

**United Rentals, Inc. and International Union of Operating Engineers Local Union Nos. 66, 66A, B, C, D, O, and R, AFL-CIO.** Cases 8-CA-34853, 8-CA-35041, 8-CA-35196, and 8-CA-35319

August 24, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On January 30, 2006, Administrative Law Judge Michael A. Rosas issued the attached decision.<sup>1</sup> The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

<sup>1</sup> The caption of the judge's decision lists three cases: Cases 8-CA-34853, 8-CA-35041, and 8-CA-35319. The judge's decision states, however, that he granted the General Counsel's motion to consolidate, with these three cases, "the bargaining case," i.e., Case 8-CA-35196. We have amended the caption accordingly.

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

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by threatening employees in multiple ways, by coercively interrogating employees, and by soliciting employee grievances and promising to remedy them, and Sec. 8(a)(3) by transferring employee Robert Williams to its East Liverpool store and assigning him lower-level duties, by disciplining Williams on July 21, 2004, and by disciplining employee Timothy Plunkett on July 13, 2004.

<sup>3</sup> We will amend the judge's Conclusions of Law, modify his recommended Order, and substitute a new notice to conform to the violations found and to the Board's standard remedial language.

The judge's recommended Order includes a compulsory notice-mailing provision as well as the customary contingent provision. The judge did not explain why he ordered compulsory notice mailing, and the General Counsel does not contend that circumstances warrant this remedy. We shall modify the judge's recommended Order accordingly.

We amend the remedy section of the judge's decision as follows. The judge provided, inter alia, that employees Timothy Plunkett and Robert Williams be made whole "for any leave time or absences unlawfully charged them" in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Because the unfair labor practices committed against Plunkett and Williams did not cause them to be separated from employment, their make-whole award is properly computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971).

The unfair labor practice allegations in this case arise in the context of a successful effort by the Union, International Union of Operating Engineers Local Union Nos. 66, 66A, B, C, D, O, and R, AFL-CIO, to organize approximately 15 employees working for the Respondent, United Rentals, Inc., a company engaged in the rental and sales of commercial construction equipment, at its places of business at Columbiana and East Liverpool, Ohio (collectively, the Columbiana branch). The Respondent's conduct alleged as unlawful began with the commencement of the Union's organizing campaign in February 2004,<sup>4</sup> and continued through the March 26 election, wherein the employees selected the Union by a vote of eight to seven, and for approximately 6 months thereafter. The judge found that the Respondent committed numerous violations of Section 8(a)(1), (3), and (5) of the Act; he also dismissed some 8(a)(3) allegations. We adopt all of the judge's unfair labor practice findings and all of his dismissals for the reasons he stated, except as modified below.

1. The judge found, inter alia, that the Respondent violated Section 8(a)(3) by taking the following actions following the Union's March 26 electoral victory: suspending annual performance evaluations and pay raises, discontinuing its practice of permitting employees to rent equipment for free, imposing a stricter dress code, and changing its practice of permitting employees to call in before a scheduled shift to advise that they would be late. In so finding, however, the judge did not state what legal standard he was applying.

It is well established that 8(a)(3) allegations that turn on employer motivation are analyzed under *Wright Line*.<sup>5</sup> Under that standard, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). If, however, the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. *Golden*

<sup>4</sup> All dates are in 2004, unless otherwise indicated.

<sup>5</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

*State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

As to all of the 8(a)(3) allegations listed above, the General Counsel easily met his initial burden under *Wright Line*. As found by the judge, on February 11, Joseph Beasley, the Union's coordinator of organizing, faxed a letter to Chris Britt, manager of the Respondent's Columbiana and East Liverpool facilities, informing Britt that 10-named employees "are currently involved in assisting the [Union] in attempting to organize your company." Beasley also faxed copies of the 10 employees' signed authorization cards. Thus, protected activity and the Respondent's knowledge thereof are plainly established. As to union animus, the judge found, and the Respondent did not except to his finding, that the Respondent committed multiple violations of Section 8(a)(1), including threats, coercive interrogation, and solicitation of grievances accompanied by express remedial promises. These violations clearly demonstrate the Respondent's union animus.

Turning to the Respondent's proffered nondiscriminatory reasons for the foregoing conduct—that is, suspending annual performance evaluations and pay raises, discontinuing free equipment rentals, imposing a stricter dress code, and changing its call-in practice—the judge rejected them as unworthy of belief. For the several reasons stated by the judge, we agree that the Respondent's proffered reasons for these actions are pretextual. Thus, the Respondent necessarily failed to show that it would have taken the same actions even in the absence of its employees' union activity. *Golden State Foods*, supra. We therefore affirm the judge's 8(a)(3) findings.

2. In finding that the Respondent violated Section 8(a)(5), the judge did not address the Respondent's contention that its unilateral changes to certain of its policies were not material, substantial, and significant.<sup>6</sup> We do so here.

As fully recounted by the judge, the Respondent, at its Columbiana branch, had a practice of permitting employees to rent equipment for free. It changed its practice after the Union won the election and subsequently provided the employees with only a discounted rental rate. Also, after the election the Respondent discontinued its practice of permitting employees to wear jeans and company sweatshirts at work. We reject the Respondent's contention that these changes were insignificant. The loss of free equipment rentals clearly had a

<sup>6</sup> See, e.g., *Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (stating that a unilateral change in a mandatory subject of bargaining is unlawful only if it is "material, substantial and significant"), modified on other grounds 337 NLRB 1025 (2002).

detrimental effect on employees. For example, under the new policy, Robert Williams and Douglas Baker were charged for equipment rentals that would have been free under the prior policy. So, too, did the change to the Respondent's dress code: the Respondent sent employee Plunkett home pursuant to the changed policy. The Respondent submits that the changes merely brought the Columbiana branch into compliance with the Respondent's written corporate policies. That defense fails. The Respondent unilaterally changed from lax enforcement to more stringent enforcement of these policies. We have previously held that a unilateral change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over. *Vanguard Fire & Security Systems*, 345 NLRB 1016, 10172 (2005), enfd. 468 F.3d 952 (6th Cir. 2006); *Hyatt Regency Memphis*, 296 NLRB 259, 263–264 (1989), enfd. in relevant part sub nom. *Hyatt Corp. v. NLRB*, 939 F.2d 361 (6th Cir. 1991).

With respect to the Respondent's change in its call-in policy, we note that the Respondent, pursuant to its unilaterally changed policy, disciplined employees for lateness and no longer allowed employees to make up the time at the end of their shift. Where employees are subject to discipline for failing to comply with a unilaterally changed policy, such a change is material, substantial, and significant. *Toledo Blade Co.*, 343 NLRB 385, 388 (2004); *Postal Service*, 341 NLRB 684, 687 (2004).<sup>7</sup>

#### AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All truck drivers, tractor trailer drivers, mechanics, parts associates, and customer service associates employed by the Employer at its 44691 State Route 14, Columbiana, Ohio and 16695 Lisbon Street, East Liverpool, Ohio locations, but excluding all office clerical employees, outside sales/rental persons, professional

<sup>7</sup> Member Schaumber agrees with his colleagues and the judge that the Respondent violated Sec. 8(a)(3) by withholding annual evaluations and pay raises, and by changing its equipment rental, uniform, and call-in policies. However, Member Schaumber finds it unnecessary to pass on the judge's additional findings that the Respondent's conduct also violated Sec. 8(a)(5) because the additional findings would not materially affect the remedy. See *Strand Theatre of Shreveport Corp.*, 346 NLRB 523 at 1 fn. 2 (2006).

employees, guards and supervisors as defined in the Act.

4. Since April 5, 2005, and at all times thereafter, the Charging Party has been the exclusive collective-bargaining representative of the unit described in paragraph 3 above, based on Section 9(a) of the Act.

5. By engaging in the following conduct, Respondent committed unfair labor practices contrary to Section 8(a)(1) of the Act.

(a) Respondent threatened that employees who signed authorization cards sealed their fate.

(b) Respondent threatened that employees suspected of leading the organization effort would be fired within a few months.

(c) Respondent threatened that the organizational effort would cause an employee to lose his job and health coverage for his ill daughter, would result in the elimination of annual evaluations and pay raises, and would cause Respondent to close one or both of the Columbiana branch stores.

(d) Respondent threatened that the genius behind the organizing effort would cause Respondent to close.

(e) Respondent threatened that if the Union prevailed or employees voted for the Union, Columbiana would be a miserable place to work; employees would lose promotional opportunities, medical benefits, free use of company equipment, and assistance with their work concerns; and there would be layoffs and employees being sent home early.

(f) Respondent threatened an employee who complained about Respondent's earlier threats that Respondent was looking to fire him and that he should avoid giving Respondent a reason to do so.

(g) Respondent interrogated employees about why they signed authorization cards and supported the Union, about whether employees had any prior union activity, and about how employees voted.

(h) Respondent promised that it would take care of employees' pay concerns and increase the pay at Columbiana.

(i) Respondent promised that it was looking out for the employee with the ill daughter and that the employee was not to worry about disciplinary action if the employee needed time off to care for the daughter.

(j) Respondent asked about employees' work concerns and any other issues, gave employees business cards and solicited their phone calls and e-mails with problems and questions, and promised to address the employees' concerns if the Union lost the election.

6. By engaging in the following conduct, Respondent committed unfair labor practices contrary to Section 8(a)(3) and (1) of the Act.

(a) Respondent eliminated annual evaluations and pay raises because unit employees supported the Union.

(b) Respondent changed its policy concerning employees' use of rental equipment by requiring employees to pay rental fees for the use of borrowed equipment because unit employees supported the Union.

(c) Respondent changed its uniform policy because unit employees supported the Union.

(d) Respondent changed its call-in policy because unit employees supported the Union.

(e) Respondent disciplined, transferred, assigned lower-level duties to, and discharged employees because they supported the Union.

7. By engaging in the following conduct, Respondent committed unfair labor practices contrary to Section 8(a)(5) and (1) of the Act.

(a) Respondent unilaterally eliminated annual evaluations and pay raises without first giving the Union notice and opportunity to bargain about the matter.

(b) Respondent unilaterally changed its policy concerning employees' use of rental equipment by requiring employees to pay rental fees for the use of borrowed equipment without first giving the Union notice and opportunity to bargain about the matter.

(c) Respondent unilaterally changed its uniform policy without first giving the Union notice and opportunity to bargain about the matter.

(d) Respondent unilaterally changed its call-in policy without first giving the Union notice and opportunity to bargain about the matter.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United Rentals, Inc., Columbiana and East Liverpool, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Threatening employees concerning their union or other protected, concerted activities, including without limitation by telling them if they signed authorization cards they sealed their fate; that employees suspected of leading the organization effort would be fired within a few months; that the organizational effort would cause an employee to lose his job and health coverage for his ill daughter, would result in the elimination of annual evaluations and pay raises, and would cause Respondent to close one or both of the Columbiana stores; that the

genius behind the organizing effort would cause Respondent to close; that if the Union prevailed or employees voted for the Union, Columbiana would be a miserable place to work, employees would lose promotional opportunities, medical benefits, free use of company equipment, and assistance with their work concerns, and there would be layoffs and employees being sent home early; and by telling an employee who complained about Respondent's earlier threats that Respondent was looking to fire him and that he should avoid giving Respondent a reason to do so.

(b) Coercively interrogating employees about their own or others' union or other protected, concerted activities, including without limitation by asking why they signed authorization cards and supported the Union, whether employees had any prior union activity, and how employees voted.

(c) Soliciting grievances and promising to remedy them, including without limitation by telling employees that Respondent would take care of employees' pay concerns and increase the pay at Columbiana, and that Respondent was looking out for an employee and that he was not to worry about disciplinary action if he needed time off to care for his daughter; and by asking employees about their work concerns, giving employees business cards and soliciting their phone calls and e-mails with problems and questions, and promising to address the employees' concerns if the Union lost the election.

(d) Discharging or otherwise discriminating against any employee for supporting the International Union of Operating Engineers Local Union Nos. 66, 66A, B, C, D, O, and R, AFL-CIO, or any other union.

(e) Discriminatorily eliminating annual evaluations and pay raises, and changing policies concerning equipment rentals, uniforms, and call-in procedures.

(f) Refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit by making certain unilateral changes in terms and conditions of employment.

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

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

(a) Conduct performance evaluations of all unit employees for the period of March 2003 to February 2004, and promptly notify each unit employee of his or her pay raise commensurate with such evaluation. Such pay increases shall be retroactive to April 1, 2004.

(b) Upon request of the Union, rescind the changes in the equipment rental, uniform, and call-in policies.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All truck drivers, tractor trailer drivers, mechanics, parts associates, and customer service associates employed by the Employer at its 44691 State Route 14, Columbiana, Ohio and 16695 Lisbon Street, East Liverpool, Ohio locations, but excluding all office clerical employees, outside sales/rental persons, professional employees, guards and supervisors as defined in the Act.

(d) Within 14 days from the date of this Order, offer Douglas Baker full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

(e) Within 14 days from the date of this Order, rescind Robert Williams' transfer to East Liverpool and assignment of lower-level duties and restore him to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

(f) Within 14 days from the date of this Order, rescind disciplinary notices issued to Timothy Plunkett on July 13 and Robert Williams on July 21.

(g) Make Douglas Baker, Robert Williams, and Timothy Plunkett whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct in the manner set forth in the remedy section of the judge's decision as amended herein.

(h) Within 14 days from the date of this Order, remove from its files any reference to the discharge or other disciplinary action against Baker, Williams, and Plunkett, and within 3 days thereafter notify them in writing that this has been done and that the discharge or discipline will not be used against them in any way.

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

(j) Within 14 days after service by the Region, post at its facilities in Columbiana and East Liverpool, Ohio,

copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, 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 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 February 3, 2004.

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

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

#### 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 threaten you concerning your union or other protected, concerted activities, including without limitation by telling you that if you signed authorization cards you sealed your fate; that employees suspected of leading the organizational effort would be fired within a

few months; that the organizational effort would cause an employee to lose his job and health coverage for his ill daughter, would result in the elimination of annual evaluations and pay raises, and would cause us to close one or both of the Columbiana stores; that the genius behind the organizing effort would cause us to close; that if the Union prevailed or you voted for the Union, Columbiana would be a miserable place to work, you would lose promotional opportunities, medical benefits, free use of company equipment, and assistance with your work concerns, and there would be layoffs and you would be sent home early; and by telling one of you, who complained about earlier threats, that we were looking to fire you and that you should not give us a reason to do so.

WE WILL NOT coercively interrogate you about your own or others' union or other protected, concerted activities, including without limitation by asking why you signed authorization cards and supported the Union, whether you had any prior union activity, and how you voted.

WE WILL NOT solicit grievances and promise to remedy them, including without limitation by telling you that we would take care of your pay concerns and increase the pay at Columbiana; by telling one of you that we were looking out for you and not to worry about disciplinary action if you needed time off to care for your daughter; and by asking you about your work concerns, giving you business cards and soliciting your phone calls and e-mails with problems and questions, and promising to address your concerns if the Union lost the election.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union of Operating Engineers Local Union Nos. 66, 66A, B, C, D, O, and R, AFL-CIO (the Union), or any other union.

WE WILL NOT eliminate annual evaluations and pay raises, or change policies concerning equipment rentals, uniforms, and call-in procedures in order to discourage you from supporting the Union or any other union.

WE WILL NOT refuse to bargain with the Union as your exclusive collective-bargaining representative by making changes in terms and conditions of employment without first giving the Union notice and an opportunity to bargain about such matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL conduct performance evaluations of all unit employees from the period of March 2003 to February 2004, and promptly notify each of you of your pay raise commensurate with such evaluation. Such pay increases shall be retroactive to April 1, 2004. The unit is:

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All truck drivers, tractor trailer drivers, mechanics, parts associates, and customer service associates, employed by us at our 44691 State Route 14, Columbiana, Ohio and 16695 Lisbon Street, East Liverpool, Ohio locations, but excluding all office clerical employees, outside sales/rental persons, professional employees, guards and supervisors as defined in the Act.

WE WILL, at the Union's request, rescind the changes we made in our equipment rental, uniform, and call-in policies.

WE WILL, before making any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as your exclusive collective-bargaining representative.

WE WILL, within 14 days from the date of the Board's Order, offer Douglas Baker full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, rescind Robert Williams' transfer to East Liverpool and assignment of lower-level duties and restore him to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, rescind the disciplinary notices issued to Timothy Plunkett on July 13 and Robert Williams on July 21.

WE WILL make Douglas Baker, Robert Williams, and Timothy Plunkett whole, with interest, for any loss of earnings and other benefits suffered as a result of our unlawful conduct.

WE WILL, within 14 days from the date of the Board's Order, remove from our personnel files any reference to the discharge or other disciplinary action against Baker, Williams, and Plunkett, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge or discipline will not be used against them in any way.

#### UNITED RENTALS, INC.

*Catherine A. Modic and Rudra Choudhury, Esqs.*, for the General Counsel.

*Daniel F. Murphy Jr. and Alex Tchernovitz, Esqs.*, of New York, New York, for the Respondent.

*Joseph Beasley*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. The International Union of Operating Engineers Local Union Nos. 66, 66A, 66B, 66C, 66D, 66O, and 66R, AFL-CIO (the Union)

filed the charge against United Rentals, Inc. (the Respondent) in Case 8-CA-34853 on February 23, 2004.<sup>1</sup> The General Counsel filed the complaint in that case on April 30. The Union filed additional charges in Case 8-CA-35041 on May 6, Case 8-CA-35196 on July 29, and in Case 8-CA-35319 on September 24. On October 29, the General Counsel issued an amended complaint consolidating the charges in Cases 8-CA-34853, 8-CA-35041, and 8-CA-35319. That case is referred to as the "initial case." On December 20, the General Counsel further amended the complaint to correct the caption to include Case 8-CA-35319 and exclude Case 8-CA-35196. The complaint alleged various coercive statements and changes in annual employee evaluations and pay raises in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint also alleged selective enforcement of the Respondent's rental, uniform, and call-in policies, and discriminatory disciplinary action in violation of Section 8(a)(3) and (1). The Respondent essentially denied the material allegations. A hearing was conducted on February 1-3 and March 15, 2005. The parties submitted posthearing briefs on May 19, 2005.

On April 5, 2005, the National Labor Relations Board (the Board) issued its Decision and Certification of Representative in Case 8-RC-16598. On April 20, 2005, the Union filed a second amended charge stating that the Respondent unilaterally changed the following practices and policies: annual evaluations and wage increases, employees' use of rental equipment, uniforms, and calling off work. On April 29, 2005, the General Counsel issued a complaint and notice of hearing in Case 8-CA-35196. That case is referred to as the bargaining case. That complaint alleged that the Respondent unilaterally refused to give its employees their annual evaluations and raises since the date of the representation election. The complaint further alleged that since April 1, the Respondent unilaterally changed its policy concerning employees' use of rental equipment, uniform policy, and employee call-offs from work. On May 12, 2005, the Respondent filed an answer essentially denying the material allegations in the complaint.

On May 23, 2005, 4 days after the parties submitted posthearing briefs, the General Counsel moved to reopen the record and consolidate the initial case with the bargaining case. On June 17, 2005, the Respondent submitted opposition papers. By Order, dated July 8, 2005, I granted the motion, but ordered a supplemental hearing to receive additional evidence regarding the 8(a)(5) and (1) allegations. On August 30, I conducted a supplemental hearing. On October 3, 2005, the parties submitted supplemental posthearing briefs.

On the entire record, 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

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent is a Delaware corporation with offices and places of business located throughout the United States, including Columbiana and East Liverpool, Ohio. It is engaged in the

<sup>1</sup> All dates are in 2004, unless otherwise indicated.

rental and sales of commercial construction equipment. Annually, in the course and conduct of its business operations, the Respondent sells and ships goods valued in excess of \$50,000 from its Columbiana and East Liverpool facilities directly to customers located outside the State of Ohio. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. *The Respondent's Operations*

The Respondent supplies rental construction equipment, including aerial boom lifts, fork lifts, and pickup trucks at branch stores throughout the United States. The regional vice president for the Respondent's midwest region is Robert Blackadar, and its regional human resource manager is Michael Albers. The midwest region consists of 13 states, 6 districts, and 75 branches. Brian Stewart is the Respondent's district manager for the district that includes the Columbiana branch. The Columbiana branch, which employs approximately 21 employees, consists of two stores—one in Columbiana and the other in East Liverpool.

From 1972 to 2000, the Columbiana and East Liverpool stores were owned and operated by Astra Rentals, which was owned by Britt's Inc. In 1987, Chris Britt succeeded his father as president of Britt's Inc. and managed Astra Rentals. In 2000, Britt's Inc. sold Astra Rentals to the Respondent and leased the Columbiana and East Liverpool stores to the Respondent. The Respondent retained Chris Britt as its Columbiana branch manager. He, in turn, relies on store managers at each of two stores to run daily operations. The Columbiana store manager is Chuck Millhorn; the East Liverpool store manager is Mike Britt and its assistant store manager is Steve Jasenec.

The disputed personnel practices at the Columbiana branch include employee performance evaluations, pay raises, and free equipment rentals. Employees normally received a performance evaluation in March of each year. The process is initiated by the employee's supervisor—either Chuck Millhorn or Bill Smith at the Columbiana store or Michael Britt at the East Liverpool store—and submitted to Chris Britt for approval. Pay raises, based on the evaluation, followed every April.<sup>2</sup> In addition, the Columbiana branch had a policy of permitting employees to use rental equipment free of charge provided that it was not being leased to a customer. Chris Britt informed job applicants about this fringe benefit when they were hired. The practice contravened the Respondent's formal policy permitting employees to "rent available URI equipment at a discount of 50 percent from the Branch's book rates, plus all charges for delivery and pickup, fuel, taxes, and any other specific costs connected with the employer's use of the equipment." A companywide memorandum was issued in January 2004 reiterating

<sup>2</sup> Chris Britt's testimony left no doubt that this was an annual practice that he suspended in 2004 at Stewart's direction. (Tr. 792–793, 843.)

this policy.<sup>3</sup> That memorandum was followed by a February 5 conference call between District Manager Brian Stewart and branch managers, including Chris Britt.<sup>4</sup> Stewart again reinforced the policy at the February supervisors' meeting in Detroit, which Chris Britt attended. Chris Britt returned to the Columbiana branch on February 13, and told branch supervisors about Stewart's comments concerning the Respondent's employee rental policy.<sup>5</sup>

### B. *The Union Organizing Campaign*

On February 9, 2004, several of the Respondent's employees attended a union organizing meeting. On February 11, 2004, Joseph Beasley, the Union's coordinator of organizing, filed a representation petition and 10 supporting authorization cards with the Regional Director of Region 8. On the same day, Beasley faxed the representation petition and authorization cards to Chris Britt. The material was accompanied by a transmittal sheet entitled, "Notice of Concerted Activity," and a cover letter. The letter stated:

This letter is to inform you that ten of your employees, Douglas Baker, Brian Brooks, Edward Crow, Frank Morrezz, Charles Muskgrove, Timothy Plunkett, James Six, William Smith, Robert Williams, and Jason Woods, are currently involved in assisting the International Union of Operating Engineers Local # 66 in attempting to organize your company. I have attached copies of their signed authorization cards for your records. They are, and will continue to be, involved in protected concerted activity that is protected by the National Labor Relations Act. We would expect that you would respect their rights under the law. Should you have any questions regarding this matter, please feel free to contact me at 412-856-8662.

Chris Britt was at a supervisors' meeting in Detroit that day. However, he was notified by the Columbiana branch and, in turn, conveyed the information to Peter M. Meany, the Respondent's director of labor relations. Meany responded by letter the same day:

We have received the enclosed fax from you today from you [sic]. At the instruction of Mr. Britt who is not in the office today, I am returning the entire fax to you, and have not kept a copy. In the future, please follow NLRB procedures in this matter.<sup>6</sup>

<sup>3</sup> Baker conceded reading such a memorandum. (Tr. 502–503, 826–827; R. Exh 8.)

<sup>4</sup> I did not credit Stewart's testimony on contested issues after cross-examination revealed a sketchy, selective memory regarding his discussions with Columbiana branch employees. In any event, the General Counsel did not challenge Stewart's assertion that he addressed employee equipment rentals within the context of the "rates initiative program." (Tr. 615–616.)

<sup>5</sup> Chris Britt, Williams, and Baker all testified that free equipment rentals were made available to employees prior to the March 26 election. Nor is it disputed that Chris Britt told branch staff about Stewart's comments. However, how staff used that information during the context of the organizing campaign is at issue. (Tr. 42, 139, 395–396, 826; R. Exh. 8.)

<sup>6</sup> GC Exh. 2.

### C. The Respondent's Preelection Actions

#### 1. Chris Britt's February 13 meetings with employees

Upon returning on February 13, Chris Britt held one-on-one meetings with three Columbiana branch employees: Robert Williams, Brian Brooks, and Jason Woods. He also met that day with Timothy Plunkett, an East Liverpool employee. Chris Britt's discussion with Woods was brief, but his discussion with the others was more extensive.<sup>7</sup>

In his conversation with Williams, a Columbiana store truckdriver, Chris Britt said that he had a list of 10 employees, including Williams, who signed authorization cards. He told Williams that these employees "sealed their fate." Chris Britt also said he suspected that Williams and Bill Smith were the leaders of the union organizing effort, Williams would be fired within 3 months, and Smith would not be far behind. Chris Britt opined that a union was not necessary and then asked Williams what prompted him and other employees to sign authorization cards. Williams explained that wages at the Columbiana branch were lower than those at the Respondent's unionized branches, workers attempting deliveries at General Motors in Lordstown, Ohio, were embarrassed by unionized workers there, and Bill Smith was annoyed at being passed over for a promotion. Chris Britt responded that the cost of living in those branches was higher and addressed Williams' concern by stating that the Respondent would discontinue deliveries to that location. He also suggested that Williams' organizing activity would cause Brian Brooks, whose daughter suffers from Cystic Fibrosis, his job and health coverage. With respect to Williams' concern about pay, Chris Britt explained that annual evaluations, typically held in March each year, would not be done. That, in turn, derailed a \$1.50 per hour pay raise that was likely in April. He also told Williams that the "genius" behind the organizing effort would cause the Respondent to close one or both of the Columbiana branches.<sup>8</sup>

Chris Britt took a somewhat softer approach with Brooks, a mechanic at the Columbiana store. He started their closed door meeting pretty much the same way—by telling Brooks he had a

<sup>7</sup> I did not find Chris Britt to be a very credible witness. In contrast to the Respondent's employees called as witnesses by the General Counsel, much of his testimony was guarded and vague regarding the details of relevant events. As such, where his testimony conflicts with that provided by the General Counsel's witnesses, I adopted the latter.

<sup>8</sup> I found Williams to be a credible witness. He had excellent recollection of the facts, although they came out in a haphazard fashion, and seemed genuinely emotional when discussing Chris Britt's veiled threat regarding Brooks' daughter. I was especially impressed with his spontaneous recollection of the facts on cross-examination. Williams and Britt provided generally similar testimony regarding the scope of their conversation on February 13. Chris Britt testified that: he was "not happy" upon learning of the organizing campaign; told Williams that the Union was not necessary at the Branch; explained that wages there were lower than at the unionized branches because of the cheaper cost of living; and he told Williams he would be unhappy there regardless of the pay scale. However, he denied: telling Williams or any other employee he was unhappy about the representation petition; threatening to fire Williams or close the branch; or promising Williams a raise. I do not credit Chris Britt's testimony in this regard and rely on Williams' version of the meeting. (Tr. 26, 29, 70–87, 785–789.)

problem with the Union, and asking him why he signed an authorization card and about any concerns with working conditions at the store. Brooks told Britt about the harassment problem at the General Motors' plant in Lordstown. After telling Brooks that employees would not receive their annual evaluation because they had signed authorization cards, Chris Britt stated that he was simply trying to look out for Brooks and his daughter.<sup>9</sup>

In his brief meeting with Plunkett, a truckdriver at the East Liverpool facility, Chris Britt started the conversation by referring to Plunkett's 6-month old daughter. At the time, Plunkett's daughter was hospitalized with pneumonia. Chris Britt told Plunkett, notwithstanding his union activity, not to worry about disciplinary action if he needed time off to care for his daughter. He then proceeded to discuss the union campaign with Plunkett, telling him that "if it wasn't for this union activity that we would all receive \$1.50 an hour raise at our evaluation."<sup>10</sup>

#### 2. Millhorn's February 16 meeting with Baker

Millhorn, the assistant manager of the Columbiana store, also made antiunion statements to employees. On February 16, he took Douglas Baker, a laborer, to an isolated portion of the showroom to discuss the union campaign. During the discussion, which lasted about 2 hours, Millhorn inquired as to Baker's reasons for supporting the Union. Baker prefaced his remarks with a comment that he did not want anyone to take his union support personal. Millhorn then asked whether money was an issue. Baker explained that it was, but added that the Columbiana store was a great place to work. That prompted Millhorn to say that it was "going to be a [expletive omitted] miserable place to work. I'll guarantee you that." Millhorn then threatened employees: would lose promotional opportunities, medical benefits, and the free use of company equipment; were "going to get [expletive deleted] laid off"; and, during slow work periods, "once you get your deliveries done, go ahead and punch out, you're [expletive omitted] going home."<sup>11</sup>

<sup>9</sup> I found Brooks' testimony credible. Although nervous, his answers were spontaneous and he did not stretch to come up with answers to questions. He even readily admitted a mistake on an insignificant issue in an affidavit he gave the General Counsel (Tr. 350–354.) On the other hand, Chris Britt testified that he "just really discussed that a petition had been filed. Brian had brought up the Wardston project as well, and the confrontations that he had there, the awkwardness being on that project, and the confrontation. I too told him that we were going to try to avoid sending service techs and drivers to that job." (Tr. 790.)

<sup>10</sup> Plunkett was also a credible witness and I base this finding on his testimony. His testimony was equally as steady, responsive, and spontaneous on cross-examination as on direct testimony. (Tr. 285–286.) Chris Britt testified that the conversation related to Plunkett's newborn child and "wasn't union associated or the campaign associated." (Tr. 842.) The overwhelming evidence belies such an assertion.

<sup>11</sup> Baker's unrefuted testimony regarding this conversation was very credible. He provided specific details concerning the time of the discussion, even recalling that another employee, Dave Matts, interrupted them to discuss the next day's reservations. (Tr. 409–416.) The Respondent, on the other hand, failed to call Millhorn to rebut the allegations. Instead, it argues that Baker's act of tape recording the conversation, not offered by the General Counsel, violated company policy and

### 3. Blackadar and Stewart's March 15 meetings with employees

The Respondent's upper management converged on the Columbiana branch on March 15. On that day, Regional Vice President Rob Blackadar and District Manager Brian Stewart met with Columbiana branch employees and presented the Respondent's antiunion position. Three employees testified concerning their conversations with Blackadar: Williams, Brooks, and Plunkett; one employee, Baker, testified concerning his conversation with Stewart.<sup>12</sup>

Blackadar gave his standard pitch in such instances, engaging in "small talk" before apprising each employee as to the Respondent's preference that the Company remain union-free and typically telling each employee: "I would like you to vote no, but I don't say you have to vote no, or anything like that." He approached Williams in the parts room of the Columbiana branch, introduced himself, and said he was there to speak about the election the next day. He added that he was also the contract negotiator for union contracts, but explained that he and the Respondent did not like unions; their preferred approach to problems was to work problems through the branch manager, then to the district manager and up to his level. Blackadar then asked Williams if he wished to discuss any concerns. Williams shared his concerns, including the view that too many Britt family members worked at the Columbiana branch and availed themselves of free company fuel, rentals, and deliveries. Blackadar responded that the Columbiana branch was a smooth running operation and he never heard of any problems there until they came "to light because of this union situation." Blackadar gave Williams his business card and cellular telephone number. He also informed Williams that, if the Union lost the representation election, he would return in April to address employees' concerns. Blackadar noted, however, that he would not return if the Union prevailed, since there would be nothing he could do because he would then be entering negotiations with the Union.<sup>13</sup>

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constituted an independent basis for termination—even though the Respondent did not terminate him for that reason. As discussed below, that argument lacks merit. In any event, the General Counsel provided the Respondent's counsel with a transcript of the tape recording, as well as an opportunity to listen to the tape, on January 31—1 day before the hearing began. (Tr. 421–423, 465–481; GC Br. at 45; R. Exh. 4, p. 3; R. Br. at 58.) As such, I do not draw an adverse inference either way due to the failure to produce the tape.

<sup>12</sup> There was conflicting or vague testimony regarding the date of Blackadar's conversation with Columbiana branch employees. Blackadar could not recall exact dates but adopted March 15 pursuant to a leading question from counsel. (Tr. 550, 555.) Williams insisted they met on March 25, the day before the election. (Tr. 94–95, 195.) Brooks testified that the discussion occurred "approximately a week before the election." (Tr. 355.) Plunkett was not asked about the date. (Tr. 276.) In any event, since Stewart also visited that March 15, I found that day to be the day Blackadar spoke with Columbiana branch employees. (Tr. 417.)

<sup>13</sup> I relied primarily on Williams' version of their conversation. (Tr. 95–98.) Williams' specific details of the conversation were consistent with Blackadar's vague testimony that he approached employees, made small talk, and discussed the Union and the election. Blackadar was not, however, credible in his assertion that he did not solicit grievances. He attempted to downplay employees' complaints as "a little bit of

In his conversation with Brooks, Blackadar said he was aware that the employees "had pay issues in our shop, and if given the chance, we have, we're going to have an election, we have the right to vote. He wants us to make sure that we're there to vote. Given the chance, he would like to take care of the issues that we have with pay, and he asked me if I had any other issues." Brooks alluded to his meeting with Chris Britt and the problem with delivering to the union worksite in Lordstown. Blackadar handed him a business card and suggested Brooks call or e-mail him with any problems or questions.<sup>14</sup>

In his 20-minute conversation with Plunkett, Blackadar asked about his reasons for supporting the Union and any concerns he had. Blackadar did not tell Plunkett how to vote, "but he naturally would want, you know, it to go no [sic], the other way." Plunkett complained about his level of pay and making deliveries on company time with company equipment and vehicles to Chris Britt's house. Blackadar acknowledged that the pay scale at the Columbiana branch was low and he was going to "try to make everything right for people."<sup>15</sup>

In his conversations with Columbiana branch employees, Stewart was also confronted with questions and concerns about wages and branch management, including favoritism, no-charge contracts, and promotional opportunities. In his conversation with Baker during the morning, Stewart asked Baker what issues contributed to his desire to bring in the Union. Baker told him. Stewart then asked Baker if he had any prior union activity. Baker explained that he was previously a member of three different unions and that the union took care of his father, a lifelong union member, after he suffered a stroke.

Later that day, Stewart also met in the shop area with a group that included Williams, Smith, Brooks, Baker, and Jim Six, another laborer/driver. Williams did most of the talking on behalf of the employees. He complained that Columbiana branch employees were paid less than employees at other branches. Stewart agreed but, when Baker asked whether employees would receive pay increases in April, responded that he could not discuss that issue because it could be considered a bribe. Baker persisted with a suggestion that it would be illegal if the Respondent withheld a scheduled pay raise. Stewart then responded that the Union would accuse the Respondent of an illegal bribe if it were to award pay raises. Stewart did add, however, that he had "seen the evaluations for that prior year and he said that we were scheduled to get them on April 1." Regarding the relative adequacy pay level at the Columbiana branch, Stewart said it was the "lowest paid in the district and he was going to bring it up to a level pay scale with the rest of the [district]."<sup>16</sup>

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frustration on behalf of some of the employees," as if to suggest there were no complaints to solicit. It was clear from his testimony, however, that several employees complained about the number of Britt family employees working at the branch. (Tr. 548–551.)

<sup>14</sup> This finding is based on Brook's credible and specific testimony regarding their conversation. (Tr. 355–356.)

<sup>15</sup> This finding is based on Plunkett's credible and specific testimony regarding their conversation. (Tr. 277–278.)

<sup>16</sup> This finding regarding Stewart's statements is based on Baker's very specific and credible testimony. (Tr. 417–420.) Stewart denied

On March 17, Chris Britt distributed a followup letter from Blackadar to each of the Columbiana branch employees:

Thank you for taking the time to speak with me on Monday. I told you that my integrity and the integrity of our management team meant everything to me. I mean it.

This election is not about the past. I know that we have made mistakes and I am willing to take responsibility for all the mistakes that I have made. However, you should know that our management team, Brian, Chris and I, are all concerned about you. We are all rational people who can calmly discuss any issue. We are asking you to give us a chance to prove ourselves.

Please do not be fooled by false Union promises of free insurance. Nothing in life is free. We all pay for insurance, one way or another. Please take the time to ask all of your questions about our health plan and the Union plan. We are proud of our employee benefits, which Mike Albers has explained to you.

I want everyone to know that *no one will lose his job because of how he votes in the election on March 26, 2004*. I ask you to vote "NO" because I believe that together we can continue to make this branch successful. I ask you to vote "NO" on March 26, 2004 because the Company has given you good reason to vote "NO". I do not want you to vote yes because the Union or someone is scaring you into believing that unless you vote for the Union you will be fired. That is simply not true. You have my word on that. Please give us a chance by voting "NO".

I look forward to speaking with you again.<sup>17</sup>

#### D. *The March 26 Election and Its Procedural Sequelae*

Pursuant to the petition filed by the Union in Case 8-RC-16598 and a stipulated election agreement between the Union and the Respondent, a representation election was held on March 26 among employees in the following unit:

All truck drivers, tractor trailer drivers, mechanics, parts associates, and customer service associates employed by the Respondent at its 44691 State Route 14, Columbiana, Ohio and 16695 Lisbon Street, East Liverpool, Ohio locations excluding all office clerical employees, outside sales/rental persons, professional employees, guards and supervisors as defined in the Act.

By a vote of eight in favor and seven opposed, the Columbiana branch employees selected the Union to be their collective-bargaining representative.<sup>18</sup>

Following the representation election, the Respondent filed timely objections. On May 7, however, Joseph Beasley, the Union's coordinator of organizing, sent a letter to Chris Britt. The letter referred to the representation election on March 26, the vote resulting in favor of the Union as employees' collective-bargaining representative, and the Regional Director's

interrogating employees about their union activities, soliciting grievances, or promising wage increases. However, he conceded agreeing with the employees that they were "underpaid." (Tr. 599-605.)

<sup>17</sup> Tr. 790; R. Exh. 7.

<sup>18</sup> GC Exh. 18; Tr. 794, 881-882.

certification of the election results. Beasley requested, in anticipation of collective bargaining, that the Respondent provide the Union with 13 categories of information and documentation relating to employee hiring dates, wage rates, disciplinary histories, and fringe benefits. Beasley concluded by stating the Union's "desire to begin negotiations as quickly as possible. Please contact me at your earliest convenience so that we can arrange some dates to meet. If you have any questions regarding these requests, please direct them to my attention. I can be reached at 412-856-8662, Ext. 17." Chris Britt forwarded the letter to Meany.<sup>19</sup> The Respondent, however, never responded to Beasley's letter.

On April 5, 2005, the Board overruled the objections and certified union representation. On April 20, 2005, Union Representative Alan Pero sent a letter to Chris Britt informing him of this event and requesting that the Respondent bargain. In preparation for such bargaining, Pero requested copies of all company policies and procedures, wage rates and benefits, as well as basic personnel information for each employee. At some point between April 20 and June 8, 2005, Meany responded to Pero's request for information.<sup>20</sup>

On June 8, 2005, the Union and the Respondent conducted their first negotiating session in Cleveland, Ohio. The Respondent was represented by Meany and the Union was represented by Pero. At this initial session, the Union provided the Respondent with a written proposal. The written proposal was a 20-page document describing proposed terms and conditions of employment. On July 7, 2005, the parties met again for the second bargaining session. Again, Meany represented the Respondent and Pero represented the Union. At this session, the Respondent submitted a written counterproposal. The written counterproposal responded to each and every proposal by the Union and described various terms and conditions of employment. The parties have agreed to meet again to continue the negotiation process.<sup>21</sup>

#### E. *The Respondent's Employment Actions After the March 26 Election*

The complaint alleges that, following the March 26 election, the Respondent took adverse action against employees. The alleged acts consisted of interrogation by an auditor as to how an employee voted, suspension of annual evaluations and pay raises, changes in uniform requirements and employee equipment rental policies, and discriminatory treatment of prounion employees Williams, Plunkett, and Baker.

##### 1. *The March 31 audit*

Dave Bellinger, an internal auditor employed by the Respondent, visited the Columbiana branch on March 30 and 31. The visit was precipitated by a telephone call on a hotline received by Global Compliance Services (GCS), the Respondent's ethics and compliance contractor. Pursuant to procedure, the call was forwarded to "someplace in management within the Com-

<sup>19</sup> GC Exh. 19; Tr. 929-930.

<sup>20</sup> R. Exh. 11; Tr. 918-919.

<sup>21</sup> The parties stipulated to the relevant facts involving the Respondent's alleged failure to bargain pursuant to Sec. 8(a)(5). (Tr. 920-921; R. Exhs. 12-13.)

pany.”<sup>22</sup> Bellinger asked branch employees four standard questions that he asked in every audit: whether the employee was aware of any company policy violations; whether the employee was aware of any violations of law; whether the employee was aware of any unethical employee behavior; and whether there were any situations that needed to be addressed. However, in the course of his conversations with employees, he learned of the recent representation election. He also mentioned hearing that the election had been close and asked Williams, “were you an eight or a seven.” Williams told him that he “was an eight.” Bellinger gave Williams his business card and reassured him that everything they discussed would be held “in confidence and would be forwarded on to Mr. Blackadar.” Bellinger also told Williams that “he had spent a little more time” with him “than any of the other employees that he had met with that day and, if questioned about why he spent so much time speaking with him, that Williams should tell branch management “he was checking over all the documents, being the insurance and the log book.”<sup>23</sup>

Bellinger also spoke with Baker. Bellinger asked him about any illegal activities that may have taken place at the Columbiana store branch. Baker told Bellinger about the tape. Bellinger said that Blackadar would probably like to listen to the recording. Blackadar called Baker at home that evening and asked him what was on the tape. Baker told him. Blackadar then asked if Baker had the tape. Baker said he did not. Blackadar then asked Baker to get a copy of the tape so they could meet and listen to it. It does not appear that Baker responded to that request.<sup>24</sup>

## 2. Annual evaluations and pay raises

The Respondent has a companywide policy for the initiation of performance evaluations at the branch level. Every year since the Respondent took over operations in 2000, Columbiana branch supervisors would complete an employee’s performance evaluation and hand it to Chris Britt. After reviewing and ap-

<sup>22</sup> Neither Stewart nor Chris Britt had advance warning that Bellinger was coming to the branch. (Tr. 614–615, 794–795.) According to its mission statement, GCS provides companies with “outsourced ethics and compliance solutions” by implementing “internal controls to conform to government and industry regulations and enhance overall business performance.” Their services include “Hotline and Web Reporting, Information Management, Field Research and Awareness and Training.” <http://www.globalcompliance.com/company/index.html>. There was no testimony explaining who the hotline call was forwarded to in “management.” Nevertheless, there is no evidence to suggest that Bellinger’s visit was triggered by anything other than a call to the GCS hotline. (Tr. 577.)

<sup>23</sup> Bellinger denied asking employees how they voted or felt about the unions. (Tr. 579–580.) However, I found Williams’ version of their conversation more credible. In contrast to Bellinger’s flat denials, Williams provided a plausible explanation as to how Bellinger learned about the election during the course of the audit. (Tr. 99–100.)

<sup>24</sup> This finding is based on Baker’s unrefuted testimony. There is no complaint allegation, however, that either Bellinger or Blackadar violated the Act by asking Baker about the tape and its contents. Baker could not recall mentioning anything about the Union during his conversation with Blackadar and it appears that his interest in the tape and its contents is attributable to Bellinger’s investigation into the branch’s rogue policy regarding free equipment rentals. (Tr. 420–423.)

proving the form, Chris Britt would meet one-on-one with the employee.<sup>25</sup> Pay raises were then awarded in April.

In 2004, however, the Respondent decided to suspend evaluations on the ground that it would be unlawful to grant raises during the pendency of a contested union campaign.<sup>26</sup> Chris Britt confirmed this to Williams on April 20, when he explained that annual performance evaluations and pay raises were on hold because Stewart was concerned “about the one on one meetings, implications to evaluations” of employees and “grievances or issues they might have with discussing wages.”<sup>27</sup>

## 3. Rental policy changes

The Respondent’s employee handbook provides, in pertinent part, a written policy regarding employee use of company equipment:

3. Employees may rent available URI equipment at a discount of 50% from the Branch’s book rates, plus all charges for delivery and pickup, fuel, taxes and any other specific costs connected with the employee’s use of equipment.<sup>28</sup>

Nevertheless, prior to the March 26 election, Chris Britt had a separate policy at the Columbiana branch—one that allowed branch employees to use company equipment at no-charge, provided the equipment was not requested by a paying customer.<sup>29</sup> In a conference call in February, Stewart did remind Chris Britt and other branch managers about the Respondent’s national policy prohibiting no-charge contracts.<sup>30</sup>

After the March 26 election, as Millhorn warned Baker on February 16, the employee equipment rental policy changed. On April 1, Chris Britt informed Plunkett that there would be no more free rentals and that he would have to wear his full uniform—not just the uniform shirt.<sup>31</sup> In addition, Baker was charged for the use of equipment on May 8, while Williams was charged for signing out equipment on June 1.<sup>32</sup>

In a letter, dated May 22, Stewart formally counseled Chris Britt for violating the Respondent’s employee equipment rental policy:

Please be advised that this letter is intended to be a written warning for violating PPB for the past several years at your

<sup>25</sup> Albers and Chris Britt confirmed that evaluations were done on a yearly basis. (Tr. 659–660, 792–794.)

<sup>26</sup> The Respondent did not refute credible testimony by Williams, Plunkett, and Brooks that pay raises were awarded every year in March and April. (Tr. 84–85, 283–285, 352–354.)

<sup>27</sup> Chris Britt’s testimony was consistent with Baker’s version of their discussion. (Tr. 147–148, 792, 848.)

<sup>28</sup> R. Exh. 8.

<sup>29</sup> Tr. 42, 139.

<sup>30</sup> I did not find credible Chris Britt’s testimony that Stewart told him at the Detroit managers’ meeting that he would be disciplined for no-charge contracts at the Columbiana branch. (Tr. 818–819.) First, Stewart testified that he simply discussed the policy with Chris Britt and other branch managers in a February 5 telephone conference, without any mention of discipline. (Tr. 611–616.) Secondly, Chris Britt was not “disciplined” until May 22—over 3 months later. (R. Exh. 6.)

<sup>31</sup> Plunkett testified that the discussion occurred a week after the election. (Tr. 279–281.)

<sup>32</sup> Tr. 145, 397–398; GC Exh. 7, 11.

branch. Going forward renting United Rentals equipment to employees for “0” no charge will result in disciplinary action up to terminations. For your information, the current policy is all employee rentals will be invoiced at 50% of manager rate.

#### 4. Uniform requirement

Prior to March, the Respondent had a vague dress code. Its written policy merely stated that employees could be disciplined for failing “to present a proper appearance or wear uniform in prescribed manner” or wearing “required safety equipment including protective footwear and eyeglasses in all applicable job classifications.”<sup>33</sup> Employees were issued a shirt with the company logo and blue khaki pants when hired. Prior to March, however, Chris Britt permitted employees to wear company sweatshirts. He also permitted truckdrivers to wear jeans. In March, however, Chris Britt changed the branch policy. The change was not done at Stewart’s direction. Stewart never discussed the issue with branch managers and, in fact, visited the Columbiana branch in February and did not notice any dress code problems.<sup>34</sup> Stewart would reprimand employees during branch visits if he noticed that they were not wearing the company-issued button-down shirt and khakis. However, he did not discuss the issue with branch managers and, in fact, visited the Columbiana branch twice in February and did not notice any dress code violations.

Prior to the election, at least two employees, Williams and Plunkett, wore jeans to work. On or about April 1, Chris Britt and Michael Britt changed the branch dress policy. Chris Britt informed Williams that he could no longer wear jeans. At the East Liverpool store, Michael Britt informed Plunkett that he would need to comply with the company dress policy. On that occasion, however, Plunkett was wearing company-issued pants and a company sweatshirt. Michael Britt informed him that he was out of uniform and directed him to go home and change into a company shirt. Plunkett responded that Chris Britt told him when he was hired that he could wear sweatshirts and, in fact, employees at the Columbiana store wore sweatshirts. Michael Britt professed to have no knowledge of such a policy and told Plunkett to just go home and change into the shirt.<sup>35</sup>

#### 5. The Respondent’s treatment of Williams

Williams was a known supporter of the Union. He attended a preelection hearing at the Board’s Regional Office in February and served as the Union’s observer at the representation election on March 26. Prior to that time, he had never been

disciplined. Shortly after the election, Williams began to receive written warnings.

On April 20, Safety Officer Matt Roberts issued Williams a disciplinary notice and written warning for violating company procedure relating to securing of equipment:

Bob Williams left our lot on Tuesday April 20, 2004 hauling a mini excavator. The excavator was only anchored at one end of the machine and there was no tie down on the boom. Bob has been through training and knows the proper procedure for equipment tie downs.<sup>36</sup>

Williams objected to the notice, refused to sign the form, explained that his actions complied with Ohio’s transportation code, and insisted they discuss the matter with Chris Britt. Williams and Roberts met with Chris Britt. Chris Britt agreed with Roberts that Williams was wrong for not tying-down the boom and told Williams that he needed to sign the disciplinary notice. Williams disagreed and explained that he secured the equipment the same way he always did. Nevertheless, he reluctantly signed the form. Williams then contacted District Safety Officer Russ Jennsome and explained the circumstances. Jennsome researched the issue and called Williams back the next day. He informed Williams that his action did not violate applicable transportation code sections. Williams then went to his supervisor, Millhorn, and asked him to rescind the discipline. Millhorn, however, said he was not responsible for the discipline and referred Williams to Chris Britt. Chris Britt told Williams that he had been thinking about rescinding the discipline because he realized that Williams had never received proper training on tying-down equipment. He also told Williams that he was considering sending him for training on how to properly tie-down equipment. Williams told Chris Britt that was fine with him. Chris Britt subsequently removed the disciplinary notice from Williams’ personnel file, but left a copy in Williams’ safety file. Employees’ safety files include any training-related information.<sup>37</sup>

On June 20, Chris Britt informed Williams, a delivery truck operator, that he was being transferred to the East Liverpool store starting June 23. The need for that position arose because Chris Britt needed a tractor-trailer driver at the Columbiana store and was transferring Frank Morrell, another union supporter, from the East Liverpool store to fill that position. Williams had driven a semitractor trailer truck until 2002, when he was nearly seriously injured while unloading machinery from his vehicle. At Williams’ request, Chris Britt no longer as-

<sup>33</sup> R. Exh. 9, Sec. II(3).

<sup>34</sup> Chris Britt’s assertion that he changed the policy in order to comply with Stewart’s directive is not credible, as it conflicts with Stewart’s testimony in this issue. (Tr. 838–839.) Stewart testified that he reprimanded employees during branch visits if he noticed that they were not wearing the company-issued button-down shirt and khakis. However, he did not discuss the issue with branch managers and, in fact, visited the Columbiana branch twice in February and did not notice any dress code violations. (Tr. 629–631.)

<sup>35</sup> I arrived at an April 1 date on the basis of Williams’ testimony that his conversation occurred shortly after the election, while Plunkett testified that his conversation occurred “probably first week of April, right after the election.” (Tr. 149–150, 281–283.)

<sup>36</sup> GC Exh. 5.

<sup>37</sup> Williams and Chris Britt provided fairly consistent testimony on this issue, but disagreed as to whether Chris Britt told Williams he would remove the disciplinary notice from his personnel file. (Tr. 101–110, 801–804.) On this point, I rely on Chris Britt’s explanation that he told Williams he would remove it from his personnel file and, in fact, did so. Williams conceded that he never looked at his personnel file to prove otherwise. Furthermore, it is of no legal consequence that Chris Britt left the notice in the safety file for “training” purposes. Williams’ concession that he agreed to receive training on tying down equipment indicates that the Respondent’s procedures were more stringent than Ohio’s transportation requirements. To the extent that the notice went into a general training file merely reflects good safety policy.

signed him to operate tractor trailers. Williams asked how long he would be at the East Liverpool store. Chris Britt informed him that he was assigned there indefinitely, but his job title, duties, pay, and benefits remained the same.<sup>38</sup> Williams then contacted Blackadar to complain about the transfer. Blackadar, however, told Williams there was nothing he could do for him because he had participated in the election and voted for the Union. He also told Williams that he should speak with the Union about the problem, although it did not appear to him that the Union was doing anything for the employees. Williams replied that Chris Britt was not recognizing the Union and that things were getting worse at the Columbiana store. Blackadar said that was unfortunate, but that issues needed to be addressed to the Union and he was no longer available to address such issues.<sup>39</sup>

Williams reported to the East Liverpool store on June 23, and met Assistant Manager Steve Jasenec. Jasenec, however, told Williams that he had no pickups or deliveries for him, and directed him to “go in the back and labor.” Prior to his arrival, Charlie Muskgrove handled those duties. A short while later, Michael Britt spoke with Williams in the presence of Jasenec and Charlie Muskgrove. Michael Britt welcomed Williams to the branch and proceeded to explain his duties. Williams was to serve as the backup driver to Don Petri and sweep, mop the floors, take out the trash, and clean the restrooms every day. Petri, a delivery truckdriver like Williams, was hired in 2002; Musgrove, a laborer, was hired in 2003. Williams asked if he was demoted and Michael Britt responded that his transfer was “as big a shock to him as it was [Williams] to be there.” Williams recounted his conversation with Chris Britt regarding the continuation of Williams’ truckdriving duties, but Michael Britt responded that he had not spoken with his brother and was unaware of such a discussion. Michael Britt then told Williams, “[y]ou do as I say, you work for me.” Later that day, Jasenec asked Williams to go in the field and perform maintenance work on a machine. As Jasenec was instructing Williams, Michael Britt interrupted and said, “[w]hy are you sending Bob anywhere. You don’t need to send him outside. You don’t need to send him out of the facility into the field.” Michael Britt added that mechanic Ed Crowe could do the job, but Jasenec explained that Crowe was busy working on three service calls. Michael Britt rejected Jasenec’s advice, told him to have Crowe handle the machinery maintenance task, and have Williams resume working as a laborer in the store.<sup>40</sup>

<sup>38</sup> Williams and Chris Britt provided fairly consistent testimony on this issue. (Tr. 111–112, 248, 256–257, 804–806.) Most significantly, Williams did not rebut Chris Britt’s assertion that Williams had an encounter with a tractor trailer in 2002, and did not wish to operate one any more. (Tr. 859–860.)

<sup>39</sup> This finding is based on Williams’ credible and unrefuted testimony. (Tr. 113–114.) Blackadar did not address this conversation, but did testify that the Respondent did not recognize the Union and that he still told Baker, during another conversation, that he should contact the Union regarding any workplace issues. (Tr. 555, 569–570.)

<sup>40</sup> I found Williams to be more credible than Michael Britt and relied on his version of the events of June 23. (Tr. 116–118.) First, Michael Britt’s assertion that Chris Britt merely told him that he was transferring Williams to his branch conflicts with Mike Britt’s testimony that

The month that followed did not go smoothly for Williams. Williams was absent from work on June 11, a Friday, June 21, a Monday, and July 13, a Tuesday. However, in each instance, Williams called-in to work to notify a supervisor that he would be out that day. On July 21, Chris Britt issued Williams a “first warning for unacceptable attendance” because he “called-off” on days that were adjacent to weekends or other time off. Williams refused to sign the form and insisted he was sick on those days and would provide doctor’s notes. He never did.<sup>41</sup>

During the morning of September 9, Williams spoke with Michael Britt about Plunkett’s consistently being sent home early because of the lack of work. Williams offered to take his place that day if the store needed to send someone home early. Williams also noted, referring to his stomach, that he had “downstairs plumbing problems.” At 9 a.m., Jasenec told Williams that work was slow and he could clock out.<sup>42</sup>

Williams clocked out and drove to nearby Calcutta. After visiting his bank and refueling his vehicle, Williams drove to the Columbiana store sometime between 9 and 10 a.m. He approached Chris Britt outside the store and asked to speak with him. Chris Britt asked what Williams was doing there, since it was his understanding that Williams had plumbing problems. Williams responded that he was there “to find out why—uh, why people are being sent home and when you got this guy here sucking you dry.” Williams was referring to Jeff Cornell, a Columbiana store employee smoking a cigarette a few feet away from Chris Britt.<sup>43</sup> Chris Britt then told Wil-

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he told Chris Britt he was transferring Williams there because he needed Morrell at the Columbiana store. (Tr. 752, 805.) Secondly, Michael Britt did not deny Williams’ testimony regarding the exchange between Williams, Jasenec, and Michael Britt, which was witnessed by Muskgrove. Third, Michael Britt’s testimony on cross-examination was, to a significant extent, evasive and nonresponsive. Furthermore, it is noted that the Respondent did not call either Jasenec or Muskgrove to dispute Williams’ testimony regarding Michael Britt’s statements. (Tr. 739–740, 753–760.)

<sup>41</sup> The General Counsel challenges Chris Britt’s testimony that the called-off days were adjacent to “scheduled time off” or scheduled “vacation” because there is no evidence of Williams’ vacation time. (Tr. 806–807; GC Br. at 30.) There is a paucity of evidence on this point. The General Counsel elicited Chris Britt’s testimony that he issued the warning, but left it at that. (Tr. 43–44.) Williams testified on this point, but merely confirmed receipt of the warning and the fact that he had never before been disciplined for attendance. (Tr. 137–138.)

<sup>42</sup> The General Counsel and the Respondent made a big issue regarding Williams’ alleged stomach problems. I find that Williams did refer to plumbing problems, but it was likely an additional comment in addition to his gesture to take off early in place of Plunkett. Given the acrimony that ensued later that day when Williams confronted Chris Britt at the Columbiana store, I find it unlikely that Chris Britt would not have disciplined Williams for begging off work for false medical reasons. (Tr. 152–154, 746–747.)

<sup>43</sup> Cornell testified that Williams asked Chris Britt, “[w]hat do you got to do around here so that you don’t get sent home?” And he pointed towards me and he said, “You’ve got to suck you dry to—so you don’t have to get sent home.” (Tr. 693.) That account varied, however, from the testimony of Chris Britt and Williams. Although I adopted Chris Britt’s testimony, both recalled the statement to be in the nature of an accusation that Cornell was “sucking” either Britt or the payroll “dry.” (Tr. 155, 810.) I do not, however, subscribe to the view

Williams that he knew he “had troops on the job,” there was no reason for him to be there and he needed to leave. Williams insisted he had a right to be there, said he was a paying customer and followed Chris Britt into the store. Chris Britt told him to leave the employees alone and not to get into any confrontations. Once inside, Williams asked Greg Habbth, a salesman, about his fair tickets. Habbth did not respond and was following Chris Britt when Williams commented that Habbth “caused an economic hardship on my family by not supplying me these fair tickets.” Chris Britt turned to Williams and insisted, once again, that he leave the employees alone. At that point, Williams left the store, walked across the street to speak with two union organizers sitting in a car. The organizers were there protesting unfair labor charges against the Respondent, but it was raining at the time. Williams asked them for an extra picket sign and proceeded to picket the Columbiana store on an adjacent lot. He left after 20 minutes and drove home. However, Williams’ wife then drove him to the East Liverpool store. Once there, he picketed that store.<sup>44</sup>

The following day, September 10, Chris Britt consulted with Meany, Stewart, and Blackadar and decided to suspend Williams for 3 days. He later drove to the East Liverpool store, met with Williams, and informed him of the disciplinary action. Williams asked why he was suspended. Chris Britt explained that the action was based on Williams’ insubordination and comments regarding Cornell the day before. Williams asked for written confirmation and Chris Britt accommodated him. Chris Britt proceeded to write a disciplinary notice confirming Williams’ 3-day suspension based on “disruption of business” and “lewd comments.” Williams, however, refused to sign the form. Prior to that date, Williams had never been disciplined.<sup>45</sup>

#### 6. The Respondent’s treatment of Plunkett

Prior to the representation election, the Respondent’s late attendance policy allowed employees to report late to work and make up the time by working later at the end of the day. Since he was hired in 2001, Timothy Plunkett had been late on about 20 occasions, but would make up the time by working later, and was never disciplined.

The Columbiana branch followed a practice of permitting employees to make up for scheduled work hours missed by allowing them to work additional hours on unscheduled time. In that way, employees could earn a paycheck for an 8-hour workday or a 40-hour workweek.<sup>46</sup> Michael Britt reaffirmed this policy in the East Liverpool store lunchroom in June during

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advanced by Chris Britt and Cornell that the term amounted to sexual harassment. (Tr. 697, 812.) The context clearly applied to Cornell being a drain on the store’s payroll and not sexual innuendo.

<sup>44</sup> Chris Britt and Williams provided fairly similar accounts of this encounter. However, Chris Britt’s account of this incident provided slightly more detail and I relied mostly on his version. I also find, contrary to his testimony, that Williams knew beforehand that the union organizers would be at that location. (Tr. 154–56, 809–812.)

<sup>45</sup> The facts surrounding the suspension are not in dispute, but I find that Chris Britt took Williams’ comments regarding Cornell out of context and solely for the purpose of piling-on another charge. (Tr. 45, 157–160, 749–750, 812–814; GC Exh. 8.)

<sup>46</sup> This finding is based on the credible testimony of Plunkett and Douglas Baker. (Tr. 286, 400.)

a discussion with Timothy Plunkett, Charles Musgrove, and Frank Morrell. He also told them that an employee would not be disciplined for being late or absent if they notified the store prior to the doors opening at 7 a.m.<sup>47</sup>

On July 13, Plunkett was running late for work, called the East Liverpool store at 6:45 a.m., and left a voicemail message for Jasenec that he would get to work a few minutes late.<sup>48</sup> Plunkett arrived at the store and clocked in at 7:13 a.m. He spoke with Jasenec at the counter and asked if he received the message. Jasenec confirmed receipt of the message but said he was considering disciplinary action and would check with Paula Shell, Columbiana branch secretary and a sister of the Britt brothers. An hour later, Jasenec called Plunkett to the counter and handed him a disciplinary notice. Plunkett refused to sign it and explained Michael Britt’s policy of allowing employees to call in anticipation of being late or absent prior to the start of their shift. On July 22, Michael Britt had Jasenec revise the disciplinary notice and they called Plunkett up to the counter. Jasenec gave him the notice, told him that he revised the wording, and directed Plunkett to sign the form. The action listed on the form was a “verbal warning” and noted this was Plunkett’s first warning. The notice described the violation as follows:

Tim called in at 6:45 a.m. that he would be late. Tim came in at 7:13 a.m. Tim was under the impression that he could call before we open to let us know he would be late.<sup>49</sup>

Plunkett asked Michael Britt if he recalled the discussion with him, Musgrove, and Morrell 2 weeks earlier regarding the late or absence call-in policy. Britt did not recall such a conversation. Plunkett again refused to sign the form.<sup>50</sup>

The Respondent’s policy and procedure bulletin (the policy manual), effective February 3, 2003, provides guidance relating to attendance. Construing several provisions, it appears the call-in procedure discussed by Michael Britt was consistent with the Respondent’s overall policy:

3. Employees are expected to start work promptly at their regularly scheduled start time and complete their full shift. Non-exempt employees recording their hours of work daily on a time card are responsible for the accuracy and legibility of the time card. Employees must sign their card to verify their attendance at work.

5. Unless pre-approved with management, the employee must notify their supervisor prior to the start of the employee’s shift that they will be absent or late. This must be done every day the employee is absent or late. An

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<sup>47</sup> This finding is based on Williams’ credible testimony. (Tr. 286–288.) Michael Britt, on the other hand, merely alluded to Plunkett’s several latenesses way back in 2001. Michael Britt alleged that Plunkett was verbally warned at that time, but produced no documentation to substantiate such action. More importantly, Michael Britt did not rebut Plunkett’s testimony regarding the June discussion about the call-in policy with Plunkett, Musgrove, and Morrell. (Tr. 742–744.)

<sup>48</sup> By stipulation during trial, pars. 20(g) and (h) of the complaint were amended to refer to 2004 in lieu of 2003. (Tr. 345–346.)

<sup>49</sup> GC Exh. 9.

<sup>50</sup> Plunkett’s credible testimony concerning this issue was not rebutted by either Britt or Jasenec. (Tr. 287–294, 345.)

employee's failure to properly notify the supervisor of an absence or tardiness may result in disciplinary action. Excessive absenteeism and tardiness may result in disciplinary action.

The policy manual also contains the following timekeeping guidelines:

2. "Clocking-in" past shift time is considered "late." Pay is not docked, however, until the employee is six (6) minutes or more late.<sup>51</sup>

The disciplinary action taken against Plunkett varied from the Columbiana branch's preapproved procedure regarding calling-in late or absent. The Respondent's personnel records indicate that, prior to the March 26 election, it enforced its attendance policy only once. On May 1, 2003, after counseling him several times over several months, Chris Britt issued Benjamin Crane a written final warning for unacceptable attendance. Crane had been absent on five occasions since January 1, 2003. It was also noted that he left work early on one occasion.<sup>52</sup>

The following day, July 23, Michael Britt informed Plunkett during the middle of the workday that work was slow and directed him to clock out early. Plunkett, who had never been sent home early before, asked Michael Britt if he charged the time to annual or sick leave. Michael Britt responded that it was not permissible to make up the time. Plunkett clocked out and lost 4-1/2 hours of pay that day. This incident happened again during the morning of September 22, when Jasenec told Plunkett that there was no work for him and to clock out. Plunkett clocked out after working 3-1/2 hours. Plunkett was surprised by this development, since he was told by Chris Britt when hired in 2001 that, if he had no tractor-trailer truck deliveries to do, he was to do deliveries in the smaller trucks. Meanwhile, the drivers of those vehicles would be assigned labor and equipment maintenance-related work in the shop.<sup>53</sup>

Notwithstanding Plunkett's displeasure at being sent home early on two occasions, the Respondent did follow a practice—before and after the election—of sending employees home early if there was no work for them to do. Cornell and a former employee, Ron Harper, were two examples. Furthermore, employees were not permitted to make up the time or charge it to accrued vacation or sick leave.<sup>54</sup>

<sup>51</sup> R. Exh. 10, pp. 1–2.

<sup>52</sup> The Respondent introduced evidence of others issued a disciplinary notice for lateness or absences. However, Crane's disciplinary action is the only example offered prior to the March 26 election. (GC Exhs. 3–6.) Thus, the failure of the Respondent to offer similar notices for lateness prior to the election leads me to conclude that no one, other than Crane, received any written notices of discipline for lateness or absences.

<sup>53</sup> This finding is based on Williams' credible and unrefuted testimony. (Tr. 295–298.)

<sup>54</sup> Chris Britt's 2001 statement to Williams that he should do other work to keep busy was not inconsistent with the unrefuted testimony of Chris Britt, Michael Britt, and Cornell that the Respondent followed a practice of sending employees home early without pay if work was slow. It simply meant that the circumstances finally caught up to Williams on those two occasions. Surely, the practice of not allowing

## 7. The Respondent's treatment of Douglas Baker

In July 2002, Chris Britt hired Douglas Baker as a laborer at the Columbiana store. After Baker began working there, Chris Britt and Millhorn became aware that he was a member of the United States Army Reserves and a volunteer at a local fire department. As an Army reservist, Baker served one weekend per month. That resulted in Baker being absent from work on a Saturday and, sometimes, the Friday before. In such instances, he was permitted to make up lost time on Tuesday, which was his regularly scheduled day off. As a volunteer firefighter, there were occasions when a service call caused Baker to be late for work. In such instances, he would call and inform the Columbiana branch. Baker was never disciplined for being late or absent in any of those instances.<sup>55</sup>

In his most recent evaluation, dated February 14, 2003, Chris Britt gave Baker an overall rating of "good." The individual components ranged from "good" to "very good." The dependability component of the evaluation indicated "overall attendance acceptable." The initiative component, however, indicated that Baker needed to improve on additional activities "when work is not evident." Baker's evaluation resulted in a pay raise and bonus in April 2003.<sup>56</sup>

After the March 26 election, however, Baker started having time and attendance problems with Columbiana branch management. On April 7, he received a "first" written warning from Millhorn for arriving 12 minutes late to work on April 1, and 19 minutes late on April 7. He protested to Millhorn that he had never before received a warning for lateness.

On April 17, Baker experienced car trouble, called the Columbiana store, and left a voicemail message for Millhorn at 6:10 a.m. indicating he would not be at work that day. Baker followed up by calling again at 7 a.m. and speaking with Jamie Davidson. Davidson responded by telling Baker that his absence was going to create a predicament for the store because a lot of deliveries were scheduled that day. At 7:49 a.m., Chris Britt called Baker and asked why he was not at work. Baker repeated his explanation and Chris Britt responded that this was the busiest Saturday of the year. He added that Baker "walked around yesterday pissed off as if somebody shot your dog. [Y]ou know Dave Matts is not going to be there today." Baker, knowing Matts would be absent, explained that he was tired the day before because he and Smith were the only employees working during the store's open house promotion. Chris Britt asked if Baker had another way to get to work, but Baker explained that his wife was already at work. Chris Britt responded that Baker needed to find a way to get to work and then told Baker, "if you don't make it to work there won't be any, do you know what I mean?" Baker responded that he would do his best to get to work. After the conversation ended,

employees in such instances to charge the remainder of the workday to accrued leave seems unfair. However, an unfair practice alone does not equal an unfair labor practice. (Tr. 690–691, 713, 744–746, 861–862.)

<sup>55</sup> Baker did not testify whether he told Chris Britt about these activities at the time he was hired, but the Respondent did not rebut his testimony that his outside service was accommodated after he began working there. (Tr. 400–406.)

<sup>56</sup> Baker's actual job title was "yardsperson." (GC Exh. 10.)

Baker took his children to a baby sitter and arrived at the Columbiana store over 2 hours late.<sup>57</sup> Baker was not disciplined on this occasion, but asked Roberts, the designated harassment coordinator, to whom he could direct his complaint regarding Chris Britt's treatment. Roberts told him that he already spoken with Chris Britt about the problem and the latter directed Baker to send his complaint to Stewart. That day or shortly thereafter, Baker called and spoke with Stewart by telephone. Stewart wanted to know why tensions were high at the Columbiana branch and commented that the Respondent had lost thousands of dollars because of the union activity. Baker, sensing that Stewart was blaming him for the problems at the branch, made some derogatory comments. The discussion concluded with Stewart providing Baker with his fax number. In a letter to Stewart, dated April 25, Baker recited the events of April 17 in vivid detail. He concluded:

Mr. Stewart, I'm tired of being harassed, bullied and blamed for the management's flaws and problems I'm sure it will continue, no matter what is asked of them. I used to like going to work, but the stress throughout the day seems not to be worth putting up with. I feel if both sides sit down to discuss the situation we may be able to move ahead and start rebuilding a better branch.

I am sorry if I sounded derogatory towards you on the phone. But I do not feel that giving this type of statement over the phone is inappropriate [sic]. I hope we can leave the past behind us and move onto making money for the company and ourselves.

Please send me a written response on how this will be handled in 5 (five) working days. Thank you for your time.<sup>58</sup>

On June 21, Baker reported to work more than 2 hours late because he had to tend to his son's swollen eye. He called in prior to 7 a.m. and let the store know he would be late. On June 23, there was a power outage and Baker was late again. On that day, Millhorn issued him two pieces of paper. One document was a "second" warning for the June 21 lateness; the other was a "final" warning for the June 23 lateness.<sup>59</sup> When Baker asked Millhorn why he was only now receiving warnings for lateness, Millhorn told Baker that the Respondent would have to start going by the book because employees selected the Union at the representation election and Baker was bringing it upon himself.<sup>60</sup>

<sup>57</sup> Baker and Chris Britt generally agree as to the events of April 17, but disagree as to whether Chris Britt threatened to fire Baker. (Tr. 517, 798-799.) I find that he did.

<sup>58</sup> It is not disputed that Stewart received the letter, which I allowed in evidence only for the purpose of showing notice to Stewart of Baker's complaint. (Tr. 438-440, 516; GC Exh. 13.) It is not clear, however, when Stewart received it. The document was faxed on June 30 to the Board's Regional Office in Cleveland. (Tr. 441.)

<sup>59</sup> Baker testified that Chris Britt knew about his additional duties as a military reservist and would permit Baker to make up time for lost work. (Tr. 400-402.) However, Baker's reservist duties had nothing to do with these latenesses. (GC Exh. 12-14; Tr. 424-428, 442-443, 507-517, 523-525.)

<sup>60</sup> Baker could not recall Millhorn's exact words, but it is clear that Millhorn's actions were attributable to the union factor. I do not find,

On June 28, 2004, there was union picketing outside the Columbiana store. Baker was returning slips to the front counter of the store when Roberts told him that it was Baker's pay raise that was paying for the picketers to sit in front of the store, while Baker worked. Baker responded that he just wanted to do his work, but Roberts continued making similar comments for 10-15 more minutes.<sup>61</sup>

On July 8, Baker was approached in the Columbiana store by Michael Albers, the Respondent's regional human resources manager. Albers asked Baker if they could speak for a few minutes in Chris Britt's office and Baker agreed. They discussed the recording that Baker made of his February 16 conversation with Millhorn and branch management's attitude toward Baker. Albers advised Baker not to be a "martyr," stated Chris Britt was looking to fire him, and not to give him a reason to do so.<sup>62</sup>

On July 23, while working in the Columbiana store, Baker heard that Plunkett was being sent home early. Wondering why that was happening, since it was a "very busy day" at the store, Baker asked Roberts why Plunkett was being sent home early. Roberts asked Baker why he wanted to know and Baker responded that it was a busy day. At the time, Baker and Bill Smith were the only employees in the store taking care of customers. Baker also asked why Plunkett would be sent home early if the Respondent had a policy of sending employees to the other store if it was busier. Roberts responded that it was none of Baker's business. Roberts also told Baker that "since the Union came in, that we've costed so many thousands of dollars to the Company because we was, we was being tied up with senior management coming in and talking and not doing actual work procedures, and all because of the Union that was coming in." Baker then asked to see the Respondent's policy and procedures manual. Roberts complied.<sup>63</sup>

however, that Blackadar rejected Baker's plea for help on June 23 because the Union was involved. There was no testimony to support this allegation in par. 14 of the complaint. (Tr. 442-444.)

<sup>61</sup> This finding is based on Baker's credible testimony. (Tr. 445-446, 451-453.) Notably, Roberts was not called to refute the allegations, even though the Respondent had ample opportunity to do so after the trial was continued to August 30, 2005.

<sup>62</sup> Albers testified that he went to the Columbiana branch that day to investigate Plunkett's sexual harassment claim and subsequently concluded that there was inappropriate behavior by branch employees and Plunkett. In the course of his investigation, he interviewed Baker, but denied discussing Chris Britt, mentioning that he was looking for a reason to fire Baker, or advising Baker not to be a martyr. (Tr. 653-657.) I did not find Albers' testimony credible on this point. He provided terse denials with no details of the conversation. Accordingly, I relied on Baker's credible and detailed version of the conversation. Nevertheless, it was not clear from Baker's testimony whether Albers brought up the recording. No one probed him on that aspect of the meeting. (Tr. 452-454.)

<sup>63</sup> Again, this finding is based on Baker's credible and unrefuted testimony, as Roberts did not testify. However, I did not credit Baker's assertion that this was the first time he saw the policy and procedures manual. (Tr. 454-457.) He acknowledged receipt of the manual when he started working at the branch on July 12, 2002. (R. Exh. 3.) In addition, Baker's testimony indicated that Roberts would periodically provide updates to employees. (Tr. 456.)

On July 24, a Saturday, Baker overslept and reported to work about 2 hours late. He worked an hour past his shift that day. Shortly after arriving at work on July 26, he was called into Chris Britt's office. Chris Britt then handed Baker a "third" warning, resulting in employment termination. There was no discussion as to why Baker was late on July 24. However, Baker asked to see the written policies that Chris Britt was basing his action on before signing the form. Chris Britt refused and told Baker to leave the facility.<sup>64</sup>

The Respondent's policy and procedure bulletin provides several examples of "causes for disciplinary action" up to and including discharge for repeated occurrences:

1. Unexcused absence, absence from work without notifying the Company before a scheduled shift, failure to return to work promptly upon expiration of a leave of absence where circumstances are not protected by State and Federal Regulations or excessive absence or tardiness. Failure to follow established time card and attendance procedures.

#### Discussion

##### A. Section 8(a)(1)

###### 1. The Respondent's preelection statements

The complaint alleges that Chris Britt, Millhorn, Blackadar, Stewart, Bellinger, and Albers violated Section 8(a)(1) through unlawful interrogation, threats, grievance solicitation, promises of wage increases, and remarks that union representation would be futile.<sup>65</sup> The Respondent stipulated that all are Section 2(11) supervisors, but denies they threatened, solicited grievances, or made promises to employees and asserts they simply expressed their lawful views about the Union.

Section 7 of the Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." An employer who interferes with, restrains, or coerces employees in the exercise of such rights violates Section 8(a)(1). The test does not turn on the employer's motive or whether the coercion succeeded or failed but, rather, whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

On February 13, Chris Britt told Williams that he had a list of employees, including Williams, who signed authorization cards and said those employees "sealed their fate." He also suspected Williams and Bill Smith were leading the organizing effort, would be fired within a few months, opined that a union was not necessary, suggested the organizing effort would cause Brian Brooks to lose his job and health coverage for his ill daughter, would result in no annual evaluations and pay raises,

and would cause the Respondent to close one or both of the Columbiana branch stores. In his meeting with Brooks, Chris Britt expressed his objection to the Union and asked why Brooks signed an authorization card, as well as concerns about working at the store. After telling Brooks that annual evaluations would be done as a result of the organizing campaign, Chris Britt stated that he was looking out for Brooks and his daughter. In his meeting with Plunkett, Chris Britt alluded to the latter's hospitalized daughter and assured Plunkett, notwithstanding the organizing campaign, not to worry about disciplinary action if he needed time off to care for her. Chris Britt then told Plunkett that the organizational campaign would cause employees to lose a pay raise.

Under the circumstances, Chris Britt's statements constituted several violations of Section 8(a)(1). His questions as to those employees who signed authorization cards and employees who were leading the organizational effort constituted coercive interrogation. *Bristol Nursing Home*, 338 NLRB 737, 738-739 (2002); *Shamrock Foods Co.*, 337 NLRB 915, 918 (2002). His threats that employees would be discharged, jobs and medical benefits lost, and pay raises suspended, constituted unlawful threats. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *Fiesta Hotel Corp.*, 344 NLRB 1363, 1386 (2005). Finally, he unlawfully solicited grievances during the organizational campaign by impliedly promising to remedy them if employees discontinued union activity. *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1090-1091 (2004); *Orbit Lightspeed Courier Systems*, 323 NLRB 380 (1997); *Reno Hilton*, 319 NLRB 1154, 1156 (1995); *Reliance Electric*, 191 NLRB 44, 46 (1971).

On February 16, Millhorn asked Baker why he supported the Union and warned that, if the Union prevailed, the Columbiana branch would be a miserable place to work and result in lost promotional opportunities, medical benefits, free use of company equipment, layoffs, and employees being sent home early during slow periods. Under the circumstances, Millhorn's threats of loss of benefits and adverse action amounted to coercive interrogation in violation of Section 8(a)(1). *Hoffman Fuel Co.*, 309 NLRB 327 (1992); *Belle Knitting Mills*, 331 NLRB 80 (2000); *Harper-Collins San Francisco*, 317 NLRB 168 (1995).

On March 15, Blackadar told Williams that he and the Respondent did not like unions and preferred to work out problems internally. He asked Williams about any problems he had at work. After Williams expressed concerns regarding the Britt family members' free use of company equipment and supplies, Blackadar gave Williams his telephone number and stated that, if the Union lost the election, he would return in April to address employees' concerns. Blackadar also stated that, if the Union won, he would not return due to collective bargaining. In his conversation with Brooks, Blackadar said that, if given the chance, he would like to take care of employees' pay issues. He also asked Brooks if he had any other issues, handed him his card, and invited Brooks to call or e-mail with any problems or questions. In his conversation with Plunkett, Blackadar asked about his reasons for supporting the Union and any concerns he had. Plunkett complained about his salary and Chris Britt. Blackadar acknowledged that the pay scale there was low and would try to correct that problem. Under the circum-

<sup>64</sup> GC Exh. 17; Tr. 457-462, 526-529.

<sup>65</sup> Complaint, pars. 6-11, 13-15.

stances, Blackadar violated Section 8(a)(1) by soliciting grievances and promising to remedy them in order to dampen employee support for the Union. *Hialeah Hospital*, 343 NLRB 391, 392 (2004); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971).

On March 15, Stewart asked Baker why he supported the Union and whether he had any prior union activity. Stewart also told Baker that he could not discuss pay increases because it could be considered a bribe. Later that day, Stewart repeated his statement regarding the inability to discuss raises to a group that included Williams, Smith, Brooks, Six, and Baker. Stewart did concede, however, that employees were scheduled to get them on April 1, and he would be increasing the level of pay at the Columbiana branch. Under the circumstances, Stewart's remark that he would be increasing the level of pay at the Columbiana branch amounted to an unlawful promise to remedy a grievance during the heat of an organizational campaign. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

On March 31, Bellinger, an auditor, interviewed branch employees about alleged policy and legal violations, unethical behavior, and any other operational problems. Upon learning about the recent union election, however, he asked several related questions relating to the vote. Bellinger asked Williams, "where [sic] you an eight or a seven." After Williams responded that he "was an eight," Bellinger assured him that everything they discussed would be kept confidential, but forwarded to Blackadar. Bellinger also spoke with Baker, who told him about the recording he had of a conversation with Millhorn. Bellinger told Baker that Blackadar would be interested in the tape and Blackadar called Baker that evening requesting a copy of the tape. Bellinger's discussion with Baker regarding the tape reasonably related to Bellinger's audit of wrongdoing at the branch. His inquiry, however, as to how employees voted in the March 26 election had nothing to do with his audit and, from an objective standpoint, tended to interfere with employees' Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984). Furthermore, the fact that the interrogation took place during a calm setting does not affect the result. *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 172 (1979). Under the circumstances, Bellinger's questions regarding employees' actions during the March 26 election violated Section 8(a)(1).

On July 8, Albers, a regional human resources manager investigating a sexual harassment complaint, deviated into a discussion with Baker about his February 16 conversation with Millhorn and branch management's attitude toward Baker. As previously discussed, Millhorn's statements on February 16 consisted of a litany of threats in violation of Section 8(a)(1). Albers responded by warning Baker that Chris Britt was looking to fire him and advising Baker to avoid giving him a reason to do so. Under the circumstances, Albers' statement constituted an unlawful threat that the Respondent would retaliate against Baker if he continued to complain about the 8(a)(1) violations by Millhorn on February 16. *Hialeah Hospital*, supra at 393.

## 2. Suspension of past employment practices

### (a) Performance evaluations and pay raises

The complaint alleges that, since March 2004, the Respondent has refused to give employees their annual evaluation and pay raises in order to discourage union support.<sup>66</sup> The Respondent contends that: (1) any discussion regarding evaluations and raises would have given the appearance of trying to influence the March 26 election; (2) the Respondent's pay raises are based solely on performance evaluations and are discretionary; (3) the Columbiana branch did not have an annual practice of issuing evaluations and pay raises because its practice had only been in place for 3 years; and (4) the Columbiana branch lawfully postponed the pay increases.<sup>67</sup>

The Respondent suspended the performance evaluation process, as well as the pay raises that were dependent on that process, due to the March 26 election. This was an annual practice that the Respondent followed for the 3 years after acquiring the Columbiana branch. The notion that such pay raises were discretionary is a hollow one, since the Respondent's custom and practice was to award raises to employees with good or satisfactory performance evaluations. Finally, the Respondent did not lawfully postpone pay raises. Stewart's alleged concern that one-on-one meetings with employees would have implications on evaluations and be construed as bribery was unfounded, given the solicitation of grievances committed by Stewart, Chris Britt, Blackadar, and Millhorn during the campaign. At the very least, the Respondent's agents did not communicate unequivocally that employees would receive their pay raises. *Promedica Health Systems*, 343 NLRB 1351, 1372 (2004); cf. *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). Under the circumstances, the suspension of performance evaluations in March and pay raises in April because of the March 26 election violated Section 8(a)(3) and (1). *Holland American Wafer Co.*, 260 NLRB 267 (1982); *GAF Corp.*, 196 NLRB 538 (1972).

### (b) Free equipment rentals

The complaint alleges that, since April 1, the Respondent has "selectively enforced its rental equipment policy against employees including but not limited to Robert Williams and Douglas Baker, by not allowing such employees the free use of rental equipment in retaliation for their support and activities on behalf of the Union."<sup>68</sup> The Respondent concedes that Chris Britt had a longstanding practice of permitting employees to use company equipment for no charge. However, it contends that Chris Britt suspended the practice after receiving notification in January of the Respondent's nationwide initiative to enforce its prohibition against no-charge contracts and Stewart's threat to discipline him in February.<sup>69</sup>

The Respondent had a written companywide policy permitting its employees to rent its equipment at a discount. An employer has a right to enforce rules and regulations, provided they are not enforced in disparate fashion. *Allied Mechanical*

<sup>66</sup> Complaint, par. 12.

<sup>67</sup> R. Br. at 35-44.

<sup>68</sup> Complaint, par. 16.

<sup>69</sup> R. Br. at 60-62.

*Services*, 341 NLRB 1084 (2004). In this instance, however, the Columbiana branch followed a practice, prior to the March 26 election, of permitting employees to rent equipment for free. It changed that practice after the Respondent lost the election. I did not credit the notion that it was pure coincidence that Stewart was cracking down on Chris Britt's branch policy at the very time that Chris Britt and Millhorn threatened employees with the loss of this benefit. Chris Britt was not issued a disciplinary notice until months later and it appears that the Respondent's crackdown on Chris Britt was actually meant to provide him with legal cover for his actions. Under the circumstances, the Columbiana branch violated Section 8(a)(3) and (1) by modifying its employee equipment rental policy in retaliation for losing the March 26 election. *Mid-South Bottling Co.*, 287 NLRB 1333, 1342 (1988).

(c) *Uniform policy*

The complaint alleges that, since April 1, 2004, the Respondent "selectively enforced its uniform policy against employees, including but not limited to Tim Plunkett, Douglas Baker and Robert Williams in retaliation for their support and activities on behalf of the Union."<sup>70</sup> The Respondent contends that it had a written uniform policy, which Stewart would enforce during visits to branches in his district.<sup>71</sup>

Prior to the election, the Respondent permitted employees to wear jeans and/or company sweatshirts to work. On or about April 1, however, Chris Britt told Williams he could no longer wear jeans, while Michael Britt directed Plunkett to change from a company sweatshirt to a company shirt. These actions on the part of Chris and Michael Britt were yet another message by the Respondent that a vote in favor of the Union would result in detrimental workplace changes. Under the circumstances, the Columbiana branch's modification of its uniform policy with respect to Williams and Plunkett violated Section 8(a)(3) and (1). See *Bristol Nursing Home*, supra at 738–739.

(d) *Call-in policy*

The complaint alleges that, since on or about June 21, the Respondent "selectively enforced its call-in policy against employees including but not limited to Douglas Baker and Tim Plunkett in retaliation for their support and activities on behalf of the Union."<sup>72</sup> The Respondent contends that they were merely enforcing a written policy requiring employees to start work promptly at their scheduled time. It also notes that the policy requiring employees to notify supervisors prior to the start of the scheduled shift if they would be absent or late did not insulate an employee from discipline.<sup>73</sup>

The Respondent did, in fact, have a policy of permitting employees to call-in before a scheduled shift to advise they would be late. After the election, in at least two instances, the Respondent modified its practice. On June 23, the Respondent disciplined Baker for arriving late to work on June 21, even though he called in late before the beginning of his shift. He provided a reasonable excuse, which the Respondent did not

contest. When he inquired as to why the Respondent changed the branch practice on calling-in late, Millhorn told him he brought it on himself by helping the Union win the March 26 election. On July 13, the Respondent disciplined Plunkett for arriving late, even though he too called in beforehand. The written disciplinary notice that followed, as well as Michael Britt's response to Plunkett's protest to the discipline, ignored Michael Britt's confirmation of the call-in policy a few weeks earlier. In both instances, the Respondent's action not only changed branch practice, it contravened the Respondent's policy manual provision permitting employees, based on pre-approved branch policy, to call-in before the start of a scheduled shift. Under the circumstances, the change in the call-in procedure was motivated by union animus and violated Section 8(a)(3) and (1) of the Act. *Master Slack*, 230 NLRB 1054, 1055 (1977).

B. *Section 8(a)(3) and (1)*

The General Counsel alleges that the Respondent, on numerous occasions in 2004, "selectively enforced its disciplinary and other policies" against Baker, Williams, and Plunkett "in retaliation for their support and activities on behalf of the Union."<sup>74</sup> The Respondent denies the allegations and contends that the discipline was warranted.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must prove, by a preponderance of the evidence, that an employee engaged in concerted protected activity, the employer had knowledge of the employee's protected activities, the employer took adverse action against the employee, and the action was motivated by discriminatory motivation. Proof of discriminatory motivation may be based on either direct or circumstantial evidence. *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183 (2004). If the General Counsel establishes a prima facie case by meeting these elements, the burden shifts to the Respondent to prove, also by a preponderance of the evidence, that it would have taken such action even in the absence of the protected conduct. Simply presenting a legitimate reason for its actions is not enough. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 966 (2004); *T. J. Trucking Co.*, 316 NLRB 771, 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

The first three factors of a *Wright Line* analysis are easily met. Beasley's February 11 letter to Chris Britt informed the Respondent that 10 of its employees, including Williams, Plunkett, and Baker, were assisting the Union in its organizational campaign. He attached copies of their signed authorization cards and further explained they would continue to be involved in protected concerted activity. The Respondent took adverse action against all three. Williams was issued disciplinary notices for a safety violation and lateness, transferred to another store and assigned laborer duties, and suspended for 3 days for insubordinate conduct. Plunkett was issued a disciplinary notice for unacceptable attendance and sent home early on two occasions without pay for the lost hours. Baker was issued three disciplinary notices and discharged for lateness. How-

<sup>70</sup> Complaint, par. 17.

<sup>71</sup> R. Br. at 62.

<sup>72</sup> Complaint, par. 18.

<sup>73</sup> R. Br. at 62–63.

<sup>74</sup> Amended consolidated complaint, pars. 20(a)–(m).

ever, the parties dispute whether such disciplinary action was motivated by union animus on the part of the Respondent.

The antiunion statements made by Chris Britt, Millhorn, and Roberts during and after the March 26 election provide strong evidence of the Respondent's motivation to stifle organizational activity: Chris Britt interrogated employees as to why they signed authorization cards and told them that the union campaign would result in the suspension of annual performance evaluations and pay raises; Millhorn told employees that, if the Union came in, the Columbiana branch would become a miserable place to work; promotional opportunities, medical benefits, and free equipment rentals would be lost; and employees would be sent home early or laid off. Millhorn also told Baker, while issuing him a disciplinary notice, that the Respondent would enforce the rules in a stricter manner because of the Union; and Roberts told Baker that his salary was paying for union picketers outside the store and that the Union had cost the Respondent thousands of dollars. Against this backdrop, it is clear that the adverse action taken against Williams, Plunkett, and Baker was motivated by union animus.

The disciplinary notice issued to Williams for the safety violation and the suspension for insubordination were not, however, connected to protected concerted activity. The safety issue resulted in the removal of the notice from his personnel file, although it remained in a safety file; the Respondent's safety procedures appeared to be more stringent than the applicable state code, a laudable notion, and Williams agreed that he needed additional training in securing equipment. Furthermore, the credible evidence indicated that Williams, regardless of whether his "plumbing" problems were intestinal or mechanical in nature, went to the Columbiana store shortly after leaving the East Liverpool store for the purpose of confronting Chris Britt and joining union picketers outside the store. On the other hand, the disciplinary notice issued to Williams for calling-off from work and his transfer to the East Liverpool store in order to perform mostly lower-level work are clearly connected to his protected concerted activity. There was no evidence that the Respondent had a policy of disciplining employees for calling-off from work and Williams' transfer resulted in his performance of primarily lower-level work after Chris Britt assured him he would continue to work primarily as a truckdriver. Under the circumstances, the Respondent's issuance of a disciplinary notice to Williams on July 21 for unacceptable attendance, and his transfer to the East Liverpool store and assignment of lower-level duties there, violated Section 8(a)(3) and (1) of the Act.

The fact that Plunkett was sent home early without pay on two occasions—July 23 and September 22—was not related to his concerted activity. First, those were the only two instances in which he was sent home early in the 6-month period since the March 26 election. Second, the Respondent had a policy of sending employees home early without pay. The disciplinary notice for lateness, however, is a different story. Prior to the March 26 election, the Respondent enforced its time and attendance policy only once and, in that case, the employee was absent on five occasions over a 4-month period in 2003. Plunkett, on the other hand, had been late on numerous occasions since he was hired in 2001. He generally called in be-

forehand, was permitted to make up the time by working later, and was never disciplined. The disciplinary notice issued Plunkett on July 13 for being 13 minutes late, even though he called in earlier that morning, was a change in practice and clearly retaliatory in nature. Under the circumstances, the Respondent's action violated Section 8(a)(3) and (1) of the Act.

Baker, rated by the Respondent in 2003 as a "good" employee, was issued three disciplinary notices after the election and discharged for lateness. As with Plunkett, prior to the March 26 election, Baker would call in late to work on numerous occasions. He was also absent on several occasions. In either instance, his absence or lateness was due to service with the volunteer fire department or Army Reserves. Baker was never disciplined and was permitted to make up lost time on his regularly scheduled day off. Shortly after the election, however, the Respondent's approach changed. On April 7, Baker was issued a disciplinary notice for being late that day (19 minutes) and on April 1 (12 minutes). On June 21, he was 2 hours late because his son was ill, but called in prior to 7 a.m. to let the branch know he would be late. On June 23, Baker was late because of a power outage. On that day, Millhorn handed Baker a "second warning" for the June 21 lateness and a "final" warning for the June 23 lateness. Millhorn also told Baker that he brought it on himself through his involvement in the March 26 election. On July 24, Baker overslept and was 2 hours late. On July 26, Chris Britt handed Baker a "third" warning for being late on July 24 and discharged him.

Baker's case was a close one, since I was not overly impressed with his excuses for being late and they had nothing to do with his service in the Army Reserves or the volunteer fire department. On the other hand, the Respondent seemed to pounce on every opportunity to discipline Baker for lateness after March 26. Without first verbally counseling him, the Respondent issued Baker disciplinary notices on April 7 for being 12 minutes late on April 1, and 19 minutes late on April 7. The Respondent then disciplined Baker on June 23 for being late on June 21 and June 23. However, the June 21 lateness was not justified because Baker called-in before the start of his shift that he would be late—a practice that the Respondent permitted prior to March 26. This dubious disciplinary history set the stage for Chris Britt to purge Baker on July 26 after he arrived at work 2 hours late in July 24. Moreover, these events transpired in an environment of hostility toward Baker, as evidenced by Millhorn's statements on June 23 and Albers' remark on July 8 that Chris Britt was looking to fire Baker. Under the circumstances, the Respondent's issuance of disciplinary notices on April 7, June 23, and July 26, were retaliatory in nature and violated Section 8(a)(3) and (1) of the Act.

Finally, the Respondent's contention that Baker's February 16 tape recording of his conversation with Millhorn provided an "independent, after-acquired reason to terminate Baker's employment which cuts off back pay as of January 31, 2005 and precludes the remedy of reinstatement."<sup>75</sup> That argument also fails. Contrary to the Respondent's representation that it only learned of the tape recording "immediately prior to the hearing," the record established otherwise: Bellinger learned of

<sup>75</sup> R. Br. at 58–59.

the tape during his interview of Baker, passed on that information to Blackadar, and Blackadar contacted Baker and spoke with him about the tape. Albers again mentioned the tape during his discussion with Baker on July 8 advising the latter not to be a martyr by pushing his concerted protected activity.

Where, as here, an employee is unlawfully discharged, reinstatement and backpay are appropriate remedies unless the employer can show subsequent acts (or discovery of the same) which would have resulted in a lawful discharge. As noted by the Board in *Opryland Hotel*, 323 NLRB 723, 728 (1997), such disqualifying acts can include the use or possession of a tape recorder at work if the employer has a rule prohibiting such conduct. The facts here, however, reveal that the employer *was made aware* of the tape recording during Bellinger's audit investigation of the Columbiana branch and did not take disciplinary action. Furthermore, Baker revealed the tape recording to Bellinger, a company auditor, during a confidential investigation into alleged misconduct at the Columbiana branch. Under the circumstances, the Respondent's failure to discipline Baker after the revelation of the tape recording during a confidential audit investigation establishes that it did not consider Baker's violation of the company rule to be a material violation that would have resulted in lawful discharge.

#### C. Section 8(a)(5) and (1)

The complaint in the bargaining case alleges the Respondent, since the March 26 election, violated Section 8(a)(5) and (1) of the Act by making the following unilateral changes without giving the Union notice and opportunity to bargain: (1) refusing to give employees annual performance evaluations and pay raises; (2) changing its policy permitting employees the free use of equipment; (3) changing its uniform policy; (4) and changing its call-in policy.<sup>76</sup> The Respondent denies enacting new policies after the election and contends that such charges cannot be reconciled with the General Counsel's 8(a)(3) theories that those policies already existed and the Respondent selectively enforced them. Furthermore, the Respondent asserts prejudice and waiver because the General Counsel failed to integrate the 8(a)(5) charges into this litigation until after the filing of briefs in the initial case.

Section 8(a)(5) obligates an employer to bargain with its employees' representative in good faith regarding "wages, hours and other terms and conditions of employment." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964). As such, an employer must notify and consult with its employees' chosen union before imposing changes in wages, hours, and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306 (5th Cir. 1992). The duty to bargain arises on the date a majority of the appropriate bargaining unit employees select the union as their representative. *Gulf States Mfrs., Inc.*, 261 NLRB 852, 863 (1982); *Howard Plating Industries*, 230 NLRB 178, 179 (1977).

After the Union won the March 26 election, Beasley requested to bargain in the May 7 letter to the Respondent. The Respondent concedes it did not respond to the letter and, in-

stead, chose to rely on its objections to the election. While the objections were pending before the Board, the Respondent changed several conditions and terms of employment of the putative bargaining unit members. As fully discussed above, those changes consisted of the suspension of annual performance evaluations and pay raises, the requirement that employees pay for the use of company equipment, the prohibition against wearing jeans and sweatshirts at work, and the discipline of employees for lateness even if they called in before their shift to advise supervisors. Those changes continue to this date.

After the Board overruled the objections and certified union representation on April 5, 2005, the Union once again attempted to bargain. On April 20, 2005, Pero requested that the Respondent bargain and, in that regard, provide certain information relative to the bargaining process; the letter did not include a request to bargain over the aforementioned changes in the terms and conditions of employment. At some point prior to June 8, 2005—and approximately 1 year after Beasley's initial request to bargain, Meany responded to Pero's request for information.

It is of no consequence that the Respondent eventually responded or is presently in negotiations with the Union. True, the Respondent was entitled to file objections to the March 26 election. In making changes to employees' conditions of employment prior to Board certification, however, it acted at its peril, unless it could show compelling economic considerations for taking such action. *Mike O'Connor Chevrolet-Buick-GMC*, 209 NLRB 701, 703 (1974). The Respondent's actions, however, were motivated by considerations other than compelling economic considerations: performance evaluations and pay raises were suspended due to a false fear of being accused of bribery during the organizing campaign; the vague nationwide company dress code was allegedly enforced because Stewart directed it; and the calling-in late procedure was disavowed by branch supervisors in instances where employees reported to work a few minutes late. It is true that the free use of company equipment by employees—when the equipment was not otherwise being rented by customers—was the subject of an alleged companywide edict to enforce the national (not branch) policy to increase revenue. There was no showing, however, that the Respondent's financial condition was significantly affected by the foregone income from the free use of equipment by employees at errant branches.

The Respondent's contention that the General Counsel may not simultaneously pursue 8(a)(3) and (5) charges is not supported by current Board law. In *Southside Hospital*, 344 NLRB 634, 634–635 (2005), the judge found, and the Board upheld, such a scenario. In that case, the employer was found to have violated Section 8(a)(5) by unilaterally changing the terms and conditions of employment of "nutrition supervisors" without affording their union notice and an opportunity to bargain. The employer was also found to have violated Section 8(a)(3) because its motivation for changing those conditions was attributable to the nutrition supervisors joining and supporting the union.

The Respondent's additional contentions of waiver and prejudice are also unfounded. First, the Respondent contends that the Union waived the 8(a)(5) charges when Pero failed to

<sup>76</sup> Complaint (bargaining case), par. 7.

include them in his April 20, 2005 letter requesting bargaining. Once an employer gives notice of its decision and affords a reasonable opportunity for bargaining, the union has an obligation to take advantage of the opportunity by requesting bargaining. See *Lenz & Riecker*, 340 NLRB 143, 146 (2003). The decision relied on by the General Counsel, *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), is particularly on point. It explained that a union must timely request bargaining over a changed condition of employment, but does not waive a change if the employer has no intention of bargaining. The Respondent's failure to ever reply to Beasley's May 7 letter demonstrated that it would have been meaningless to request bargaining over the changed practices.

Each of the cases cited by the Respondent in support of waiver, on the other hand, involves a fact pattern in which an employer actually recognized its employees' designated union representative, gave the union notice of its decision to change a term of employment, afforded the union a reasonable opportunity to bargain, and the union failed to avail itself of such opportunity. See *Associated Milk Producers*, 300 NLRB 561 (1990); *Citizens Bank of Willmar*, 245 NLRB 389 (1979); *Clarkswood Corp.*, 233 NLRB 1172 (1977); *Medicenter, Mid-South Hosp.*, 221 NLRB 670 (1975); *Coppus Engineering Corp.*, 195 NLRB 595 (1972); *Triplex Oil Refinery*, 194 NLRB 500 (1971); *NLRB v. Alva Allen Industries*, 369 F.2d 310, 321 (8th Cir. 1966). In this instance, however, the Respondent failed to respond to Beasley's May 7 general request to bargain, much less notify him of the changed employment conditions. The first indication that the Respondent even recognized the Union was when Meany provided Pero—sometime between May 20 and June 8, 2005—the information sought in Pero's letter. There was no proof, however, that Meany, even at that late point, notified Pero about the changed employment conditions at the Columbiana branch.

Second, the Respondent alleges prejudice due to the General Counsel's delay in seeking to consolidate the bargaining complaint with the initial complaint until after the hearing closed in March 15, 2005. As noted by the General Counsel, however, the filing of a complaint by the General Counsel prior to the Board's Decision and Certification of Representative on April 5, 2005, would have been premature.<sup>77</sup> Under the circumstances, the Respondent's failure to respond to Beasley's May 7 request to bargain, followed by its actions in changing certain terms and conditions of employment, constituted 8(a)(5) and (1) violations.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating employees regarding their support for the Union, threatening employees with discharge, loss of jobs,

promotional opportunities, free use of company equipment and medical benefits, suspension of performance evaluations and pay raises, soliciting grievances and promising to remedy them, 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.

4. By suspending annual performance evaluations and pay raises, eliminating its free employee equipment rental policy and call-in policy, all because the Union won the election, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1).

5. By disciplining Plunkett, Williams, and Baker because they actively supported the Union, the Respondent violated Section 8(a)(3) and (1).

6. By making the following unilateral changes without giving the Union an opportunity to bargain—the failure to conduct annual performance evaluations, the requirement employees pay for the rental, the requirement employees wear company-issued uniforms, and abrogation of the branch's practice permitting employees to call-in before their regularly scheduled shift to say they would be late—the Respondent violated Section 8(a)(5) and (1) of the Act.

7. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, 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 an employee, disciplined two others and retaliated against its employees for supporting the Union by suspending or modifying certain terms and conditions of employment, it must make all affected employees whole. The Respondent shall offer reinstatement to Douglas Baker and making him whole from the date of discharge, July 26, 2004, to the date of a proper offer of reinstatement. It shall also make whole Plunkett and Williams for any leave time or absences unlawfully charged them. With respect to all employees, the Respondent shall conduct performance evaluations retroactive to March 1, 2004, and award commensurate pay increases retroactive to April 1, 2004. Any loss of earnings, including pay increases, shall be computed for the applicable period on a quarterly basis in accordance with the formula prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall also be ordered to cease interrogating or threatening employees with adverse action because of their support for the Union, reinstate certain policies and practices that it suspended or modified in retaliation for employees' support of the Union, and refrain from making any changes to employees' terms and conditions of employment without giving the Union an opportunity to bargain.

[Recommended Order omitted from publication.]

<sup>77</sup> GC Supp. Br. at 9–10; R. Supp. Br. at 10–14.