Bowling Transportation, Inc. ***and*** **Richard Ashby.**
Case 25–CA–26896

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On September 22, 2000, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions,[1] a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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,[2] and conclusions as modified[3] and to adopt the recommended Order as modified.[4]

As explained below, the judge found that the Respondent violated Section 8(a)(1) by telling employees Richard Ashby and Kenneth Hanks they were being disciplined for protected concerted activity and, in Ashby's case, for suspected union activity. For the reasons stated by the judge, we agree. The judge further found that the Respondent violated Section 8(a)(1) and (3) by discharging Ashby and Hanks for protected concerted activity and for suspected union activity. For the reasons stated below, we agree.

The judge also found that the Respondent violated Section 8(a)(1) and (3) by threatening employee Jeffrey Horton with reprisals for his protected concerted activity and suspected union activity and by discharging him for both activities. We agree. As set forth below, however, we find it necessary to correct two of the judge's findings to conform to the evidence.

I. RICHARD ASHBY AND KENNETH HANKS

The Respondent transports steel from steel mills, including those of AK Steel, to major automotive producers. The Respondent also performs intraplant steel hauling at AK Steel. In 1999,[5] the Respondent employed Kenneth Hanks as a "supertruck" driver and Richard Ashby as a "supertruck" driver and "tow motor" operator. Both Ashby and Hanks performed their work for the Respondent on AK's property.[6]

As explained more fully in the judge's decision, AK had a safety bonus program under which its contractors, including the Respondent, could earn up to $1 for each injury-free hour worked by their employees. The Respondent decided to share 50 cents per hour of this bonus with its employees. Ashby thought the employees should receive the full $1 per hour, and he discussed his concern with other employees, including Hanks. About December 9, Ashby and Hanks went to the office of Brian Rydberg, AK's transportation and materials manager. Ashby explained to Rydberg his concern that the Respondent shared only half the bonus with its employees and kept the remainder to pay for safety equipment and the Christmas party. Hanks was present throughout this discussion. Rydberg reported the discussion to L.J. Martin, the Respondent's terminal manager.

On December 19, Martin and an AK security guard escorted Ashby off AK's premises. Martin told Ashby he was being removed from the property because they believed he was trying to get a union started because of his discussion with Rydberg. Martin told Ashby that AK had barred Ashby from its property.

Also on December 19, Martin escorted Hanks from AK's premises. Martin told Hanks that AK wanted him removed from the property because he had been present with Ashby for the discussion with Rydberg about the safety bonus.

Several days later, the Respondent terminated Ashby and Hanks. Each employee's termination notice described the reason for termination as "not able to function on AK Steel property."

The judge found that the Respondent violated Section 8(a)(1) by telling Ashby and Hanks they were being removed from AK property because of their protected concerted activity (i.e., their discussion with Rydberg about the safety bonus) and, in Ashby's case, because of suspected union activity. We agree.

The judge further found that the Respondent violated Section 8(a)(1) and (3) by terminating Ashby and Hanks

[1] No exceptions were filed to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by creating the impression that employees' union and protected activities were under surveillance and by promulgating and posting a rule forbidding employees from discussing their wages.

[2] 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.

[3] We shall modify Conclusion of Law 5 to correct Jeffrey Horton's name and to conform to the violations found.

[4] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[5] All dates are in 1999 unless otherwise specified.

[6] As discussed below, the General Counsel did not allege that Bowling and AK were joint employers, and AK was not charged with any unfair labor practices.

because they had engaged in protected concerted activity and because the Respondent believed they had engaged in union activity. Applying *Wright Line*,[7] the judge concluded that protected concerted activity and suspected union activity were motivating factors in the terminations. As noted above, Martin told both Ashby and Hanks that it was removing them from the property at AK's request because of their discussion with Rydberg, which we agree was protected concerted activity. Both Ashby and Hanks were later terminated for the same reason. Thus, we agree with the judge that protected concerted activity was a motivating factor in Ashby's and Hanks' discharges.

We also agree that suspected union activity was a motivating factor in both discharges. Martin told Ashby that the Respondent believed Asbhy was trying to start a union because of his discussion with Rydberg.[8] Although Martin did not expressly mention union activity to Hanks, both Ashby's and Hanks' terminations stemmed from the discussion with Rydberg about the safety bonus and were inextricably intertwined. It is clear that the discussion with Rydberg was the basis for the belief that Ashby was engaged in union activity. Therefore, there is ample evidence to support the finding that the Respondent believed Hanks, as well as Ashby, was engaged in union activity and that this belief was a motivating factor in both discharges.[9]

The judge then addressed whether the Respondent had met its burden under *Wright Line* to prove it would have discharged Ashby and Hanks even in the absence of their protected activity. The Respondent asserted several reasons for discharging Asbhy and Hanks, claiming that Hanks violated a work rule against leaving a loaded truck unattended, Ashby interrupted production, and both Ashby and Hanks "walked off their jobs" and entered Rydberg's office without permission. We reject these defenses for the reasons stated by the judge.

The Respondent also argued that it would have terminated Ashby and Hanks regardless of their protected concerted activity because AK had barred them from the premises and the Respondent could not employ them productively elsewhere. The judge rejected this argument, finding that the Respondent knew AK barred Ashby and Hanks from the premises because of their discussion with Rydberg. Relying on *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), the judge found that the Respondent was required, but failed, to take all measures within its power to resist the unlawful termination of Ashby and Hanks. *Capitol EMI*, however, involved the circumstances under which two joint employers will be found to have violated Section 8(a)(1) and (3) when only one employer took the unlawful action in question. See 311 NLRB at 997. Here, as the judge acknowledged, the General Counsel did not allege, and the judge did not find, that the Respondent and AK Steel were joint employers. Therefore, we disagree with the judge's reliance on *Capitol EMI*.

Nevertheless, we agree that the Respondent failed to prove an affirmative defense under *Wright Line*. The Respondent argues that it would have terminated Ashby and Hanks regardless of their protected concerted activity because AK barred them from its premises and the Respondent could not productively employ them elsewhere. The Respondent knew, however, that Ashby's and Hanks' discussion with Rydberg about the safety bonus was the reason AK barred them from its premises. Although AK was not charged with any unfair labor practices, its barring of Ashby and Hanks from the property because of their protected concerted activity was for an unlawful reason.[10] Thus, the Respondent relies on the

[7] Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of protected activity. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB at 1089. The employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995), enfd. 86 F.3d 1146 (1st Cir. 1996).

[8] The Respondent argues that there is no evidence that the Respondent (as opposed to AK) thought Ashby was trying to start a union. Ashby, however, testified that Martin said, "*[W]e* believe that you are trying to get a union started and *we* need to do an investigation of it." (Emphasis added.) The judge credited Ashby's testimony regarding his conversation with Martin and specifically noted that he was impressed with Ashby's demeanor as a witness.

[9] In his *Wright Line* analysis, the judge stated that Martin "told Ashby and Hanks that they were terminated" because they had spoken with Rydberg about the safety bonus and, in Ashby's case, because he was suspected of union activity. The evidence (and the judge's factual finding) shows that Martin told Ashby and Hanks that they were being *removed* from AK's property for these reasons. Ashby and Hanks were not officially terminated until several days after they were removed from the property. Thus, the evidence does not show that Martin expressly told Ashby and Hanks that the reason for their *termination* (as distinguished from the reason for their initial removal from the premises) was the discussion with Rydberg or the suspected union activity. The judge found, however, that Ashby and Hanks were terminated for the same reasons they were initially removed from the premises, and as discussed above, the evidence supports this finding. Thus, the judge's conclusion that the discussion with Rydberg and suspected union activity were motivating factors in the terminations is supported by the evidence.

[10] Cf. *Tracer Protection Services,* 328 NLRB 734 (1999).

action of another employer taken for an unlawful reason as its *Wright Line* defense.[11] This it cannot do.

An affirmative defense under *Wright Line* must be based on a lawful, legitimate reason for the challenged employment decision.[12] The Respondent's burden, therefore, is to prove that it would have terminated Ashby and Hanks for a lawful, legitimate reason even in the absence of their protected conduct. By definition, the Respondent's reliance on AK's action, which was based on an unlawful reason, cannot satisfy this requirement. Accordingly, without relying on *Capitol EMI*, we agree that the Respondent discharged Ashby and Hanks in violation of Section 8(a)(1) and (3).[13]

II. JEFFREY HORTON

Jeffrey Horton worked for the Respondent as a truck driver. As explained more fully in the judge's decision, about December 18, Horton prepared a list of work rules he found troubling. He discussed the list with other employees and told them he intended to present the list to Bill Bowling, the Respondent's President and CEO. Horton did present the list to Bowling and discussed it with him. The next day, Horton was suspended.[14] While suspended, Horton called Bowling at home. Bowling told Horton that it sounded like several employees were going to lose their jobs. Bowling also said that it sounded like the employees were trying to form a union and that Horton, because he had presented the list of work rules to Bowling, was the leader. Bowling said there would not be a union because Bowling was the union. On December 23, Horton was discharged. On his termination notice, the boxes marked "failure to follow instructions" and "other" were checked as reasons for termination, and a handwritten remark stated "employee priorities to [sic] inconsistent with company policy."

We agree with the judge that Horton's discussion of the list of work rules was protected concerted activity and that the Respondent violated Section 8(a)(1) by threatening Horton with reprisals for his protected activity and for what the Respondent believed to be union activity. We also agree with the judge that the Respondent violated Section 8(a)(1) and (3) by discharging Horton for the same reasons. In doing so, we find it necessary to correct two of his findings to conform to the evidence.

In concluding that the Respondent violated Section 8(a)(1) by threatening Horton with reprisals, the judge stated: "The General Counsel next alleges that on December 23 Respondent threatened its employees with discharge because of their union activity. I have concluded above that on that date Bowling told Horton that it sounded like the employees were trying to form a union and since Horton was the one who brought the list to him, Horton was the leader." The factual findings referenced by the judge in this statement do not include a finding as to the specific date this statement was made, but instead place it sometime between Horton's December 19 suspension and his December 23 termination. This is consistent with the evidence and does not affect the validity of the judge's conclusion that Bowling's statement violated Section 8(a)(1).

In addition, in concluding that the Respondent failed to prove that it would have terminated Horton even in the absence of his protected activity, the judge stated that there was no factual evidence supporting the Respondent's assertion that Horton would have been discharged in any event because he was unwilling to abide by the AK rules he found troubling. Bill Bowling did testify that Horton called him on December 23 from Milwaukee, Wisconsin, and that during this conversation Horton indicated he would not "adhere to" the AK rules. However, Bowling's own testimony earlier in the hearing[15]

[11] Although Martin talked to Rydberg to try to get Ashby and Hanks allowed back on AK's property, the record contains no evidence that Martin or any other representative of the Respondent informed AK that its insistence on removing Ashby and Hanks from the premises because of their protected concerted activity was unlawful.

[12] See, e.g., *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 29 fn. 4 (D.C. Cir. 1998) (*Wright Line* gives an employer the opportunity to prove that "despite any unlawful motive, the same action would have occurred pursuant to some additional, lawful motive"); *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1314 (7th Cir. 1998) (employer can "avoid a finding of an unfair labor practice if it can show that it would have taken the action regardless; that is, for legitimate reasons"); *Oakes Machine Corp.*, 288 NLRB 456, 458 (1988) (where both lawful and unlawful grounds motivated respondent, respondent could not prevail under *Wright Line* without showing that the lawful reason alone would have prompted its actions), enf. granted in part, denied in part on other grounds 897 F.2d 84 (2d Cir. 1990).

[13] We have adopted the judge's recommended Order requiring, in part, that the Respondent reinstate Ashby and Hanks. The judge found, at least at the time of his decision, that the Respondent could not employ Ashby and Hanks productively if they were barred from AK's property. The General Counsel did not except to this finding. The judge, citing *Flav-O-Rich, Inc.*, 309 NLRB 262 (1992), stated that if AK continues to resist reinstatement of Ashby and Hanks for unlawful reasons, that matter will have to be addressed in another proceeding. We do not agree that *Flav-O-Rich* stands for that proposition. Our Order in this case, however, requires the Respondent to offer Ashby and Hanks reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions. Once the Respondent has taken steps to comply with that Order, any issues as to the adequacy of the actions it has taken are properly left to the compliance stage of this proceeding.

[14] Horton's suspension notice listed the reason for his suspension as failure to follow instructions by "grouping" with other employees after being told not to do so. The General Counsel did not allege that Horton's suspension was unlawful.

[15] Both the Respondent and the General Counsel called Bowling as a witness.

was that he did not recall why Horton was terminated. When shown a copy of Horton's termination notice stating "employee priorities to [sic] inconsistent with company policy," Bowling testified that he did not remember what that statement meant. Bowling further testified that when Martin called him to discuss discharging Horton, Bowling merely told Martin to handle it as he saw fit. Martin testified that he terminated Horton on Bowling's instructions, and that Bowling did not give a specific reason for the termination but stated that Horton had presented a list of things he did not like about the Company. Martin did not corroborate Bowling's testimony that Horton expressed any unwillingness to follow the rules unless and until they were changed. Thus, the evidence does not support the Respondent's assertion that Horton's alleged unwillingness to follow rules was a reason for his discharge. We therefore agree that the Respondent failed to meet its burden to prove it would have discharged Horton even in the absence of his protected conduct. Accordingly, we affirm the judge's conclusion that the Respondent discharged Horton in violation of Section 8(a)(1) and (3).[16]

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 5 of the judge's Conclusions of Law:

"5. By discharging Jeffrey Horton because he engaged in protected concerted activity and because the Respondent believed he had engaged in union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bowling Transportation, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(d):

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Rafael Williams, Esq., for the General Counsel.
Konrad Kuczak, Esq., of Dayton, Ohio, for Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Owensboro, Kentucky, on July 31 and August 1, 2000. The charge and amended charge were filed January 12 and February 16, 2000, respectively,[1] and the complaint was issued April 13, 2000. The complaint alleges that Bowling Transportation, Inc. (Respondent) violated Section 8(a)(1) of the Act by posting and promulgating a rule forbidding employees from discussing their wages with each other, creating the impression among its employees that their union and protected concerted activities were under surveillance, and threatening employees with discharge because of their union and protected concerted activities. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) by discharging employees Jeffery Horton, Richard Ashby, and Kenny Hanks because they engaged in protected concerted activities and because Respondent believed that they had engaged in union activity. Respondent filed a timely answer that admitted the allegations of the complaint concerning the filing and service of the charge, commerce and jurisdiction, and agency status. Respondent denied the substantive allegations of the complaint.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in heavy hauling and material transportation with an office and place of business in

[16] The Respondent also argues that reinstatement and backpay are improper because Ashby's testimony regarding Martin's antiunion statements and Horton's testimony regarding Bowling's antiunion statements were uncorroborated. The Respondent contends that under Sixth Circuit law, backpay cannot be awarded based on the uncorroborated testimony of interested parties.

The Respondent overstates Sixth Circuit precedent. The Sixth Circuit has stated that it generally will not find substantial evidence supporting an unfair labor practice based solely on uncorroborated testimony of an interested party whose testimony is directly contradicted by a disinterested witness. See, e.g., *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 662 (6th Cir. 1983). Bowling is the Respondent's CEO and President and therefore is not disinterested. Although it might be argued that Martin, who is no longer employed by the Respondent, may be disinterested, Martin did not expressly confirm or deny making the statement about which Ashby testified. In addition, Ashby's written statement, prepared at Martin's request and submitted to Martin within a few days after Ashby was removed from AK's property, states that "at no time was me or [Hanks] thinking about let alone trying to form a union." This statement, which appears to be a reply to an assertion of union activity, supports Ashby's testimony that Martin cited union activity as the reason for removing Ashby from AK's property.

In any event, the Respondent's exception relates only to testimony regarding the Respondent's statements about union activity. The judge found separate violations of Sec. 8(a)(1) based on the Respondent's discharge of Ashby, Hanks, and Horton for protected concerted activity.

[1] All dates are in 1999 unless otherwise indicated.

Owensboro, Kentucky. During 1999, Respondent purchased and received at its Owensboro, Kentucky facility goods valued in excess of $50,000 directly from points located outside the Commonwealth of Kentucky. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As indicated, Respondent is engaged in the business of heavy hauling and material transportation. Generally, Respondent transports steel coils from major steel mills to the big three automotive producers. It also provides intraplant transportation services. Since about October 1988, Respondent has provided such services to A.K. Steel at AK's facility in Rockport, Indiana. There Respondent provides equipment and employees to perform intraplant handling and movement of steel coils using ultra heavy duty tractor-trailers called supertrucks. Depending on the production schedule, Respondent's employees at this facility had a significant amount of idle time. The AK facility has several check shacks that have a computer and are used to check vehicles in and out of the facility. AK also has a receiving office; about six or seven AK employees worked there.

Bill J. Bowling is Respondent's president and CEO. Don Bowling, Bill's son, is vice president. Lawrence J. Martin served as Respondent's terminal manager at the Owensboro facility until June 2000. Paul Brewer serves as Respondent's safety and maintenance supervisor. These persons are admitted supervisors and agents of Respondent.

B. The Terminations of Hanks and Ashby

Kenneth Hanks worked for Respondent at the AK facility from early July until his suspension on December 19; he worked as super truckdriver. Richard Ashby worked for Respondent as a super truckdriver/tow motor operator from early August until his suspension on December 19.

At some point AK implemented a safety program for its contractors, including Respondent, in which the contractors could earn up to $1 for each injury-free hour worked by their employees. AK strongly encouraged that the contractors share this bonus with their employees. Respondent determined to pass on 50 cents per hour of the safety bonus to its employees at the AK facility.

Ashby felt that the employees should be receiving the full $1 per hour safety bonus. He spoke to other employees at the AK facility, including Hanks, about the safety bonus and these employees shared Ashby's concern. Ashby also voiced his concerns about the safety bonus to Paul Brewer, Respondent's safety and maintenance supervisor.[2]

On December 9, during some "down time" when there was no work to perform, Ashby decided to bring the matter of the safety bonus to the attention of Brian K. Rydberg. Rydberg worked for AK at the Rockport, Kentucky facility as manager of transportation and materials until December 1999. He had an office in AK's receiving office. Ashby told Hanks that he was going to Rydberg's office to give him "some hell" and Hanks decided to join Ashby. They entered the receiving office and encountered Rydberg in the hallway. Ashby asked if they could talk to Rydberg for a minute, and Rydberg replied that they could, and he invited them in his office. Ashby said that he wanted to ask some questions about the safety bonus. Rydberg said that he really did not know much about the program but he would answer what he could. Ashby then explained his concern that employees were only getting 50 cents per hour and the remainder of the bonus was retained by Respondent to pay for things such as safety shoes, hard hats, safety glasses, and the Christmas party. Rydberg said that this was not his concern and suggested that they talk to Glen Easterling, another AK employee, about the matter. The discussion in Rydberg's office lasted about 10 to 15 minutes.[3]

Rydberg contacted Martin and told him that Ashby and Hanks had been in AK's receiving office and had raised the matter of the safety bonus. Rydberg explained that AK should not be in a position where they were being contacted about these matters. Rydberg instructed Martin to have them removed from the premises.[4]

In response to this incident on December 10, Respondent issued a memorandum to employees stating:

> Effectively immediately, there shall be no contact between . . . Bowling Over-the-road/Highway personnel and AK Steel shipping department, unless you have been specifically told to stop in by Bowling Transportation management, or have been asked to come in by AK Steel Supervisory personnel.
>
> . . .
>
> Deviation from this directive could result in disciplinary action or termination.

[2] Indeed, Respondent in its brief at p. 3 concedes "Mr. Ashby and Mr. Hanks had freely discussed their disagreement with the amount of the safety bonus among themselves, other employees and Mr. Paul Brewer, a member of Bowling management."

[3] These facts are based on a composite of the credible testimony of Ashby and Hanks. In deciding to credit that testimony, I have considered Rydberg's testimony. Rydberg acknowledged that on December 9 Hanks and Ashby approached him at his office in AK's receiving office. He denied that he invited them into his office and claimed that they were not welcome there. He testified that he told Hanks and Ashby that if they had any questions concerning the safety program that they should raise it with Glen Easterling and Bowling. Rydberg testified that Hanks later approached him and said that he had not been involved with Ashby's comments; that he had simply followed along. Hanks denied that this subsequent conversation took place. Rydberg also claimed that there were at least two other occasions when Ashby and Hanks visited him at his office on this matter. Rydberg claimed that he informed Don Bowling and Martin of these subsequent meetings. However, Respondent offered no evidence to corroborate Rydberg's testimony that Hanks and Ashby approached him in his office on the safety bonus matter more than on the single occasion described above. None of the documents describing the reasons for discharge mention anything more than this single occasion. Moreover, my observation of Rydberg's demeanor as a witness left me with the sense that he was more eager to build a case to support the discharge of the employees than merely accurately recount the facts. For these reasons I do not credit Rydberg's testimony.

[4] These facts are based on the credible testimony of Martin.

This was the first that the employees were notified of this policy.[5]

On December 19 Martin and a security guard escorted Ashby from AK's facility. Martin told Ashby that he had to escort him off the property because they believed that he was trying to get a union started because he had talked to Rydberg. Martin said that AK barred Ashby from its property. Ashby said that he was not trying to start a union and that he never even talked to anyone about a union. Martin said that they would have to investigate the matter. Ashby asked if he was terminated and Martin replied no, not at that time. Martin told Ashby to get in contact with him in 2 or 3 days and he would try and resolve it. Martin suggested that Ashby write a letter explaining why he was talking to Rydberg because that would provide Martin with more leverage to get Ashby reinstated.[6]

Ashby prepared such a letter and addressed it to Martin; it read:

> Approximately one week ago I went to Byron Rydberg's office and Kenny Hanks followed me. Once in Byron's office I asked him if he knew anything about the safety bonus. He said he did not. I went on to tell him that I heard that we were getting one dollar an hour and the Bowling was taking fifty cents of it for boots, hard hats, and glasses. I then told him I was informed that our boots were to last one year and showed him the soles of my boots and told him I had only been working for Bowling for approximately four and a half months. He then informed me that he knew nothing about any of it. He then said that these problems were between Bowling and me, and that he or AK Steel had anything [sic] to do with it. At that time me and Kenny left Byron's office.
>
> Me and Kenny were in Byron's office for approximately five to ten minutes. If I caused any problems I apologize but I was trying to get an answer, but at no time was me or Kenny thinking about let alone trying to form a union. [spelling corrections made].

On December 27, Martin informed Ashby that in the best interests of the Company he was terminated. Ashby's termination notice indicated that he was terminated because he was "not able to function on AK Steel property." Other records show that the reason he was terminated was because he was not "welcomed" on the site by AK.

On December 19, Martin also escorted Hanks from the AK facility. Martin told Hanks that this was due to the fact that he was present with Ashby when Ashby spoke to Rydberg about the safety bonus. Martin also told Hanks to prepare a statement of exactly what had occurred during the meeting with Rydberg. Martin said that he would use the statement to try and persuade AK to permit Hanks to come back on the property. Hanks' suspension notice indicated that he was suspended pending termination and read "barred by AK- escorted off site."

Like Ashby, Hanks prepared a letter for Martin. Hanks' letter read:

> On or around the 8th or 9th of December I took a load to door 722. When I got there Richard (Ashby) was walking towards Brian (Rydberg)'s office. I asked what he was doing. Richard said he was going to give Brian some hell. Not knowing what he was going to ask, I went to the office with him. Richard asked Brian if he had a moment. Brian said yes, come on in. Richard and I went in and sat down. Richard asked who was in charge of the safety program. Brian said Glenn Easterling and then asked why? Richard told him about our safety bonus.

A few days later Martin called Hanks and told him that AK did not want him back on the site. Hank's termination notice indicated that the reason he was terminated was "not able to function on AK Steel property."

It had been AK's policy to occasionally bar an employee of a contractor from the site for up to 3 days as a penalty for safety violations. After Hanks and Ashby were suspended, but before they were terminated, Martin went to Rydberg's office and asked if they could be only temporarily barred. Rydberg replied that they were permanently barred from the site. After Martin received the letter from Ashby he again approached Rydberg to see if things had "cooled down" and asked if there was something they could do to work this out. Rydberg replied that if Hanks and Ashby returned to the site Respondent would be removed from the site the next day. During the time that Martin was employed at the site, no other employee had either been permanently barred from the site.[7]

Respondent did not offer Hanks and Ashby positions at any of its other facilities. However, the evidence shows that they could not be employed elsewhere without being required to visit an AK facility.

C. Horton's Termination

Jeffrey Horton worked for Respondent as a truckdriver from July 1998, until his termination on December 23, 1999. Horton was dissatisfied with some of Respondent's work rules. He spoke to other employees at the AK facility about his concerns. On December 18 Horton prepared a list of the rules that troubled him and other employees.

The list read:

> Things I can *not* do at AK Steel
>
> Don't talk to AK management.
> Don't talk to anyone about pay, mine or otherwise.
> Don't sit in plane [sic] sight if I have nothing to do.
> Don't sit at the drop lot if I have nothing to do.
> Don't go in the drop lot office when I have nothing to do.
> Don't drive around the plant when I have nothing to do.
> Don't go into the receiving trailer when I have nothing to do.

[5] This is based on the credible testimony of Ashby and Hanks.

[6] These facts are based on Ashby's testimony. I note that Martin was not recalled to specifically deny that he made the remarks concerning the Union. I was also impressed with Ashby's demeanor as a witness.

[7] These facts too are based on Martin's credible testimony.

Don't go to the scale house parking lot when I have nothing to do.

Don't leave the truck unattended when I have nothing to do.

Don't be more than 50 (feet) away from the truck without the key in my pocket.

Don't use the company radio for anything except purely business. No personal comments on the radio.

Don't move the truck with the tarp open, foreward [sic] or back.

No books, magazines or any other reading material in the trucks.

No electronic devices in the truck that are not supplied by Bowling.

Don't park in a bunch when we have nothing to do. Separate.

Horton showed the list to other employees and told them that he intended to present it to Bowling that evening at the company Christmas party. The employees agreed that Horton should do so. Before the Christmas party several employees approached Bowling and said that Horton wanted to know if he would be at the party, that if Bowling would be at the party then Horton would come also. Bowling said that he would be at the party.

That evening, at the Christmas party, Horton presented the list to Bowling. They went into an office to discuss the matter. Horton said that the list was of things that the employees were not supposed do while at AK. He and Bowling discussed the rules and Bowling asked for a copy of the list. Horton gave no indication that other employees assisted him in preparing the list.[8] Bowling admitted that Horton approached him at the Christmas party with a "laundry list" of rules that he did not like at AK. Bowling testified that he told Horton that those were AK's rules and that the employees had to abide by them if they were going to work at AK's facility. The day after the Christmas party Bowling showed the list to Martin. Rydberg acknowledged that on the day after the Christmas party Bowling told him that Horton had presented a list of grievances concerning AK's work rules.

On December 19, Martin advised Horton that he was suspended for 5 days. Records indicate that on December 20 Horton received a suspension for failure to follow instructions in that he was "grouping" with other drivers inside that AK check shack after being told not to congregate and not to leave his truck.[9]

Horton called Bowling at his home and asked if Bowling was aware of the fact that he had been suspended. Bowling replied that he was, and that it sounded like several employees were going to lose their jobs. Bowling said that it sounded like the employees were trying to form a union and since Horton was the one who brought the list to him, Horton was the leader. Horton attempted to assure Bowling that they were not trying to form a union. Bowling replied that there was not going to be a union because he was the union. After unsuccessfully attempting again to assure Bowling that the employees were not trying to form a union, Horton told Bowling that he was sorry that Bowling felt that way and the conversation ended.[10] Bowling conceded that Horton called him at home. Bowling testified that he told Horton that he wanted a happy employee and that an unhappy employee does not do a good job and that if Horton were so unhappy he would get Horton out of the AK job.

A few days later Bowling advised Martin to terminate Horton. Bowling did not give a specific reason for the termination; instead, Bowling told Martin that Horton was unhappy and had presented a list of things that he did not like about company policy.[11]

On December 23 Martin informed Horton that he was terminated. Horton's termination notice indicated that he had failed to follow instructions and read "employee priorities to [sic] inconsistent with company policy." Other records indicate that Horton was terminated for his disagreement with company policies.

III. ANALYSIS

A. The 8(a)(1) Allegations

The General Counsel alleges that in early December, Respondent, by an unknown agent, posted and promulgated a rule that forbid employees from discussing their wages. In support of this allegation the General Counsel presented testimony from Horton. He testified that in early December Paul Brewer, Respondent's safety officer/dispatcher and an admitted agent, distributed a memorandum to employees at a shift meeting. Horton testified that about 10 employees were present at this meeting, including Hanks. The employees allegedly signed this memorandum and returned it to Brewer. The memorandum supposedly stated that it was against Respondent's policy to discuss wages with fellow employees; however, no memorandum was produced at the trial. Hanks testified that he was present at a meeting where Brewer told employees that they were not to talk to anyone about their wages. Hanks testified, however, that this meeting took place in early November. He testified that Ashby was there, but Ashby did not corroborate this testimony. Hanks did not confirm Horton's testimony that this rule was issued in writing. Brewer was not called to testify by Respondent. Bowling, however, denied that Respondent had a rule that prohibited employees from discussing their wages. He explained that such a rule made no sense because the wage rates of employees were common knowledge.

In his brief, the General Counsel appears to concede that he has failed to show that Respondent issued any unlawful *written* rule. Rather, in his brief he argues that an *oral* rule was promulgated. However, Hanks testimony in this regard was uncorroborated. Under these circumstances, I conclude that the General Counsel had failed to meet his burden of proof by showing, by a preponderance of the evidence, that any unlawful rule was promulgated. I shall dismiss this allegation of the complaint.

[8] These facts are based on Horton's credible testimony.

[9] The General Counsel does not allege that this suspension was unlawful. Horton's suspension was based on an incident that occurred the day before the Christmas party and before Horton began preparing the list.

[10] These facts are based on the credible testimony of Horton. I note that Respondent did not recall Bowling to contradict this testimony.

[11] These facts are based on the credible testimony of Martin.

The General Counsel also alleges that on December 19 Respondent informed employees that they were terminated because they engaged in union and protected concerted activity. I have found above that on that date Martin told Ashby that he was being removed from the property because Respondent believed that he was trying to get a union started because he had talked to Rydberg (about the safety bonus).[12] Telling an employee that he is being disciplined because he engaged in union or protected concerted activity is unlawful. *Atlas Transit Mix Corp.,* 323 NLRB 1144, 1150 (1997). By telling an employee that he was disciplined because he engaged in union activity and in protected concerted activity, Respondent violated Section 8(a)(1).

The General Counsel next alleges that on December 23 Respondent threatened its employees with discharge because of their union activity. I have concluded above that on that date Bowling told Horton that it sounded like the employees were trying to form a union and since Horton was the one who brought the list to him, Horton was the leader. Horton attempted to assure Bowling that they were not trying to form a union. Bowling replied that there was not going to be a union because he was the union. I conclude that Bowling impliedly threatened Horton with reprisals because Respondent suspected that he had engaged in union activity and protected concerted activity.[13] Bowling's remarks were made in the context of Horton's earlier, albeit lawful, suspension. He emphasized the risk Horton was taking by engaging in those activities when he indicated that there would not be a union at Respondent.[14] By threatening an employee with reprisals for having engaged in union and protected concerted activity, Respondent violated Section 8(a)(1).

The General Counsel also alleges that during this same conversation Respondent gave the impression that it was engaging in surveillance of the union and protected concerted activities of its employees. I disagree. In context it was clear that Bowling indicated that his suspicion that Horton and others were engaging in union activity and protected concerted activity came not from surveillance but from Horton's open act of presenting and discussing the list of work rules with Bowling. I shall dismiss this allegation of the complaint.

B. The Terminations

1. Legal standards

The General Counsel alleges that Ashby, Hanks, and Horton were terminated because they engaged in protected concerted activity and because Respondent suspected that they engaged in union activity. In determining whether employees have engaged in concerted activity, I examine *Meyers Industries,* 268 NLRB 493 (1984), remanded sub. nom. *Prill v. NLRB,* 755 F.2d 941 (D.C. Cir. 1985), *Meyers Industries,* 281 NLRB 882 (1986). There, the Board determined that for an employee's activity to be concerted within the meaning of Section 7 of the Act the activity must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself. Once it has been determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the activity, the concerted activity is protected under the Act, and the adverse employment action was motivated by the employee's protected concerted activity.

In addition, the shifting burden analysis set forth in *Wright Line*[15] governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employees for their union activity and also whether it violated Section 8(a)(1) by terminating them for their protected concerted activity. The Board has restated that analysis as follows:

> Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]
>
> [7] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).
>
> [8] See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the Illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")
>
> [9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T&J Trucking Co., 316 NLRB 771 (1995).

This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

2. Terminations of Ashby and Hanks

I first address the issue of whether Hanks and Ashby were terminated for protected concerted activity in violation of Section 8(a)(1). Ashby spoke to Hanks and other employees about the matter of the safety bonus and the employees shared his concerns. Moreover, Ashby and Hanks together went to Rydberg's office and discussed the safety bonus issue. This clearly constitutes concerted activity. Respondent argues that Hanks was not involved in concerted activity because he entered Rydberg's office without knowledge of what Ashby intended to discuss there. This argument misses the point. The evidence shows that Hanks remained with Ashby in Rydberg's office while they discussed the safety bonus; this became con-

[12] I conclude below that the discussion of the safety bonus with Rydberg was concerted activity protected by the Act.

[13] I conclude below that the Horton's discussion of the list of offensive work rules is concerted activity protected by the Act.

[14] The General Counsel does not allege, either in the complaint or in his brief, that this remark constituted an unlawful statement that employees' union activities would be futile.

[15] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

certed activity. Moreover, Respondent would reasonably perceive that Hanks, by accompanying Ashby, was engaged in concerted activity.

Respondent was aware of the concerted nature of the activity because Rydberg reported that Ashby and Hanks had come to him and raised the safety bonus matter. Indeed, Respondent concedes as much. Similar to its earlier contention, Respondent argues that it was unaware of the concerted nature of the activity. It relies on the postsuspension letters written by Ashby and Hanks wherein they stated that Hanks merely followed Ashby in to Rydberg's office. This argument suffers from the additional infirmity that Respondent's knowledge of this fact occurred after the employees were suspended and the employees were subsequently terminated for the same reason that they were suspended—they together talked to Rydberg about the safety bonus.

Martin told Ashby and Hanks that they were terminated, in part, because they had spoken with Rydberg about the safety bonus matter; this statement violated Section 8(a)(1). Indeed, Martin urged these employees to prepare a written explanation concerning their meeting with Rydberg. This evidence shows that the terminations were motivated in substantial part by the employees' protected concerted activity. The timing of the discharges further supports such a conclusion.

Respondent argues: "A bonus is not the appropriate object of 'concerted activity.'" Such an argument is inconsistent with Board law and the clear language of Section 7 of the Act. Respondent cites *New River Industries v. NLRB,* 945 F.2d 1290 (4th Cir. 1991). However, that case is inapposite. There, the concerted protest concerned a free ice cream cone that the employer provided to employees on a single occasion. Here, the concerted activity concerned, from the employees' perspective, 50 cents per hour for as long as the safety bonus program existed.

Respondent next argues: "Attempts to determine from a customer the terms (of) an employer's compensation from that customer are not the appropriate object of a concerted activity." Without deciding whether this argument is legally sound, I note that it is factually unsupported by the credible evidence. The employees were already aware of the $1 per hour safety bonus. Hanks and Ashby did not seek private, confidential information from AK. Instead, they protested the fact that they did not directly receive the full amount of the bonus. I conclude that their activity was protected under Section 7.

In sum, I conclude that the General Counsel has met his initial burden under *Wright Line* of showing that Ashby and Hanks were terminated because they engaged in protected concerted activity.

I now turn to the allegation that Respondent fired Ashby and Hanks because it believed that they had engaged in union activity. Martin told Ashby that he was terminated in part because he was trying to get a union started; I have concluded that this statement violated Section 8(a)(1). This admission from Martin amply supports the conclusion that Ashby's termination was motivated in substantial part because Respondent believed that he had engaged in union activity. The fact that Respondent's belief was mistaken is to no avail. *NLRB v. Link-Belt Co.,* 311 U.S. 584, 589–590 (1941). I further conclude that Hanks' termination was similarly motivated. Both suspensions and discharges stemmed from the same events and were inextricably intertwined. I thus conclude that the General Counsel has again met his initial burden under *Wright Line*.

I now examine whether Respondent has met its burden under *Wright Line* of showing that it would have terminated Ashby and Hanks in any event. Respondent argues that Hanks and Ashby would have been fired for entering Rydberg's office. However, the record does not support such an assertion. In the first place, Respondent has failed to establish that prior to December 9 it had any policy concerning employees entering the receiving office to discuss work related matters. Certainly, there was no written rule to that effect. To the contrary, it was only after the incident that Respondent found it necessary to issue any rule,[16] and even then the rule dealt with "contact" between Respondent's employees and AK. Moreover, the rule itself did not show that employees would be fired; it provided only that a breach of the rule "could result in disciplinary action or termination." In a similar vein, Respondent argues that it was justified in terminating these employees because they conceded that they were going to give Rydberg "hell" and a "hard time." However, the evidence shows that Respondent did not rely on this reason in terminating the employees and failed, in an event, to show that it would have terminated them if it had relied on such a reason.

Respondent also asserts that Hanks was also terminated because he violated a rule against leaving a loaded truck unattended. It will be recalled that in that statement Hanks prepared for Martin after his suspension he made passing reference to taking a load to door 722. At that door a tow motor operator would unload the truck. Respondent now seizes upon that statement to support its argument. However, there is no credible evidence that Respondent then relied on this reason to discharge Hanks. In any event, it has failed to show that it would have terminated Hanks had it relied on it.

Respondent also asserts that Ashby was terminated because he interrupted production. It bases this conclusion on Ashby's written statement to Martin, described above. It argues that because the statement did not indicate that Ashby was on lunch or break, he was therefore interrupting production. This argument falls of its own weight.

The reasons for discharge described in the previous paragraphs were not told to the employees and did not appear in their termination papers. Thus, Respondent shifted its reasons for the terminations. Moreover, in Respondent's prehearing brief it asserted that terminations were "fully justified as they walked off their jobs, leaving a loaded truck standing." Respondent no longer made this argument in its posthearing brief. These shifting reasons for discharge not only to undermine Respondent's case but also serves to strengthen the General Counsel's case.

[16] Respondent, in its brief, argues that Horton conceded that employees knew that they were not to go into the receiving office. Indeed, Horton did concede at much, but this of little use to Respondent's argument since the record is not clear whether Horton's knowledge of this policy came about as a result of the memorandum issued after the December 9 incident or whether such a policy predated that event.

Finally, Respondent argues that it had to fire Hanks and Ashby because AK had barred them from the facility and they could not be productively employed elsewhere.[17] To be sure, AK insisted that Respondent remove the employees from the premises, and I have concluded that Respondent could not productively employ them elsewhere in the business. However, I have also concluded that Respondent knew that AK's insistence was based on the fact that the employees had engaged in concerted activity protect under Section 7. Under these circumstances Respondent's legal obligation was to refuse to acquiesce in AK's request. I recognize that the General Counsel has not charged AK with any violations of the Act and has not alleged that AK is a joint employer with Respondent. But the Board has stated

> [E]ven in the absence of a joint employer relationship, an employer is properly held liable for its own actions that affect an individual's employment status with another employer. Thus, an employer that successfully requests the termination of an employee for discriminatory reasons violates the Act and can be required to make the employee whole for loss of pay, even if it is not the employee's employer. *Flav-O-Rich, Inc.,*[309 NLRB 262 (1992)]. The entity acquiescing in the request would not be guilty of an unfair labor practice, however, it were not aware of the motive behind the request. Id. at 266.

Capitol EMI Music, 311 NLRB 997, 1000 fn. 22. Respondent's efforts to persuade AK to reinstate Hanks and Ashby fell short of its obligation to take all measures within its power to resist the unlawful terminations. Indeed, Respondent added a second unlawful motive of its own when it also terminated the employees because it suspected that they had engaged in union activity.

I conclude that Respondent has failed to show that it would have terminated Ashby and Hanks even if they had not engaged in protected concerted activity or because it believed that they had engaged in union activities. It follows that Respondent violated both Section 8(a)(1) and Section 8(a)(3) by suspending and then terminating Ashby and Hanks.

3. Termination of Horton

I now address the issue of whether Horton was terminated because he engaged in protected concerted activity. Horton spoke to other employees of the concerns he had about work rules. He then prepared a list of those concerns and showed the list to other employees. He also told them that he intended to present the list to Bowling; the employees agreed that he should do so. This presents a clear case of concerted activity.

I also conclude that Respondent was aware of the concerted nature of the activity. First, several employees asked Bowling whether he would be attending the Christmas party because if he was then Horton would attend. When Horton came to the party and presented the list it must have been obvious to Bowling that the other employees knew that Horton intended to do so. More importantly, Bowling later told Horton that because Horton had presented the list to him, Horton was the leader of the effort to form a union. This statement shows that Respondent knew, or at least suspected, that Horton had concertedly prepared and presented the list.[18]

Bowling's remarks, described immediately above, also show that Horton's protected concerted activities were a substantial motivating factor in his discharge. These remarks were unlawful. Also, Martin admitted that Bowling told him that a reason Horton was being fired was because Horton presented the list of work rules complaints to Bowling. The timing of the discharge reinforces this conclusion. I conclude that the General Counsel has met his initial burden under *Wright Line* of showing that Horton's protected concerted activities were a substantial motivating factor in his termination.

I turn to address the issue of whether Horton was discharged because Respondent believed that he had engaged in union activity. I have found that Bowling told Horton that it sounded like the employees were trying to form a union and since Horton was the one who brought the list to him, Horton was the leader. This statement violated Section 8(a)(1). When Horton protested that the employees were not attempting to form a union, Bowling remarked that there was not going to be a union because he was the union. This evidence establishes that Horton's termination was due in substantial part because Respondent suspected that he had engaged in union activity.

I now examine whether Respondent has met its burden under *Wright Line* of showing that it would have terminated Horton in any event. Horton was not told any reason for his termination other than unlawful reasons. The notation on his termination notice that he was terminated because his priorities were inconsistent with company policies is not to the contrary. Respondent argues that Horton was properly discharged because he had been recently suspended for lawful reasons and he had, by protesting the nature of some of the work rules, shown an unwillingness to abide by those rules. This argument lacks both factual and logical support. There is no factual evidence that Horton was unwilling to abide the rules until they were changed and it does not logically follow that because employees seek to change work rules that they will be unwilling to live by the rules until changed. I conclude that Respondent has failed to show that it would have terminated Horton in any event.

Respondent violated Section 8(a)(1) when it terminated Horton in substantial part because he had engaged in protected concerted activities, and it violated Section 8(a)(3) when it terminated him in substantial part because it believed that he had engaged in union activity.

CONCLUSIONS OF LAW

1. By telling employees that they were disciplined because they engaged in union activity and in protected concerted activity, Respondent has engaged in unfair labor practices affecting

[17] Although I raised this issue at trial with the General Counsel he does not address it in his brief.

[18] Respondent argues that it was not aware of the concerted nature of Horton's activity because Horton admitted that at the meeting where he presented the list he did not give any indication that other employees assisted him in the preparation of the list. However, this testimony does not address the issue of whether Respondent otherwise learned of the concerted nature of Horton's activity.

commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By threatening an employee with reprisals for having engaged in union and protected concerted activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By suspending and discharging Ashby and Hanks because they engaged in protected concerted activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By suspending and discharging Ashby and Hanks because Respondent believed that they had engaged in union activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (3) and (1) and Section 2(6) and (7) of the Act.

5. By discharging Ashby Horton because Respondent believed that he had engaged in union activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

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

Having discriminatorily discharged employees, the Respondent must offer them reinstatement[19] and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

Respondent, Bowling Transportation, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they were disciplined because they engaged in union activity and in protected concerted activity.

(b) Threatening employees with reprisals for having engaged in union and protected concerted activity.

(c) Suspending, discharging, or otherwise discriminating against employees because they engage in protected concerted activity.

(d) Suspending, discharging, or otherwise discriminating against employees because Respondent believed that they engaged in union activity.

(e) 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) Within 14 days from the date of this Order, offer Richard Ashby, Kenneth Hanks, and Jeffrey Horton full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Richard Ashby, Kenneth Hanks, and Jeffrey Horton whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Owensboro, Kentucky, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 1999.

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

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

APPENDIX

NOTICE TO EMPLOYEES

[19] If AK continues to resist the reinstatement of Hanks and Ashby for unlawful reasons, that matter will have to be addressed by the General Counsel in another proceeding. *Flav-O-Rich,* supra.

[20] 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.

[21] 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."

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT tell employees that they were disciplined because they engaged in union activity and in protected concerted activity.

WE WILL NOT threaten employees with reprisals for having engaged in union and protected concerted activity.

WE WILL NOT suspend, discharge, or otherwise discriminating against employees because they engaged in protected concerted activity.

WE WILL NOT suspend, discharge, or otherwise discriminating against employees because we believe that they engaged in union activity.

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

WE WILL make Richard Ashby, Kenneth Hanks, and Jeffrey Horton whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Richard Ashby, Kenneth Hanks, and Jeffrey Horton full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Richard Ashby, Kenneth Hanks, and Jeffrey Horton and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

BOWLING TRANSPORTATION, INC.