

Alaska Ship and Drydock, Inc. and Piledrivers, Bridge, Dock Builders, and Divers Local Union 2520, affiliated with United Brotherhood of Carpenters and Joiners of America. Cases 19–CA–27490, 19–CA–27627, and 19–CA–27700

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
SCHAUMBER AND WALSH

On March 14, 2003, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and 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,¹ and conclusions²

¹ There are no exceptions to the judge's recommended dismissal of the allegation that the Respondent discharged David Harvey in violation of Sec. 8(a)(3) and (1) of the Act. 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent's no-distribution policy violated Sec. 8(a)(1) of the Act, we note that the General Counsel did not challenge the lawfulness of the policy that prohibits the posting of unauthorized written materials on the Respondent's premises at any time.

In adopting the judge's finding that the maintenance of the Respondent's wage discussion policy violated Sec. 8(a)(1) of the Act, we find, contrary to the judge, that the Respondent did in fact proffer a business justification for its wage discussion policy. The Respondent asserted that, because the employees are not aware that the hourly wage rates are based on different skill levels, the wage discussion policy is designed to prevent "hurt feelings" that would result should the employees become aware that they are being paid different hourly wage rates. We conclude, however, that the proffered business justification is insufficient to warrant reversal of the judge's finding of a violation.

² In adopting the judge's conclusion that the Respondent's wage discussion policy violated Sec. 8(a)(1) of the Act, Chairman Battista and Member Schaumber note that the wage discussion policy is not simply a confidentiality policy, but expressly bans the discussion of wages. Cf. *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). They also note that, from late 2000 to 2001, the Respondent's work force swelled from no more than 50 to more than 200 employees, and thus a significant number of employees were brought under the provisions in the handbook for the first time during the period covered by the complaint. They further note that, although the employee handbook did not specify a form of discipline for failure to adhere to the wage discussion policy, the Respondent violated Sec. 8(a)(1) when Supervisor Carney told employee Mike Hamilton that he would be in "big trouble" if he talked about wages.

and to adopt the recommended Order as modified³ and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Alaska Ship and Drydock, Inc., Ketchikan, Alaska, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth in full below.

1. Cease and desist from

(a) Maintaining an employee handbook provision that interferes with employee discussion of their pay rates or salaries.

(b) Maintaining an employee handbook provision that requires employees to obtain management authorization to distribute literature on its premises at any time.

Threatening to discharge employees who possess or sign union authorization cards.

(c) Threatening employees for discussing their wages among themselves.

(d) 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) Expunge from its employee handbook those provisions that interfere with employee discussion of their pay rates or salaries and that require employees to obtain management authorization to distribute literature on its premises at any time.

(b) Within 14 days after service by the Region, post at its shipyard and drydock in Ketchikan, Alaska, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 19, 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

³ We have modified the recommended Order and notice to accurately reflect the violations found.

⁴ 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."

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 April 13, 2001.

(c) 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.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an employee handbook provision that interferes with employee discussion of their pay rates or salaries.

WE WILL NOT maintain an employee handbook provision that requires employees to obtain management authorization to distribute literature on its premises at any time.

WE WILL NOT threaten to discharge employees who possess or sign union authorization cards.

WE WILL NOT threaten employees for discussing their wages amongst themselves.

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

WE WILL expunge those provisions from our employee handbook that interferes with employees discussing their pay rates or salaries, and that requires employees to obtain management authorization to distribute literature on our premises at any time.

ALASKA SHIP AND DRYDOCK, INC.

Irene Botero, Esq. (brief by John H. Fawley, Atty.), for the General Counsel.

Bruce Bishoff, Esq., of Bend, Oregon, for the Respondent.

Daniel Boone, Esq., of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. In this consolidated proceeding, the General Counsel alleges that Alaska Ship and Drydock, Inc. (Respondent, Company, or ASD) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act). Piledrivers, Bridge, Dock Builders, and Divers Local Union 2520, affiliated with United Brotherhood of Carpenters and Joiners of America (Charging Party or Local 2520) initiated this proceeding by filing unfair labor practice charges on April 13 Case 19-CA-27490, July 12 Case 19-CA-27627, and August 28, 2001, Case 19-CA-27700.¹ The complaint issued by the Regional Director on September 30, 2002, alleges that ASD violated Section 8(a)(1) of the Act: (1) by maintaining employee handbook rules barring employee discussions about their pay rates and requiring management approval for the distribution of written materials on Respondent's premises; (2) by a supervisor's threats concerning employee solicitation of union authorization cards and employee wage rate discussions. Additionally, the complaint alleges that Respondent violated Section 8(a)(1) and (3) by permanently laying off employee David Harvey. Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged.²

I heard this case at Ketchikan, Alaska, on November 5 and 6, 2002. Having now carefully considered the entire record, the demeanor of the witnesses,³ and the briefs filed by the General Counsel, Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Alaska corporation engaged in the marine and vessel repair business on a nonretail basis, maintains an office and place of business in Ketchikan, Alaska. In the 12-month period preceding the issuance of the complaint, Respondent's inflow of goods and services, either directly or indirectly, exceeded \$50,000. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that it would effectuate the purposes of the Act for the Board to exercise its statutory jurisdiction to resolve this labor dispute.

¹ Most of the relevant events occurred in 2001. Unless shown otherwise, all further dates refer to that year.

² Respondent does not challenge that Regional Director's action in setting aside a prior settlement agreement in this matter.

³ The findings reflect my credibility resolutions based on various factors summarized by Judge Medina in *U.S. v. Foster*, 9 F.R.D. 367, 388-390 (1949). I do not credit testimony inconsistent with my findings. Additional discussion of some credibility issues appears below.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Randy Johnson owns ASD and serves as the corporate president. He also owns three other related enterprises, Tyler Rental, an equipment rental company; Ty-Matt, Inc., a commercial construction firm; and Alaska Personnel Incorporated (API). API provides personnel services for the Johnson-owned firms. This dispute only involves ASD.

ASD employs approximately 35 to 50 employees to perform the routine marine and vessel repair work ordinarily on hand. However, in the period from late 2000 through most of 2001, ASD started work on its contracts to refurbish the *MV Columbia* and the *MV Matanuska*, two large ferries in the Alaska Marine Highway System (AMHS) fleet, and to build a local passenger ferry, the *Oral Freeman*, the smallest of the three projects.⁴ This shipyard work caused ASD's work force to swell to more than 200 employees at times. Respondent preferred to employ workers from the Ketchikan area in order to avoid the higher labor costs associated with out-of-town workers who received per diem and lodging reimbursements.

Throughout the relevant period, Respondent maintained and distributed a handbook to all employees that details various company policies. Its policy concerning pay and pay periods includes the following provision: "An employee's pay rate or salary is confidential and should only be discussed with their immediate supervisor." (GC Exh. 17 p. 4.) The handbook contains no explicit language describing any form of discipline for failing to adhere to the pay confidentiality rule. The handbook also contains certain "Rules of Conduct." Failure to adhere to these rules subjects an employee to discipline up to and including discharge. One part of rule 17 bars the "[u]nauthorized distribution or posting of written material on the premises at any time." (GC Exh. 17 p. 31, No. 17.)

Because the *Columbia* and the *Matanuska* are a part of the State-owned AMHS fleet and because the State and Federal government funded a substantial portion of the *Oral Freeman* project, the Alaska Department of Transportation (ADOT) required ASD to file periodic reports reflecting the wage rates paid various worker classifications used on these projects. ADOT, in turn, provides public access to these wage reports. Of further significance here, the U.S. Coast Guard maintains and enforces rules requiring the testing and certification of skilled workers performing certain tasks on passenger vessels such as these three.

David Harvey, an experienced millwright who is the alleged discriminatee, obtained employment with Ty-Matt in August 2000, following an interview by Lloyd Gossman, API's human resources director.⁵ Gossman entered a "COIW" classification

⁴ Ferries in the AMHS fleet transport passengers and vehicles among various Alaska ports and south to Bellingham, Washington. The *Oral Freeman*, owned by the Ketchikan Gateway Borough, transports passengers and motor vehicles back and forth from the city of Ketchikan, located on the west edge of Revillagigelo Island, and the Ketchikan International Airport located across the Tongass Narrows on the eastern edge of Gravina Island.

⁵ Harvey previously worked for Ty-Matt in the period from 1994 into 1996 as a millwright.

on Ty-Matt's records to signify his skills as a carpenter, an operator, an ironworker, and a welder. While at Ty-Matt, Harvey worked on a veneer plant-remodeling project performed jointly by Ty-Matt and another contractor. In early November, Harvey received a transfer to a steel crew at ASD where he began working on the *Matanuska*.⁶ The steel crew consisted of employees classified as welders, pipefitters, and firewatch personnel. ASD records classified Harvey as a welder, a designation most likely made by Carl Smith, ASD's production manager, with input from his subordinates. As work on the *Matanuska* began to wind down in January, ASD transferred Harvey to the *Columbia* project. During his ASD tenure, Harvey came to be well liked and regarded as a good worker by the ASD management.

Regardless of classification, ASD managers and supervisors frequently assign employees to jobs requiring the use of other skills. Plainly, Harvey performed very little welding while he worked at ASD. By his own account, Harvey's work at ASD consisted mostly of installing insulation, cutting holes for electrical wires, and "tacking" inserts. At the time of his layoff, Harvey was doing installation work in the women's restrooms. Harvey estimated that after his transfer to the *Columbia* in January, he spent about 3 days engaged in welding work of all kinds, including tack-up and actual welding, during his remaining tenure at ASD.⁷

Harvey's lack of the required USCG-recognized welding certification unquestionably explains the overwhelming predominance of his nonwelding work assignments. Harvey acknowledged that he had never before received a formal welding certification on any of the jobs where he worked and that ASD supervisors told him he would have to be certified in order to weld on the ships. In June, Larry Jones, ASD's welding inspector and a temporary supervisor through the relevant period, provided Harvey with an opportunity to become a certified welder but he felt Harvey's test sample turned out so substandard that he did not bother to send it to ASD's independent testing laboratory for certification.⁸ According to Jones, USCG regulations require that certified welders must perform all welding on marine vessels. He claimed that ASD adhered strictly to this requirement during the *Matanuska*, *Columbia*, and *Oral Freeman* projects.

In January 2001, Piledrivers Local 2520 undertook to organize the ASD workers. Mike Harvey, a supervisor, admitted that union talk was commonplace around the shipyard through the spring and summer. Union handbills appeared throughout the shipyard and even on the ships under construction. Harvey became an ardent supporter of union representation and played

⁶ Ty-Matt and ASD regularly interchange employees. The practice is so common that the Johnson-owned companies require employees sign a written acknowledgement of the interchange practice and the practice of coordinating employee benefits to avoid any misunderstanding about benefit duplication.

⁷ The term "tack-up" refers to temporary spot welds holding two or more pieces of steel in place before the permanent weld occurs. Usually a tack-up work involves only rudimentary welding skills.

⁸ As to Harvey's welding test, I credit Jones' testimony over Harvey's. Jones impressed me generally with his straightforward demeanor and I found his to be the more convincing account concerning Harvey's welding test.

an active and open part in the organizing effort. He attended virtually all of the Union's meetings and assisted Jim Strassburg, Local 2520's organizer, to distribute union campaign literature before and after work as employees entered and left the parking lot. On one occasion while attending a union meeting, Harvey stood in a window at the union hall and observed Larry Jones, an ASD welding inspector drive by and look toward him. Harvey and other employees, including Mike Hamilton, solicited employees to sign union cards in and around the employee parking lot. Harvey estimated that he successfully solicited at least four authorization cards. Using reports that Strassburg obtained from ADOT and provided to him, Hamilton spoke to a number of employees in an effort to confirm the ADOT wage reports ASD had filed. In certain instances, Hamilton learned of variances between the reports and the actual wages paid, and presumably sought to make the most of that for organizing purposes. One union supporter recalled that Harvey and about a dozen or so other employees wore union insignia on their hardhats around the shipyard.

The organizing drive generated considerable controversy among the employees and sparked considerable opposition from ASD. Randy Johnson conducted two captive audience meetings with the employees in late March and early April. At the first meeting, Johnson spoke for about 40 minutes to express ASD's desire to remain unorganized, to caution employees against signing union cards lest they forfeit their right to negotiate with the company, and to suggest that the Company's bidding flexibility would be hampered by union representation. Gossman also conducted a meeting with some ASD employees in May or June to address complaints the employees registered about the wage rates of the temporary employees from outside the Ketchikan area. At the start of this meeting, Gossman confronted Harvey with an angry tone by asking if he had a problem with the out-of-state workers. Another welder, Bill Saunders, joined the issue and engaged Gossman in a heated dialogue over the out-of-staters. Toward the end of the meeting, Gossman again repeated Johnson's assertion that signing a union card could result in the loss of the individual's right to negotiate with management.

ASD's campaign against union representation also included a series of bulletin board postings containing messages opposing unionization. One very bold "Notice to Employees" warned employees that they risked forfeiting to union agents, some who might be "total strangers," the right to act on their behalf on all job-related matters. It also argued that signing an authorization card "may mean a pledge to pay dues, fines, initiation fees and to participate in picketing and strikes." This notice concluded by urging employees to refrain from signing an authorization card so that ASD would remain an "open shop."

Todd Chapin worked as a laborer at ASD from December 2000 until May 2001, when he quit his employment there. On the morning of April 12, Chapin went to the toolroom to obtain a tool that he needed. A couple of days before, Chapin unsuccessfully solicited the toolroom custodian, Cheryl Elfstrom, to sign a Local 2520 authorization card. When Chapin entered the toolroom on April 12, Mike Carney, the machinist supervisor who oversaw the toolroom operations, happened to be working behind the counter carrying on a conversation with Elfstrom. A

welder named Gypsy stood behind Chapin filling out a tool requisition form. After making eye contact with Chapin, Carney stated in a loud voice "if anybody was caught signing . . . having these authorization cards [they] would be immediately . . . fired."⁹

Mike Hamilton worked at ASD as a laborer for about 2-1/2 years preceding his layoff in May 2001. In April 2001, Carney confronted Hamilton in ASD's central yard about discussing wages with other employees. At the time, Hamilton was returning to work from a break in the lunchroom located on the floor above the machine shop. During that break, Hamilton had spoken to an unidentified new employee concerning his wage rate. That employee left the lunchroom just ahead of Hamilton. Hamilton went to the locker room to collect some supplies and the employee entered the toolroom.

As Hamilton started out across the central yard toward his work location on the *Columbia*, Carney called out to him. When Hamilton stopped and turned, Carney said to him, "What's this I hear about you talking about wages?" Hamilton shrugged but did not respond. Carney repeated the same question and Hamilton nodded affirmatively. Carney then chastised Hamilton by telling him sternly, "You're going to be in big trouble." Carney next told Hamilton that there was to be absolutely no discussion of wages and repeated the "big trouble" threat.¹⁰

On June 20, Local 2520 filed an election petition. Subsequently, ASD and Local 2520 entered into a consent election agreement that provided for a Board-conducted representation election on July 26. The election was blocked by the charge in this case.

Around the same time, ASD's work force started to contract significantly primarily because work on the *Columbia* was nearly completed. Planning for the work force that would remain after the completion of the *Columbia* project began in early June. (See R. Exh. 1.)¹¹ Of the 81 employees ASD hired in the period from April through August, 69 no longer worked there at the time of Harvey's layoff of July 12. Of the remaining 12, 4 left or were terminated within a week after Harvey's layoff. It hired 5 of the 12 following Harvey's layoff but all those left the Company by the end of August. Only three con-

⁹ Carney denied that he ever made such a remark or that this incident ever occurred. I do not credit Carney on this point.

¹⁰ Carney admits that he confronted Hamilton after a toolroom employee made repeated claims that Hamilton bothered her by "talking to her about wages and how much more money she could make if the union came into the shipyard." Carney asserted that he made reports about Hamilton to his boss and the shipyard general manager before confronting Hamilton personally. This happened after Hamilton purportedly bothered the toolroom employee again that morning. Carney asserts that he told Hamilton: "[D]o not talk to my employees about union wages or anything but work because I have a certain employee that has complained about you and I don't want you harassing her." Because Respondent failed to corroborate the harassment claim suggested by Carney's account, I do not credit his story.

¹¹ This exhibit reflects that planning. Obviously, this planning document did not turn out to be a precise reduction-in-force timetable as ASD retained some individuals, including Harvey, beyond July 2. However, the exhibit shows the crew selected for the *Oral Freeman* project.

tinued to work for ASD. Altogether, 51 employees left ASD or were terminated in June and 43 more left or were terminated in July. In the week before Harvey's layoff, three others classed as welders left Respondent's employ. Two others classed as welders were let go the same day as Harvey and two more welders were let go within the next 2 days. (See GC Exh. 3.)¹²

On July 12, Harvey and a pipefitter were working on the women's showers aboard the *Columbia*. Harvey estimated that about 2 more days remained on that assignment. Steve Dunham, a leadman, approached about 9 a.m. and told the two men to "get a pallet and get your tools gathered up . . . you need to get them off the boat," words that amounted to their layoff notice. Dunham completed the shower work himself. After gathering their tools, the two men again spoke with Dunham on the *Columbia's* car deck. At this time, Dunham told Harvey that he tried without success to keep him on to work on the "camp barge" then in the drydock. Later, at Supervisor Jones' office, Harvey asked what was going on. Jones told Harvey that there was a reduction in force and that he should see Gossman after turning in his tools. Gossman asked Harvey for his address and told to keep in touch, as he was one of his key people. As he left, Harvey asked Gossman what he thought about the Union. Gossman replied that not many wanted a union. Gossman then pointed at the Oral Freeman project visible out his window and said "the only ones who wanted a union were the steel workers in there, right there." Harvey has never been recalled to work at a Johnson-owned company.

Respondent's records reflect that it hired eight employees in June. That group of hires included two laborers, four painters, a sandblaster/painter, and a welder. (See GC Exh. 3.) The welder hired in June, Cecil Smith, left the day before Harvey's layoff. The same record also reflects that Respondent hired two other welders, Steve Hinson and Dean Griffith II, in July after Harvey's layoff. In fact, both of these welders previously worked on the *Columbia*. ASD hired Hinson on March 29, 2001. He worked until June 28 when he, in effect, obtained a leave of absence to return home in the contiguous States because he needed to attend to some personal problems. Hinson returned to ASD on July 12, but was let go on July 23 because he failed to show up for work after July 19. ASD originally hired Griffith on April 19, 2001, and let him go on June 30. Griffith returned on July 18 and worked until August 31 when he voluntarily left to return to his home in Oregon. Both Hinson and Griffith were certified welders and pipefitters. Gossman credibly denied that either Hinson or Griffith returned to ASD to replace Harvey.

B. Further Findings and Conclusions

Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees for exercising their Section 7 rights. Section 7, in effect, gives employees the right to engage in union or other concerted activities "for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(3) prohibits employers from discriminating in regard

¹² This exhibit shows all ASD employees from March through August together with their hire and employment termination dates. For purposes of this exhibit, employment termination may refer to a voluntary quit, a layoff, or a discharge.

to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization."

The Wage Discussion Rule

In the absence of a business justification, an employer violates the Act by the maintenance of a rule that merely requests employees to refrain from discussing their wages with other employees. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). Such rules, the Board asserts, "constitutes a clear restraint on the employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment." *Id.* citing *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989). Respondent claims only that its handbook rule contains no enforcement mechanism. It advanced no business justification for the rule. Even so, the Act's protection of employee wage discussions presumably would be subordinate to any alleged business justification only rarely where, as here, a public wage-disclosure requirement exists. Accordingly, I conclude that Respondent's wage discussion rule violates Section 8(a)(1), as alleged.

The Distribution Rule

A rule requiring employees to secure their employer's permission or authorization to engage in protected solicitation or distribution activity at the employer's premises on the employees' own time and in nonwork areas is unlawful. *Brunswick Corp.*, 282 NLRB 794 (1987), and cases cited therein. Moreover, the mere existence of such a rule tends to interfere with and restrain employees in the exercise of their statutory rights even in the absence of employer enforcement. *Id.* at 795, citing *Schnadig Corp.*, 265 NLRB 147, 157 (1982). Here, ASD's handbook rule barred the distribution at anytime without management's prior authorization. For this reason, I conclude that Respondent's distribution rule violates Section 8(a)(1) as alleged.

The Conduct of Supervisor Carney

Having rejected Carney's account of his discussion with Hamilton about speaking to a toolroom custodian regarding her wages, I find that his remark that Hamilton would be in "big trouble" for discussing wages with another employee would have a strong tendency to coerce Hamilton's exercise of Section 7 rights. *Waco, Inc.*, 273 NLRB 746 (1984). Similarly, Carney's loud claim in the toolroom with employees present about discharging anyone caught possessing or signing a union authorization card would also have a strong tendency to coerce the employees' exercise of Section 7 rights. *Baron Honda-Pontiac*, 316 NLRB 611, 619 (1995). Both remarks amount to nothing more than ham-handed threats that interfere with protected employee activity. Accordingly, I conclude this conduct by Carney violated Section 8(a)(1) as alleged.

Harvey's Layoff

In mixed motive discrimination cases, the Board applies a causation test first adopted in *Wright Line*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Following the Supreme Court's clarification in *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), the Board, in *Manno Electric*, 321 NLRB at 280 fn. 12,

explained that its *Wright Line* causation test requires the General Counsel to first “persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision.” Typically, the elements of the General Counsel’s case include: 1) showing that the discharged employee engaged in some protected activity; (2) proving that the employer knew about the employee’s protected activity; and (3) establishing the employer’s hostility toward the employee’s activity. *Best Plumbing Supply*, 310 NLRB 143 (1993). Although not conclusive, the timing of an adverse action may be significant in discrimination cases. *Equitable Resources*, 307 NLRB 730, 731 (1992).

If the General Counsel establishes a prima facie case, the burden of persuasion shifts to the employer to show that the same adverse action would have been taken even in the absence of the employee’s protected activity. *Best Plumbing Supply*, supra. To meet this burden “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

I have concluded that the General Counsel’s case concerning Harvey lacks a persuasive quality. Even assuming the presence of a prima facie case, I conclude that a preponderance of the credible evidence fails to establish a causal connection between Harvey’s union activity and his layoff. Harvey’s layoff occurred in the midst of a general reduction in force near the time when ASD completed a major project and well after Harvey began to openly engage in union solicitation around the ASD facility. As his layoff lacked any extraordinary characteristics (it was neither among the first nor among the last), I find General Counsel failed to prove ASD acted with an unlawful motivation.

Even though work remained on the *Oral Freeman* at the time of Harvey’s layoff, the overwhelming evidence establishes that the size of Respondent’s total work force shrank considerably in June and July at the conclusion of the *Columbia* project. I reject the General Counsel’s argument that the timing of Harvey’s layoff close to the filing of the petition supports an inference of unlawful motivation. Respondent likely knew about Harvey’s strong union sympathies months before the filing of the petition and did little, if anything, to signify its displeasure with his activities.¹³ Because ASD simultaneously laid off numerous other workers and did not replace others who left voluntarily around that same time, the General Counsel’s effort to link Harvey’s layoff to the filing of the petition amounts to a flawed construct that ignores too many other events at the shipyard during that period. The magnitude of Respondent’s downsizing strongly favors an inference that economic considerations motivated Harvey’s layoff.

The perception that welders Hinson and Griffith replaced Harvey lacks solid foundation. Both worked on the *Columbia*

¹³ Gossman’s assertion that he knew nothing of Harvey’s union activities until he read about it in the local newspaper lacks credibility particularly where other supervisors testified about the pervasiveness of the union literature around the premises and continuous employee discussions of unionization.

and took brief leaves to attend to personal matters. As certified welders, these two workers would have had greater assignment flexibility than Harvey. Absent more, no basis exists to conclude that ASD designed their return to replace Harvey or any of the four or five other welders (whose union sympathies are not known) laid off with Harvey. Even if it might be possible to view these two as replacements, it would be virtually impossible to determine whether they replaced Harvey as opposed to any of the other welders laid off with him. Put simply, no basis exists to establish or even infer that ASD pegged the return of Hinson or Griffith specifically to take Harvey’s place or that Respondent shortchanged its skill pool by Harvey’s layoff. Harvey’s layoff occurred in close conjunction with the departure of more than 20 other workers following a steady stream of layoffs from mid-June onward. Nothing indicates a subsequent increase in the amount of available work ever occurred; on the contrary, the amount of work available and the size of Respondent’s crew continued to diminish periodically following Harvey’s layoff.

In addition, the General Counsel’s case lacks the type of supporting statements before, at the time of, or afterward betraying a discriminatory motive for Harvey’s layoff. Although Respondent plainly and emphatically opposed unionization, it quickly agreed to an election after the Union filed a representation petition. Moreover, the unlawful conduct noted above occurred substantially before Harvey’s layoff and cannot be correlated with any of Harvey’s protected activities. Hence, Respondent’s 8(a)(1) conduct adds very little support for a conclusion that it acted with a discriminatory motive when laying off Harvey.

Both the General Counsel and the Charging Party accuse the Respondent of offering “shifting and unreliable reasons” for Harvey’s layoff. They argue that Gossman’s assertion that Harvey’s layoff resulted from his lack of an appropriate welding certificate contradicts Jones’ that it resulted from a lack of fitting work. I do not view these assertions at all contradictory. Instead, they would appear generally compatible in that a welding certificate may well have enhanced Harvey’s retention chances.

The General Counsel charges that Supervisor Jones treated Harvey in a disparate manner by not scheduling him for another welding test after 30 days as was typical. However, because Harvey’s first test opportunity did not occur until June, I find this claim without merit. At best, Harvey’s next opportunity for testing would have occurred virtually at the time as his layoff.¹⁴ In fact, by providing Harvey with an opportunity to enhance his credentials when employment opportunities at ASD began to shrink, it is possible to infer that Jones, at least, did what he could to improve Harvey’s chances to continue with the company.

¹⁴ The General Counsel also seems suspicious of the fact that Jones failed to submit Harvey’s test welds to the certification laboratory. The General Counsel’s argument confuses Jones’ supervisory judgment with his technical qualifications at the time. Jones acknowledged that he had no authority to certify a test at that time but, clearly, as an experienced welder serving in a supervisory role he knew what would and what would not pass a certification test.

As I am unable to conclude that a preponderance of the evidence establishes that Harvey's union activity constituted a substantial or motivating factor for his layoff, I recommend dismissal of the 8(a)(3) allegation pertaining to him.

CONCLUSIONS OF LAW

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

2. Local 2520 is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining handbook rules designed to bar employees from discussing their pay rate or salary with anyone other than their immediate supervisor, and to bar the unauthorized distribution of written material on ASD's premises at any time; by supervisor Carney's remark that an employee would be in "big trouble" for discussing wages with another employee; and by

supervisor Carney's threat to employees about discharging anyone caught possessing or signing a union authorization card, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, my recommended order will require it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. My recommended order requires Respondent to forthwith expunge the provisions in its handbook that I have found unlawful and to post the notice attached hereto as the Appendix so employees will know the outcome of this matter.

[Recommended Order omitted from publication.]