

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

CRH NORTH AMERICA, INC.

and

Cases 10-CA-36715

DONNIE PAUL BAKER, an Individual

and

10-CA-37123

U. L. RATLIFF, an Individual

*John Doyle, Esq., for the General Counsel.
J. Frederic Ingram, Esq., Marcel L. Debruge, Esq., and
Ronald W. Flowers, Jr., Esq., for the Respondent.*

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Birmingham, Alabama, on February 11-13, 2008. Donnie Paul Baker, an Individual, filed the charge in Case No. 10-CA-36715 on March 2, 2007 and amended it on March 7, 2007 and March 21, 2007.¹ U. L. Ratliff, an Individual, filed the charge in Case No. 10-CA-37123 on November 19. Based upon the charges and amended charges, an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing issued on January 25, 2008, alleging that CRH North America, Inc., the Respondent, violated Section 8(a)(1) and (3) of the Act.² Specifically, the complaint alleges that the Respondent issued a written warning to Baker, suspended him, changed his job and shift assignment, and ultimately discharged him on March 13 because of his union activities. In addition, the complaint alleges that the Respondent, through various supervisors, threatened employees and interfered with their Section 7 rights on various dates in October, and issued Ratliff a warning on October 9 because he advised employees of their right to contact the Board.

The Respondent filed its answer to the amended consolidated complaint on February 8, 2008, denying that it committed any of the alleged unfair labor practices and raising several affirmative defenses. Among other things, the Respondent asserts that some of the allegations are untimely; that some or all of the alleged union activity was not related to protected activity;

¹ All dates are in 2007 unless otherwise indicated.

² The consolidated complaint also included allegations based upon a charge filed in Case No. 10-CA-36719 by Stephen J. Perry, an Individual, on March 6, 2007. At the beginning of the hearing, I granted the General Counsel's motion to sever Perry's charge from the instant case and remand it to the Regional Director for approval of a non-Board settlement. I also granted the General Counsel's motion to withdraw the complaint allegations that were based on Perry's charge.

that the Respondent lacked knowledge of the alleged protected activity; that the actions the Respondent took were for legitimate business reasons and for good cause; and that Baker and Ratliff would have been treated the same even in the absence of any protected activity.

5 On the entire record³, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

10 Findings of Fact

I. Jurisdiction

15 The Respondent, a corporation, manufactures seats and seat adjusters for automobiles at its facility in Clanton, Alabama, where it annually sells and ships goods valued in excess of \$50,000 directly to customers located outside the State of Alabama. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), the Union herein, is a labor organization within the meaning of Section 2(5) of the Act.

20 II. Alleged Unfair Labor Practices

A. *Admissibility of General Counsel's Exhibit 17*

25 On the last day of the hearing, General Counsel offered this exhibit as part of his rebuttal case. The Respondent, while not disputing the authenticity of the evidence, objected on a number of grounds, including relevance. At that time, I reserved ruling on admissibility because of serious concerns about the relevance and materiality of the evidence. The proposed exhibit, a series of optical discs containing the daily log files copied from the Respondent's computer network server at its Clanton, Alabama facility, covering the period from March 31, 2006 through 30 May 4, 2007, purports to show the frequency with which computers at the facility have been used to access pornographic websites before and after the incident for which Baker was disciplined. General Counsel included, as part of his post-hearing motion, an explanation of the method used to access the data on the discs and a summary of that data.

35 Counsel for General Counsel conceded at the hearing that it cannot be determined from the logs which of the many computers in the facility accessed particular sites as all go through the server. As a result, there is no way to tell from the exhibit which employee was responsible for accessing the pornographic websites, or even which department was the source of the 40 allegedly unauthorized access. General Counsel essentially argues that this evidence shows that, had the Respondent monitored these logs, it would have uncovered other instances of the conduct for which Baker was disciplined and, had it investigated those instances, it could have determined which employees were responsible. This is pure speculation. I note that Dwayne Short, the Respondent's I.T. Manager, testified that the Respondent has no practice of routinely 45 reviewing the daily logs, nor the time and staff to do that. Counsel for General Counsel has provided no basis for me to discredit that testimony. Moreover, even assuming the Respondent were to review these logs, there is nothing in the discs themselves, nor in General Counsel's explanatory summary, that would indicate how the Respondent would determine which

50 ³ General Counsel's Motion for Admission of General Counsel's Exhibit 17, which was filed concurrently with his brief, will be addressed later in this decision.

employee was responsible for accessing pornography. In addition, as the Respondent argued at the hearing, expert testimony may be required to facilitate an understanding of what actually is revealed on these discs and the usefulness of that information in the employee discipline context.

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Having considered the arguments made by General Counsel in his motion and Respondent's objections voiced at the hearing, I will reject the Exhibit. As noted above, the evidence is highly speculative. I also find that, even if relevant, its probative value is outweighed by the danger that it will confuse the issues and unduly burden the record. See Rule 403, Federal Rules of Evidence.

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*B. Alleged Discrimination Against
Donnie Paul Baker*

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The Respondent is referred to as a Tier Two supplier in the automotive industry. The Respondent manufactures automobile seat frames at the Clanton, Alabama facility. The frames are then shipped to other companies (Tier One suppliers) that add batting and cloth to the frames before shipping the completed seats to the automobile manufacturers for installation in a vehicle. The ultimate customers, e.g. Ford, Hyundai, Mercedes and Volkswagen, are known as original equipment manufacturers, or OEMs. The production floor at the Respondent's plant is organized by department according to the OEM for whom the seats are being assembled. In addition, the Respondent has a logistics department responsible for shipping, receiving and material handling activities. The shipping and receiving areas are at opposite sides of the plant. Employees in this department receive materials used in the manufacturing process, stock the material until needed and transport it to the production area when needed. They also handle finished seat assemblies for shipment to the tier one suppliers. Employees in the logistics department use company computers to track material and products from receipt at the plant through shipment out of the plant. Donnie Paul Baker and U.L. Ratliff, the prime actors involved in this drama, both worked in the logistics department.⁴ Sam George was employed as the Logistics Manager during the period involved in this proceeding. Ricky Coburn was the Scheduler/Shipping Supervisor and Danny McGee the Receiving Supervisor at the time. McGee is related to Baker by marriage.

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In March 2007, the Respondent had about 450 employees at this facility, including supervisors and managers. Its employees have historically been unrepresented by a union. Baker, a member of the Steelworkers for a number of years while employed by another employer in Calera, Alabama, testified that he first had a conversation with co-workers about a union in 2005.⁵ These efforts were abandoned when a call to the UAW was returned by a representative of the Steelworkers Union, a union not favored by Baker's co-workers. According to Baker, he next heard talk of a union in Fall 2006 when fellow employee Allen Acre told Baker he had been in contact with the UAW. Baker told Acre about the last time an employee had contacted the UAW and how their inquiry had been passed off to the Steelworkers. Acre called the UAW to confirm that they would stick with the employees at the Respondent's plant this time, and then gave Baker a business card for Harvey Durham, a UAW staff representative. On the back of this card, Acre wrote his name and contact information. Baker did the same on the back of another of Durham's business cards which he gave to Acre. This exchange took place inside the plant. There is no evidence that any managers or supervisors witnessed it. Acre, who

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⁴ Perry, whose charge was settled at the outset of the hearing, also worked in the logistics department.

⁵ Baker started working for the Respondent in July 2004.

is still employed by the Respondent and testified as a witness for the General Counsel, corroborated this testimony.

5 Baker did not testify regarding what, if anything, he did after his conversation with Acre to organize his fellow employees. He did testify that, several months later, about the third week of February, he met with Rick England, another UAW representative, at a Shoney's restaurant in Clanton. According to Baker, he called England to set up this meeting.⁶ Baker was alone when he met with England. England testified and confirmed that he met with Baker at Shoney's, recalling that the meeting occurred on February 11. According to England, he was accompanied
10 by another union organizer. His only prior contact with any employees at the plant was a phone call to Acre, in November 2006, when he was first assigned to organize the Respondent's employees and had been given Acre's name as a lead. England testified that he met with one other employee from the Respondent's plant, Donell Williams, about a week after his meeting with Baker. These are the only contacts England had with the Respondent's employees. He
15 acknowledged that the Union never kicked off an organizing campaign among the Respondent's employees, never handbilled at the plant or engaged in any other overt organizing activities, and never signaled to the Respondent that the UAW was interested in representing its employees. However, there is no dispute that England was a well-known figure in the area from union organizing efforts at other companies that were suppliers to the local Mercedes plant.

20 Williams, who was still employed by the Respondent at the time of the hearing, testified under a subpoena from the General Counsel. He confirmed that he met with England at Shoney's in February. Williams testified further that the day after this meeting, his supervisor, McGee, approached him while Williams was sitting at the desk in the receiving office and said,
25 "just be careful who you talk to." Nothing further was said in that conversation. Williams recalled one other conversation with McGee, around the same time, in which McGee apologized in advance if "he started acting like an a—hole, because it's something [he] has to do." McGee, who testified for the Respondent, did not specifically contradict this testimony. The General Counsel does not allege that either conversation violated the Act.

30 Baker testified that he showed Durham's business card, with the handwritten contact information for England, to McGee shortly after his meeting with England. According to Baker, this occurred in the receiving office, after other employees had told Baker about meetings the company was having with the employees. Baker recalled that McGee came out of a meeting
35 and said, "now they know about it." McGee then said, "his name is Rick, he drives a white Tahoe and makes \$122,000 a year."⁷ When McGee appeared to be having trouble with Rick's last name, Baker showed him the business card with England's name on it. McGee said, "yeah, that's it." According to Baker, this was not the first time he spoke to McGee about a union. Baker testified that he had previously asked McGee if he thought the employees should go for a union
40 and that McGee replied, "you know how they are, go for it." McGee did not specifically contradict Baker's testimony about these conversations.

45 Baker also recalled, somewhat vaguely, that he had a conversation with Mike Ramsey, a second shift supervisor at the time, about unions. To the best of Baker's recollection, this occurred about a month before he was terminated. In the context of discussing the need for a raise for line workers, Baker asked Ramsey if he thought the employees needed a union.

⁶ England's name and contact information is handwritten on the front of Durham's business card. No explanation was provided as to the source of this information.

50 ⁷ England testified that he does drive a white Tahoe. According to Baker, this was the vehicle that England drove to the meeting at Shoney's.

According to Baker, Ramsey replied by telling Baker that he had previously worked at a plant that got rid of the union and that a union wasn't the answer, or "something like that." Ramsey, who testified for the Respondent, acknowledged on cross-examination that he had a conversation with Baker during which the subject of unions was raised. According to Ramsey, it was Baker who brought up the subject by telling Ramsey that he had worked at a plant with a union and that unions could guarantee high wages. Ramsey responded by talking about demographics and how that affects wages. According to Ramsey, the conversation was not limited to the subject of unions but touched on a number of issues regarding employees' terms and conditions of employment. Ramsey reluctantly admitted that he sent an e-mail to the Respondent's Human Resources Manager, Judy Benson, documenting this conversation with Baker. Ramsey could not recall reporting to Benson any other employees as having talked about unions. Benson testified that she recalled receiving a report from Ramsey about employees asking questions about the union but she did not recall receiving an e-mail from him specifically about Baker. Benson recalled that Ramsey was the only supervisor who reported, in the February-March period, that employees were asking questions about unions.

As previously noted, the Respondent held a series of meetings with the employees to inform and educate them about unions. Benson, who set up the meetings, testified that she did so in response to the report from Ramsey that employees had asked questions about unions. As documented by Benson's memo to the supervisors enlisted to conduct the meetings, these meetings occurred on Mar. 1 and 2 and March 5 and 6., not in mid- to late February as suggested by General Counsel's witnesses. The meetings were conducted by front-line supervisors like Ramsey, McGee and Sam George for groups of 15-20 employees at a time throughout the day. The supervisors received training in preparation for the meetings on February 27. The General Counsel does not allege that any statements made during these meetings violated the Act.⁸ However, General Counsel's witnesses testified, without dispute, that the Respondent's supervisors showed the employees pictures of England and identified him as the Union organizer. Employees were also shown documents that revealed England's salary.

Baker was first disciplined on February 27 when he received a three day suspension in lieu of termination. The disciplinary notice states that it was due to his "involvement in an investigation with inappropriate material on the company's computer in your work area during work hours." There is no dispute that the inappropriate material was pornographic images that were found on a computer in the receiving office. Baker served his suspension February 28 through March 2, coinciding with the first two days of meetings described above. Baker did not deny that he had viewed the inappropriate images on the computer. He denied that he had been the one to access the web sites from which the images were downloaded.

Dwayne Short, the Respondent's IT Manager since October 2006, testified that he discovered pornographic images on the computer in the shipping office on February 22 while troubleshooting a problem with a label printer that had been brought to his attention by Shipping Supervisor Ricky Coburn. The Respondent has a policy on internet usage by employees that strictly prohibits accessing or downloading such images. Short immediately brought this to the attention of Coburn and Production Manager Jimmy Simpler. The images were located in a temporary internet file for an employee named Jimmy Desmond. When Short gave this information to Coburn and Simpler, he was told that Desmond's employment had ended in

⁸ Acre testified that Jimmy Simpler, the plant manager who conducted the meeting he attended, "demonized" the UAW. However, General Counsel did not ask Acre to specify what was said that led Acre to characterize the presentation in this manner.

October 2006. Coburn and Simpler asked Short if he could determine who had downloaded these images. Short informed them that whoever had access to Desmond's login password could have done it. After further investigation, Short was able to determine the date and time the images were downloaded, i.e. January 3, 9 and 10 between the hours of 2:00 and 4:00 AM.

5 With this information, according to Short, Coburn was able to check the Respondent's electronic timekeeping records to determine who would have been working with access to the shipping office during those times. Short testified that the time records showed that Baker, Stephen Perry and Joshua Bryant were the only ones in the plant when the images were accessed. With this information, Short and Simpler reported to Human Resources Manager Judy Benson what they
10 had found.⁹

Benson testified that, upon receiving this report from Simpler and Short, she began an investigation to determine who was responsible for accessing and downloading this material. Because Bryant was then working in quality control on the first shift, she called him to the office
15 first. Benson interviewed Bryant with Logistics Manager George and Short present. Benson acknowledged that, at the time of this interview, she had not yet seen the images that were found but that Short had described them as "sexually explicit." Benson asked Bryant if he had been in the shipping office during the times in question. Bryant denied he had. When Benson asked Bryant if he had seen anyone else who had been in the shipping office those times, he
20 replied that he had seen Baker and Perry on the computer laughing. He also volunteered that Perry was very familiar with using computers. Benson later prepared a written statement for Bryant to sign documenting the interview. Bryant did not sign this statement until March 15, after Baker was terminated. On May 7, Bryant signed an affidavit prepared by the Regional Office investigator in which he stated that he did not remember being asked by Benson about the
25 specific time during which the images were accessed. This apparent conflict in his testimony generated a great deal of dispute during the direct and cross-examination of Bryant but he insisted on the witness stand that Benson in fact asked him about the specific times and he told her he saw Perry and Baker on the shipping office computer those times.

Benson was not able to speak to Baker or Perry on February 22 because Logistics
30 Manager George had to leave before they were scheduled to come in for work. Both men were not scheduled to work the next day. When Benson tried to speak to Baker and Perry on Monday, February 26, she found that Perry was on vacation and that Baker had gone to a company warehouse in Thorsby, Alabama to retrieve materials. Finally, on Tuesday, February
35 27, everyone was at the plant at the same time and Benson was able to continue her investigation by interviewing Baker and Perry. In the meantime, Benson had confirmed through payroll records that Baker and Perry were working during the periods the pornography was accessed. She also confirmed that no other employees were working overtime those nights. She had also had an opportunity to see copies of the images that Short had found on the
40 computer.

Benson spoke to Baker first. George was also present. George and Benson first
45 questioned Baker about his trip to the Thorsby warehouse the night before. Benson characterized this as a safety issue because Baker had gone alone to the warehouse where he would have had to operate a forklift. According to Baker, he told Benson and George that his supervisor, McGee, was aware that he had gone to the warehouse alone. At that point, Benson changed the subject and asked Baker about the pornographic images on the computer. Baker

50 ⁹ Coburn did not testify. Although Simpler testified as a witness for the Respondent, he was not asked any questions about this incident. The Respondent did place in evidence copies of the images found on the shipping office computer.

testified that he denied any involvement in this. Benson asked if Perry had been looking up “dirty stuff” on the computer and Baker said that never happened. Benson gave a more detailed account of this meeting. According to Benson, Baker claimed that he did not know much about computers but that his co-worker Perry did. Baker also volunteered that Perry spent a lot of time on the computer doing data entry.¹⁰ Benson asked Baker if anyone else had access to the shipping office computer and he said he didn’t know.

After interviewing Baker, Perry was brought into the office and questioned about the pornographic images. According to Benson, Perry admitted using the computer to access the internet to look up weather, news and “funny stuff”, i.e. jokes, etc., but he denied having anything to do with the sexually explicit material. Perry identified several other employees who had access to that computer, including Baker. When Benson told Perry that the internet had been accessed using former employee Desmond’s username and password, Perry said he had seen that information posted on the wall by the computer and that other employees could see it there as well. Benson told Perry to wait outside while she and George discussed the matter. According to Benson, she decided to terminate Perry because he had admitted accessing the internet and viewing websites that were included with the sites where the sexually explicit material was found. She also believed some of his answers to her questions had been contradictory. Benson then proceeded to terminate Perry.¹¹

After terminating Perry, Benson and George called Baker back to the office. On the way back to the office, Baker asked George if this was about the “safety issue”, i.e. his trip to the Thorsby warehouse alone. George said that issue had been resolved through his supervisor, McGee. When Baker and George got to the office, Benson informed him that Perry had been terminated. She again questioned him about the pornographic images and he again denied any involvement. Benson then showed him a sample of the thumbnail pictures that had been found on the computer and asked Baker if he had seen them. Baker finally acknowledged having seen them but denied any involvement in accessing or downloading this material to the shipping office computer. At the conclusion of this meeting, Benson told Baker he was suspended for three days and would return to a job on the production line on first shift. Baker thought he was being fired but Benson assured him he would be coming back to work after three days, but to a different job and shift. Baker testified that, either at this meeting or the first one, he said, “why don’t we just get down to what the deal is, it’s the Union.” According to Baker, Benson denied that this had anything to do with the Union. On cross-examination, Baker testified that he then told Benson that he didn’t care about the Union.

Benson’s testimony about this second meeting with Baker was again more detailed than Baker’s vague recollection. Benson testified that Baker immediately said he had seen Perry viewing porn on the computer and that it had been going on for a long time. He said he didn’t know why the company hadn’t discovered it sooner. Baker also told Benson that he did not feel it was his responsibility to report this because he was not a supervisor. Baker also claimed that he had only seen pictures of women’s breasts and, when shown copies of the images, identified those he recalled seeing. At one point, Baker told Benson she could check the record to see if he was out of the plant on lunch when the material was accessed. Benson replied that she could not do this because her review of the records indicated Baker was not using the turnstiles

¹⁰ This is consistent with Baker’s testimony on cross-examination that, because Perry had lost his forklift license, Baker had to deliver the parts to the production areas leaving Perry to do the computer work.

¹¹ As noted at the beginning of this decision, Perry withdrew his charge before the hearing opened based on a non-Board resolution of his claims. He did not testify in this proceeding.

to access the plant. Baker admitted that he never used the turnstiles and claimed ignorance of the policy. Benson showed Baker the policy on using the turnstiles to enter and leave the plant and reminded him that he was required to do so. Benson told Baker to wait outside while she and George discussed the matter.

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Benson testified that, after discussing things with George and considering the information gathered in the investigation, she called Baker back into the office. She told him that they believed he was guilty of misconduct because he knew what was going on but failed to report it. She told Baker he was being moved to production on the first shift where he would not have access to a computer because they couldn't leave him to work alone, unsupervised, on second shift in light of what happened. He would continue to receive the same pay. She gave him a final warning and three days off. Baker was told to return to work on Monday, March 5 at 5:00 am. According to Benson, it was during this meeting that Baker said he thought he was being singled out because of the union and that she had it all wrong because he was not involved with the union. Benson told Baker his discipline had nothing to do with the union, it was about misconduct.¹²

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I found Benson's account of these meetings more credible than that of Baker. Baker admitted he had a poor recollection of what was said during these meetings. His responses, even on direct examination, were vague and often non-responsive. He appeared to remember only those portions of the meeting that supported his claim that he was disciplined for union activity. Yet, on cross-examination, he conceded that he told Benson he was not interested in a union. I also note, as pointed out by the Respondent's counsel, that Baker said, in his pre-trial affidavit, that the business of people looking at dirty pictures on the computer had been going on for over a year, and that it occurred at night when management and supervisors were gone. This supports Benson's testimony that he admitted during the second meeting that employees had been accessing pornography for some time and that he himself had viewed some of the images. His affidavit also contradicts his denials at the hearing that he had anything to do with the issue.

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Benson identified one other incident of an employee being disciplined for misuse of internet access. She testified that employee Mark Besant was terminated on February 20, shortly before the Baker and Perry incident, after it was discovered that he was spending 4-5 hours a night playing computer games on his company computer. Benson testified that she was unaware of any other incidents involving use of company computers to access pornographic or sexually explicit images. In particular, she denied being aware that such images had been accessed through a handheld scanner. Short, during his testimony, admitted being aware of this earlier incident but he was not the I.T. Manager at the time and did not know whether Gary Ernest, who was the Manager at the time, was able to identify the employee responsible for this. Short was aware that the particular scanner involved had been reported missing for a period of time, making it difficult to pinpoint responsibility for the inappropriate use of this device.¹³

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¹² Baker acknowledged, on cross-examination, that Perry, who was fired as a result of this incident, was not an open advocate for the Union and engaged in no organizing activity as far as he knew.

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¹³ I have rejected General Counsel's proffer of evidence purporting to show the prevalence of company computers being used to access sexually explicit materials. As previously noted, this evidence, even if received, does not demonstrate that the Respondent was aware that such conduct occurred or that it knew of any employees, other than Baker and Perry, involved in this activity.

5 Baker returned to work, as instructed, at 5:00 am on Monday March 5.¹⁴ According to
Baker, he encountered Danny McGee near the Volkswagen production line shortly after
returning to work. Baker testified that he asked McGee, “you know why they done this?” and
McGee replied, “oh yeah”. Baker then said, “because of the Union” and McGee responded,
10 “yeah”. Baker testified that he had another conversation with McGee, on March 7 which turned
out to be his last day of work, in which he asked McGee who was in the meeting where the
supervisors were told to look out for Union organizer England. According to Baker, McGee
responded, “two lawyers.” McGee, who was called as a witness by the Respondent, denied
15 telling Baker that he was disciplined or terminated because of the Union and further denied
making any statements that would give Baker any reason to believe this. McGee also denied
telling anyone else that Baker was terminated because of his union activity. According to
McGee, he was not involved in the decisions to discipline or terminate Baker and was not
questioned during the investigation into the issue of pornography being accessed on the
computers. I found McGee’s testimony more credible than that of Baker. I note that, as a relative
of Baker’s by marriage as well as his supervisor at work, McGee was placed in an awkward
position. He would be less likely to testify adverse to Baker than another supervisor who lacked
familial ties, making his denials of these conversations more trustworthy.

20 Baker testified that, when he returned to work on March 5, he began entering and
leaving the plant through the turnstiles, as Benson had instructed him to do. However, he
admitted that on the evening of March 6, he returned to the plant to speak to two employees
and entered through the side door without using the turnstiles. According to Baker, he returned
to the plant after work because the Board agent investigating his charge needed the phone
25 numbers of employee witnesses. Baker encountered Supervisor Ramsey immediately upon
entering the plant. He was unable to recall the substance of this conversation. After talking to
Ramsey, he went to find Rita Chapman, one of the employees whose phone number he
wanted. He encountered her working on a production machine. He spoke to her briefly,
requesting her phone number and listening to her response that her husband did not like her
30 getting phone calls at night. According to Baker, she continued to operate the machine while
they talked. After getting her phone number, Baker found the other employee he was looking
for, Robert Spence, operating a forklift. Spence had to stop what he was doing to talk to Baker.
Baker got his phone number and left the plant. Baker recalled that his conversations with
Chapman and Spence lasted no more than five minutes each.

35 Ramsey testified about his encounter with Baker on the evening of March 6. According
to Ramsey, he first encountered Baker in between some racks in the Ford production area.
Although Ramsey testified that he thought Baker was still on second shift, he found it unusual to
find Baker in the Ford area because that operation was not running at the time. He also
observed that Baker was acting suspicious. Ramsey testified that he did no more than
40 exchange greetings with Baker and continued on his rounds. He denied having any substantive
conversation with Baker. According to Ramsey, he next saw Baker talking to Chapman in the
SCS tracking area. Chapman was operating a continuous motion machine by herself at the time
and he observed that she had stopped working to converse with Baker. Ramsey admittedly did
not break up the conversation or tell Chapman to get back to work because he thought Baker
45 was on duty at the time and did not know what they were talking about. Ramsey testified that he
came across Baker later talking to Spence while Spence was assigned to operate a forklift in
support of one of the production lines. Again he observed that Spence had stopped what he
was doing to talk to Baker. Again, Ramsey admits he did not interrupt the conversation or tell

50 ¹⁴ As noted above, Respondent was in the midst of conducting its “educational” meetings for
employees on the subject of unions when Baker returned to work.

Spence to get back to work. Ramsey acknowledged that he has seen employees chatting while working and that he would ordinarily tell them to get back to work if it continued too long. His recollection regarding the length of Baker's conversations with Chapman and Spence was about 3-5 minutes each. He did not hear what was said in either conversation.

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Ramsey testified that he reported his observations to Jimmy Simpler, the Second Shift Assembly Manager at the time. He asked Simpler if there was any reason for Baker to be speaking to production employees. Simpler told Ramsey that Baker was not even on second shift any longer. Ramsey then spoke to Chapman and Spence and asked if either of them had called Baker to their area and both denied doing so. After reporting the incident to Simpler, Ramsey had no further involvement with this issue.

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Benson testified that Simpler reported to her on March 7 that Ramsey had seen Baker in the production area the night before, interrupting two employees who were supposed to be working. Simpler told Benson that he didn't know how Baker entered the plant. Benson told Simpler that she would look into the matter and get back to him. Benson then reviewed the visitor logs and checked the turnstile records to see if there was any record of Baker entering the plant. She found none, other than the turnstile record of his entering and leaving the plant for his normal shift. After reviewing the records, Benson had Simpler bring Baker to her office where she asked him about his activities the night before. When Benson told Baker there was no record of his re-entering the plant through the turnstile, Baker said he didn't believe he had to because he had come and gone many times before without using the turnstiles. He told her he believed the turnstile was only for entering and leaving during your normal shift. She told him it was against policy to do what he had done. Baker said he had never seen the policy. When Benson got up to get a copy of the policy, Baker told her he believed her but had never seen it or abided by it. Benson told Baker he was suspended again while she investigated this violation of company policy. She told Baker to return the following Monday, March 12. When Baker returned on March 12, Benson told him she had not made a decision yet and to come back the next day. She told him he would receive four hours pay for showing up that day. On March 13, Benson informed him that she had completed her investigation and that he was being fired for a violation of company policy after being placed on final warning. The violation involved his returning to the plant after hours and being in the production area disrupting employees who were working. Benson could not recall if she specifically mentioned the violation of the turnstile policy during her meeting with Baker on March 13. Baker testified that during one of his meetings with Benson, on March 7 or March 13, he turned to Simpler, who was present, and asked if he remembered a time when Baker came back to the plant to show off his new vehicle and Simpler went outside with him to see it. According to Baker, he entered the plant through the side door on that occasion as well and Simpler did not object to his presence. Simpler told Baker in this meeting that he remembered the incident but assumed that Baker was on the clock when he saw him in the plant.

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Benson testified that, while Baker was on suspension from March 7 through 12, she investigated the incident by talking to Ramsey and obtaining statements from the employees involved, Chapman and Spence. Both employees reported that Baker came to the plant to talk to them and requested their phone numbers without being asked by them to do so. They also reported that they were working when he approached them and that he interrupted their work. Based on these reports and her own review of the records, Benson made the decision to terminate Baker. She denied that union activity had anything to do with her decision.

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Counsel for the General Counsel offered testimony from Baker and other witnesses in an attempt to establish that it was common for employees to enter and leave the plant without going through the main entrance turnstiles. This testimony also indicated that it was not unusual

for Baker and others to be at the plant when they were not working to visit with employees who were working. There was also some testimony about family members who were not employed by the Respondent entering the plant to visit employees on duty. Significantly, with respect to much of this testimony, there is no evidence that Benson or anyone else in management was
 5 aware of these incidents when they occurred. Nor is there any evidence that an employee entered the plant without going through the turnstile after being explicitly told that company policy required use of the turnstiles. With respect to Ratliff's testimony about his frequent return to the plant to retrieve pallets and other unwanted material for personal use, all of his visits were approved in writing by his supervisor and thus are unlike Baker's March 6 visit after hours.

10 The consolidated amended complaint alleges that the Respondent's actions against Baker violated Section 8(a)(3) and (1) of the Act, thus placing in issue the Respondent's motivation in deciding to suspend, re-assign and ultimately terminate Baker. In *Wright Line*,¹⁵ the Board held that, in cases where employer motivation is the issue, the General Counsel must
 15 first establish, by a preponderance of the evidence, that union or protected concerted activity was a "motivating factor" in the decision to discharge an employee. In order to meet his initial burden, the General Counsel must show that the employee was engaged in protected activity, that the employer was aware of this activity, and that the employer exhibited animus against such activity. See also *United Rentals, Inc.*, 350 NLRB No. 76 (August 24, 2007); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Only if the General Counsel has made the requisite showing will the burden shift to the Respondent to "demonstrate [by a preponderance of the
 20 evidence] that the same action would have been taken even in the absence of the protected conduct." *Wright Line*, 251 NLRB supra, at 1089. See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Where an employer asserts, as here, that
 25 some type of employee misconduct was the reason for discharge, the employer "does not need to prove that the employee *actually* committed the alleged offense. It must show, however, that it had a *reasonable belief* the employee committed the offense, and that the employer acted on that belief in taking the adverse action against the employee." *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004). See also *Doctors' Hospital of Staten Island, Inc.*, 325 NLRB 730, 30
 fn. 3 (1998) and cases cited therein.

The evidence here establishes that Baker did engage in protected activity when he first discussed with Acre, in the Fall of 2006, the idea of organizing Respondent's employees and then followed up these discussions by contacting Union organizer England and meeting him at
 35 Shoney's on February 11. Baker's testimony as to this activity was corroborated by other witnesses who had no reason to fabricate their testimony. The record is spotty regarding any other protected activity in which Baker might have engaged. Although he testified that he spoke to other employees about union representation, the testimony was uncorroborated and lacked any specifics as to time and place. I find, as with much of Baker's testimony, it was self-serving
 40 and exaggerated his role in the nascent organizing campaign.

The only reliable evidence that the Respondent had knowledge that Baker was interested in unions is the admission of Ramsey that he had a conversation with Baker on the subject and that he informed Human Resource Manager Benson of this conversation. The fact
 45 that, soon after this report, Benson scheduled a series of "educational" meetings on the subject to convey the Respondent's position to the employees supports a finding that the Respondent was at least generally aware of the beginnings of a union campaign and may have believed Baker was involved by virtue of his statements to Ramsey. Baker's uncontradicted testimony

50 ¹⁵ 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.989 (1982).

regarding his conversation with McGee, a member of his extended family, regarding the meetings that Respondent was having with its supervisors is further indication that Respondent was aware of the beginnings of an organizational drive and had a desire to act swiftly to nip it in the bud. I also note that Baker filed the initial unfair labor practice charge alleging that his suspension and job and shift re-assignment violated Section 8(a)(3) on March 2 and a copy of the charge was mailed to the Respondent on March 5. Thus, it is likely that the Respondent would have been on notice of these claims when it decided to suspend Baker a second time on March 7 and to discharge him on March 13.

There is no question that the Respondent took adverse action against Baker soon after learning that employees, including Baker, were asking questions and talking about unions and around the same time that the Respondent was preparing its response to this union talk. Although timing is a factor in determining motivation, it is not conclusive here because Baker's union activity coincided with the Respondent's discovery of pornography on a computer to which he had access, a serious violation of company policy and one that would ordinarily warrant discipline. The question is whether it was the Union activity, or Baker's other conduct, which motivated the decisions to discipline him up to termination. A key element in determining the existence of unlawful motivation is the question of animus.

The evidence of anti-union animus here is weak. I note, for example, the absence of any allegations of independent Section 8(a)(1) violations or of any history of hostility to unions on the Respondent's part. The evidence proffered by the General Counsel on the issue of animus is not convincing. General Counsel cites, for example, Baker's testimony about a conversation he had with supervisor McGee on March 5, during which McGee confirmed Baker's belief that his first suspension was because of the union. However, this is only evidence of animus and unlawful motivation if I believe Baker. I have previously found that McGee's denial of such a conversation is credible. Thus, I find that McGee never told Baker, nor otherwise suggested, that his suspension as a result of the pornography incident was unlawfully motivated. General Counsel also relies on statements McGee allegedly made to employee Williams, after Williams had met with union organizer England in February, to "be careful who you talk to." As noted previously, McGee did not contradict this testimony. In addition, I found Williams, who is still employed by the Respondent, to be a generally credible witness. I thus credit his testimony as to this conversation. However, the "friendly advice" given by McGee, a low level supervisor, to one employee is insufficient evidence of the Respondent's animus to prove an unlawful motivation for its actions involving another employee, particularly where there is no evidence that McGee was involved in the decisions to discipline Baker. See *NACCO Materials Handling Group*, 331 NLRB 1245, 1246, fn. 4 (2000).

In the absence of any direct evidence of animus, General Counsel is forced to rely on circumstantial evidence of animus and motivation. Other than the suspect timing of Baker's discipline and termination, General Counsel points to an assertedly aggressive investigation of Baker and Perry after the discovery of pornographic images, and the apparent lack of interest in other employees' use of company computers to access similar material. General Counsel also suggests that Baker was subjected to disparate treatment when he was terminated for returning to the plant after work to speak to employees who were working and for entering the plant at that time without using the main entrance where the turnstiles are located. General Counsel argues that Baker's conduct on March 6 was no different than that of many other employees who have never received any discipline for doing the same thing.

Although there is some surface appeal to this circumstantial argument of unlawful motivation, the evidence does not withstand close scrutiny. The "aggressive" investigation of the pornography incident resulted from the fact that, because of the timing when the material was

accessed and the location of the computer, the list of suspects was short and identifiable. The General Counsel showed that there was only one other instance of access to inappropriate material of which Respondent was aware, i.e. the use of a handheld scanner to access pornography. In that case, however, there was no way to tell which employee was responsible. I
 5 have already rejected the evidence intended to show that this was a pervasive problem among the Respondent's employees that was ignored until Baker mentioned the Union. The serious nature of this incident, which was discovered inadvertently by the Respondent's I.T. Manager, and precipitated the investigation leading to Baker's February 27 suspension, can not be ignored. Baker admitted at least some involvement in the incident. I find that the Respondent
 10 decision to suspend Baker for three days, rather than terminate him, and to place him in a position where he would be supervised and would not have access to a computer was a measured response and not a reaction to incipient union activity.

Counsel for General Counsel offered much anecdotal evidence regarding other
 15 employees entering and leaving the facility through side doors or not going through the turnstiles, visiting the plant when not working and other conduct similar to that for which Baker was ultimately discharged. However, in none of these other situations did an employee engage in such conduct after being explicitly told not to. That is precisely the situation Mr. Baker found himself on March 7. There is no dispute that Benson, upon learning in the course of the earlier
 20 investigation that Baker was not using the turnstiles, told him it was company policy to enter and exit the plant through the turnstiles. Despite this instruction, Baker chose to return to the plant after work and enter surreptitiously through the side door, as if nothing had happened. It is this defiance on his part which led to his termination, not the minimal union activity he engaged in. Accordingly, I find that General Counsel has not proved that Respondent's actions involving
 25 Baker were discriminatorily motivated. Moreover, even assuming animus and motivation were shown, the Respondent offered sufficient evidence to rebut General Counsel's case and to establish that Baker would have received the same discipline even absent union activity.

Based on the above, and the record as a whole, I find that the Respondent did not
 30 violate Section 8(a)(1) and (3) of the Act with regard to Baker and shall recommend dismissal of these allegations in the complaint.

C. Allegations Involving U. L. Ratliff

Ratliff is a retired Methodist minister who started his employment with the Respondent
 35 on June 20, 2005. He was still employed at the Clanton facility at the time of the hearing. In August 2007, Ratliff worked in the Logistics department on second shift as a forklift driver and material handler. Ratliff testified that, during his employment with the Respondent, he has performed pastoral duties for his fellow workers, counseling them with problems, praying with
 40 them and otherwise being of assistance to those in need. One of the employees he has helped on a regular basis is Rita Chapman, whose husband was experiencing medical problems. According to Ratliff, his conversations with Chapman would begin by her stopping him as he passed her line. He never went into the production area to speak to her. On one occasion, in
 45 August 2007, Chapman stopped him as he and Donnell Williams, another forklift operator on his shift, were walking toward the turnstiles after clocking out at the end of the shift. Chapman was upset. When he asked her what was wrong, she told him she was afraid she would lose her job because her supervisor was sending her home early and assigning her duties to temporary employees. She asked Ratliff what she could do. Ratliff told her the only thing he knew to do
 50 was talk to Human Resource Manager Judy Benson about her concerns. Chapman then asked what she should do if that didn't work. In response, Ratliff said the only thing he knew to do was go to the Labor Board. When Chapman asked how she could get in touch with the Labor Board, Ratliff got one of General Counsel Doyle's business cards from Williams, who had continued

walking ahead of Ratliff, and gave the card to Chapman. According to Ratliff, at the time of this conversation, Chapman's production line was running but the employees, including Chapman were not doing anything. The closest employee during this conversation was Team Leader Vicky Bush. Williams, whom I have already noted to be a credible witness, also testified about this incident. Williams recalled that, one night as he was leaving the plant after clocking out, Ratliff asked for Doyle's business card, saying he had to talk to someone. Williams gave Ratliff the card but he didn't see who Ratliff went to talk to.

Ratliff testified that, about six weeks after this incident, sometime in early October, he was called to the Logistics office by supervisor Kevin Conatser and shown an "Employee Discussion Report" that identified the problem for discussion as "interruption of work operations", which was described as follows: "Employees complained of interruption of work operations in the Ford assembly area by employee regarding non work activities." The form is dated September 26, 2007. Conatser professed to Ratliff that he didn't know what the Report was about. He told Ratliff that he would have to talk to Judy Benson about it. Conatser also told Ratliff that he had to sign the form. Ratliff protested that he had never interrupted production and knew nothing about the incident. He again asked Conatser who he was accused of interrupting and again Conatser said he knew nothing about it. He told Ratliff that he could write a response on the form, which Ratliff did. Ratliff wrote: "I know nothing about this accusation. If I am being accused of holding up production in any way; I request to be informed of the incident, when where and to whom." He signed and dated the form October 9.

After leaving the Logistics office, Ratliff went to see Ramsey because Conatser told him Ramsey had prepared the Report. According to Ratliff, Ramsey initially wouldn't tell him anything about the Report. Instead, he told Ratliff that it was only a discussion report, that it doesn't amount to anything and that "just about everybody here has gotten one." Ratliff replied that he didn't care about everybody else, he was concerned about what went into his file. There ensued a debate between Ratliff and Ramsey over whether the Discussion Report was a disciplinary write-up or not with Ramsey continuing to downplay its significance while Ratliff insisted on knowing why a derogatory statement was going into his file.¹⁶ Ramsey refused to discuss the substance of the report, telling Ratliff it was against company policy to disclose that.

After getting nowhere with Ramsey, Ratliff went to the Ford department because that was the location identified in the report where Ratliff allegedly interrupted production. Ratliff spoke to Team Leader Bush. When he asked if she knew anything about it, she said she did and volunteered that she couldn't believe he was written up for it. She told him Ramsey had asked her about the incident with Rita Chapman a few weeks before this and that she had told him there was no interruption of work. Bush later received a Employee Discussion Report based on her conversation with Ratliff.

Although Conatser had suggested that Ratliff talk to Benson about the Report, Ratliff was unable to do so at that time because Benson was on vacation. However, he had another encounter with Ramsey later that same week that became the subject of a complaint allegation. According to Ratliff, the incident started when co-worker Jonathan Payne, who was operating a forklift alongside Ratliff, asked for Ratliff's phone number. Ratliff gave Payne a pen and paper so he could record the phone number and said, as he was doing so, that Payne should hurry up because Ratliff had already been written up for doing no more than what he was doing now.

¹⁶ Contrary to Ramsey's assertions, the form itself warns the employee receiving it that further discipline could result from continued behavior of the type documented in the Discussion Report.

When Payne asked what was he written up for, Ratliff told him for providing contact information to a co-worker. Payne asked Ratliff who had written him up. Ratliff pointed to Ramsey, who was walking by, and said, "he did." Ratliff testified that Ramsey slapped him on the stomach with the back of his hand, looked at him, and walked on. Shortly after this exchange, Ramsey
5 approached Ratliff as he was unloading parts and accused Ratliff of walking around with a chip on his shoulder and bringing down morale. Ramsey told Ratliff that his attitude was causing problems around the plant. Ramsey and Ratliff then resumed their debate over the significance of the Discussion Report he had given Ratliff. After going back and forth for some time, Ratliff suggested they wait until Benson returned to continue their discussion. Instead, Ramsey
10 persisted, inviting another supervisor, Duke Martin, to join the discussion. Ramsey asked Martin to confirm that a discussion report was not discipline but Ratliff responded that it didn't matter to him whether they called it discipline or not, what was important to him is that a negative report was going into his file when he had done nothing wrong. After further back and forth, Ramsey told Ratliff if he continued to press the issue he could be written up for it and lose his job.

15 Ratliff finally got to speak to Benson when she returned from vacation. On October 16, he met with her alone in her office. When she asked what she could do for him, he told Benson he had received a write-up. Benson "corrected" him and told him it was a discussion report. Ratliff told Benson that he didn't believe there was any truth to it. Benson said she had
20 investigated it and believed the report was justified and that it would stay in his file. Ratliff asked how could she have investigated the incident if she never talked to him or Williams. Benson then closed the door and said, "why don't you leave if you're so unhappy. Every time you come in here you're complaining." Ratliff told her he was happy most of the time except when he was being harassed or done wrong. He and Benson then had a lengthy discussion in which he
25 disputed her version of the incident with Chapman, explaining that Chapman had called him over and asked who she should contact with a work problem. He told Benson that he had given her a card for the Labor Board. Benson told him that he was not to hand out cards at work, that it was not his business to advise employees to go to the Labor Board. Ratliff expressed his belief that there was a double standard in the Respondent's enforcement of the rules. During
30 the course of the meeting, Benson also accused Ratliff of having a negative attitude and said his supervisors told her he had a negative attitude.

After his meeting with Benson, he sought out his supervisors to ask them if they had complained to Benson that he had a negative attitude. One of the supervisors he spoke to was
35 Kevin Conatser. Conatser confirmed that he had reported to Benson that Ratliff had a negative attitude. When Ratliff asked Conatser why he felt that way, Conatser said because Ratliff "walked around here like a loaded cannon, passing out cards, advising people of their rights." Ratliff replied that the Labor Board existed to answer employee questions and that there was nothing wrong with telling an employee to call the Labor Board if they had a question. Conatser
40 responded that if everyone brought the company up on charges, the cost of defending itself could put the Respondent out of business and then even Ratliff would be without a job. Ratliff then asked Conatser what he would do if a friend came to him for advice. Conatser replied that he would tell such a friend to discuss his problems only with Human Resources. Conatser then said that even if he learned his son had been passing out cards to contact the Labor Board, he
45 would walk him out the door.¹⁷

Rather than directly contradict Ratliff's testimony, most of the witnesses called by the Respondent spent their time on the witness stand attempting to characterize Ratliff as a disgruntled employee who constantly complained about everything, interfered with production
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¹⁷ Conatser has a son who is also employed by the Respondent.

and affected the morale of other workers. Ramsey, in particular, testified that he spent a good deal of time addressing problems with Ratliff not communicating well with others and not following work rules. Ramsey testified that he also spoke to Ratliff with supervisors Martin and Conatser but Ratliff continued to complain and not follow instructions. Although Ramsey claimed to have spoken to Ratliff at least 10 times, he did not document any of these discussions. Ramsey denied that he wrote up the Discussion Report in dispute here, although he acknowledged that he was involved in its issuance. Ramsey testified that he personally observed Ratliff approach Chapman while she was working, causing her to stop working. Ramsey initially denied seeing Ratliff hand Chapman a card and claimed that he was not even aware that a card was involved in the encounter between Ratliff and Ramsey. However, on October 24, Ramsey forwarded an e-mail to Benson, reporting that he had “got Donnell Williams to admit that U. L. approached Rita with the card in the Ford production area.” In addition, the incident report signed by Chapman on September 19, which allegedly precipitated the discussion report, specifically states that Ratliff “handed her a card from a labor law attorney and asked her to please call him and tell him that she was being treated unfairly by management.”

Martin, the shipping supervisor at the time of these incidents, testified that he was present at one meeting with Ramsey and Ratliff where Ramsey spoke to Ratliff about Ratliff interfering with the work of other employees. However, neither Ramsey nor Martin specifically testified about the incident described by Ratliff, which occurred after he received the Employee Discussion Report. Both Martin and Ramsey claimed that they met with Ratliff before the Report issued and Ramsey claimed it was even before he observed Ratliff talking to Chapman.

Benson also testified that she had numerous meetings and conversations with Ratliff during his employment regarding work-related matters. Her testimony suggested, as did Ramsey’s, that Ratliff was a chronic complainer who could not be satisfied and that his complaining interfered with other employees. Benson did testify specifically regarding the meeting in her office after she returned from vacation, during which Ratliff disputed the Discussion Report. She corroborates Ratliff that she told him she was satisfied that the Report was justified and that it would remain in his file. According to Benson, Ratliff also complained in this meeting that Ramsey had assaulted him in the production area, referring to the incident when Ramsey hit him on the stomach while he was talking to Payne. After telling Ratliff that it was hard for her to believe that Ramsey assaulted Ratliff, she asked him: “Do you want to work here? Because every time you bring a complaint in here and we give you an answer, you just come up with something else or you don’t accept the answer.” Benson testified that Ratliff said he did not want to work at the Respondent’s facility but he had to for two more years to make retirement. Benson testified that he became emotional and she reassured him that the Respondent did want him to remain an employee.

Conatser did dispute Ratliff’s version of the conversation that occurred after Ratliff met with Benson. Conatser recalled Ratliff asking if he had complained to Benson about his attitude and Conatser confirmed that he had. According to Conatser, he told Ratliff that he told Benson that Ratliff had a negative attitude because Ratliff argued and debated every assignment instead of simply doing it. Conatser denied that there was any mention of the Labor Board in this conversation. Conatser also denied that he made any statements to Ratliff that would suggest he would look with disfavor on Ratliff for telling people about the NLRB or providing contact information to other employees.

The consolidated amended complaint alleges that the Respondent’s treatment of Ratliff after his encounter with Chapman violated Section 8(a)(1) of the Act in a number of ways. Specifically, the complaint alleges that the October 9 Employee Discussion Report was an

unlawful written warning issued to Ratliff because he advised employees of their rights under the Act. Under General Counsel's theory of the case, Ratliff was engaged in activity protected under Section 7 of the Act when he handed Chapman the business card of the Board's General Counsel in response to her expression of concern over her working conditions. Counsel for
5 General Counsel argues that the claim that Ratliff interfered with production was a pretext to hide its unlawful motivation. The Respondent argues that Ratliff was not engaged in protected activity because he approached Chapman while she was working and interfered with her job performance. According to the Respondent, the warning had nothing to do with the substance of Ratliff's communication with Chapman.

10 Initially, I have decided to credit Ratliff's testimony regarding this incident. He appeared to be an honest, straightforward witness, endeavoring to tell the whole story and not just those parts that supported his case. I also note that he was still employed by the Respondent at the time of his testimony, a factor that the Board has cited in assessing the credibility of witnesses.
15 See *Flexisteel Industries*, 316 NLRB 745 (1995). Having credited Ratliff, I find that it was Chapman who called Ratliff over and expressed the concern that led him to retrieve Doyle's card from Williams and give it to her. Contrary to the Respondent's assertion, Williams testimony is not inconsistent with that of Ratliff. Williams was ahead of Ratliff when she stopped him and he acknowledged that he did not see who Ratliff gave the card to. Thus, he was not in
20 a position to know whether Chapman or Ratliff initiated the conversation. In any event, he did corroborate Ratliff's testimony that Ratliff asked for the General Counsel's card to give to another employee. To contradict Ratliff's testimony, the Respondent only offered the testimony of Ramsey that he observed Ratliff talking to Chapman while she was supposed to be working. I found this testimony not credible because Ramsey was not truthful about his knowledge of the
25 business card being exchanged. Only after being confronted with the e-mail he forwarded to Benson did he acknowledge this. The Respondent also offered the initial "complaint" by Chapman, dated September 19, and her subsequent statement to the Respondent's supervisors in which she denied that she was the one who approached Ratliff. I can not rely on these statements to discredit Ratliff because they were unsworn, taken by supervisors with
30 economic power over her, and she was not called as a witness to testify. Her "testimony", as it were, was not subject to cross-examination.

The Respondent may argue that, regardless of whether Chapman's statements to company officials were true, the Respondent could rely on them to issue discipline to Ratliff.
35 That might be true had the Respondent conducted an investigation into Chapman's September 19 complaint. The Respondent never questioned Ratliff about this complaint, nor interviewed other witnesses, like Williams. Instead the Respondent seized on the complaint, which specifically reported that Ratliff gave her the card of a labor law attorney and asked her to contact him about the company, to issue the warning to Ratliff. Ramsey's subsequent e-mail,
40 reporting that he had finally got Williams to admit that Ratliff gave Chapman the card shows that it was this aspect of the incident that primarily concerned the Respondent, not any momentary interruption of work.

Because I find that Respondent issued a disciplinary warning to Ratliff because he gave
45 a Board agent's card to another employee, activity which is protected by the Act, I must find as alleged in the complaint that the September 26 Employee Discussion Report, issued to Ratliff on October 9, violated Section 8(a)(1) of the Act.¹⁸

50 ¹⁸ Contrary to the arguments of the Respondent's witnesses, it is clear that Employee Discussion Reports are a step in the disciplinary process as it states on its face.

The complaint further alleges that Respondent violated Section 8(a)(1) on October 11 by Ramsey threatening Ratliff with discipline and discharge if he persisted in protesting the warning. This allegation relates to the conversation Ratliff had on that date with Ramsey and Martin after the incident with Payne. Contrary to the Respondent's argument, this allegation is not based on a single sentence taken out of context. In fact, Ratliff gave a great deal of context to Ramsey's statement. It was uttered at the end of a lengthy discussion that took place after Ramsey overheard Ratliff telling another employee that he had received discipline for exchanging contact information with another employee. It followed the continuing debate between Ratliff and Ramsey over whether the Discussion Report was discipline or not and whether it was justified. Only when Ratliff would not drop his objections to the warning did Ramsey say: if Ratliff continued to press the issue he could be written up for it and lose his job. This is a clear threat of further disciplinary action for protesting what I have already found to be an unlawful warning. Because the Respondent did not specifically ask Ramsey or Martin about this conversation, Ratliff's testimony is unrefuted. Moreover, I found Ratliff generally more credible. His detailed account of conversations with supervisors and managers was more believable than the vague generalized character assassination that comprised the testimony of the Respondent's witnesses regarding the Ratliff allegations. Accordingly, I find that the Respondent violated the Act, as alleged, through Ramsey's statement to Ratliff on October 11.

The complaint also alleges that Respondent violated the Act during Ratliff's meeting with Benson, on October 16, when she suggested he go work somewhere else if he was so unhappy working for the Respondent. Again, I credit Ratliff over Benson as to this conversation. Ratliff came to Benson's office that day specifically to discuss the warning he received for giving Chapman the General Counsel's business card. Regardless of the merits of other complaints he might have had in the past, he had a right to protest this unlawful warning. It was in response to this assertion of his rights that Benson suggested he find other employment. As the General Counsel points out, the Board has found such statements unlawful. *Rolligon Corp.*, 254 NLRB 22 (1981). See *Jupiter Medical Center Pavilion*, 346 NLRB No. 61 (2006).

Finally, the complaint alleges that Conatser's statements to Ratliff on October 16 conveyed to employees that the Respondent would discharge them if they advised other employees how to contact the NLRB. This allegation is based on Ratliff's testimony that, during the conversation about Ratliff's "negative attitude", Conatser told Ratliff that even if his own son were passing out cards to call the NLRB, Conatser would "walk him out the door", a clear reference to termination. Although Conatser denied making any statements that would suggest the Respondent would look with disfavor on employees communicating with the NLRB, he did so in response to leading questions. Conatser did not specifically deny making the statement about his son. Because I found Ratliff generally a more credible witness, I find that Conatser in fact made this statement. I further find that such a statement has a reasonable tendency to convey to employees that the Respondent would discharge employees for contacting the NLRB. As such, it was an unlawful threat.

Based on the above, and the record as a whole, I find that the Respondent has violated the Act as alleged by the above incidents involving Ratliff.

Conclusions of Law

1. By issuing an Employee Discussion Report to U.L. Ratliff because he provided information to another employee about contacting the NLRB, by threatening Ratliff with further discipline and discharge if he persisted in protesting the Report, by telling Ratliff he should find another place to work because of his protest of this Report and by suggesting that the Respondent would discharge employees who contacted the NLRB, the Respondent has

engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

5 2. The Respondent did not violate Section 8(a)(1), (3) or any other provision of the Act by suspending, re-assigning and discharging Donnie Paul Baker.

Remedy

10 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. Because I have found that Ratliff's Employee Discussion Report dated September 26 was unlawful, Respondent shall be required to rescind this disciplinary notice and remove any reference to it from Ratliff's file. Respondent shall further be required to post the attached Notice to Employees and to abide by it.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

20 The Respondent, CRH North America, Inc., Clanton, Alabama, its officers, agents, successors, and assigns, shall

25 1. Cease and desist from

(a) Issuing Employee Discussion Reports or otherwise disciplining employees for advising or assisting other employees in contacting the National Labor Relations Board.

30 (b) Threatening employees with discipline or discharge if they protest the issuance of unlawful discipline.

(c) Suggesting to employees that they find another place to work because they have protested the issuance of unlawful discipline.

35 (d) Impliedly threatening employees that the Respondent would discharge them if they contacted the National Labor Relations Board.

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

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

45 (a) Within 14 days from the date of the Board's Order, rescind the September 26, 2007 Employee Discussion Report issued to U. L. Ratliff on October 4, 2007 and remove from its files any reference to this unlawful discipline, and within 3 days thereafter notify Ratliff in writing that this has been done and that the discipline will not be used against him in any way.

50 ¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (b) Within 14 days after service by the Region, post at its facility in Clanton, Alabama,
copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by
the Regional Director for Region 10, 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 ensure that the notices are not altered,
defaced, or covered by any other material. In the event that, during the pendency of these
10 proceedings, the Respondent has gone out of business or closed the facility involved in these
proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice
to all current employees and former employees employed by the Respondent at any time since
October 9, 2007.

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

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

Dated, Washington, D.C., August 28, 2008.

25 _____
Michael A. Marcionese
Administrative Law Judge

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²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in
the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted
Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the
National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT discipline you for advising or assisting other employees in contacting the National Labor Relations Board.

WE WILL NOT threaten you with discipline or discharge, or suggest you find another place to work, if you protest the issuance of unlawful discipline.

WE WILL NOT make implied threats that we will discharge employees for contacting the National Labor Relations Board.

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful Employee Discussion Report issued to U. L. Ratliff on October 9, 2007, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

CRH NORTH AMERICA, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

233 Peachtree Street NE, Harris Tower, Suite 1000
Atlanta, Georgia 30303-1531
Hours: 8 a.m. to 4:30 p.m.

404-331-2896.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 404-331-2877.

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