Trus Joist MacMillan *and* United Mineworkers of America, *and* Dane Wood Moore, III. Cases 6–CA–29855, 6–CA–30823, 6–CA–30855, 6–CA–30868, and 6–CA–30915

March 5, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 6, 2000, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. They also filed answering briefs and reply briefs.

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, cross-exceptions,[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

Introduction

The Respondent manufactures and sells wooden structural components at its facility in Buckhannon, West Virginia. The several unfair labor practice complaint allegations in this case arise from two unsuccessful campaigns by United Mineworkers of America from late 1997 through mid-March 1999 to organize employees at this facility. We agree with the judge, for the reasons set forth in his decision, that the Regional Director properly revoked an earlier informal settlement agreement resolving some of these complaint allegations. We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging or disciplining prounion employees Roger Allman, Joe Hall, Mylinda Casey Hayes, Troy Stire, and Larry Wilson, and that it violated Section 8(a)(1) by discharging Supervisor Dane Moore.[3] However, we reverse the judge and dismiss the 8(a)(3) and (1) allegations involving employee Roger Harris. For the reasons discussed in section 1 below, we find that Harris engaged in misconduct forfeiting the Act's protection.

The judge's dismissal of the complaint's remaining 8(a)(1) allegations pertaining to employee interrogations, the imposition of a plant access restriction, and the maintenance of a no-solicitation/no-distribution rule. We affirm the dismissal of the interrogation allegations but, for the reasons discussed in sections 2 and 3 below, we reverse the judge and find that the Respondent maintained an unlawful no-solicita-tion/no-distribution rule at the Buckhannon plant after March 13, 1998, and it unlawfully restricted employee Joe Hall's access to areas within the Buckhannon plant in March 1999.

1. Discharge of Roger Harris

Harris worked as a quality assurance technician under the direction of Supervisor Moore until the latter's discharge on August 27, 1999.[4] As previously stated, we affirm the judge's finding that the Respondent unlawfully discharged Moore for refusing to commit the unfair labor practice of giving Harris an unwarranted evaluation downgrade because of his prominent union activities during both union organizing campaigns at the Buckhannon plant. Moore's discharge occurred less than a week after he notified Harris about the Respondent's illegal plan to get rid of Harris and to give him an unsatisfactory rating. Harris did not want Moore, a well-respected supervisor, to risk his job on Harris' behalf. When Thomas Booker, the assistant plant manager and interim technical director in the quality assurance department, telephoned and told Harris about Moore's termination earlier that Friday, Harris was shaken. He testified "that floored me . . . just like a never ending bad dream here." Over the

[1] There are no exceptions to the judge's dismissals of the alleged unlawful (1) threat that the Respondent would "come down hard" on employees who worked for the Union; (2) disciplinary warning to Joseph Hall; and (3) interrogation of Roger Riley.

[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.

We also find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

[3] The judge drew adverse inferences against the Respondent for its unexplained failure to call Supervisors Terry Leigh, David Marple, and Cletus Wamsley as witnesses in the hearing. We agree that the judge properly inferred that their testimony would not have been favorable to the Respondent's theory of the case. However, we do not rely on the judge's speculation that Marple may have been told to fire Hayes by higher level management. Such evidence is unnecessary to uphold the 8(a)(3) violations involving Hayes. Member Schaumber also does not rely on a similar speculative statement made by the judge that Leigh was directed to discipline Allman by higher management.

In analyzing Hayes' situation, the judge found that even assuming Hayes' conduct merited discipline, there was no explanation why she was terminated, as opposed to being given another written warning. While Member Schaumber finds that the Respondent's progressive discipline system could sustain a discharge action following two written warnings, he agrees with the judge that the circumstances in Hayes' situation establish unlawful discrimination.

[4] All dates in this part of our decision are in 1999 unless otherwise indicated.

weekend, Harris decided to meet with Booker on Monday. He planned to ask Booker for an explanation for Moore's termination and to call Booker a liar if Booker refused to give him a reason.

On August 30, Harris approached Booker, and requested a meeting with Booker, Human Resource Manager Alexis Butcher, and Supervisor David Marple. In the ensuing meeting in Butcher's office, Harris repeatedly asked Booker for an explanation of Moore's termination. When Booker refused, citing confidentiality concerns, Harris insisted that Moore was wrongly terminated. Harris then repeatedly called Booker a "liar" and a "lying bastard." He did so despite continued warnings that he stop. Butcher's testimony, which the judge credited, also reveals

> [t]hat [Harris] felt pretty strongly about Dane [Moore] and his supervisory roles and his capacity and how Dane did his job. He continued to say and, then it got a little harsher, he said . . . I think on numerous times that Tom [Booker] was [Plant Manager Len Komori's] prostitute. That he had prostituted himself. Wanted to know how much Len was paying him. How much prostitutes got paid now a days. I remember he grabbed his crotch and said something to the effect of, I have your manhood hanging right here.

When Harris' verbal attacks continued, Plant Manager Komori was summoned to Butcher's office and informed about what had happened during the meeting. Komori asked Harris if he had called Booker a liar, a lying bastard, and a prostitute. Harris conceded that he had, but denied purposely grabbing his crotch. After a brief private caucus to discuss the matter with Booker and Butcher, Komori terminated Harris for insubordination.

The judge found that Harris' behavior on August 30 was provoked by the Respondent's unlawful discharge of Moore on August 27. According to the judge, the provocation had been "extraordinarily extreme," and it was reasonable for Harris to assume he would soon be fired or constructively discharged by Booker. The judge further found that Harris' protest of Moore's termination constituted protected activity and that neither Harris' premeditated conduct (i.e., calling Booker a liar) or his unplanned, more offensive outbursts (calling Booker a prostitute, a lying bastard, and grabbing his crotch) during the August 30 meeting removed the Act's protection. Thus, the judge concluded that the Respondent violated Section 8(a)(3) and (1) by discharging Harris.

The parties do not take exception to the judge's finding that Harris' conduct was concerted activity under the Act. However, not all concerted activities are protected under Section 7 of the Act. Thus, where an employee engages in indefensible or abusive conduct, his concerted activity will lose the protection of the Act. Whether the Act's protection is lost depends on a balancing of four factors: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. See *Atlantic Steel Co.*, 245 NLRB 814 (1979). Applying these factors, we find that Harris' August 30 conduct cost him the Act's protection.

With respect to the place of the discussion, Harris' August 30 meeting with Booker was held in the human resource manager's office. In one respect the locus of Harris' outburst was one that would have a less disruptive effect than it would have if it had occurred on the plant floor, in the presence of employees.[5] However, in another respect, the locus accentuated and exacerbated the insubordinate nature of Harris' offensive outbursts. Thus, as found by the judge, Harris' purpose in requesting the August 30 meeting was to embarrass Booker before management. For this reason, at Harris' instigation, the meeting included other managers. From this standpoint, a meeting in management offices, before other managers, would accentuate and exacerbate the disruptive effect of Harris' outburst. Accordingly, in light of these countervailing factors, we find that this factor neither weighs in favor nor against the Act's protection for Harris' conduct.

Regarding the subject matter of the discussion, Harris initiated the meeting to formally complain to Booker. The meeting focused on Moore's discharge. From his prior conversations with Moore, Harris knew that Moore's discharge had been precipitated by Moore's refusal to further the Respondent's unlawful campaign against union advocates by downgrading Harris' monthly evaluation rating. Thus, the August 30 meeting initiated by Harris involved the matter of the right of employees to engage in protected union activity and the unlawful removal of a supervisor who refused to violate this right.[6] However, it was not intended by Harris to be a peaceful but firm demonstration of his concern about what had occurred. Harris' intended to confront Booker, call him a liar, and embarrass him before management. Under these circumstances, Booker reasonably should have known that the discussion would escalate. On bal-

[5] Compare *Aluminum Co. of America*, 338 NLRB 20, 21 (2002) (employee lost the protection of the Act where his profane outbursts took place in employee breakrooms).

[6] See *Thore, Inc.*, 296 NLRB 859, 870 (1989) (discharge of supervisor for refusing to honor employer's request to lower performance evaluations of known union adherents so as to provide employer with a discriminatory pretext to fire them).

ance, however, we find this second *Atlantic Steel* factor—the subject matter of discussion—weighs slightly in favor of the Act's protection.

With respect to the nature of the employee's outburst, Harris' remarks were personal, highly offensive, and escalated to the point that Plant Manager Komori had to be summoned to the meeting. Harris lodged a series of profane verbal attacks directed against Booker in the presence of Butcher and Marple. Harris repeatedly accused Booker of being a "prostitute" for Plant Manager Komori and called Booker a "lying bastard." Harris even went so far as grabbing his crotch and telling Booker that he had Booker's manhood "hanging right here." Notwithstanding this provocation, Booker, Butcher, Marple, and Komori merely sought to stop Harris' attacks, without engaging in conduct that reasonably would escalate it.

Employers and employees have a shared interest in maintaining order in the workplace, an order that is made possible by maintaining a certain level of decorum.[7] Disorder can have a detrimental impact on morale, productivity, and discipline. Viewed from this necessary perspective, Harris' behavior far exceeded what can be expected or tolerated. Despite the fact that the confrontation took place away from the workfloor, its severity added to its significance. Harris' anger in reaction to Booker's unlawful actions did not give him license to launch a planned, vituperative personal attack, with foul language and obscene gestures, against Booker in the presence of other supervisors, including a woman, to undermine Booker's managerial authority.[8] After Harris' conduct, it would be unreasonable to expect that Komori, Marple, Butcher, and (most especially) Booker would be able to work effectively with Harris. In these circumstances, this third *Atlantic Steel* factor—the nature of the employee's outburst—weighs heavily towards Harris losing the Act's protection.

Finally, we consider the last *Atlantic Steel* factor—whether the outburst was, in any way, provoked by an employer's unfair labor practice. The judge found, and we agree, that it would not be unreasonable for Harris to be more angered by the Respondent's unlawful retaliation against Moore for his refusal to wrongfully downgrade Harris' evaluation than Harris would have been by a direct retaliation against him. Harris was aware of the Respondent's animosity toward his union activities and the Respondent's attempts to use Moore to get rid of him. Just a week before Harris' August 30 meeting, Moore told Harris that Moore was told by Booker that (1) Moore's peers expected Moore to "take care of" Harris by isolating him and making him feel unwelcome, (2) Moore might be promoted to technical director if he cooperated with Booker in getting rid of Harris, and (3) Harris was going to be given an unsatisfactory teamwork evaluation because of Harris' union activities. Thus, Harris reasonably viewed Booker as being responsible for Moore's discharge and (with Moore now out of the way) as being ready and willing to pursue the same unlawful course against Harris. However, our agreement with the judge that Harris' anger toward Booker was the result of Moore's termination is not the same as a finding that there were no limits to Harris' expression of his anger,[9] particularly, where, as here, it took place 3 days later.

Harris' offensive outburst was not a spontaneous or reflexive reaction to the news about Moore's termination. Rather, on Friday afternoon when Booker first told Harris about Moore's termination, Harris said nothing offensive, and reacted calmly. Afterwards, however, while he had time to reflect, Harris engaged in considerable planning as to how, when, and where he would respond to the news. Based on this planning, Harris did not confront Booker when he first returned to work on Monday, but merely requested that Booker schedule a meeting with him and other named managers. Thus, it was Harris who orchestrated a confrontational, face-to-face meeting on a date of his own choosing. In that meeting, Harris deliberately launched into a vituperative personal attack on Booker, replete with obscene language and gesture.[10] Thus, it was Harris, and not the Respondent, who orchestrated this encounter on August 30 that gave rise to his insubordinate and profane outburst. Therefore, the *Atlantic Steel* factor regarding the provocation by an employer's unfair labor practice does not favor the Act's protection for Harris. The provocation is balanced off by Harris' premeditation.

To summarize, our analysis reveals that one factor—the nature of the outburst—weighs heavily in favor of Harris losing the protection of the Act. Two factors—the place of the discussion and the provocation by unfair labor practices—are neutral. The remaining factor—the

[7] See *Woodruff & Sons*, 265 NLRB 345, 347 (1982) ("Although the Board long has recognized that an employee's right to engage in protected activity permits some leeway for impulsive behavior, this must be balanced against the employer's right to maintain order and respect.").

[8] See *Aluminum Co. of America*, supra (employee's repeated, sustained, ad hominem profanity removed the Act's protection); *Piper Realty Co.*, 313 NLRB 1289 (1994) (employee's insubordination and display of repeated profanity removed the Act's protection).

[9] See *NLRB v. Steinerfilm*, 669 F.2d 845, 852 (1st Cir. 1982) ("[T]here are . . . limits to employee insubordination, even when provoked.").

[10] See *J.P. Stevens v. NLRB*, 547 F.2d 792 (4th Cir. 1976) (premeditated disruptive employee conduct not protected by the Act).

subject matter of the discussion—leans slightly in favor of the Act's protection for Harris. In our view, this last factor (in favor of the Act's protection) is outweighed by the nature of the outburst because the latter factor strongly favors a loss of protection.[11] Accordingly, we find that Harris lost the protection of the Act during his meeting with Booker on August 30. Therefore, his discharge did not violate Section 8(a)(3) and (1) of the Act.

2. No-solicitation/no-distribution rule

The complaint alleges that the Respondent announced, promulgated, and maintained an overly broad no-solicitation/no-distribution rule. The judge categorized these allegations in terms of the Respondent's conduct occurring before and after March 13, 1998. He found that Section 10(b) of the Act barred consideration of the pre-March 13 activity, including promulgation of the rule, and the General Counsel waived his contention that the post-March 13 activity was unlawful. The General Counsel does not challenge the judge's 10(b) finding for the pre-March 13 activity, but he excepts to the judge's failure to find an 8(a)(1) violation based on the post-March 13 activity. We find merit in these exceptions.

We agree with the General Counsel that the "maintenance" of the Respondent's no-solicitation/no-distribution rule after March 13, 1998, is before the Board for consideration. This matter is clearly encompassed in the amended charge in Case 6–CA–29855 filed on September 24, 1998, and in paragraph 9(a) of the outstanding amended consolidated complaint in the instant cases. Contrary to the judge, we find that the General Counsel never withdrew or sought to withdraw this complaint allegation at the hearing or in his posthearing brief to the judge. In fact, the General Counsel introduced evidence of the rule's maintenance after March 13, 1998.

The Respondent's rule at issue is set forth in its employee handbook for its Buckhannon plant employees.[12] According to the testimony of Human Resource Director Butcher, this rule was in existence since before March 1998 through at least March 2000. She further testified that the Respondent never openly disavowed or revoked this rule.

On its face, the rule prohibits distribution of literature "in all working areas and all areas of all plant property at all times." It is undisputed that the rule includes distribution of union literature and that the Respondent has so informed employees about the rule's applications to such situations. The Board has consistently held that "[a] rule prohibiting distribution of literature on employees' own time and in nonworking areas is presumptively invalid." See *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001), and cases cited therein. When a rule is presumptively unlawful on its face, the employer bears the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time. *Ichikoh Mfg.*, 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994).

Uncontradicted evidence shows that on numerous occasions during the campaign leading to the first election on March 12 and 13, 1998, the Respondent's managers and supervisors repeatedly told employees that distribution of union literature or solicitation on behalf of the Union at any time and anywhere on the company premises would be considered a violation of the company's no-solicitation/no-distribution rule, and would subject violators to discipline. Thus, not only did the Respondent's communications fail to rebut the presumptively unlawful nature of its no-distribution rule, they also gave an equally overbroad and unlawful meaning to its no-solicitation rule, which was presumptively lawful on its face.

The Respondent made no attempt to alter this overbroad interpretation of the no-solicitation/no-distribution rule, which it continued to maintain after March 13, 1998, and throughout the Union's second campaign in 1999. Employee witnesses testified that they curtailed their union activities at the plant during the second campaign so as to not run afoul of the invalid no-

[11] Compare *Felix Industries*, 331 NLRB 144 (2000), enf. denied and remanded 251 F.2d 1051 (2001), on remand 339 NLRB No. 32 (2003). In that case, employee Yonta used profanity during a grievance-related telephone conversation with a supervisor. The Board majority found that one *Atlantic Steel* factor—the nature of the outburst—did not outweigh the other factors favoring the protections accorded Yonta under the Act. Chairman Battista dissented because, in his view, Yonta's outburst constituted outrageous misconduct and outweighed the other *Atlantic Steel* factors, thereby causing Yonta to lose the Act's protection. Id. at slip op. 4. While Member Schaumber did not participate in *Felix Industries*, he agrees with Chairman Battista's dissent. Nevertheless, *Felix Industries* can be distinguished from the present case. In *Felix Industries*, Yonta's conduct was not as egregious as Harris' insubordinate and profane conduct. Calling your manager boss a "f—ing kid," on the telephone away from the workplace, as did Yonta in *Felix*, is less insubordinate than accusing your superior of being a prostitute, and graphically illustrating your comment, as did Harris. In addition, Harris' outburst was made after the passage of 3 days, i.e., after a chance to "cool down" to his boss while Yonta's statements were made immediately to his supervisor.

[12] The rule states:

Solicitation by any associate of another associate during the working time of either associate for any reason is strictly prohibited, unless otherwise prohibited by law. Distribution of advertising materials, handbills or other literature is prohibited in all working areas and all areas of all plant property at all times. . . . Solicitation of a Trus Joist MacMillan sponsored event, which have been preapproved by the Human Resource Manager or Plant Manager, is permissible.

solicitation/no-distribution rule. Furthermore, as recounted in the next section of our decision, the Respondent demonstrated its adherence to the rule as previously interpreted when it restricted prounion employee Hall's movement during the final days of the second campaign and warned that he would be presumed to be soliciting for the Union in violation of its no-solicitation rule if he did not abide by the restriction.

In its defense, the Respondent argues that no employee was ever disciplined for violating the rule. However, the absence of actual discipline does not negate either the rule's clear unlawful interpretation or its maintenance throughout the period from March 13, 1998, to the hearing date. Indeed, the absence of any discipline in these circumstances may speak more to the effectiveness of the overboard rule in chilling employees' exercise of their Section 7 rights under the Act, as confirmed by employee witness testimony. Thus, we find that the maintenance of the no-solicitation/no-distribution rule after March 13, 1998, violated Section 8(a)(1) of the Act.

3. Restriction of plant access

George Dolmat served as maintenance manager until he was demoted to plant engineer in January 1999. The complaint alleges that in March 1999 Dolmat unlawfully restricted employees' access within the facility in order to prevent them from discussing the Union. In its answer, the Respondent admitted Dolmat's supervisory and agency status at all material times.[13] The judge dismissed this allegation for lack of evidence. We reverse the judge.

Before the Union's organizing campaign began, maintenance employees, including Joseph Hall, enjoyed free access within the Buckhannon plant and could discuss a variety of nonwork-related subjects in work areas during work time provided these discussions did not interfere with production. Hall testified that during the closing days of the Union's second organizing campaign in March 1999, Dolmat repeatedly called Hall into his office. Dolmat instructed Hall to restrict his movement within the facility or it would be presumed that Hall was soliciting employees to support the Union in violation of Respondent's no-solicitation rule.

We find that Dolmat, acting as the Respondent's agent, departed from company past practices of allowing free plant access and restricted Hall's movement within the facility to curtail employees' union discussions. An employer violates Section 8(a)(1) of the Act when it prohibits its employees from discussing union-related matters while allowing discussion of other nonwork related subjects during working time. See *McGaw of Puerto Rico, Inc*., 322 NLRB 438, 449 (1992); *Willamette Industries*, 306 NLRB 1010 fn. 2 (1992). Accordingly, we find Dolmat's statements violated Section 8(a)(1) of the Act.

[13] In its exceptions, the Respondent belatedly contends that Dolmat was no longer a statutory supervisor at the time of the alleged incident. We find no basis for setting aside the Respondent's prior admission of Dolmat's supervisory status.

AMENDED CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful no-solicitation/no-distribution rule after March 13, 1998.

2. The Respondent, through its agent, George Dolmat, violated Section 8(a)(1) of the Act by restricting employee Joe Hall's access within the Respondent's facility in order to prevent him from discussing the Union in March 1999.

3. The Respondent, through Supervisor Terry Leigh, violated Section 8(a)(1) of the Act by informing employee Troy Stire in the summer of 1999 that he was targeted for reprisal due to his union activities.

4. The Respondent violated Section 8(a)(1) of the Act by discharging Supervisor Dane Moore on August 27, 1999, for refusing to commit an unfair labor practice.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging or disciplining the following employees on the dates set forth below opposite their respective names:

Roger Allman	August 23, 1999
Joe Hall	May 12, 1999
Mylinda Casey Hayes	August 12, 1999
Troy Stire	May 11, 1999
Larry Wilson	June 4, 1998

6. The remaining allegations of the amended consolidated complaint are dismissed.

ORDER

The National Labor Relations Board orders that the Respondent, Trus Joist MacMillan, Buckhannon, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining overly broad rules that prohibit employees from engaging in union solicitation during nonworking time and from engaging in union solicitation or distribution in nonworking areas.

(b) Restricting an employee's access within the Respondent's facility in order to prevent him from discussing the Union.

(c) Informing an employee that he was targeted for reprisal due to his union activities.

(d) Discharging a supervisor for refusing to commit an unfair labor practice.

(e) Discharging, disciplining, or otherwise discriminating against its employees for supporting the Union or any other labor organization.

(f) In any other 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) Rescind its unlawful no-solicitation/no-distribution rule, remove it from the employee handbook, and advise employees in writing that the rule is no longer being maintained.

(b) Within 14 days from the date of the Board's Order, offer Joe Hall, Mylinda Casey Hayes, and Dane Moore 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.

(c) Make Roger Allman, Joe Hall, Mylinda Casey Hayes, Dane Moore, and Troy Stire whole for any loss of earnings and other benefits resulting from their discharges or discipline, less any net interim earnings, plus interest.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges or disciplinary actions of Roger Allman, Joe Hall, Mylinda Casey Hayes, Dane Moore, Troy Stire, and Larry Wilson and, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges or disciplinary actions will not be used against them in any way.

(e) 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, 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.

(f) Within 14 days after service by the Region, post at its facility in Buckhannon, West Virginia, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, the Respondent has gone out of business or closed the facility involved in this proceeding, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 1998.

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

[14] 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."

MEMBER WALSH, concurring and dissenting in part.

I agree with my colleagues in all respects except their finding that union activist Roger Harris lost the protection of the Act and was lawfully discharged for his misconduct while protesting the unlawful discharge of his supervisor for attempting to protect Harris from the Respondent's unlawful conduct in trying to rid itself of prounion employees. I agree with the administrative law judge that Harris was unlawfully discharged.

Facts

The essential facts about Harris' discharge are contained in section 1 of my colleagues' opinion.

Applicable Principles

As recently reiterated on remand from the D.C. Circuit Court of Appeals in *Felix Industries*,[1] the Board examines and balances four factors set forth in *Atlantic Steel*[2] in determining whether an employee's misconduct while engaged in protected activity causes him to lose the protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Application of Principles

After carefully weighing the *Atlantic Steel* factors, I find, contrary to my colleagues, that Harris did not forfeit the protection of the Act by his misconduct during protest of the Respondent's unlawful discharge of Harris' supervisor, Dane Moore, just 3 days before.

With respect to the place of the discussion, Harris' meeting with Assistant Plant Manager Booker, Human Resource Manager Butcher, and Supervisor Marple on Monday, August 30, 1999, was conducted in Butcher's

[1] 331 NLRB 144 (2000) (*Felix I*), enf. denied and remanded 251 F.3d 1051 (2001), on remand 339 NLRB No. 32 (2003) (*Felix II*).

[2] 245 NLRB 814 (1979).

private office, away from the plant floor and out of the sight and hearing of any employees. Harris' misconduct during the meeting therefore had no effect on the Respondent's interest in maintaining order and decorum on the work floor. Accordingly, the place of Harris' misconduct does not even begin to carry it beyond the scope of the protection of the Act.

Regarding the subject matter of the discussion, Harris asked for the meeting to get an explanation for why Booker discharged Supervisor Moore. The meeting focused on Moore's discharge, which Harris already knew was caused by Moore's rightful refusal to downgrade Harris' performance evaluation in furtherance of the Respondent's unlawful campaign to get rid of prounion employees like Harris. Thus, the subject matter of Harris' meeting with Booker, Butcher, and Marple was the Respondent's unlawful discharge of Supervisor Moore for trying to protect the fundamental rights of employees to engage in prounion activity. Indeed, during the meeting, Harris told the management officials present that he was going to let both the National Labor Relations Board and the Union, as well as the other employees, know what the Respondent had done to Moore—it fired him for refusing to participate in the Respondent's unlawful campaign to rid itself of prounion employees. As with the place of the discussion, then, the subject matter of this discussion does not remove it from the protection of the Act.

Finally, I fully agree with the judge's balancing of the third and fourth *Atlantic Steel* factors: (3) the nature of Harris' outburst and (4) the extent to which it may have been provoked by the Respondent's unlawful discharge of Harris' supervisor, Moore. While I do agree with my colleagues that Harris' conduct moments before he was discharged weighs toward a loss of the protection of the Act,[3] I also agree with the judge that the provocation for Harris' behavior was extraordinarily extreme: the Respondent's unlawful discharge of Harris' well-respected supervisor just 3 days earlier, because Moore steadfastly refused to give Harris an unsatisfactory rating on his performance evaluation in furtherance of the Respondent's unlawful scheme to get rid of several prominent union leaders—including Harris.

Harris was fully aware of the Respondent's animosity toward his union activities and the Respondent's attempts to use Moore to get rid of him. Just a week before Harris' August 30 meeting with management, Moore candidly informed Harris that Moore had been told by Booker that (1) Moore's managerial peers expected Moore to "take care of" Harris by isolating him and making him feel unwelcome; (2) Moore might be promoted to technical director if he cooperated with Booker's plan to get rid of Harris; and (3) Harris was going to get an unsatisfactory teamwork evaluation. (The next day, and again 2 days after that, Moore expressly refused to obey Booker's instruction to give Harris an unsatisfactory rating, because, as Moore told Booker, Moore believed that Booker's instruction was motivated by the Respondent's desire to retaliate against Harris because of his union activity.)

In consideration of these circumstances, the judge found that it would not be unreasonable for Harris to be more infuriated by the Respondent's unlawful retaliation against Moore for not mistreating Harris than by a direct retaliation by the Respondent against Harris himself. I agree. Thus I find, under these aggravated and unusual circumstances, that Harris' spontaneously and repeatedly accusing Booker of being a "prostitute" for Plant Manager Komori, calling Booker a "lying bastard," and even grabbing his crotch and telling Booker that Harris had Booker's manhood "hanging right here," were provoked by the Respondent's unlawful termination of Moore just 3 days earlier for going to bat for Harris in a doomed effort to keep the Respondent from running Harris out of his job in retaliation for his support of the Union.

Until his union involvement, Harris had been considered a valued, long-term employee. His behavior on the day of his discharge was out of character for him and stood in stark contrast to his otherwise good work record over nearly 4-1/2 years.

In sum, balancing Harris' behavior and the Respondent's unlawful provocation, I first acknowledge that Harris' behavior did weigh toward a loss of the protection of the Act. But I also find that Harris' behavior was substantially provoked by the Respondent's unlawful discharge of Harris' supervisor for refusing to unlawfully discriminate against Harris in retaliation for his support for the Union. Accordingly, I find, on balance, that Harris' behavior ultimately did not carry him beyond the scope of the protection of the Act. I conclude, therefore, that Harris' discharge violated Section 8(a)(3) and (1) of the Act.

[3] Although I agree with my colleagues' ultimate conclusion that the nature of Harris' conduct weighs toward forfeiting the protection of the Act, I do not share all of their value judgments concerning the conduct. For example, my colleagues seem somewhat patronizingly concerned with the fact that a female supervisor was present during Harris' outburst, a fact I find entirely irrelevant.

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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a no-solicitation/no-distribution rule which prohibits you from engaging in union solicitation during nonworking time and from engaging in union solicitation or distribution in nonworking areas.

WE WILL NOT restrict your access within our plant in order to prevent you from discussing the United Mineworkers of America (the Union).

WE WILL NOT inform you that you are targeted for reprisal due to your union activities.

WE WILL NOT discharge our supervisors for refusing to commit an unfair labor practice.

WE WILL NOT discharge, discipline, or otherwise discriminate against you for supporting the Union or any other labor organization.

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

WE WILL rescind our unlawful no-solicitation/no-distribution rule, remove it from our employee handbook, and advise you in writing that the rule is no longer being maintained.

WE WILL, within 14 days from the date of the Board's Order, offer Joe Hall, Mylinda Casey Hayes, and Dane Moore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Roger Allman, Joe Hall, Mylinda Casey Hayes, Dane Moore, and Troy Stire whole for any loss of earnings and other benefits resulting from their discharges or disciplinary actions, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges or disciplinary actions of Roger Allman, Joe Hall, Mylinda Casey Hayes, Dane Moore, Troy Stire, and Larry Wilson and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges or disciplinary actions will not be used against them in any way.

TRUS JOIST MACMILLAN

Patricia Daum, Esq., for the General Counsel.
Richard W. Gallagher, Joseph M. Price, and *Michelle Duncan, Esqs. (Robinson & McElwee, LLP*), of Charleston, West Virginia, for the Respondent.
Gene Saunders, International Representative, of Charleston, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J AMCHAN, Administrative Law Judge. This case was tried in Clarksburg, West Virginia, on February 1–3, 28–29, and March 1–2, 2000. The charges were filed on June 15, 1998, August 26, September 9, September 14 and October 7, 1999, and the amended consolidated complaint was issued January 14, 2000.

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, Trus Joist MacMillan (TJM),[1] a limited partnership, manufactures and sells wooden structural components at its facility in Buckhannon, West Virginia. From this facility, it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of West Virginia. 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, the United Mineworkers of America (UMW or UMWA), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The First Organizing Campaign

Trus Joist MacMillan built its plant at Buckhannon, West Virginia, in 1994 and 1995. The facility began operation in 1995, under Len Komori, its current plant manager. At Buckhannon, logs are debarked and treated and then are processed depending on their quality. High-grade material is dried and then is processed further to produce Respondent's microllam product. Lower grade material is put into strands of material which are glued, heated, and pressurized to make TJM's parallam product. Both are used as structural members in construction. Approximately 275 hourly production and maintenance employees work at Respondent's Buckhannon facility.

[1] Trus Joist MacMillan, which operates a number of other facilities in the United States and Canada, was recently purchased by Weyerhaeuser Corporation.

The United Mine Workers conducted two unsuccessful organizing drives at the Buckhannon plant. Company management learned of the first drive in late 1997. On February 12, 1998, TJM received a list from the Union identifying 32 employees as members of the Union's in-house organizing committee.[2] Len Komori conducted formal and informal strategy meetings on how to respond to the organization efforts of the UMW. At one of these meetings, he told his managers and supervisors not to allow the distribution of union literature anywhere on company property and to prohibit any prounion campaigning on company property. Later during the campaign, Komori told his supervisors and managers that the Company may not be correct in prohibiting prounion campaigning on company property, but to continue prohibiting it nevertheless.[3] At least some of the supervisors and managers followed his instructions.

During February 1998, David Vincent, one of Respondent's shift managers, told approximately 14 employees on his crew that the Company would probably come down hard on employees who worked for the Union.[4] Several other supervisors and/or managers interrogated employees as to whether they were for or against the Union. These include Shift Manager Keith Barbo who interrogated Kenneth Mealy and Roger Riley, and Larry Harvey, Respondent's shipping manager, who interrogated John Mundy.

The Union lost the NLRB representation election, which was conducted on March 12 and 13, 1998, by a margin of 143 to 107; 5 ballots were challenged.[5] After the election, however, Komori continued to conduct formal and informal strategy sessions regarding the issues that arose during the union campaign. At a meeting in the office of the Human Resources Director, Alexis Butcher, following the campaign, George Sander,[6] Respondent's plant engineer, suggested that the company "fire all the troublemakers and let our lawyers earn their keep." Komori responded, "[W]hy don't we just fire all the Rogers, that way it won't be discriminatory."[7] Four members of the union in-house committee are known by the name of Roger: Harry "Roger" Allman, Roger Harris, Roger Riley, and Roger Zickefoose. Allman and Harris were two of the most active union supporters, as was Joseph Hall, another of the alleged discriminatees in this case. Respondent was aware of their prominent role in the union campaign.

Sometime during the first campaign or shortly thereafter, Quality Assurance (QA) Supervisor Dane Moore had a discussion with Roger Harris, a QA technician and prominent union supporter, about Harris' compensation. Harris contended that he and QA technician Kevin Strader should have gotten raises earlier than production employees, who were hired by Respondent sometime after Harris and Strader. Moore prepared a memo recommending that Harris and Strader be given such raises retroactively. Moore and his immediate supervisor, Technical Director David Ruth, took the memo to a meeting with Komori and Alexis Butcher. Komori did not adopt Moore's suggestion. During the meeting, Komori said that given Harris' union activity he wasn't sure that he could continue to work at Trus Joist.[8]

During the same time frame, David Ruth had a meeting by himself with Komori. At some point, Komori opined that Roger Harris' union activism "did not mesh with TJM's basic business values, with TJM's culture, and that he really did not need to fit in." Continuing, Komori told Ruth that Harris was not a team player and didn't need to be at the plant. Komori repeated these views at another meeting attended by Ruth.[9]

B. The Legal Standard for Analyzing the Discharges and Disciplinary Measures Taken Against the Alleged Discriminatees

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.[10] Once the General Counsel had made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

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[2] GC Exh. 49 only contains 24 names. I infer from the testimony of Alexis Butcher at Tr. 1105–1108, and Larry Wilson at Tr. 861, that there is another sheet with eight names on it that was received by Respondent on or about February 12.

[3] The testimony, to this effect, of a former supervisor, George Dolmat, who was fired by Respondent in March 1999, is uncontradicted.

[4] Joy Parker's testimony in this regard is uncontradicted. Vincent did not testify.

[5] The General Counsel's unopposed motion to reopen the record to receive joint stipulations is granted.

[6] Sander should not be confused with Gene Saunders, the Charging Party's representative at this hearing.

[7] Neither Komori nor Butcher, nor any other witness contradicted George Dolmat's testimony regarding this exchange. "Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation," *Missouri Portland Cement Co. v. NLRB,* 965 F.2d 217, 222 (7th Cir. 1992). I have no reason to dismiss the testimony of Dolmat in this regard. Although he was fired by Respondent, his testimony is consistent with that of Moore, Ruth (who apparently left Respondent voluntarily), and Williams (who is still employed as a supervisor at TJM). Moreover, the testimony of Assistant Plant Manager Booker lends credibility to testimony of the General Counsel's witnesses regarding Respondent's expressions of animus. Booker concedes that he asked Dane Moore how he knew Roger Harris wasn't soliciting for the Union while working and how Moore would ensure that such solicitation wouldn't happen again. Finally, Dolmat's testimony and that of many other General Counsel witnesses is supported by the fact that Respondent had a number of witnesses available, such as Komori and Butcher, to contradict him and did not do so, *MDI Commercial Services*, 325 NLRB 53, 60 (1997).

[8] Moore's testimony about this meeting was not contradicted by either Komori or Butcher.

[9] It is not clear whether either of these meetings is the meeting about which Dane Moore testified. However, Komori did not deny that he made the statements attributed to him by Ruth.

[10] *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB,* 70 F.3d 863 (6th Cir. 1995).

With regard to the 8(a)(1) and (3) violations alleged in this case, Respondent's knowledge of the discriminatees' union activity, except that of Mylinda Casey Hayes, is established by clear and uncontradicted direct and circumstantial evidence. Respondent's animus towards this activity is also established by direct, as well as circumstantial evidence. This includes the statements by Komori to Moore and Ruth regarding Roger Harris' union activities, and his suggestion that TJM simply "fire all the Rogers." Animus and discriminatory motive is also established by the statements made by Assistant Plant Manager Thomas Booker and other supervisors, notably Terry Leigh, after the second union campaign, and the obviously pretextual reasons given for some of the personnel actions taken by Respondent.

> Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge.

W.F. Bolin Co. v. NLRB, 70 F. 3d 863, 871 (6th Cir. 1995).

As noted by the Court of Appeals for the Ninth Circuit in *Shattuck Denn Mining Corp. v. NLRB*, 366 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact-here a trial examiner-required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal-an unlawful motive-at least where, as in this case, the surrounding facts tend to reinforce that inference.

Accord: *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988); *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991).

Each of the alleged violations must be established independently and Respondent's defense to each alleged violation must also be analyzed independently. However, in analyzing each allegation, the entire context of the situation must be considered. This includes other established unfair labor practices, which are highly relevant in determining Respondent's motive—particularly, as in this case, where they establish extreme hostility to unionization and employees' efforts to organize, *NLRB v. DBM, Inc*., 987 F. 2d 540 (8th Cir. 1993); *Reeves Distribution Service*, 223 NLRB 995, 998 (1976).

C. The Termination of Larry Wilson[11]

1. Background

Larry Wilson was hired by Respondent in June 1995; within a few months he began working as an electrician. His name was on the in-house organizing committee list sent to TJM and he openly supported the Union at work. At a company campaign meeting, when Plant Manager Komori began to discuss the wages and benefits paid to the UMWA president, Wilson asked Komori what he was paid. Komori responded that it was none of his business.

For a number of years, Wilson was supervised by Darryl King, who criticized Wilson's job performance on a number of occasions. On October 3, 1997, King completed a performance evaluation for Wilson covering the period June 26, 1996, through June 26, 1997. On a scale of 0–3, zero being unsatisfactory, King gave Wilson an overall evaluation of "1." A rating of "1" is defined as "mostly meets expectations." King summarized Wilson's performance as follows:

> Motivation needs improvement, needs to be more of a leader than a follower during breakdown situations. Good basic troubleshooting skills, needs to improve complex knowledge of machinery, more attention needs to be given to the "leaders" of a breakdown to acquire a better knowledge for corrective actions.

Wilson was also criticized for being slow in his work by a number of people. As a result, he requested a transfer to the maintenance department in mid-to-late 1997. This request was rejected. In a memo to Human Resources Director Alexis Butcher, Darryl King stated, "I also explained that I needed him in the electrical department as a valuable associate." Between June and October 1997, on monthly team matrix evaluations,

[11] On June 15, 1998, the Union filed a charge alleging that Respondent committed an unfair labor practice in discharging Wilson. Subsequent to the filing of a complaint, the matter was informally settled. Wilson waived reinstatement and TJM paid him $15,000. The settlement contained an exculpatory clause stating the TJM did not admit to any violation of the Act. It also provided for compliance with the terms of a notice to employees, which TJM agreed to post at its facility. That notice includes a promise not to threaten employees with job loss or terminate employees because of union membership, activities, or sympathies. By promising to comply with the terms of the notice, TJM in turn promised not to interfere with, restrain, or coerce employees in the exercise of their rights under the NLRA. On November 30, 1999, the NLRB Regional Director revoked the settlement agreement.

The General Counsel has not sought reinstatement or any additional financial compensation for Wilson. It seeks only that the Board find that Respondent terminated Wilson in violation of Sec. 8(a)(3) and (1) of the Act, GC Br. at 79. Since, the General Counsel seeks no additional remedy, I do not fully appreciate the reasons for his litigation of the Wilson discharge. However, the Board has long held that a settlement agreement may be set aside if there has been a failure to comply with the provisions of the settlement or if postsettlement unfair labor practices are committed, *Tower City Concrete*, 317 NLRB 1313 (1995). Given the fact that I find a number of postsettlement unfair labor practices, I conclude that the Regional Director was entitled to revoke the settlement agreement and seek a finding that Wilson was discriminatorily discharged.

King gave Wilson mostly "2" ratings, i. e., "consistently meets expectations."

King issued Wilson a "Written Discussion" on August 1, 1997, for falling asleep in the control cab of the lathe machine.[12] Wilson was issued an "Associate Warning Report" by Respondent's maintenance manager, George Dolmat, on January 8, 1998, after Dolmat was instructed to do so by Plant Manager Len Komori. The warning report was issued on the basis of a incident during which Wilson heard a press operator page the heating and energy department several times. Wilson telephoned the operator and informed him that the paging system could not be heard in heating and energy, which is located in a separate building from the main production plant. Wilson told the operator that he would have to contact that department by telephone. At the end of this conversation Wilson called the operator, "dumb ass."

In March 1998, Dolmat accused Wilson of pressuring an employee to remove a "Vote No" button from her clothing. Wilson denied the accusation and in turn complained that Mylinda Casey had attempted to deface and remove his UMWA button.[13]

D. Incident Resulting in Larry Wilson's Termination

On May 30, 1998, at about 5 a.m., Wilson got sawdust in his eye, while working the midnight shift. He reported it to his shift manager, Terry Leigh, who took him to the safety department, where they filled out a safety report and had his eye was washed out. Wilson completed his shift at about 7 a.m. and started home. En route, Wilson's eye began to bother him and he turned around and drove to the emergency room at a local hospital, where a physician removed two pieces of sawdust from his eye.

Wilson did not notify Respondent that he went to the emergency room until he reported to work approximately 12 hours later and so informed Shift Manager Leigh.[14] On Monday morning, June 1, Wilson also discussed his eye injury and the fact that he had been to the hospital after work with Cletis Wamsley, who had replaced Darryl King as electrical supervisor.

On Thursday, June 4, Wilson was summoned to the office of Human Resources Director Alexis Butcher. When he entered her office, George Dolmat, the maintenance manager, was in the office with Butcher. Butcher informed Wilson that he was being terminated for not following the chain of command, not getting permission to go to the emergency room or informing Respondent that he was going to the emergency room. Dolmat told Wilson that his failure to inform Respondent about his trip to the emergency room was the "straw that broke the camel's back" after the "dumb ass" warning. Butcher conducted the benefit portion of the meeting. When the meeting ended, Wilson, who was angry, looked at Butcher and said, "if you think I will get even, I will." He was then escorted out of the plant.

Other than Len Komori, it is not clear that anyone had input in the decision to terminate Larry Wilson's employment.[15] Komori testified that, "we considered the entire series of events in Mr. Wilson's work career . . . within the plant." He specifically stated that Wilson was not terminated solely because he went to the doctor without a supervisor. Respondent's position, however, appears to be that this incident, when considered in conjunction with Wilson's performance problems between June 1996 and June 1997, the sleeping incident 9 months earlier, and the "dumb ass" remark almost 5 months earlier, led it to terminate him.

The General Counsel has established that Respondent terminated Larry Wilson in retaliation for his union activity. There is no dispute that Respondent was aware of Wilson's union activity. His name was on the in-house committee list. He stood out amongst the individuals on the in-house list by his

[12] Respondent's progressive discipline system or "General Improvement Guideline Process" is set forth at page 30 of its Associate (Employee) Guidebook, GC Exh. 43. The first step in this process is an "Associate Coaching and Improvement Session." The second step is an "Associate Written Discussion" typically used for repeated or willful violations of a more serious nature. The third step is an "Associate Written Warning" issued as followup for continued disregard of coachings or discussions, or as a first instance sanction, if the violation of company rules or policy is sufficiently serious. A written warning delays an employee's next pay increase by 6 months and excludes the employee from eligibility for a gainsharing check in the month in which the warning is received. Terminations must by authorized by the plant manager.

[13] Casey (now Mylinda Casey Hayes) is also an alleged discriminatee in this case. She strongly opposed the Union in the first campaign but supported it in the second.

[14] I credit Wilson's account of the events of May 30–31, which is not contradicted. Terry Leigh did not testify in this proceeding.

[15] George Dolmat, who was terminated by Respondent in March 1999, testified about Wilson's termination. However, from Dolmat's testimony and a memorandum he wrote on June 5, it is not clear that Dolmat was anything other than the bearer of bad news. There is no evidence that he recommended termination or played any role in the decision to terminate Wilson. Similarly, there is no evidence that Alexis Butcher either recommended termination or had any meaningful input in the decision to terminate Wilson, as opposed to imposing a lesser form of punishment or no punishment. Respondent did not call either Terry Leigh or Cletis Wamsley as witnesses; there is no evidence that either of them recommended that Wilson be terminated or had any input in this decision.

In this regard, I sustained the General Counsel's objection to R. Exh. 18, which purports to be a June 4 memorandum authored by Terry Leigh. Although the reporter indicates that I received this exhibit during Alexis Butcher's testimony, my review of the record indicates that I never received it. Moreover, the memo on its face indicates that Leigh had no idea that Wilson was going to be terminated.

I also received, over the strenuous objection of the General Counsel, R. Exh. 23, which purports to be notes authored by Cletis Wamsley on May 31 and June 1, 1998. I received these pursuant to Rule 803(6) of the Federal Rules of Evidence. Regardless of whether or not I was correct in receiving these notes, I do not accord them any weight with regard to the truth of the matters asserted therein. These assertions were denied by Wilson and Respondent offered no reason for its failure to call Wamsley, who still works for it in a supervisory capacity. I credit Wilson's testimony over the evidence contained in these notes, regardless of whether they were properly admitted. I therefore find that Respondent has not established that Wilson responded to Wamsley's inquiry about his eye by stating that it was "round" or that he disparaging told Wamsley something to the effect that if an employee had an arm cut off, TJM would make the employee bleed to death while he or she found a telephone.

question to Komori regarding Komori's compensation. Finally, the fact that Respondent accused him of pressuring another employee to remove a "Vote No" badge, establishes that it knew that Wilson was an active supporter of the Union.

Animus and discriminatory motive are established by uncontradicted testimony that Komori made statements indicating a desire to get rid of employees because of their role in the union campaigns. A finding of discrimination is also supported by Komori's expressed desire to get rid of Roger Harris, as well as the other unfair labor practices committed after the second election. Additionally, the pretextual reasons given for Wilson's discharge are relevant both in concluding that the General Counsel established his initial case and in concluding that Respondent did not meet its burden of proving that it would have fired Wilson even if he hadn't engaged in union activities. Respondent failed to offer a persuasive nondiscriminatory reason for terminating Wilson.

Komori conceded that it was not inappropriate for Wilson to go to the emergency room when his eye started to bother him again on the way home. He merely stated that Wilson was under an obligation to let the company know that's what he was doing. Komori made no attempt to explain how Wilson violated company policy in a material way,[16] since Wilson reported his injury to his supervisor, Leigh immediately and informed Leigh that he had obtained additional medical treatment as soon as he reported for his next shift, 12 hours later.

Komori's very general explanation for Wilson's termination does not satisfy Respondent's burden under *Wright Line*. Indeed, it strongly suggests pretext. Although, Komori said that TJM considered Wilson's work history in its entirety, there is no indication whether, or to what extent, Respondent weighed Darryl King's opinion that Wilson was "a valued associate" who couldn't be spared from the electrical department. It is also unclear whether, and to what extent, Komori considered Wilson's alleged display of disrespect to Wamsley. Assuming that input from Wamsley contributed to Wilson's termination, I infer from Respondent's unexplained failure to call Wamsley as a witness that his testimony, if offered, would not have been favorable to Respondent's case, *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Moreover, there is no evidence that Respondent made an adequate investigation of either the allegations contained in the Wamsley memo or the circumstances surrounding Wilson's failure to call TJM from the hospital. TJM's decision to fire Wilson without such an adequate investigation, lends support to an inference of unlawful motivation and shows that Respondent was not truly interested in determining whether misconduct had actually occurred, *Washington Nursing Home*, 321 NLRB 363, 375 (1996).

Respondent has disciplined and discharged a significant number of employees in 1998 and 1999. There doesn't appear to be any statistical significance in the number of employees discharged who supported the Union.[17] However, there is also no evidence as to what standards TJM used in determining when termination was warranted. A comparison of Wilson's employment record with several other employees, for whom there is no evidence of support for the Union, reveals disparate treatment of Wilson from which I also infer retaliatory motive.

The employee whose situation appears most analogous to Wilson is Charles Horner, who received a written warning on October 3, 1997, for failing to tell his immediate supervisor before seeing a physician for an on-the-job injury. Horner's violation of this rule was more consequential than Wilson's because on the basis of his visit to the doctor, Horner did not show up for work for his next shift, without contacting his supervisor.[18] Horner could have worked on a light duty assignment. Like Wilson, Horner's prior work record with TJM was not spotless. In May 1997, he had a verbal discussion about his poor attendance and tardiness. In August, Horner received a written discussion for poor attendance (GC Exh. 52).

The employee whose record best demonstrates that Respondent has no hard and fast rules as to when termination is appropriate is press operator Eric Mitchell. In December 1998, his supervisor discussed with Mitchell his harassment of a fellow employee with the use of foul language. On March 9, 1999, Mitchell was reprimanded for engaging in horseplay at the infeed of the Parallam press. Shortly thereafter Mitchell was reprimanded for engaging in horseplay in the control room. On April 15, 1999, after receiving a change in assignments from his supervisor, Mitchell told him that he wished he'd make up his "damn mind." These incidents resulted in Mitchell being issued an Associate Discussion.

On June 24, 1999, Mitchell was issued a formal written warning. In the 2 months since his discussion, he had been reprimanded for not showing proper respect for his fellow employees, for inadequate performance as a control room operator and not completing and documenting microwave leak checks. On July 7, 1999, Mitchell was issued a second written warning for failure to complete his tasks as a parallam outfeed operator. On September 1, 1999, Mitchell received a "0" (unsatisfactory) on his annual performance evaluation.

A followup review of Mitchell's performance on September 16, 1999, revealed no significant improvement. On November 5, 1999, Mitchell was demoted from control room/outfeed op-

[16] Respondent offers no justification as to why Wilson's conduct would warrant termination even in conjunction with other factors. There is no suggestion, for example, that Wilson was trying to make Respondent responsible for an injury sustained outside of work, or in any way was attempting to defraud TJM. Even if Wilson violated company policy, his violation appears de minimis in view of the fact that he reported his injury to his supervisor as soon as it occurred and notified him of his trip to the emergency room as soon as he returned to the plant.

"To the extent that [Wilson] . . . engaged in misconduct, it appears to be so trivial and insubstantial, and Respondent's severe punishment of discharge so extreme as to raise the strong inference of retaliatory motive," *Detroit Paneling Systems*, 330 NLRB 1170, 1171 (2000). This principle is also applicable to the discharge of Joseph Hall, which is analyzed later in this decision.

[17] Alexis Butcher testified that of 24 employees discharged in 1998 and 1999, only 5 were on the in-house list. Her statistics do not include Mylinda Casey Hayes, who alleges she was discharged in retaliation for her union activities, nor Scott McNemar, who testified that he was fired on his last day of work—after having notified TJM that he was quitting.

[18] Horner did leave a voice mail message at the plant.

erator on a parallam team to offbearer on a dryer team. This resulted in a salary decrease of 22 cents per hour. There is no explanation for the extreme forbearance accorded to Mitchell when compared with the terminations of Larry Wilson, Joseph Hall, and Mylinda Casey Hayes.

In conclusion, I find that Respondent violated Section 8(a)(3) and (1) because the General Counsel has established that Larry Wilson would not have been discharged but for his union activities. TJM has not rebutted the General Counsel's case. That many employees without union sympathies have been disciplined or discharged does not at all undercut a finding of discrimination. There is no evidence as to why these nonunion employees were discharged. It may well be that their conduct clearly merited discharge.

At page five of its brief, TJM argues that discriminatory motive is also belied by the fact that 29 of 34 employees on the in-house list still work at its plant, that some have received promotions, and all have received at least one pay raise. First of all, the record indicates that only 21 of 32 employees on the in-house list remain at the Buckhannon facility. Five or six were terminated in 1998 and 1999 and at least six others have received discipline (Allman, Mealy, Stire, Mike Walker, and Terry Bates). Moreover, discriminatory motive, otherwise established is not disproved by an employer's proof that it did not take similar actions against all union adherents, *Master Security Services*, 270 NLRB 543, 552 (1984). This is particularly so in the instant case where some of the discriminatees were the most open and vocal supporters of the Union.

E. The Second Union Organizing Campaign

Union organizing activity ceased at the Buckhannon plant until late November or early December 1998. Employees supporting the Union were much more secretive than during the first campaign. Unlike the first campaign, a list of the Union's in-house organizing committee was not sent to Respondent. Only a few employees, including alleged discriminatees Roger Harris and Roger Allman, openly wore union paraphernalia, such as T-shirts and badges. Distribution of union literature was done clandestinely.

The Union filed a representation petition on February 11, 1999. The second election was conducted on March 18 and 19, 1999. The day prior to the election, Roger Allman and Larry Wilson stood in front of the plant's main entrance for the entire day with picket signs encouraging employees to vote for the Union.[19] Roger Harris served as an observer at the election for the Union; Robert Hoover, a quality assurance technician, who was Harris' partner on his shift, served as an observer for Respondent. The Union lost the second election by a margin of 142 to 95. Thirty-five ballots were challenged and one was void.

F. The Discipline and Discharge of Joseph Hall

1. Hall's work record and two disciplinary warnings

Joseph Hall, a maintenance mechanic, worked for Respondent from June 1995 until May 12, 1999, when he was fired. On his last annual performance evaluation, for the period June 1996 to June 1997, Hall received a "2" rating (on a scale of 0–3), i.e., "consistently meets expectations." All evaluations of Hall's performance prior to June 1997 were also favorable.

Hall was on the in-house committee list supplied to Respondent in February 1998. He was regarded by management as one of the leaders of the organizing effort. In January 1998, Hall received an associate warning report for performing a repair without locking out the electrical power for the equipment he was fixing. This is a serious safety violation and the General Counsel does not allege that this warning was administered in a discriminatory manner.

Fourteen months later, on March 9, 1999, Hall received a second warning report. This warning issued only 9 days before the second election and is alleged as a violation of the Act in paragraph 19 of the complaint. This warning was issued by Green End Superintendent Scott Williams, who was in a breakroom with several other employees on the evening of March 9, when Hall entered. Hall told a fellow employee that the exhaust vent for one of the heaters was off in an area in which the employee's pregnant and estranged girlfriend worked and that she might be exposed to carbon monoxide. The record indicates that this remark was a crude and tasteless attempt at humor.

Scott Williams asked Hall if he had fixed the vent. Hall replied that he didn't have a work order. Williams told him he didn't need a work order. Hall said he reported the problem to several people but that they apparently didn't care enough to fix it. He also said that not caring seemed to be the prevailing attitude at the plant; that he used to care about people, but that management "broke him of that."

Williams later went to the area in which the heater with the detached vent was located and determined that it was not turned on. Williams issued Hall a warning for failing to fix the vent or notify an electrician of the problem. The warning was also issued because Williams concluded that Hall was trying to cause unrest and division amongst the work force, and that Hall was disrespectful towards Williams and the employee whose girlfriend worked near the heater.

I dismiss the complaint paragraph alleging a violation with regard to this warning. Respondent, through Scott Williams, offered a nondiscriminatory explanation for the warning, which I credit. In crediting Williams' testimony I am particularly influenced by the fact that he resisted efforts by Thomas Booker in June to pressure him into taking retaliatory measures against union adherents. I therefore determine that the record does not establish discriminatory motivation in the issuance of the warning of March 9.

G. Joseph Hall's Termination

On the evening of May 8, 1999, Hall and several other employees were told that they would be spending most of the night repairing the parallam press, which had broken down. While the employees waited for further instructions, Gene Zara, a maintenance superintendent, who normally worked days, showed up.

A discussion ensued between Zara, Hall, and other employees as to why Zara was at the plant to supervise the parallam press repair, as opposed to Terry Leigh or David Tallman, the

[19] Wilson had been fired 9 months earlier.

supervisor for the parallam press. Employees had heard that Leigh and Tallman could not come to work because they had consumed some unspecified amount of alcohol during the day and therefore could not work pursuant to Respondent's "zero tolerance" policy with regard to alcohol consumption.

Hall remarked to Zara that he looked very tired. Zara responded that he was tired because he had spent the day cutting weeds. Hall said that Zara should have put a message on his answering machine that he had been drinking and therefore couldn't come to work. All present, including Zara, chuckled at the remark. They then went to the parallam press and spent the most of the night repairing it. Hall also worked at least one more shift and then was off work Monday, May 10, and Tuesday, May 11.[20] When Hall reported to work on the evening of May 12, his supervisor, Terry Leigh, ushered him to Alexis Butcher's office. Butcher read him a termination notice (GC Exh. 13). Hall signed it and left.

This termination notice is signed by Terry Leigh, who is still a supervisor at TJM (Tr. 232), but did not testify in this proceeding, and Alexis Butcher. Butcher testified, but offered no explanation as to how and why Respondent decided to terminate Joseph Hall. Len Komori testified that he made the decision to fire Hall:

> What came to my attention was that the notes were placed, the comments that Hall made about Dave Tallman and about Terry Leigh. It was pretty much Terry Leigh that came to me and was very upset about the comments made about him, suggesting that he was, I suppose, an alcoholic, or that he had a drinking problem, or that he just chose not to come in to work that weekend, so he called and said, Hey, I'm having a couple of beers in the backyard, so I just can't come in. Call somebody else.
>
> And, so, as a result of that, we looked at the history again with respect to documentation in the file, as to all the things that would lead up to the process and, at some point we made a determination whether or not someone should be let go or not.

Tr. 1145.

I do not credit Komori's testimony. First of all, I infer from Respondent's failure to call Terry Leigh that if called, Leigh's testimony would have been adverse to TJM. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). However, my reasons for not crediting Komori go far beyond the fact that Leigh was not called as a witness. Komori indicates that he relied completely on the account of Leigh, who was not present when Hall made his remarks. He did not interview Zara, the management official who actually heard what Hall said and was familiar with Hall's tone and the context of the remarks. As in Wilson's case, Komori's woefully inadequate investigation of Hall's alleged offense indicates that he wasn't interested in determining the truth but was merely looking for a pretext to get rid of Hall.

More importantly, there is direct evidence that the reasons for Hall's discharge are pretextual. On May 11, the day before Hall was fired, Troy Stire, another employee on the in-house list received a written warning, which is also at issue in this case. On June 14, Stire went to Terry Leigh's office to receive his 30-day followup form for the written warning. Stire's uncontradicted testimony, which I credit, is as follows:

> So when I went up to get this follow up Terry told me he said "Troy you just need to be careful what's going on." I said "Well what happened Terry?" He said "You know why this happened as well as I do." I said "What are you talking about?" He said "You know why this happened." He said "You've got a bulls eye on your back you need to watch what you say. Len don't like you to start with" he said. I said "What do you mean he don't like me." I said "I've never had any problems with him."
>
> He said "Troy you know you're targeted the same as others are targeted." He said "you guys with your name on that list on the wall downstairs you've got to watch what you say and do." I said "This is over the union?" He said "You know it is." He said "I'll never admit it."

Tr. 519.

On this occasion or when presenting another followup, Leigh told Stire that with regard to the Union, "I don't have any problem with it but it's out of my hands once it reaches the front office . . . there's nothing I can do about it." From these remarks I conclude that Leigh never asked Komori to terminate Joseph Hall. I conclude further that Komori made this decision in furtherance of a plan to rid the plant of a sufficient number of prominent union supporters that there would never be any further union activity.

That such a plan existed is established through the testimony of several of Respondent's past and former supervisors. On June 24, 1999, Assistant Plant Manager Thomas Booker entered the office of Quality Assurance Supervisor Dane Moore. Booker asked Moore for a brief evaluation of all the quality assurance employees. When Moore got to Roger Harris, one of the most prominent union adherents, Booker told Moore, "that his peers wanted to know what was going to be done about Roger Harris and that they were looking to me to do something about him."

According to Moore, whose uncontradicted testimony I credit:

> Booker talked at length about the threat that he thought that the union posed to the plant and to the people that worked there. He said that he valued his job at Trus Joist MacMillan and that he hoped I valued my job at Trus Joist MacMillan and that he thought that the union posed a considerable threat to the future of the plant.
>
> He went on to say that he believed that Mr. Harris would continue in his organizing efforts.

Tr. 101.

Moore accepted Booker's invitation to go to lunch on June 28. During lunch, Booker told Moore that, contrary to what he had said in their prior conversation, he had talked to Komori about Roger Harris. He then reiterated that he believed the

[20] Hall was on the "B" team, which worked the following schedule: 2 days on, 2 days off, 3 days on, 2 days off, 2 days on, 3 days off.

Union posed a threat to the Company and noted that it had cost TJM $100,000 to fight the second union campaign.[21]

Dane Moore went to Human Resources Director Alexis Butcher to discuss his conversations with Booker. She sent an e-mail to Len Komori forwarding Moore's concerns that he was being pressured to violate the law. Komori never responded to the e-mail or gave any indication that he disavowed Booker's actions. From this I conclude that Booker was acting at Komori's behest or with Komori's approval in pressuring Moore to retaliate against Roger Harris.

Direct evidence that Respondent had a plan to rid itself of a number of union sympathizers is not limited to above-quoted testimony regarding Harris and Stire. Scott Williams, who still works at TJM, testified as follows:

> Mr. Booker did come to me in June of last year [1999]. . . . And what I remember Tom's words to me were what are we going to do about all this Union activity, or all these Union employees.

Tr. 323.[22]

From the above-cited evidence I conclude that the General Counsel has established that but for Joseph Hall's union activity, he would not have been discharged on May 12, 1999. Moreover, I find his discharge was part of concerted effort on the part of Respondent, emanating from Komori or higher levels of management to terminate the employment of enough union sympathizers that no employee would ever try to organize the plant again.

H. Warning Report, Followup Reports and Yearly Evaluation of Troy Stire

Troy Stire has been employed in the heating energy department of the Buckhannon plant since July 1995. He works in a building located 50 feet from the main plant and his job is to keep the furnace at 530 degrees to heat the facility.

Stire was on the in-house committee list mailed to Respondent in February 1998. During the first campaign Stire had a conversation with TJM Vice President Pat Smith. It began when Smith pointed to his UMWA badge and asked him to give the Company a chance and not to vote for the Union for the wrong reasons.

During the second union campaign, Stire talked to some other employees to encourage them to support the Union, but made no attempt to display his support in front of management personnel. In fact, Alexis Butcher and Shift Manager David Marple told him that they he heard he was no longer supporting the Union; Stire did not correct them. Despite this, on the basis on Stire's uncontradicted account of his conversations with Terry Leigh and the pretextual nature of the reasons for his discipline, I conclude that Len Komori either knew or suspected that Stire was a union adherent and that discipline was imposed upon him to discourage union activity by Stire and other employees.

Stire had no disciplinary record with Respondent until May 11 (the day before Respondent fired Joseph Hall). On that day he was issued a written warning by Maintenance Manager Terry Leigh. As a result of this warning Stire lost his gainsharing compensation for May 1999 and his scheduled pay increase was delayed for 6 months.

A few days prior to May 11, Jim Coleman, who had recently resigned his employment at TJM, asked Stire to pick up his gainsharing check for him. On or about May 10, Stire went to the office of payroll clerk Peggy Haddix and inquired if she had this check; she replied that she did not have it. He then went to Shirley Halle, a secretary, and inquired whether Coleman had received a prize for submitting an innovative idea to Respondent. Halle told him that she could not give out information regarding Coleman's entitlement to an innovation award without Coleman's permission. Stire was in Halle's office no more than 10 minutes and was pleasant in dealing with her.

That day or the next, Stire made one or two more inquiries to both Haddix and Halle about Coleman's gainsharing check and/or Coleman's entitlement to innovation prizes. He made a second visit to Halle's office. She testified that on this second visit, which lasted less than 10 minutes that "he felt that the company was doing something to really cheat Mr. Coleman out of getting something that was owed to him."[23] Stire contacted Halle once more on the telephone to inquire about Coleman's gainsharing check and/or innovation awards.

Shirley Halle testified that, without consulting her supervisor, she went directly to Plant Manager Komori and told him that she felt she was being pressured to give out confidential information. Komori testified that after listening to Halle, he contacted Terry Leigh and told him to look into the situation. Thus, Respondent's position is that Terry Leigh, who did not testify, determined that Stire deserved "An Associate Written Warning" with its attendant economic penalties. If I believed Komori, his testimony would be fatal to Respondent on this allegation. This is so because the Company's failure to call Leigh, the decision maker, to explain the reasons for the discipline gives rise to an adverse inference, which I draw, that his testimony, if offered, would not have been favorable to Respondent's case. Apart from the adverse inference, TJM's fail-

[21] Booker did not deny making any of these statements. Indeed, he conceded that on June 24, he told Moore that he was concerned that Roger Harris would continue to solicit employees to support the Union, Tr. 954–955.

[22] Since there was no union activity going on at the plant in June 1999, it is apparent that Booker was suggesting retaliation against union supporters. Williams, the green end superintendent, did not report to Booker, which explains why he may not have been subjected to the same intense pressure to retaliate to which Moore was subjected. Moreover, it is not clear that Williams directly supervised any employees for which Respondent had as much interest in getting rid of, as it did in getting rid of Roger Harris.

[23] I make no finding as to what Stire actually said to Halle. In response to a leading question, "And, he made those comments to you?," she replied, "Yes, he did." I find only that Halle concluded that Stire thought the company was trying to cheat Coleman. Halle also testified that Stire was "aggravated and very pushy." On the basis of her testimony, I conclude that Stire exhibited frustration with her answer. There is no evidence that Stire was rude or hostile towards Halle personally. The warning report makes no such accusation. It merely accuses Stire of showing disrespect for TJM by telling an employee that Respondent had lost Coleman's gainsharing check. If he made this remark, it is unclear whether he made it to Haddix, who did not testify, or to Halle, who did not testify to such a statement by Stire.

ure to subject Leigh to cross-examination cannot be overlooked in determining what actually transpired, *Government Employees (BPO)*, 327 NLRB 676, 701 (1999).

However, I do not believe Komori's testimony. Instead, I credit Stire's testimony that Terry Leigh told him that the warning was issued pursuant to directions from Komori and that it was issued to retaliate against Stire. I find, based on this uncontradicted testimony, that the warning was issued to retaliate against Stire for his support for the Union and to restrain, interfere with, and coerce Stire in the exercise of his Section 7 rights. I also find that followup reports given to Stire on June 14, July 15, and August 20, 1999, as a result of the written warning, are also 8(a)(3) and (1) violations, as are references in his August 20, 1999 performance appraisal to the warning.

With regard to the August 20 followup form, I find the references therein to a loss of heat in the plant to be violative. Two weeks earlier, the furnace had shut down because the oil was not hot enough. Plant Engineer George Sander accused Stire of shutting down the furnace deliberately.[24] Several months earlier, when heat energy operators had lobbied for a pay raise, Stire tried to justify the raise by arguing that when the furnace is down, the plant can't operate.

Terry Leigh told Stire that Komori wanted to fire Stire over the furnace shutdown. Leigh refused to do so, but told Stire "You know they're looking for a way to get rid of you." I deem this further evidence that the May 11 warning was part of a larger plan to rid TJM of a sufficient number of union supporters to end union organizing efforts for the foreseeable future.

Finally, even assuming that Stire's conduct in May warranted discipline, Respondent has offered no evidence to explain why Stire was given an "Associate Written Warning" for a first offense. According to page 30 of the employee handbook (GC Exh. 30), the penalty for first instance misconduct is generally an "Employee Coaching and Improvement Session."

Respondent has made no showing that Stire violated any company rule by inquiring about Coleman's gainsharing check and innovation awards. It certainly has made no showing that if he violated such a rule or policy that the violation was sufficiently severe to warrant an "Associate Written Warning."

I. The 10(b) Issue with Regard to Troy Stire's Discipline

Prior to the hearing, Respondent moved to dismiss the complaint allegations pertaining to Troy Stire on the grounds that his May 11,1999 warning was issued more than 6 months prior to the filing of a charge on his behalf.[25] Charge in Case 6–CA–30823 was filed by the Union on August 26, 1999, alleging that Respondent had discharged Joseph Hall in retaliation for his union activities. In the fall of 1999, the Union filed additional charges concerning the discharges of Roger Harris and Mylinda Casey Hayes, as well as a written warning issued to Roger Allman. In November it amended the charge in Case 6–CA–30823 to allege, among other things, that TJM was violating the Act in continuing to refuse to employ Hall.

On January 14, 2000, the Union filed a second amended charge alleging that TJM violated the Act in issuing the May 11, 1999 written warning to Stire, as well as the subsequent followup reports and performance appraisal. The Board has allowed litigation of untimely allegations if they are closely related to the allegations of a timely filed charge, *Columbia Textile Services*, 293 NLRB 1034, 1036 fn. 13 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). I find that the allegations with regard to Stire are sufficiently related to the allegations in the original charge to be considered. The warning to Stire was issued the day before Hall was fired and was part of the same plan to stifle further union activity at the Buckhannon plant.

J. The Termination of Mylinda Casey Hayes[26]

Mylinda Casey Hayes worked for Respondent from December 1995 until August 11, 1999, when she was fired. At the time of her termination, Mylinda Hayes worked at the wrap and strap station on the parallam production line. During the first organizing campaign, she was demonstratively against the Union. Mylinda Hayes wore a "Vote No" button, was accused of trying to deface and remove a UMWA button by Larry Wilson and attended Respondent's "victory party" after the first election.

Sometime before the second election, Mylinda Hayes began living with Bill Hayes, who worked at the wrap and strap station on a different shift. Bill Hayes had openly supported the Union during the first campaign. Mylinda Hayes supported the Union during the second campaign and discussed her support for the Union with coworkers. Respondent contends that it was unaware of her support for the Union when it fired her.

K. Did Management Personnel See Mylinda Casey Hayes Wear a Union Badge or Button During the Second Organizing Campaign?

Mylinda Hayes testified that she wore a UMWA badge to work daily during late February and early March 1999, just prior to the second election. Her husband also testified that she wore a union badge; so did Connie Blake, a crane operator, who is still employed by Respondent. Blake testified that she saw Mylinda Hayes with a UMWA button on at least two occasions. Additionally, Mylinda Hayes testified that she was wearing a union button when she had a somewhat acrimonious discussion with Shift Manager David Marple, a few weeks prior to the second election.[27] During that conversation, Marple raised the subject of the Union. Hayes also testified that Len Komori came to her workstation when she was wearing a union badge. Komori did not contradict this testimony.

On the other hand, several witnesses testified they never saw Hayes with a union button or badge. One of these witnesses, Jeff Grey, was her regular supervisor, and saw Hayes on a daily basis. Dane Moore, the quality assurance supervisor, who is also an alleged discriminatee, also has no recollection of seeing

[24] Sander is the management official who previously advised Komori to get rid of the troublemakers and let our attorneys earn their keep.

[25] The 10(b) argument with regard to Stire is not reiterated in Respondent's brief.

[26] Throughout her employment this discriminatee was known as Mylinda Casey. She married Bill Hayes a month after her termination.

[27] Hayes' testimony that she wore a union button while talking to Marple was elicited by a leading question from the General Counsel. On the other hand, Respondent never called Marple as a witness and therefore this testimony is uncontradicted.

Mylinda Hayes wearing a union badge or any other indicia of support for the Union. It is not clear, however, how often Moore would have seen Mylinda Hayes. However, Delmar Tenney, who worked daily with Mylinda Hayes at the wrap and strap station, testified that he never saw her wearing a union badge or button. I am convinced that Tenney, who was called as a witness by Respondent, testified truthfully on this issue, because he confirmed that Mylinda Hayes did indicate to him her support for the Union during the second campaign. However, Tenney also testified that he saw Bill Hayes wear a UMWA button during the second campaign, a fact not testified to by Bill Hayes. Therefore, I am not certain that Tenney's perception and recollection as to which employees wore union badges or buttons during the second campaign is accurate.

Although it is a close issue, I find that Mylinda Hayes wore a union badge at times when she was observed by Marple and Komori. It was incumbent upon Respondent to contradict her testimony on this issue, if it was inaccurate. However, I also conclude on the basis on circumstantial evidence that Respondent knew that Hayes supported the Union and that it would not have discharged her but for that support. This circumstantial evidence includes the evidence that Respondent was aware of Mylinda's relationship with Bill Hayes, a known union supporter, Respondent's extreme hostility towards unionization and the lack of any substantial explanation for Mylinda's discharge.

Although the quality of Mylinda Casey Hayes' work was usually very good, Respondent disciplined her numerous times during her employment. She had continual trouble getting along with her coworkers, which was documented by her supervisors as early as 1996. In March 1997, she received a documented verbal warning for being too bossy and constantly getting into arguments with fellow employees. She had two documented discussions in October 1997.

Hayes received a "1" rating on her annual evaluation for the period December 1996 to December 1997. Her supervisor, Jeff Grey, noted that her teamwork, attitude and behavior all needed to improve. On December 12, 1998, Respondent issued Hayes a written warning for teasing another employee and then becoming belligerent with her coordinator during a discussion about her light duty limitations.[28] During this exchange, Hayes told her coordinator that, "I am so sick of this f—king bullshit." As a result of this warning, Hayes lost her gain sharing eligibility for December 1998, and her next pay increase was delayed for 6 months. On her annual evaluation for the period December 1997 to December 1998, Hayes received another "1" rating.

The Company's 30, 60, and 90-day followup reports to Hayes' written warning are all very favorable to her. During this period Hayes was also commended for preventing the shipment of the wrong product to a customer. The followup reports coincide with the second union organizing campaign.

L. Mylinda Casey Hayes' Last Day at Work for Respondent

On August 10, 1999, Mylinda Casey Hayes was stung by a bee on her left ring finger at home. She reported to work on August 11 at the wrap and strap station on the parallam production line. That day she was working on a three-person crew with Delmar Tenney and Mark Riggs. Generally, one person in the crew operated a computer, while the other two employees wrapped and strapped the parallam product for shipment.

Shortly after the shift began, David Marple, the shift manager that evening,[29] took Tenney off the wrap and strap crew and sent him to operate different equipment. Hayes went to see Marple and told him that because of the bee sting and resulting swelling of her finger she could not wrap the parallam. Marple told her that if she couldn't do her job she had to go home. Hayes said she could operate the computer. Marple told her that if she couldn't perform all the functions at the wrap and strap station she had to leave the plant.

Hayes protested that if Marple sent her home the wrap and strap station would be even more short-handed. Marple pointed to a list on the wall and told her there were a lot of employees he could get to replace her. Hayes asked why he couldn't have one of those employees do the job Marple sent Tenney to do. Marple told her that wasn't her concern.

Hayes continued by telling Marple that most of the time she runs the computer, while her coworkers wrap and strap the product. Marple insisted that if Hayes could not wrap and strap she had to go home. He also told Hayes that she would have to bring in a doctor's note before returning to work. At one point, Hayes told Marple that what he was doing was childish. She also said that Marple and/or his decision to send her home was stupid.[30]

The next day, August 12, 1999, Hayes called Marple to tell him that she had been to the doctor, who had given her an excuse and that she would not be coming to work because her hand was still swollen. Marple told Hayes to come to the plant. When she arrived, Marple read her a written warning (GC Exh. 39), and told Hayes she was being terminated. Alexis Butcher then explained to Hayes her termination benefits.

There is absolutely no substantial evidence in the record establishing why Respondent terminated Mylinda Casey Hayes. Neither Butcher nor Komori, who testified, offered any explanation. Marple did not testify. The warning he drafted is hearsay and does not establish that Hayes was terminated for the reasons set forth therein. As in the case of Hall and Wilson, I draw the inference from Respondent's failure to call Marple that his testimony, if offered would not have been favorable to its case, *Government Employees*, supra. For example, in light of Troy Stire's testimony regarding his conversations with Terry Leigh, I conclude that Marple may have been told to fire Hayes by higher-level management.

Moreover, Respondent's failure to offer substantial evidence of a nondiscriminatory reason for terminating Hayes leads me to infer that it was aware she supported the Union, that it bore animus towards her as a result and that she would not have been terminated but for her support for the Union. Assuming that Hayes' conduct merited discipline, there is no explanation

[28] Hayes was on light duty for an extended period of time after carpal tunnel surgery on both wrists.

[29] Jeff Grey, her regular supervisor, was on vacation. There is no indication that Grey was consulted about Hayes' termination.

[30] Hayes denies using the word "stupid" but I credit Jeff Whitehair's testimony to the contrary.

why she was terminated, as opposed to being given another written warning. Her conduct was certainly no more offensive than her response to her coordinator in December 1998, prior to her union activity.[31] There is no explanation for why her conduct that had been objectionable to Respondent for years suddenly became grounds for discharge on August 12.

Further, from the fact that Respondent had a plan to get rid of union supporters when the opportunity arose, from the fact that at about the same time it fired Hayes, it took discriminatory action against Roger Allman and Roger Harris, I conclude that Hayes' discharge was part of the same broad-based initiative against union supporters.

There is also no adequate explanation for Marple's insistence that Hayes leave Respondent's facility on August 11. Her testimony that she regularly operated the computer for an entire shift is uncontradicted. It is also clear that Marple could have accommodated her if he had so desired. I infer that the hard line taken by Marple was also discriminatory. In conclusion, I find that Respondent violated Section 8(a)(3) and (1) in discharging Mylinda Casey Hayes on August 12, 1999.

M. The Associate Written Discussion Issued to Roger Allman on August 23, 1999

Roger Allman has been employed at TJM as a maintenance mechanic since 1995. He was on the in-house organizing committee for both campaigns. He was recognized as one of the leaders of the organizing drive by Respondent. Len Komori told George Dolmat that Allman was very clever in avoiding any situation that would cause him to be disciplined.

Allman was one of the few employees to openly display a union badge during the second campaign. For 3–4 hours, 2 days just prior to the second election in March 1999, Allman and Larry Wilson stood outside the main entrance to the plant holding up signs encouraging employees to support the Union.

During the summer of 1999, Respondent was looking for opportunities to discipline and discharge prominent union supporters. I draw this conclusion from the previously discussed conversations between Assistant Plant Manager Thomas Booker and Dane Moore, and between Booker and Green End Superintendent Scott Williams.

On August 23, 1999, Roger Allman was summoned to the office of Maintenance Manager Terry Leigh. Leigh presented Allman with a written discussion and told him to read it.

The discussion (GC Exhibit 26), begins as follows: "This discussion is for a trend that Roger is showing that we will not tolerate. Roger has an attitude that everything that we are doing is wrong and the company is trying to take advantage of associates."

The document then recites three incidents, only one of which appears to be logically related to Allman's attitude. The related incident refers to a safety meeting on August 17, at which Allman asked Leigh how employees were to dispose of a parts cleaner. Cletis Wamsley, the electrical superintendent, told Allman that the substance was to be burned in the furnace. Leigh asked Allman if he had read the Material Safety Data Sheet (MSDS) for the substance. Allman did so afterwards and told Leigh he had read the MSDS. Respondent does not have a policy of disciplining employees for asking questions at safety meetings, even questions that can be answered with minimal research.

The second incident mentioned is Allman's telephone call to TJM purchasing agent Brenda Hinerman at about 11:30 p.m. on August 17. That evening the drive belts on the overshog machine began to smoke. The operators reported this to the maintenance employees on duty, one of whom was Allman. The first thing Allman did was go to a storeroom to get replacement belts.[32] There were none in the storeroom. Allman then called Purchasing Agent Brenda Hinerman, who was in bed, at home.

Allman told Hinerman that the belts on the overshog had burned up and that there were no more in stock at the plant. Allman contends that he told Hinerman that there was no hurry in getting the belts because the overshog was not scheduled to operate during the first shift the next day.[33] He also testified that he told her that she could bring the belts with her when she came to work the next morning. Hinerman testified that Allman only told her that the overshog was "down" and that she understood from this conversation that the belts were needed immediately.[34]

Hinerman called TJM's local distributor, who had no v-belts in stock. As a result, she had to order them from an outlet in Carmichael, Pennsylvania. The belts were transported by taxi from Carmichael to Buckhannon at a cost of about $312, so that they would be available for the first shift. Allman did not violate any company policy or practice in calling Hinerman at home. She gets similar calls 3 or 4 times a month. However, he could have waited until Hinerman arrived at about 5:30 the next morning. After Allman's call to Hinerman, he and another employee worked several hours to unjam the overshog and then shut the machine down because it was not needed until the beginning of the second shift the following afternoon.

The third incident mentioned in the written discussion is that Allman rebuilt a cylinder on a lathe. It did not work properly. He had to remove the cylinder and retighten it, which kept the lathe from operating for an hour. Other employees made similar errors and were not disciplined.

I conclude that the General Counsel has shown that the written discussion was issued to Allman in retaliation for his union activities. It is clear that TJM was aware of his prominent role in both organizing campaigns, bore an extreme amount of animus towards that activity and was looking for an excuse to discipline Allman and other union leaders. Moreover, I con-

[31] Respondent's treatment of Hayes also contrasts markedly with its forbearance towards its safety director, who made a very obscene remark to her.

[32] Allman was acting in accordance with TJM policy in checking on the availability of replacement parts before going to the overshog machine.

[33] The overshog, which grounds wooden material into smaller bits, was scheduled for preventative maintenance on the first shift on August 18.

[34] I find no need to resolve the conflict between the testimony of Allman and Hinerman. It is clear that Allman did not tell her that the belts were needed immediately. It may be that she simply misunderstood Allman or that he did not adequately communicate to her the schedule for the overshog.

clude that Respondent has offered no evidence to rebut the General Counsel's case.[35] This leads me to conclude not only that TJM did not meet its *Wright Line* burden but also that the reasons for the discussion are pretextual.

Respondent offered no explanation for issuing an associate written discussion to Roger Allman. Terry Leigh, who gave the discussion form to Allman, did not testify.[36] I again draw an adverse inference from Leigh's failure to testify, that any testimony he would have offered would have been harmful to TJM's case. Indeed, in light of Troy Stire's uncontradicted testimony regarding his conversations with Leigh, I find that Leigh was directed to discipline Allman by higher management because of union activity.[37]

N. The Terminations of Dane Moore and Roger Harris

Roger Harris was hired by Respondent in March 1995, as a quality assurance technician. During his first year at TJM, Harris reported to Quality Assurance Supervisor Dana Fields. In 1996, Fields was terminated by her supervisor, Technical Director David Ruth. Before he fired Fields, Ruth issued her a warning in September 1995, a followup to the warning in October 1995 and a second warning in January 1996. Ruth issued these warnings consistent with his understanding of TJM's policy, i.e., to provide an adequate opportunity for an individual to correct their job performance before making a decision to terminate them.

Fields was replaced as quality assurance supervisor by Bruce Christiansen. In June 1997, Christainsen left this position and Ruth hired Dane Moore to replace him. Moore had been a green end supervisor at the plant since April 1995. Ruth considered Moore an excellent supervisor and Moore considered Roger Harris an excellent employee.

Harris was on the in-house organizers list provided to Respondent in February 1998, and was widely regarded as one of the leaders of the union effort at Buckhannon. As noted before, shortly after the first election, Plant Manager Leonard Komori indicated to both Moore and Ruth that Harris did not belong at the plant because of his union activities. Also as noted previously, Roger Harris was one of the few employees who openly demonstrated support for the Union during the second campaign. He served as an observer for the Union in both elections.

In the fall of 1998, Robert Hoover transferred from the microllam department to quality assurance. Hoover was assigned to work with Roger Harris, who was given responsibility for training Hoover. Harris was a very competent technician who tended at times to be harsh in his assessment of new employees. Harris told Hoover that he brought another employee to tears, when he threw his hardhat across the floor in anger several years earlier.[38] Hoover found Harris to be a difficult person. Two weeks after Hoover started working in quality assurance, Harris told him that he did not think Hoover would make it as quality assurance technician.

Tension between Harris and Hoover increased after the second union campaign began, because Hoover discussed his opposition to the Union, possibly in response to inquiries from Harris. On one occasion just prior to the election, Harris chided Hoover for having worked for a hardware store at the minimum wage. He told Hoover that if the Union won at TJM, he would make more money and indicated that Hoover was "dumb" for opposing the Union.[39]

On occasion, Harris referred to Hoover as "Len's boy" or "Pat's boy" (TJM Vice-President Pat Smith). Harris had completed a career in the military sometime prior to his employment with TJM. Harris, on at least one occasion, told Hoover how when he was in the service, "they settled things with their fists." However, there was no indication that Harris said this in way that threatened Hoover with physical violence.

Harris at times referred to Leonard Komori, who is of Japanese ancestry, as "a rice eater." A number of employees, including Harris, Roger Allman, Supervisors Terry Leigh and Gene Zara, also at times referred to Komori as "Hop Sing," the name of the Chinese cook on the television show "Bonanza."[40]

Just prior to the second election in March 1999, David Ruth and Dane Moore invited all the quality assurance technicians to breakfast to demonstrate their appreciation for the job they were doing. Hoover and Harris were invited to join Ruth and Moore at the same time. Harris declined the invitation due to other commitments. Hoover went to this breakfast meeting alone.

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[35] The written discussion document is pure hearsay with regard to the reasons for which it was issued and therefore does not constitute credible evidence.

[36] Komori testified that he had no role in issuing Allman this discussion; I do not credit his testimony in this regard. Alexis Butcher, who signed the discussion, offered no explanation for why it was issued.

[37] On November 19, 1999, Leigh prepared an annual evaluation for Allman, rating his overall performance as a "1," the second lowest rating out of four choices. The same day, Leigh prepared a team matrix rating (GC Exh. 26). The rating has zeros in the box for overall performance for the dates of August 23, October 22, and November 19, which have been scratched out. Although not alleged as violations in the complaint, these evaluations are a direct result of the written discussion and are to be expunged from Allman's records pursuant to the order portion of this decision.

[38] This incident occurred before Dane Moore became the quality assurance supervisor. Similarly, QA Technician Jason Croston had complained to David Ruth about the way Harris treated coworkers prior to Moore's transfer to the QA department. However, Ruth also received complaints about the manner other QA technicians treated coworkers, including one about Jason Croston.

Respondent's attempt to depict Harris as an employee who was routinely cruel and insensitive to others is belied by Jason Croston's testimony. In 4-1/2 years working with Harris, Croston could recall only two unpleasant experiences with Harris. Both of these incidents occurred at least 2-½ years prior to Harris' termination.

[39] There is no evidence that prior to August 30, 1999, Respondent was aware of this conversation, which was overheard by QA technician Kevin Strader. Strader, one of Respondent's witnesses, also heard Harris make complimentary remarks about Hoover. He never heard Harris make any derogatory remarks about anyone's ethnic origins.

[40] Other employees and management officials were also referred to by nicknames, albeit names that appear less offensive. George Dolmat was referred to by many employees as "Casper" (as in "Casper the friendly ghost"). He was given this nickname apparently because during the early stages of his employment at Buckhannon, he appeared not to be at the plant very much.

During this breakfast meeting, Hoover told Ruth and Moore that his relationship with Harris was very tense. He told them that one day he approached Harris and said, "I know that we have different views. But all I desire is your friendship." Hoover said that Harris "laughed in his face" and told him, "I don't have friends, only acquaintances." At this point, Ruth displayed anger towards Harris, and said, "I'm going to talk to Roger." Hoover asked him not to do so, that he preferred to handle the situation himself. Ruth, Moore and Hoover discussed the ongoing union campaign. Moore and Ruth indicated to Hoover that since the organizing drive was the source of much of the tension between he and Harris, they thought things would improve when the campaign ended.

At sometime after the breakfast meeting, Hoover approached Supervisors Cal Zirkle and David Marple and discussed his tense relationship with Roger Harris. Marple asked Hoover if Harris was harassing him and said that if he was, Hoover or Marple (it's not clear which) should do something about it. Hoover replied that he wanted to leave things alone and see what happened.

After the breakfast meeting, Moore asked Hoover frequently how he was getting along with Harris. Hoover repeatedly told Moore that everything was fine. In June he told Moore that if he had his choice of anyone to work with in the QA department he would choose to work with Roger Harris.[41]

On April 12, 1999, Moore gave Roger Harris his annual performance appraisal (GC Exh. 6). The review is generally favorable and Harris received a "2" rating ("3" being the highest). One area in which employees are evaluated is "Teamwork." In evaluating employees in this category, supervisors are directed to consider, "cooperation, attitude towards others, communicates effectively, participation as a team member, willingness to accept change, and work responsibilities, including overtime."

Moore's assessment of Harris was that, "I have always believed Roger to be a strong team player, though demanding. I want Roger to focus on being even tempered and consistent with teammates." When he met with Harris, Moore told him that not everybody sees things his way and that not everybody else believes the same thing. Moore assiduously avoided mentioning the word "union," although he was obviously referring to Harris' attitude towards antiunion employees.

In June 1999, David Ruth was transferred to Respondent's plant in Colbert, Georgia. Assistant Plant Manager Thomas Booker became interim technical director. As discussed earlier, Booker went to Dane Moore on June 24, and began pressuring him to take disciplinary action against Roger Harris in conjunction with conversations about the threat posed to Respondent by the Union and Harris' organizing activities.

On June 28, as discussed previously, Booker invited Moore to lunch. He told Moore, that, contrary to their prior conversation, Booker had discussed Roger Harris with Len Komori before asking Moore to do something about Harris. From this I conclude that Booker approached Moore on this subject at the direction of Komori, or at least with his approval. After discussing how much the union campaign had cost Respondent, Booker told Moore that "there were things we could do to make Roger know he was unwelcome in the plant." To this end Booker suggested that if a vacancy in the quality assurance department were not filled, Harris could be assigned to work alone, thus suggesting he was not welcome at TJM.

Moore told Booker that he was "tip-toeing around the edges of legality" and said he could count on Moore to act with integrity and respect for employees. Booker questioned the integrity of employees supporting the Union and rhetorically asked whether they should not be held to account for spreading misinformation about Respondent.[42]

After his conversation with Booker, Moore went to see Scott Williams, the green end superintendent, to whom Booker also suggested taking retaliatory action against union supporters. When Moore told Williams about his conversation with Booker:

> [Williams] told me that he felt that the company would really like to be rid of a number of people and he believed that if it meant getting rid of Dane Moore and Scott Williams to get that done they would do that.[43]

As discussed earlier, Moore also went to see Human Resources Director Alexis Butcher about his conversations with Thomas Booker about Roger Harris. Butcher forwarded his concerns to Len Komori in an e-mail to which Komori did not respond.[44]

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[41] Robert Hoover confirms Moore's testimony on this point. At some point after the union campaign ended, Hoover told Moore that Roger Harris was not speaking to him. It is unclear when this occurred in relation to the occasions on which Hoover told Moore that everything was fine and that he wouldn't trade Harris as a partner for anyone else.

I generally regard Robert Hoover to be a credible witness. However, he is clearly a very malleable individual. Thus, where he responded to leading questions from Respondent, I tend to discount some of his testimony, particularly his testimony as to his opinion that Harris was deliberately denigrating his religious beliefs.

I would also observe that Respondent elicited a great deal of testimony regarding offensive behavior by Harris of which it was not aware when it terminated him and on which it did not rely in terminating him. There is also no evidence that Moore or Ruth was aware of this behavior (e.g., Harris' unflattering and offensive characterizations of Komori's ethnic background). I therefore find this evidence to be irrelevant to Respondent's motivation in discharging Harris and Moore, or any other issue in this case.

[42] Booker's testimony confirms the essential details of his discussions with Moore in June, 1999. To some extent, his testimony is even more damning than Moore's. Booker confirms, for example, that at the same time he was telling Moore that Harris should not get a passing grade on his teamwork evaluation, he also told Moore that he was concerned that Harris would continue to solicit employees to support the Union (Tr. 937–938, 955).

[43] To the extent that there is conflict between the testimony of Moore and Scott Williams, I credit Moore. However, Williams, who is still at supervisor at TJM, confirms the essentials of Moore's testimony. He testified that he did not recall making the above-quoted remark, not that he did not make it. I find he did make it and that things said to him by Booker and other management personnel led Williams to believe that any supervisor who interfered with plans to rid TJM of certain prominent union supporters, would be fired.

[44] I credit Butcher's testimony over that of Komori in this regard.

On August 9, Dane Moore returned from a 1-week vacation and prepared bimonthly evaluations for all the employees in the quality assurance department. On August 13, Booker came into his office and told Moore that he was "right on target" with his evaluations, except for the one for Roger Harris. Booker told Moore that Harris had to receive an unsatisfactory score for teamwork. Harris, Booker continued, had not acted as a teammate towards Booker and Komori, and did not have the acceptance of the people on the plant floor.

Booker and Moore discussed Roger Harris' relationship with Robert Hoover. Moore told Booker that the problem had been resolved to his satisfaction and to Hoover's satisfaction. He also told Booker that he had addressed Harris' relationship with his teammates satisfactorily in Harris' annual evaluation.

During this conversation, Moore asked Booker if he had some kind of agenda and whether he knew that the next technical director would share that agenda. Booker replied that he hoped he was talking to the next technical director. Booker continued by saying that Komori was waiting for Moore to step up and take the job by showing that he was willing to do what it takes to get the job.[45]

In preparation for meeting with Booker the following day, Moore called Roger Harris on Sunday, August 22, and asked him to come to his home. When Harris arrived, Moore read to him from notes he had taken. The notes Moore read included Moore's account of being told by Booker that Moore's peers were expecting him to take care of Harris, that Harris was to be isolated and made to feel unwelcome, and that Moore might become technical director if he co-operated with Booker's plan to get rid of Harris. Moore told Harris he was going to be receiving an unsatisfactory teamwork evaluation and cautioned him not to overreact.

The next day, August 23, Moore went to Booker and told him that he would not give Harris the failing rating, as Booker had suggested. Moore told Booker that he thought such a rating was wrong and was motivated by a desire to retaliate against Harris for his union activity. Two days later, on Wednesday, Booker asked Moore again if he had prepared the evaluations. Moore reiterated that he would not give Harris an unsatisfactory rating.

On Friday morning, August 27, 1999, Booker summoned Moore to Alexis Butcher's office and told Moore that he could either resign or be terminated. Booker handed Moore a termination notice (GC Exh. 4) that stated "[o]n a range of issues, we either sense a lack of support or we know that Dane is unwilling to support management decisions."

The notice gave no specifics as to what range of issues Booker was referring. When Moore asked him, Booker, for the first time, mentioned he thought Moore had not supported his position regarding some defective runs of the parallam product.[46] I credit Moore's testimony that there was no difference of opinion between him and Booker on this issue, and find that this and other reasons given for Moore's termination during the hearing were fabricated.[47]

Moore left the plant. Later that day, Booker called Roger Harris at home to inform him that Moore no longer worked for Respondent and to tell him that any information he previously gave to Moore should now be given directly to Booker. On Friday, Harris decided to ask for a meeting with Booker the following Monday morning. He planned to ask Booker for an explanation for Dane Moore's termination and to call Booker a liar if Booker refused to give him a reason.

Upon arriving at the plant for his next scheduled shift on Monday, August 30, 1999, Roger Harris requested a meeting with Thomas Booker, Alexis Butcher, and David Marple. For the first time since the election, Harris was wearing his UMWA T-shirt. According to Butcher, whose account, I credit:

> [W]e came into my office. Roger sat and began to question Tom about why Dane Moore had been let go, why his employment had been terminated. Tom explained to him numerous times throughout the discussion, that we were not permitted to give that information, it wouldn't be fair to Dane to do that . . . that basically, that was confidential information.
>
> Roger continued to ask why Dane had been let go, made comments to the effect that this was not . . . about anything other than between he, Roger, Tom and Dane. That he felt pretty strongly about Dane and his supervisory roles and his capacity and how Dane did his job. He continued to say and, then it got a little harsher, he said . . . I think on numerous times that Tom was Len's prostitute. That he had prostituted himself. Wanted to know how much Len was paying him. How much prostitutes got paid now a days. I remember he grabbed his crotch and said something to the effect of, I have your manhood hanging right here.

Tr. 1071.

Harris also called Booker a lying bastard. Booker asked Marple to bring Len Komori to Butcher's office. Booker told Komori what Harris had said to him. Komori asked Harris if he had called Booker a liar, a lying bastard, and a prostitute. Harris conceded that he had. Harris denied purposely grabbing his crotch. He told Komori, Booker, and Butcher that he was going to let both the Union and the NLRB know what Respondent had done to Dane Moore. A few minutes later Komori terminated Roger Harris.

O. Respondent Violated Section 8(a)(1) in Terminating Dane Moore

An employer violates Section 8(a)(1) of the Act when it discharges a supervisor for refusing to commit an unfair labor practice, *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982).

[45] Moore had applied for the technical director position. That such a conversation occurred is confirmed by Alexis Butcher's testimony at Tr. 1084–1085. Butcher testified that Moore came to her office one day and told her that Booker had asked him to take care of Roger Harris and that if he did, maybe something could be worked out with the technical director position. I see no reason why Moore would have such a conversation with Butcher unless Booker had intimated to him that his chances of becoming technical director would greatly improve if he gave Harris a failing teamwork rating.

[46] The glue was not bonding the strands of the parallam together well enough in a production run on about August 5 or 6, 1999.

[47] I credit Moore's testimony that Booker never indicated any dissatisfaction with his work or his response to any assignment—other than the evaluation to be given to Roger Harris.

I conclude that Respondent discharged Dane Moore solely for refusing to give Roger Harris an unsatisfactory teamwork rating. The evidence of animus towards Roger Harris' union activities is overwhelming. It is also apparent that Respondent, by Thomas Booker, put a great deal of pressure on Dane Moore to give Harris an unsatisfactory teamwork rating as part of a scheme to either fire Harris or make him quit because he supported the Union. The timing of Moore's discharge, a few days after he informed Booker that he would not give Harris a poor teamwork rating is another reason I find that Moore's termination violated the Act.

Additionally, the pretextual reasons given for Moore's discharge support the General Counsel's case. I find the testimony of Thomas Booker and Leonard Komori as to other reasons for Moore's discharge to be completely false. Komori concedes that he never gave Moore any indication that Respondent was dissatisfied with his job performance prior to his termination. Further, I credit Moore's testimony that Booker never expressed any dissatisfaction with his work prior to August 27.[48] In addition to my general assessment of Moore as a credible witness and Booker as an incredible witness, I rely on the fact that absolutely no documentation or corroboration exists for Respondent's assertions that Moore's performance with regard to the curtain coater project, the internal bond problem and the indent problem, was unsatisfactory.

Respondent's treatment of Moore contrasts markedly with Ruth's extensive documentation prior to firing Dana Fields. I credit Ruth's testimony that the manner in which he documented Field's performance and offered her an opportunity to improve was in accordance with TJM policy. The fact that no documentation exists for Moore's alleged deficiencies and no opportunity was provided to him to correct any perceived problems is also an indication that the proffered reasons for his discharge are pretextual.[49]

Finally, I conclude that Respondent had no legitimate reason to discharge Moore for his refusal to downgrade Roger Harris. It is quite clear that Moore did everything within his power to assure that Harris treated Robert Hoover fairly. Moore can hardly be faulted for not taking action against Harris when Hoover repeatedly told him that everything was fine and asked him not to intervene. Moreover, as the record indicates that the teamwork rating generally covers an employee's behavior during a 2-month period, there is no indication that Harris' conduct warranted an unsatisfactory rating anytime after April 1999.

The proposed unsatisfactory teamwork rating was to be imposed for activities protected under the Act. Respondent sought to punish Harris for trying to persuade Robert Hoover, an antiunion employee, to change his views during an election campaign and for exhibiting resentment towards Hoover by not going on coffeebreaks with him and not being friendly. Harris' conduct was neither sufficiently abusive nor threatening to remove his conduct from the protections of the Act, see *Patrick Industries*, 318 NLRB 245, 248 (1995).[50]

P. Dane Moore's Loyalty to Respondent

At page 32 of its brief, Respondents contends that "[e]ven if Dane Moore's termination somehow were found to have violated the Act, he clearly is entitled to no relief since it is now known that he intentionally breached his obligation of confidentiality, loyalty and trust owed to Respondent." Just as Moore did not violate any obligations to Respondent by refusing to give Roger Harris an unsatisfactory teamwork rating, he did not violate his obligations to Respondent by advising Harris that he was to be given this rating and that it was part of an unlawful plan to make Harris feel unwelcome at TJM. Further, Moore's testimony establishes that he forewarned Harris to prevent him from overreacting to the appraisal, thereby giving Respondent an excuse to fire Harris.

In *Buddies Super Markets*, 223 NLRB 950 (1976), the Board held that an employer unlawfully discharged a supervisor who told an employee that it was building a case against him because of union activities. *Parker-Robb*, supra, 404 fn. 20, overruled *Buddies Super Markets* to the extent the decision rested upon the fact that the supervisor's discharge was an integral part of its attempt to restrain, coerce, and interfere with Section 7 rights or part of a pattern of conduct to do so. However, *Buddies Super Markets* was not overruled to the extent that it relies upon the need to vindicate employees' exercise of their rights. I conclude that Moore, in advising Harris of the actions to be taken against him, was vindicating Harris' right to continue to engage in protected activity and to avoid retaliation for such activity. Therefore, Respondent would have violated the Act if it had discharged Moore for tipping Harris off about the teamwork evaluation and the plan to encourage Harris' departure from the plant. It therefore cannot evade its obligation to offer Moore backpay and reinstatement as a result.[51]

Q. Legal Conclusions Regarding Roger Harris' Discharge

As a general proposition, an employer is entitled to terminate an employee, who says the kinds of things that Roger Harris said to Thomas Booker on August 30, 1999. The General Counsel argues that Respondent was not entitled to fire Harris, however, because: 1. he was engaged in protected activity and 2. Respondent provoked his conduct.

As to the first proposition, I conclude that Harris' protest of the termination of Dane Moore for refusing to commit unfair labor practices against Harris is indeed protected. Generally, the protest of a supervisor's discharge by a single employee

[48] I note that even Moore's termination notice, GC Exh. 4 mentions no specific instances of unsatisfactory performance on Moore's part. I further credit Moore that Booker only mentioned the salvaging of the defective parallam beams (due to poor bonding of the glue) on August 27. However, I conclude that all three alleged deficiencies (the bond, the indents, and curtain coater) were fabricated by Respondent as post hoc rationalizations for its unlawful discharge of Moore.

[49] On the other hand, Len Komori appears to have demoted, and then terminated, George Dolmat with little or no warning or documentation.

[50] Booker's testimony at Tr. 933–934 confirms that Hoover told him that his "poor treatment" by Harris had diminished or ceased by July and that it was related to "the Union stuff."

[51] I also note that Moore was sufficiently willing to act in behalf of Respondent's interests that during the election campaigns that he received a note of appreciation from Company Vice-president Pat Smith, and a case of frozen steaks. It also appears that Moore, on TJM's behalf, may have violated the Act in engaging in surveillance of Roger Harris' union activities (Tr. 937).

might not be protected. However, Harris' protest was an extension of his union activity, in that he was protesting retaliation against Moore for failing to carry out directives to discriminate against Harris. On the other hand, the manner in which protected activities are engaged can result in the forfeiture of the employee's protected status. "[T]here are . . . limits to employee insubordination, even when provoked," *NLRB v. Steinerfilm, Inc.*, 669 F. 2d 845, 852 (1st Cir. 1982).

With regard to employee outbursts provoked by an employer's unlawful discrimination, the Board has held that:

> When the impulsive behavior is induced by the employer's unlawful infringement of employee rights, we also compare the seriousness of the employer's unlawful conduct with the extent of the employee's reaction.

Brunswick Food & Drug, 284 NLRB 663, 664 (1987), enfd. mem. 859 F. 2d 927 (11th Cir. 1988); *Paradise Post*, 297 NLRB 876 fn. 2 (1990).

Respondent contends that the above-cited cases and similar cases provide no support for the arguments of the General Counsel (R. br. at p. 37). TJM argues that:

> Harris certainly did not experience a "moment" of enthusiasm. Rather having been informed [of Moore's termination] on a Friday afternoon, Harris had an entire weekend to develop his plan before his next shift on Monday morning . . . . Harris waited until he had Booker in the presence of his peers, then did all he could to intentionally humiliate and degrade Booker.

I agree with Respondent that Harris planned to embarrass Booker in front of Alexis Butcher and David Marple. I do not credit his testimony that he expected Booker to admit to him in front of Butcher and Marple that he fired Moore because of his refusal to retaliate against Harris for his union activities. Harris concedes that he planned in advance to call Booker a liar if he did not get a satisfactory answer to his inquiry. I find that no reasonable person would have expected to get a satisfactory response under the circumstances. Had Booker given Harris the rationale put forth by Respondent at the hearing, I infer that Harris' response to Booker would have been the same.

In almost all of the cases in which the Board and/or the courts have excused an outburst such as Harris', the outburst immediately followed the employer's provocation. In this regard, the Fourth Circuit decision in *J. P. Stevens v. NLRB*, 547 F. 2d 792 (4th Cir. 1976), makes a distinction between spontaneous and premeditated actions by employees. However, that decision found unprotected a premeditated interruption of an employer's lawful election speech and is not particularly relevant to the instant case.

The Board and the Fourth Circuit first held that an employer cannot provoke an employee and then rely on the employee's indiscretion to justify termination in *NLRB v. M & B Headwear Co.*, 349 F. 2d 170, 174 (4th Cir. 1965), enfg. 146 NLRB 1634 (1964). In this case the court stated,

> We hold only that when a layoff is discriminatory a rehiring of the injured employee cannot be avoided by reliance on her later unpremeditated and quite understandable outburst of anger that in no way harms or inconveniences the employer . . . . Justice in this instance demands the employee's reinstatement with the strict admonition that she will be expected to conduct herself properly and with due respect to supervisory personnel. After reinstatement any further misconduct will subject her to disciplinary action as it would any other employee.

Nevertheless, the facts of that case show that a interlude of several days between the provocation and the employee's outburst is not necessarily fatal to the employee's protected status.

In *M & B Headwear*, the discriminatee, Rena Vaughan, was the most active union adherent at her plant. On June 10, 1963, Vaughan was laid off in retaliation for her union activities. Upon being laid off, Vaughan told supervisor Dorothy Ellis that Ellis and supervisor Roy Trivette were not going to sleep anymore at night. Seven days later, Vaughan returned to the plant to seek reemployment. In the course of a conversation with a clerical employee, Vaughan declared, "I am going to beat Dorothy Ellis if it is the last thing I do." Sometime later, during a discussion with the company president, Vaughan told the employer's vice president to "shut up" when he tried to intervene in the conversation.

The Court of Appeals majority observed:

> We in no way condone insubordination and in normal situations it would be a justifiable ground for dismissal. But we cannot disregard the fact that the unjust and discriminatory treatment of Vaughan gave rise to the antagonistic environment in which these remarks were made.
>
> An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment . . . . The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression. To accept the argument addressed to us by the company would be to provide employers a method of immunizing themselves from the only real sanction against violations of Section 8(a)(3) . . . refusal to reinstate her would put a premium on the employer's misconduct.

On the basis on the decision in M & B Headwear, I conclude that the intervening weekend between the provocation herein and Harris' response does not preclude a finding of discriminatory discharge, or reinstatement. In this case the provocation is extraordinarily extreme. Respondent had just fired a well-respected supervisor who refused to take part in its scheme to rid of itself of an number of prominent union supporters, including Roger Harris, himself. Indeed, it would not be unreasonable for the retaliation against Moore to have infuriated Harris more than retaliation against himself. While the discriminatee in M & B Headwear had herself been laid off before her outburst, I deem this insufficient to distinguish Harris' situation. Given the accurate information Harris had received from Moore, it was reasonable for him to assume that he would soon be fired or constructively discharged by Booker.

Although Harris had the weekend to think about the manner of his protest, his outburst occurred almost immediately upon his return to the plant after Moore's discharge, and at his first opportunity to confront Booker. Moreover, Harris did not physically threaten Booker, as did employees in *Steinerfilm* and

M & B Headwear, whom the Board and the courts found could not be legally discharged for their conduct.

While it is clear that Harris planned to call Booker a liar, I do not conclude that he necessarily planned to call him a prostitute, a lying bastard, and grab his crotch. It is just as likely that this more outrageous conduct on Harris' part was unpremeditated. In balancing Harris' misconduct and Respondent's unlawful provocation, I deem that Respondent was not entitled to fire him for his premeditated conduct in calling Booker a liar, nor for his more offensive outbursts, which may not have been planned.

While not in any way justifying Roger Harris' very imprudent behavior, I conclude that given the nature of the provocation, i.e., Moore's discharge pursuant to a premeditated plan to fire Harris and others for union activity, and the close proximity of his behavior to the provocation, that Respondent was not entitled to terminate him as a result of that behavior. I therefore conclude that Trus Joist MacMillan violated Section 8(a)(3) and (1) in terminating Roger Harris' employment on August 30, 1999.[52]

R. The Complaint Allegations Regarding Respondent's Overly Broad No-Solicitation/No-Distribution Rule are Dismissed Because They are Barred by Section 10(b) of the Act

Complaint paragraphs 7(a), 9 (a), 11, and 12 allege violations of Section 8(a)(1) in that Respondent unlawfully promulgated and maintained an overly broad no-distribution/no-solicitation rule during the first election campaign prior to March 13, 1998. Respondent argues in a conclusory fashion at page 12 of its brief that these allegations are barred by the 6-month limitation in Section 10(b) of the Act.[53]

The first charge filed by the Union on June 15, 1998, alleged only that Respondent violated Section 8(a)(3) and (1) in discharging John Bales on April 9, 1998, Larry Wilson on June 4, 1998, and constructively discharging Joy Parker in May 1998.[54] On September 24, 1998, more than 6 months after the first election, the Union amended its charge to allege violations during the first campaign, including the no solicitation/distribution claims at issue. I conclude that these allegations are not sufficiently related to the allegations of the timely filed charge to permit consideration by the Board, *Redd-I, Inc.*, supra. I therefore dismiss these paragraphs of the complaint.[55]

S. The General Counsel has not Established the 8(a)(1) Violations Alleged in Complaint Paragraphs 8(a) and (b), 9(b) and (c), 10(a) and (b), and 14

Not every question asked or comment made by a management official about union activity violates Section 8(a)(1). One must determine whether under all the circumstances of the interrogation or comment, it reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act, *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d. 1006 (9th Cir. 1985). Some of the factors to be considered with regard to interrogations are: (1) the background of the questioning; (2) the nature of the information being sought; (3) the identity of the questioner; and (4) the place and method of the interrogation.

The General Counsel alleges that sometime prior to the beginning of open organizing efforts, in about January 1998, Supervisor Keith Barbo asked Kenneth Mealy if he attended any union meetings. Mealy told Barbo it was none of his business and Barbo made no further inquiries of him (complaint par. 8(a)). Barbo had one similar conversation with Roger Riley at about the same time (complaint par. 8(b)). I conclude that neither of these isolated inquiries were unlawful.

Similarly, I dismiss complaint paragraph 10(a) alleging a 8(a)(1) violation by Shipping Manager Larry Harvey in a conversation with John Mundy. Harvey asked Mundy if he favored the Union prior to the date that Mundy began wearing a union button. When Mundy responded affirmatively, Harvey asked why. Mundy told him that TJM employees needed a seniority system and better retirement benefits. Harvey responded that everyone could use a better retirement plan. There was no further discussion between Harvey and Mundy regarding the Union. I conclude that this conversation is not unlawful pursuant to the criteria in *Rossmore House*.

No evidence, or insufficient evidence, was introduced to support the allegations of paragraphs 9(b) interrogation of Joy Parker by Komori,[56] 10(b) threats by Larry Harvey, 14(a) and (b) violations by Dolmat and Vincent in February and March 1999. These are also dismissed.

Additionally, I dismiss complaint paragraph 9(c) alleging that Komori solicited complaints from employees and promised to remedy them in order to dissuade them from supporting the Union. I conclude that the record does not support this allegation. After a conversation with Komori, Joy Parker was temporarily transferred to a position she desired, to fill in for an in-

[52] While Respondent had no reason to know that Moore had advised Harris of Respondent's plan to give him a poor teamwork evaluation and make him feel unwelcome at TJM, and its suggestion to Moore that he would be promoted if he did so, I conclude that it assumed the risk that Harris would learn of this plan or infer its existence.

[53] Sec. 10(b) is an affirmative defense, that is waived if not timely raised, *Public Service Co.*, 312 NLRB 459, 461 (1993). It is a close question as to whether Respondent adequately raised this defense. In the answer, TJM merely asserted that "[t]he circumstances alleged to constitute violations of the Act occurred, in whole or in part, more than 180 days prior to the filing of either the Complaint or the underlying charges referenced therein. As such, the claims asserted in the Complaint are barred by the applicable statutes of limitation." Since it is self-evident on the face of the charges that the no-solicitation/no-distribution rule was not alleged until September 24, 1998, I will consider this defense. However, I will not consider it with respect to other allegations, such as the early 1998 interrogations, which Respondent has not specifically claimed were barred by Sec. 10(b).

[54] It is not clear whether the General Counsel filed a complaint on behalf of Bales and Parker.

[55] Although the record indicates that Respondent never changed its overly broad no-solicitation/ no-distribution rule and that it maintained it during the second campaign, the General Counsel only argues that the violation occurred during the first campaign (GC Br. at 56). I therefore find that the General Counsel has waived any contention that Respondent violated the Act after March 13, 1998, by maintaining such a rule.

[56] Parker testified that at a captive audience meeting, Komori asked employees why they wanted a Union. The record does not reflect whether Parker and the other four to five employees present openly supported the Union when the question was asked.

jured employee. Parker's wages were not increased and she was not told that the transfer would be permanent. Indeed, the record indicates that Parker understood that she was being transferred only until the injured employee returned to work.

Finally, I dismiss complaint paragraph 13 because Respondent has not been provided an adequate opportunity to respond to it. The complaint alleges that in about mid-March Shift Supervisor Ron Howell threatened employees with the loss of their jobs because of their union activities. In his brief, the General Counsel alleges that the violation was committed by Supervisor David Vincent.

Joy Parker testified that Vincent told approximately 14 employees at a team meeting that Respondent would probably come down hard of those who worked for the Union. While this testimony is properly considered as evidence of TJM's animus towards union activities, it would be unfair to find a 8(a)1) violation in this regard because the General Counsel did not amend the complaint. Therefore, Respondent may have had insufficient notice of the need to call Vincent as a witness to avoid being found in violation of the Act.

CONCLUSIONS OF LAW

1. Complaint paragraphs 7(a), 9(a), 10, 11, and 12 are dismissed as untimely pursuant to Section 10(b) of the Act.

2. Respondent, by Terry Leigh, violated the Act as alleged in paragraphs 7(b) and (c), when Leigh advised Troy Stire that he was targeted for reprisal due to his union activities. Leigh's comments are violative regardless of his apparently "friendly" objectives in trying to protect Stire, *Jordan Marsh Stores, Corp.*, 317 NLRB 460, 462 (1995).

3. Respondent violated Section 8(a)(1) in terminating and refusing to rehire Dane Moore as alleged in paragraphs 15–17.

4. Respondent violated Section 8(a)(3) and (1) in terminating Larry Wilson on June 4, 1998, as alleged in complaint paragraph 18.

5. Respondent did not violate the Act by issuing a disciplinary warning to Joseph S. Hall on or about March 9, 1999, as alleged in paragraph 19.

6. Respondent did not violate the Act as alleged in paragraphs 8(a) and (b), 9(b) and (c), 10(a) and (b), 13, and 14 (a) and (b).

7. Respondent violated Section 8(a)(3) and (1) in issuing a warning, follow-up reports and downgrading Troy Stire as alleged in paragraph 20.

8. Respondent violated Section 8(a)(3) and (1) in terminating Joseph S. Hall on May 12, 1999, as alleged in paragraph 21.

9. Respondent violated Section 8(a)(3) and (1) in terminating Mylinda Casey Hayes on August 11, 1999, as alleged in paragraph 22.

10. Respondent violated Section 8(a)(3) and (1) in issuing a disciplinary discussion to Roger Allman on August 23, 1999, as alleged in paragraph 23.

11. Respondent violated Section 8(a)(3) and (1) in terminating Roger Harris on August 30, 1999, as alleged in paragraph 24.

REMEDY

Having found that the 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.

The Respondent having discriminatorily discharged Dane Moore, Joseph Hall, Mylinda Casey Hayes, and Roger Harris, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to 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).

Because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]