

Advance Window Corp and Ronnie Codett Cases
2-CA-21562 and 2-CA-21852

September 30 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT

On March 29 1988 Administrative Law Judge Julius Cohn issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

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 findings¹ and conclusions² and modify the remedy³ and to adopt the recommended Order.

In section III C 3 of his decision the judge applying a *Wright Line* analysis⁴ found that the Respondent had unlawfully discharged Ronnie Codett because the asserted reason of absenteeism had not been established. In reaching this conclusion the judge relied on inter alia the Respondent's failure to apply its progressive discipline policy to Codett. We agree that the Respondent unlawfully discharged Codett but we do not rely on the judge's reference to the progressive discipline policy. Instead we find that the Respondent tolerated Codett's absences and seized on them as a convenient justification for Codett's discharge only after Codett, as union steward, had aggressively disputed Plant Manager Wojtaszek's version of an agreement reached by Codett and Wojtaszek (the Saturday agreement)⁵. That Codett's absenteeism was

not the real reason for his discharge was made evident by several of the Respondent's actions. Thus Wojtaszek testified that no other long term employee had the poor attendance record of Codett yet Codett was given a merit increase in August 1985 when he was building the absentee record that the Respondent now asserts justifies his dismissal. Also the Respondent never spoke to Codett about his attendance record⁶ and Codett's attendance actually had improved in the 6 weeks prior to his termination⁷.

The record also shows that Wojtaszek clearly was displeased with Codett's aggressiveness as union steward. Wojtaszek stated he could terminate Codett after Codett refused to sign a warning notice because he had not worked one of the Saturdays covered by the Saturday agreement⁸. Further when he discharged Codett Wojtaszek stated that Codett was not the kind of steward he wanted.

These circumstances establish that the justification offered for Codett's discharge was pretextual and that the real reason was Codett's aggressiveness as a union steward. Accordingly the Respondent's discharge of Codett violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent Advance Window Corp Newburgh New York its officers agents successors and assigns shall take the action set forth in the Order.

⁶ The General Counsel introduced into evidence a warning notice to Codett for excessive absenteeism dated February 7 1985. There is no indication however that Codett was presented with this notice or that he ever knew about it. For this reason the Respondent's counsel stated that he would not rely on it as support for Codett's discharge. Also Codett's evaluation dated July 29 1985 lists his attendance as fair—not good or poor. Codett stated that the Respondent never spoke with him regarding this factor in his evaluation. The evaluation recommends that Codett be retained and as stated he received a merit increase in August 1985.

⁷ The Respondent's claim that the decision to discharge Codett was made in mid December conflicts with Codett's December 23 1985 warning notice which listed the action to be taken if violation continues as possible suspension. As the General Counsel points out if the Respondent had already decided to terminate Codett possible suspension would not have been listed as its next action.

⁸ See fn 5 supra.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products* 91 NLRB 544 (1950) enf'd 188 F.2d 362 (3d Cir 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Respondent's motion to dismiss the consolidated complaint is denied as lacking in merit.

³ We have modified the recommended remedy to include the provision that backpay be computed as prescribed in *F W Woolworth Co* 90 NLRB 289 (1950).

⁴ *Wright Line* 251 NLRB 1083 (1980) enf'd 662 F.2d 899 (1st Cir 1981) cert denied 455 U.S. 989 (1982). See *NLRB v Transportation Management Corp* 462 U.S. 393 (1983).

⁵ The credited version of this agreement shows that the employees were to be given the option of working several Saturdays to make up for unpaid holidays in December 1985. The credited testimony further reveals that Codett specifically asked if the employees who did not work on these Saturdays would be disciplined and that he was told they would not be. Wojtaszek's discredited explanation of the agreement was that all the employees had to work the replacement Saturdays or the agreement was off.

Leonard Grumbach Esq for the General Counsel
Joel Spivak Esq (Spivak & Meiselas) of Greck Neck
New York for the Respondent

DECISION

STATEMENT OF THE CASE

JULIUS COHN Administrative Law Judge. This proceeding was tried at New York New York during various dates in February and April 1987. On a charge filed

by an individual Ronnie Codett the Regional Director for Region 2 issued a complaint in Case 2-CA-21562 on 9 May 1986 alleging that Advance Window Corp (Respondent or the Company) violated Section 8(a)(1) and (3) of the Act by discharging Codett because of his union activities. An informal settlement agreement was approved by the Regional Director in that matter on 25 July 1986. Thereafter another charge was filed by Codett in Case 2-CA-21852 in which it was alleged that Respondent further violated the Act by in effect blacklisting Codett with respect to employers with whom he sought employment and because of his resort to the Board's processes. Subsequently the Regional Director on 26 November 1986 issued an Order revoking his approval of the settlement agreement in the prior case and simultaneously consolidating the cases in a complaint alleging violations by the Respondent of Section 8(a)(1) and (3) of the Act. Respondent filed an answer denying the commission of unfair labor practices. The issues presented concern the propriety of setting aside the settlement agreement in the prior case and whether Respondent violated the Act by discharging Codett and blacklisting him in his efforts to obtain employment.

All parties were given full opportunity to participate to introduce relevant evidence to examine and cross examine witnesses to argue orally and to file briefs. The General Counsel and Respondent submitted briefs which have been carefully considered. On the entire record in this case and from my observation of the witnesses and their demeanor I make the following

FINDINGS OF FACT

I JURISDICTION

Respondent a New York corporation has an office and principal place of business in Newburgh New York where it is engaged in the manufacture and nonretail sale of aluminum windows. In the course and conduct of its business operations Respondent annually purchases and receives at its Newburgh facility goods and services valued in excess of \$50,000 directly from points outside the State of New York. The complaint alleges Respondent admits and I find that it is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

II LABOR ORGANIZATION

The complaint further alleges Respondent admits and I find that General Trades Employees Union Local 5A (the Union or Local 5A) is a labor organization within the meaning of Section 2(5) of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

A Background

Respondent manufactures and installs windows in residential and commercial buildings. It has a collective bargaining agreement with the Union that represents approximately 30 production and maintenance employees. The owner of the Company is Larry Toscano and Paul Wojtaszek was the plant manager from October 1985 to September 1986.

Charging Party Codett was employed on 4 June 1984 and worked in the shipping and receiving department. He became shop steward in November of that year. Codett was discharged on 13 January 1986 allegedly because of his poor attendance record. The formal proceedings with regard to the issuance of the consolidated complaint under consideration have already been noted.

The preliminary question to be determined in this proceeding is whether the settlement agreement approved by the Regional Director was properly set aside. Such agreement can only be set aside in the event of misconduct by the Respondent in violation of the terms of the settlement agreement. In the context of this proceeding the reference is to the alleged unlawful conduct in the second complaint relating to the so called blacklisting. If Respondent engaged in the violations alleged in the second case then the settlement agreement may be set aside. Accordingly I shall proceed to make my determination with respect to the complaint in Case 2-CA-21852 *Cambridge Contracting* 259 NLRB 1374 (1982) *Ann's Schneider Bakery* 259 NLRB 1151 (1982).

B The Blacklisting Allegation

1 Facts

The facts relating to this portion of the complaint are relatively few. According to Codett on 5 September 1986 he applied for a job at an automobile service station in Newburgh New York. Owner John Servidio told Codett that there was a job open for a mechanic. Codett stated that he had previously worked as a mechanic after having gone to a technical college for training as an automobile specialist. Servidio replied that he would accept Codett's application and would call his previous employer and determine what type of recommendation he would be given. As instructed Codett returned in 2 hours and was told by Servidio that he could not be hired. Servidio informed him that he had spoken to Wojtaszek who advised him that Codett was not a good worker, was not self motivated and had many accidents. Wojtaszek also told Servidio that Codett was a labor organizer and had taken the Company to the Labor Board. Servidio then told Codett that after such a reference he was unable to hire him.

Servidio testified that he owned a service station for about 4 years. He confirmed that about 5 September 1986 Codett came in and asked for a job as a mechanic or mechanic's helper, indicating that he had gone to school to become a mechanic and had actually worked as such. Codett filled out an application and Servidio told him to return later in the day. Servidio then called Respondent for a reference and was connected with Wojtaszek. Servidio asked him how good an employee Codett had been and was told not too good. Wojtaszek stated that Codett had to be told what to do all the time, was not a self starter and also took off a lot of time for medical reasons. Finally Wojtaszek told Servidio that Codett had been a shop steward and took the Company to the Labor Board and gave them all kinds of trouble. During his cross examination Servidio affirmed this narrative and in addition recalled that he asked Wojtaszek

whether he would rehire Codett and was told that he would not. Servidio asked why and it is then that Wojtaszek told him that Codett was a shop steward and took him to the Labor Board.

As to Wojtaszek in his direct testimony by Respondent he did not recall the name John Servidio but did remember receiving a telephone call in September 1986 from someone who said he owned a gas station concerning an application by Codett. The man asked if he would hire Codett and Wojtaszek replied that he would not. He told the man that Codett was not an ambitious type worker but was somebody that required supervision and direction. During his cross examination he also recalled that the man asked what kind of worker Codett was and he replied that he was not self motivated and needed supervision. Although he remembered that the man asked if he would rehire Codett and he replied he would not, Wojtaszek stated that the caller did not ask why.

Codett further testified that on 2 September he applied for a job as a warehouse worker at Wakefern Foods in Middletown, New York. He filled out an application was interviewed by a lady who then told him to call a person named Gail on Thursday by which time they would have called Respondent for a recommendation. He did call as instructed and was told that they had not heard yet from Advance Window but she Gail would call Codett when she did. Not having heard he called 2 weeks later and responded that she had not heard from Advance Window and he was not to call her again. He never did hear anything from that company. The record reveals a document in the nature of a request for information sent by Wakefern to Advance Window who responded that Codett had had 18 accidents and that his safety habits and attendance were poor. This paper is dated 10 September. The parties based on records available stipulated that Codett did not have 18 accidents while working for Respondent. It is further stipulated that there were 8 accident reports involving Codett rather than 18. It appears that the form sent by Wakefern asked for the number of accidents involving workmen's compensation. There is no evidence that Codett ever received any workmen's compensation and on the contrary indicated that he lost little or no time as a result of the eight accidents in which he was involved.

In his testimony concerning Codett's application for work at Wakefern Wojtaszek said that he prepared the form sent to him by Wakefern except the item regarding workmen's compensation. He stated that item was filled in by a secretary who mailed the completed form to Wakefern without showing it to him.

2 Analysis and conclusions

A decision in the so called blacklisting case rests basically on the determination of the conflict in the testimony of Servidio and Wojtaszek. Although Codett corroborated in substance the testimony of Servidio nevertheless Codett's testimony was what Servidio had related to him. On the record as a whole I credit Servidio over the testimony of Wojtaszek. The circumstances of their appearance as witnesses in this matter reflect on this determination. On cross examination Wojtaszek admitted that he appeared without subpoena and was being compen-

sated to the tune of \$100 per day for his testimony and preparation in this proceeding. Incidentally he is no longer employed by Respondent having left its employ on 1 January 1987. On the other hand Servidio was indeed a reluctant witness as his appearance was compelled by a court order enforcing a subpoena that had been served on him by the General Counsel. There is no indication of any relationship between Servidio and Codett who was merely an applicant for employment at his service station. Indeed an appearance in New York City would appear to be an imposition on his time. Accordingly I find no reason why his testimony should be favorable to the Charging Party and the General Counsel other than a desire to tell the truth. In addition I find Servidio to be forthright in demeanor and testified clearly and concisely. On the other hand Wojtaszek was at times evasive and as will appear in connection with the case involving Codett's original discharge somewhat contradictory. I therefore adopt the testimony of Servidio as governing the disposition of this case.

Having credited the testimony of Servidio I find that in response to his telephone call to Wojtaszek the latter informed him that not only was Codett an employee who had to be told what to do all the time but also was not a self starter and took off a lot of time for medical reasons. Wojtaszek also stated that Codett was a shop steward and took Respondent to the Labor Board. The Board has found that this type of response to a request for a reference interferes with employment opportunities and amounts to a blacklisting that related to union or other protected activity is a violation of the Act. *Madison South Convalescent Center* 260 NLRB 816 823 (1982). Accordingly by this conduct on the part of Wojtaszek its plant manager at the time Respondent violated Section 8(a)(1) of the Act.

Inasmuch as Respondent has engaged in unlawful post settlement conduct I further find that the Regional Director properly set aside the settlement agreement in Case 2-CA-21562. Accordingly I shall proceed to a decision in that matter.

C The Case 2-CA-21562

1 Background

Codett was employed in Respondent's shipping and receiving department from 4 June 1984 until terminated on 13 January 1986. Soon after the commencement of his employment in November 1984 Codett was elected shop steward in Respondent's shop representing about 30 employees. In that capacity Codett actively handled grievances from fellow employees which were usually determined by oral discussion with the plant manager who at the outset was James Scott and after 1 October 1985 Paul Wojtaszek. Indeed Codett never had recourse to the filing of a written grievance. Moreover it appears that Richard Costello vice president of the Union in charge of administering the contract rarely visited the plant but rather when necessary would discuss problems with Codett on the telephone. The number of grievances markedly increased when Wojtaszek assumed the post of plant manager.

In his grievance handling Codett made reference to the collective bargaining agreement and also to Respondent's employee handbook which according to testimony of other employees had been used by management during the entire period involved. In addition it also appears that Respondent had a system of progressive discipline not only during the tenure of Scott but also when Wojtaszek took over. It should also be noted in connection with events to be described subsequently that overtime was optional and employees could and would often decline overtime work when asked to do so and would not be disciplined.

2 The facts

During the latter part of 1985 Codett and Wojtaszek clashed over a number of matters. For example there was one problem concerning overtime in which Codett and five other employees refused to work because there was some disagreement about money and evaluations for merit raises that Wojtaszek refused. The following day according to Codett Wojtaszek called in Codett and two other employees during which Wojtaszek informed them that while overtime was not compulsory they had to perform it once they agreed to do so. During this discussion Codett queried Wojtaszek as to why he and the two other employees all black were called in and not the three white employees who had also refused to work the overtime. On another occasion Codett challenged Wojtaszek concerning his transfer of employees to a different shift and his refusal to pay the 10 percent shift differential for a period of time. One time Wojtaszek employed his brother in law on a temporary basis as a truckdriver. Codett then sought to have the brother in law sign union forms which Wojtaszek protested. Codett also testified that he had a dispute concerning a raise that was supposed to have been given a woman on maternity leave. On still another occasion Codett raised the question of supervisors working and thereby performing unit work. Apparently Wojtaszek was so put out by this action that he shouted at Codett and told him he was going to take him and the Union to the Labor Board. Codett stated that when Toscano heard about it he apologized.

Finally there was considerable discussion and some dispute in December 1985 with respect to the plant closing during Christmas week. Besides the regular holiday on 25 December Christmas Day Wojtaszek told Codett that the plant would be closed 24, 26 and 27 December. The employees would not be paid for those 3 days but Wojtaszek proposed that the employees work three Saturdays prior to Christmas 7, 14 and 21 December for which they would be paid straight time. According to Codett he told him at this point that he did not think that all employees would agree to work on these Saturdays. Wojtaszek replied that he did not need 100 percent just a majority.

Codett then met with the employees informed them of the proposal and determined that four employees and himself would not want to work on these Saturdays. Codett related these results to Wojtaszek who asked him to inform Costello of this arrangement. The latter said it would be okay as long as the employees knew that if they did not work they would not get paid.

Codett further testified that 2 days before the first Saturday workday Wojtaszek told him that he needed 100 percent cooperation or the agreement was off. If enough employees did not come in on the first Saturday he would just pay those that did come in time and a half payable in the next pay period and that would be the end. Codett protested that this was not the original agreement. The following day he met with the employees to report that Wojtaszek had gone back on his original agreement. The employees all affirmed that they wanted the original agreement even for regular pay to be paid during the week that the shop would be closed. They said they did not want this second proposal which would be dependent on the number of people who reported to work. The following day Codett received a call from Costello who told him that he had heard from Wojtaszek who claimed that Codett had called off the agreement. Codett then explained to Costello what actually happened. Costello then informed him that Wojtaszek had agreed to put in effect the original agreement providing for employment on the Saturdays for regular pay to be received by employees during the plant closing.

Codett stated that later that afternoon a meeting was called by Charles Stewart and Michael Tillman. Codett referred to the former as production manager and the latter as foreman. All employees attended. Codett testified that Stewart told the employees that the original agreement was still on that they could work Saturday at regular pay and receive their pay during the week the shop was closed. Stewart then asked how many employees did not want to work and Codett and four others said that they would not. Codett then asked Stewart whether there would be any disciplinary action taken against employees who did not work any of the Saturdays to which Stewart replied no and the meeting was then concluded.¹

Codett did not work on three Saturdays. No one received disciplinary notices for absence on 7 December. The record reveals that Codett and two other employees were marked excused absence while five others were marked absent no call. Wojtaszek testified that no action was taken because this was the first Saturday and they merely reminded employees that it was a scheduled workday. However Wojtaszek did give disciplinary notices of warning to employees who were absent on 14 December. Indeed he called Codett to his office the following Monday and told him that the last warning

¹ In its brief Respondent correctly contends that the complaint did not allege either Stewart or Tillman to be supervisors within the meaning of the Act. Moreover I find the record insufficient to establish such supervisory status. However it is apparent that Stewart at least represented management in this situation. According to the testimony of Codett and other employees at the hearing this meeting was instituted and conducted by Stewart and not anyone in a pure employee category. The only other contention regarding this meeting was the question whether Wojtaszek attended or was in some location such as a doorway so that he could hear what was going on. Wojtaszek of course denied having been there and in this respect the testimony of employees who attended the meeting is at variance on the question. In any event I do not deem this to be of any importance. Suffice it to say there is no denial that a meeting took place even in Wojtaszek's absence and this is sufficient to indicate certain of the protected concerted activity in which Codett was engaged.

notice was saved for him and asked Codett to sign it. The latter refused stating that he had not done anything wrong because he had informed the Company that he was not going to work on those Saturdays and that he and the other employees who did so had not broken the agreement. Codett testified that at this point Wojtaszek began hollering and said that he could be terminated for talking like that and harassing him in front of another supervisor pointing at Stewart. Codett refused to sign and walked out. Codett did not work on 21 December nor did eight other employees. The Monday after that Saturday two employees informed Codett they had received messages on Saturday that they would be terminated if they did not come in. Codett later saw Wojtaszek and asked him why he used these illegal tactics on employees Saturday and the latter walked away and told him to call his union. Codett did call and report this incident to Costello.

On Saturday 4 January Codett came to work for half a day. He had told Stewart of this the night before and the latter said it would be okay. Codett did not receive a disciplinary notice for that day. On 13 January 1986 when Codett reported for work Stewart told him that he was wanted in the office. Wojtaszek handed him his attendance sheet which Codett looked at and returned. Wojtaszek then gave him a check and told him he was terminated for excessive absence. He also said that Codett was not the kind of shop steward he wanted and that there was no need to argue about this because he had already informed Costello.

On the date of the discharge Codett also called Costello and told him what had occurred. Costello asked for information concerning the times that he was absent for medical reasons which Codett furnished him. After a week Costello informed him that the matter may go to arbitration because Respondent refused to take him back after the controversy concerning the Saturdays prior to Christmas. About 2 weeks later Costello again called and told Codett they could not go to arbitration because there was no witness to any statement by management that there would be no disciplinary action against employees who did not come in on those three Saturdays in December. Codett then went and obtained a statement signed by a number of employees. A few days later Costello in response to a call from Codett stated that the Union was not going to arbitration and he later received a letter confirming that decision. Incidentally Codett testified that the employees who signed the statement that management said they would not be disciplined also told Codett that they had never been questioned on this point by Costello or anyone representing the Union. This was further substantiated by the testimony at the hearing of employee witnesses Kolb, Sickler and Watson.

Finally Codett's record of absenteeism must be detailed as this is the stated reason for his discharge. The record shows that Codett was absent a total of 38 days in 1985. With regard to these he received a warning from Wojtaszek's predecessor Scott for an absence on 15 May 1985 because he failed to call in. A number of his absences were due to illnesses such as 5 days in August when he was hospitalized and absences on 4 and 5 December because of an injury sustained at work. He

was absent on 31 December also because of an injury at work. In addition 9 days of absence were the result of a loss of a return bus ticket while on vacation in South Carolina. Respondent was advised of this matter and Scott sent him a money order that permitted him to return to work. Codett received no warning or reprimand regarding this absence of 9 days. The total also included 3 disputed days of the Christmas Saturdays 7, 14 and 21 December. Codett was not absent in January 1986 during the period immediately preceding his discharge. In addition his record indicated four warning notices of which one on 15 May has been previously mentioned, one issued 2 October by Wojtaszek because of Codett's failure to work overtime after agreeing to do so. This is the incident that resulted in a heated discussion and charge of racism also referred to above. Two notices of course were with respect to the disputed absences on 14 and 21 December. The parties stipulated that Codett was never suspended for absenteeism or any other reason although it appears that Respondent's work rules provided for progressive discipline including suspension prior to discharge.

3 Analysis and conclusions

A determination must be made initially with respect to credibility. As noted in the discussion of the postsettlement case above on the basis of Wojtaszek's demeanor or coupled with his presence at the hearing pursuant to subpoena by Respondent and its payment to him for his testimony I do not find him to be credible. On the other hand Codett's testimony was in various areas substantiated by the testimony of other employee witnesses. Wojtaszek was the only witness called by Respondent and despite the references in the record to conversations, meetings and incidents at which other management people such as Toscano, Stewart, Tillman and others were present, not one of these was called to corroborate any of Wojtaszek's statements or testimony. For example although Respondent has contested the supervisory status of Stewart and Tillman I find on the basis of uncontradicted testimony that they were at the very least management representatives. It is noted that the meeting of employees conducted by Stewart was not really contested by Respondent whether it actually took place. The only matter put in issue was whether Wojtaszek was in the neighborhood of the meeting so that he could have overheard what was being said. It is difficult to believe that Stewart would have a meeting with employees without the knowledge and acquiescence of management. Nevertheless Stewart did not testify in connection with the attendance requirements of employees on the Saturday workdays in December. On the basis of these credibility findings I further find that Codett's version and that of the other employees regarding the agreement to make up for the lost days during the Christmas holidays by working three Saturdays voluntarily was correct. In any case this would be the more likely version in view of the past policy of voluntary overtime and the history of absences so that the Respondent was usually agreeable to having a reasonable complement rather than having an expectation of 100 percent attendance.

The complaint alleges that during December 1985 Wojtaszek threatened Codett with discharge because of his activities as shop steward. This allegation refers to the Monday following the second Saturday of work 14 December. Wojtaszek had given warning notices to employees who had not reported for work that Saturday. He called Codett into his office, told him he had saved the last disciplinary action for him, and asked Codett to sign it. The latter refused, saying he had not done anything wrong since he had informed the Company that he was not going to work on those Saturdays, and further that no agreement had been broken by the employees, but rather that Wojtaszek did not keep his agreement. Stewart and a secretary were present in the office at the time. Wojtaszek at that point began hollering at Codett and said he could be terminated for talking like that and harassing him like that in front of another supervisor, pointing at Stewart. Codett then walked out. I find by this conduct on the part of Wojtaszek Respondent violated Section 8(a)(1) of the Act. The disciplinary action in question was not only with respect to Codett, but also to the other employees who failed to work on the preceding Saturday. The discussion, if one could call it that, was with respect to the agreement made by Codett as shop steward with Wojtaszek representing the Employer. Any argument concerning its interpretation, or who did or did not break that agreement, is concerted activity protected under the Act, particularly since other employees were disciplined. When Wojtaszek stated that Codett could be terminated for talking the way he did, that is, by stating that Wojtaszek violated the agreement, then clearly Wojtaszek was unlawfully threatening termination. Curiously, it may also be noted that during Wojtaszek's response to Codett, he referred to Stewart as a supervisor. This serves to substantiate, by Respondent's sole witness, the prior finding that Stewart was at the least a member of management.

There remains for consideration whether Respondent violated Section 8(a)(3) of the Act by terminating Codett. The General Counsel contends that Respondent discharged Codett because he was an active and persistent shop steward. Respondent claims that the cause was excessive absenteeism. Almost the entire record of this proceeding relates to Codett's activity as a steward, constantly embroiled with the grievances of the employees, individually or as a group. Wojtaszek, as plant manager, was clearly hostile to Codett and his efforts. Moreover, it has been found that Codett was threatened with termination by Wojtaszek in violation of Section 8(a)(1) of the Act. This would be sufficient to establish Respondent's animus toward Codett.

However, it is equally clear, on the basis of *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that an employer may defend by a showing that an employee would have been discharged in any event, despite his involvement in union or other protected activity.

I find that Respondent's asserted reason of absenteeism has not been established. The total number of days absent in 1985 (38 days) was inflated by the three Saturdays in contention, 9 days while on vacation in South

Carolina, apparently excused by Respondent sending him a bus ticket to return, and several other days absent due to work-related injuries. In addition, Respondent was plagued by absenteeism and had to overlook some of it to retain its work force. Actually, since Codett was discharged on 13 January, his attendance record was good for the past 6 weeks, if one discounts the three disputed Saturdays. Also to be noted is that Respondent did not apply its progressive discipline policy to Codett, as he never was suspended.

Arrayed against this is the obvious animus displayed by Wojtaszek against Codett. He actually said it all when he told Codett at the time of his termination that he was not the kind of steward he wanted. This brings to mind the strange absence of the Union in this situation—not to file even a grievance on the termination of its steward. Codett's hyperactivity, perhaps, is more understandable in this atmosphere of lack of support by union officials. Moreover, it sheds more light and reason for the termination. Getting rid of Codett was buying peace for Wojtaszek and Respondent, absent an active union presence.

Accordingly, I find that Respondent has not shown that it would have taken the same action (discharge) absent Codett's union activity. It thereby violated Section 8(a)(3) and (1) of the Act.

IV THE EFFECT OF UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III above, occurring in connection with the operations of Respondent described in section I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce, and the free flow of commerce.

THE REMEDY

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

Having found that Respondent unlawfully discharged Ronnie Codett in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former position, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings suffered by reason of the discrimination against him, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).² The earnings shall be computed

² In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

at the rate he received at the time of his termination by Respondent and any increments thereafter or at the rate he would have obtained if employed by Servidio or Wakefern the Employers at which he was unlawfully black listed by Respondent whichever of the three was highest Respondent shall receive credit for the amount of money it paid Codett pursuant to the settlement agreement in Case 2-CA-21562 which has been set aside

I shall also recommend that Respondent remove from its records any reference to the unlawful discharge of Codett and inform him that this will not be used as a basis for further personnel actions against him³

Finally I shall recommend that Respondent be ordered to notify John Servidio and Wakefern Foods in writing that it withdraws its negative statements and remarks with respect to Codett's union activities

CONCLUSIONS OF LAW

1 Respondent is an employer engaged in commerce within the meaning of Section 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 As a result of Respondent's unlawful conduct in Case 2-CA-21852 the settlement agreement in Case 2-CA-21562 was properly set aside

4 By threatening termination of Ronnie Codett because of his union and other protected concerted activities Respondent violated Section 8(a)(1) of the Act

5 By discharging Ronnie Codett because of his union activities as shop steward Respondent violated Section 8(a)(3) and (1) of the Act

6 By blacklisting Codett as a union activist in response to request for references by other prospective employers Respondent violated Section 8(a)(1) of the Act

7 The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

8 Respondent has not engaged in unfair labor practices except as specifically found above

On these findings of fact and conclusions of law and on the entire record I issue the following recommendation⁴

ORDER

The Respondent Advance Window Corp Newburg New York its officers agents successors and assigns shall

1 Cease and desist from

(a) Threatening employees with discharge because of their support for and activities on behalf of the Union

(b) Discharging employees because of their activities on behalf of the Union

(c) Blacklisting discharged employees on the basis of their union activities in their efforts to seek other employment

³ *Sterling Sugars* 261 NLRB 472 (1982)

⁴ If no exceptions are filed as provided by Sec 102.46 of the Board's Rules and Regulations the findings conclusions and recommended Order shall as provided in Sec 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes

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

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

(a) Offer Ronnie Codett immediate and full reinstatement to his former position of employment or if that job no longer exists to a substantially equivalent position without prejudice to his seniority and other rights and privileges previously enjoyed

(b) Make whole Ronnie Codett for any loss of earnings and other benefits suffered by him as a result of the discrimination against him in the manner set forth in the remedy section of this decision

(c) Notify John Servidio and Wakefern Foods by registered mail that Respondent has withdrawn the negative references concerning Ronnie Codett and his union activities that it furnish them either by telephone or in writing

(d) Remove from its files any reference to the discharge of Ronnie Codett and notify him in writing that this has been done and that evidence of this unlawful termination will not be used by it as a basis for future personnel action against such employee

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

(f) Post at its Newburgh New York office and plant copies of the attached notice marked Appendix⁵ Copies of the notice on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered defaced or covered by any other material

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

IT IS FURTHER ORDERED that the complaint be dismissed regarding such allegations not specifically found violative of the Act

⁵ If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading Posted by Order of the National Labor Relations Board shall read Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board

APPENDIX

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

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

WE WILL NOT threaten you with discharge because of your activities on behalf of the Union

WE WILL NOT discharge employees because of their activities on behalf of the Union

WE WILL NOT blacklist discharge employees on the basis of their union activities in their efforts to seek other employment

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

WE WILL offer Ronnie Codett immediate and full reinstatement to his former position of employment or if that job no longer exists to a substantially equivalent position without prejudice to his seniority and other rights and privileges previously employed

WE WILL notify those prospective employees to whom we furnished references that we are withdrawing the negative remarks about Ronnie Codett and his union activities

WE WILL remove from our files any reference to the discharge of Ronnie Codett and notify him in writing that this has been done and the evidence of his unlawful termination will not be used by us as a basis for future personnel actions against him

ADVANCE WINDOW CORP