Gamble, Hager, and Artman were all known union activists. Now Speerhas also admitted to voting for the Union. When Shope commented to Gamble, at the end of their interview, that he was a different type of individual than she had been told, it indicated that he, specifically, had been discussed by management prior to the interview and probably in preparation for the interview.

In May, when Gamble placed the ad in the newspaper announcing the support of the Alpo employees for the Ball employees' organizational efforts, when Gamble spread the word among the other employees that he had done so, when the ad then came to the attention of Polansky and Kirpsak through complaints from their own employees as well as from Ball management people, it had to have been clear to Respondent's management that Gamble must have been involved and that he was going to remain an active unionist for as long as he was around. Whether they actually had evidence that Gamble had personally placed the ad or not, they would certainly have suspected his involvement. Their concern is apparent because Polansky and Kirpsak contacted corporate headquarters to advise them of the ad. It was shortly after that, that Polansky left Respondent's employ.

At the time of the layoff the projects that had been undertaken earlier still had not been completed. Hager and Gamble were still performing tasks on these projects when they were laid off in July. They had been performing these tasks because it was more economic for Respondent to use its own employees to do the work than to hire outside contractors to perform it. As Kirpsak admitted that the work on the projects continued until the latter part of 1994, and there is no evidence in the record to indicate that it suddenly became more economical for Respondent to hire outside contractors than to use its own maintenance employees to do the work, it is clear that Respondent was perfectly willing to take the losses rather than keep Gamble and the other two pronion people on the payroll.

As noted supra, Grieco testified that he used to be able to depend on obtaining the help of machinists when he had problems with his machine that he could not solve himself. He said that since the layoff, however, there have been instances when his machine has broken down with no one available to help, with resulting downtime. Respondent, of course, had to be aware of these instances but did nothing. This indicated that Respondent would rather suffer the loss of downtime than recall the machinists whose layoffs were responsible for the loss of production. The recall of one or more of the machinists could alleviate the situation but Respondent does not want them as employees. Since Respondent has never claimed that there was anything wrong with their work and their services are obviously needed, there must be some other reason why they are not being recalled. The only apparent reason is their past union activities and sympathies and the certainty that Gamble will certainly be at the forefront of the next union organizing campaign with the likelihood that he will have the support once again of Hager and Speerhas.

The tables included in the above section on machine efficiency clearly indicate that since the layoff of Gamble, Hager, and Speerhas, Respondent's machine efficiency has decreased markedly. The tables prove, through the timing involved, that this decrease is directly due to the July layoffs and that the maintenance department, since then, has been understaffed. Grieco's testimony supports this conclusion. Although the problem could easily be solved by rehiring one or more of the laid-off maintenance employees or hiring new employees, the Respondent cannot do either because it has placed itself in an untenable position by choosing to claim that the layoffs were economically motivated and were successful. Clearly, Respondent's own charts prove that the layoffs were injurious, that machine efficiency has decreased. Yet, Respondent cannot rectify the situation without undermining its case. It cannot hire new maintenance employees to replace those who were laid off because Gamble, Hager, and Speerhas were all admittedly good employees. It cannot recall those who were laid off because Gamble has departmental seniority and under Respondent's own rules would have to be the first recalled. Respondent could simply admit, if it were actually true, that the layoff was an economic mistake and recall Gamble and perhaps the others. As it has refused to do so, in the face of the problems brought about by the depleted staff, I find the position taken by Respondent to be evidence of unlawful motivation.

The record indicates that Respondent granted raises in July and October and payments under the profit-sharing plan, at various times. The October raise and the profit-sharing payments were annual and not precedential. The July 20-cent-per-hour raise that was granted within 2 weeks of the layoff was given, Kirpsak testified, because "we were going to ask particular individuals to assume more responsibility for the maintenance and operation of their equipment." As no one was requested to assume any new responsibilities and no such responsibilities in fact were assumed, and because this raise was granted to all skilled positions across the board, including to the remaining maintenance department employees, it clearly had nothing to do with the assumption of additional responsibilities by "particular individuals." Rather, following hard on the heels of the layoffs, it may have served the purpose of generally demonstrating the gratitude of Respondent for the loyalty of the majority of its employees who voted against the Union while making an obvious example of Gamble, the most outspoken union activist and the two other prounion employees laid off along with him. At the very least, I find that the granting of the raises and profit-sharing payments demonstrate, as the General Counsel argues, that Respondent was not in such dire financial condition that the layoffs were an economic necessity.

The above subsection on subcontracting contains evidence that the total amount of subcontracting, as measured in dollars, decreased following the layoff of the three prounion maintenance employees. This fact is apparently due to a decrease in the subcontracting of the nearly completed project work. It appears, however, that there was an increase in the amount of subcontracted work that had previously been done by the maintenance employees who were laid off in July. This work is regular maintenance work always performed by Respondent's own employees in connection with production, as opposed to project work assigned to them in connection with plant expansion, and already discussed supra.

The allegation in the complaint that Respondent subcontracted maintenance work previously done by the maintenance employees laid off in July 1994 is supported by the testimonial evidence offered by Respondent's employees and by Kirpsak's own testimonial admissions.

I find, therefore, that the subcontracting was undertaken by Respondent in conjunction with the layoffs in an effort to avoid employing and/or recalling its maintenance employees because they engaged in union activities. Consequently, I find further that the layoffs of Gamble, Hager, and Speerhas on July 15, 1994, and the subsequent subcontracting of the work previously performed by them was in violation of Section 8(a)(1) and (3) of the Act.

Having found that the General Counsel has presented a prima facie case that Respondent violated Section 8(a)(1) and (3) by laying off Gamble, Hager, and Speerhas because they engaged in union activity and also laid off Hager and Speerhas in order to be able to lay off Gamble in compliance with existing seniority rules in violation of Section 8(a)(1) and (3), I find further that Respondent has failed to meet its burden under *Wright Line*<sup>21</sup> of demonstrating that the same action would have taken place in the absence of the protected conduct. The decrease in machine efficiency suffered as a direct result of the discriminatory layoffs demonstrably precludes the availability to Respondent of a *Wright Line* defense.

#### VI. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act and that it is responsible for remedying the violations, I shall recommend that it be ordered to cease and desist therefrom and to take certain appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as I have found that employees Gamble, Hager, and Speerhas were discriminatorily laid off, I shall recommend that Respondent be required to offer them full and immediate reinstatement to their former positions, without loss of seniority or other rights and privileges, discharging if necessary any replacements, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them by payment to them of a sum of money equal to the amounts that they normally would have earned from the date of their layoffs to the dates on which bona fide offers of reinstatement are made, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I shall also recommend that Respondent be required to post an appropriate notice.

<sup>21</sup> *Wright Line, Inc.*, 251 NLRB 1083 (1980).

## CONCLUSIONS OF LAW

1. Respondent Nestle is the successor to Respondent Alpo and is responsible for the remedying of all unfair labor practices found here.

2. Respondents Alpo and Nestle are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Oil, Chemical and Atomic Workers International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. By laying off David Gamble, Earl Franklin Speerhas, and Mark Hager and failing and refusing to recall them to their positions in the maintenance department because of their union activity, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By subcontracting work previously performed by David Gamble, Earl Franklin Speerhas, and Mark Hager because of their union activity, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>22</sup>

## ORDER

The Respondent, Alpo Pet Foods, Inc. and Friskies Pet Care, a Division of the Nestle Food Company, Weirton, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from discouraging membership in, activities on behalf of, or sympathies toward Oil, Chemical and Atomic Workers International Union, AFL-CIO or any other labor organization by

(a) Laying off employees and failing and refusing to recall them because of their union activity.

(b) Subcontracting work previously performed by employees who have been laid off because of their union activity.

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

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

(a) Offer to David Gamble, Earl Franklin Speerhas, and Mark Hager immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, discharging if necessary, any replacements,

<sup>22</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.

and make them whole for any lost earnings resulting from the discrimination against them by payment to them of a sum determined in accordance with the formula set forth in the remedy section of this decision.

(b) 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 analyze the amount of backpay due under the terms of this Order.

(c) Post at its plant in Weirton, West Virginia, copies of the attached notice marked "Appendix."<sup>23</sup> Copies of the notice on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

<sup>23</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.

WE WILL NOT lay off employees because of their union activity.

WE WILL NOT subcontract work previously performed by employees who have been laid off because of their union activity.

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 offer David Gamble, Earl Franklin Speerhas, and Mark Hager immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, discharging, if necessary, any replacement, and make them whole for any lost earnings resulting from the discrimination against them.

ALPO PET FOODS, INC. AND/OR FRISKIES PET CARE, A DIVISION OF THE NESTLE FOOD COMPANY