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

GREENHECK FAN CORPORATION

and 30-CA-087881

KEITH ALFT, JR., An Individual

Andrew S. Gollin, Esq.,
for the General Counsel.
James F. Hendricks, Jr., Esq.,
(Lewis, Brisbois, Bisgaard & Smith, LLP)
Chicago, Illinois,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Wausau, Wisconsin, on January 23, 2013. Keith Alft, Jr., an individual, filed the charge on August 22, 2012[1] and the Regional Director for Region 30 of the National Labor Relations Board (the Board) issued the complaint on October 30, 2012. The complaint alleges that the Respondent violated Section 8(a)(1) and Section 8(a)(3) and (1) of the National Labor Relation Act (the Act) by terminating Alft because of the views he expressed to other employees about the ratification of a collective bargaining agreement. The Respondent filed a timely answer in which it denied that it violated the Act when it terminated Alft.

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 and conclusions of law.

[1] All dates are in 2012 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures air movement products at its location in Schofield, Wisconsin, where it annually sells and ships goods and materials valued in excess of $50,000 directly to customers located outside the State of Wisconsin. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates a total of ten facilities at its campus in Schofield, Illinois. The Sheet Metal Workers International Union, Local 565, (the Union) represents a unit covering production and skilled trades employees at all the Schofield campus facilities. Charging party Alft, a bargaining unit employee, worked as a welder at one of those facilities, referred to as "Facility 5" or the "Architectural Products Division." As of the time of trial, approximately 180 of the bargaining unit employees worked at Facility 5.

In 2012, the parties entered into negotiations for a collective bargaining agreement to replace the existing contract, which was set to expire on August 11of that year. During those negotiations, the Respondent sought concessions regarding the terms and conditions for the unit employees working at Facility 5. While negotiations were ongoing, the Respondent's operations manager, Scott Graf, told employees that, unless the concessions were agreed to, Facility 5 would close or be relocated to Mexico. Ultimately, the Union's bargaining committee agreed, subject to ratification by the entire Schofield bargaining unit, to multiple concessions affecting employees at Facility 5. The same concessions were not imposed on bargaining unit members who worked for other divisions at the Schofield campus.

On August 1, prior to the ratification vote scheduled for April 10, the Union and the Respondent held a joint meeting for employees of Facility 5. Among the officials present at this meeting were Ray Ficken (union president), Tim Kilgore (vice-president of operations), Graff, Mark Berg (plant manager), and Jenna Rennie (human resources generalist). At the meeting, the employees were presented with a written document outlining the concessions that the proposed contract imposed on employees at Facility 5. These concessions included pay reductions of 9 percent for employees in one job classification, pay reductions of 15 percent for employees in another classification, and a general wage freeze. The proposed terms also provided that, no later than May 15, 2015, the unit employees at Facility 5 would be segregated into their own collective bargaining agreement and would no longer participate in the agreement for the larger unit.

During the August 1 meeting at Facility 5, employees expressed their disagreement with the concessions in the proposed contract. Employees also posed questions about the possibility of transferring to other facilities in order to avoid the wage concessions and about the possibility of recouping some of the lost wages if the performance of Facility 5 improved in the future. The Respondent told the employees that, during the term of the proposed 3-year contract, employees would have the opportunity to transfer to other facilities. Around the time of the meeting, the Respondent posted notices at Facility 5 informing employees of an opening at one of the other facilities on the Schofield campus. According to Alft, approximately 150

employees signed up seeking to transfer, even though it appeared that only one position was available at the other facility.

As the August 1 meeting was ending, Alft asked Ficken whether "this was the best that the Union could do for our plant" after the employees had been paying dues to the Union for 6 ½ years. Ficken indicated that it was. Alft told Ficken that the Respondent was "bluffing" about closing the plant, and was using "the oldest trick in the book" to obtain concessions.

During the period leading up to the August 10 contract ratification vote, handwritten messages about the vote began to appear on the dry-erase boards – also known as "whiteboards" – that were spread around Facility 5, including at individual welding stations. These messages included "Vote No" and "Gone to Mexico." The whiteboards were used primarily as a way for employees to communicate between shifts regarding work that was in-progress or upcoming. Employees also regularly used the whiteboards to communicate a variety of other types of messages to co-workers – including holiday greetings, statements regarding sports rivalries, opinions regarding political issues, and lewd remarks. Each welding work station has a whiteboard, and estimates of the size of the whiteboards ranged from 11 inches by 17 inches, to 2 feet by 3 feet.

Although there was opposition at Facility 5 to the proposed contract, the total bargaining unit covering all the facilities at the Schofield campus facilities voted to ratify the contract on August 10 – a Friday. When Alft arrived for work the following Monday, August 13, he was feeling "saddened and frustrated" that the Union had proposed, and the total bargaining unit had ratified, a contract that reduced the compensation of the unit employees who were working at Facility 5. He made a spontaneous decision to communicate with other employees by writing the following message on the whiteboard at his welding station:

> Let us not forget how the union betrayed us.
> Revenge will be sweet to those who wait!

After writing the message, Alft returned to work. He did not discuss this message with anyone before or after writing it, but the whiteboard was positioned facing a walkway so that other employees could see the message. What Alft meant by the message was that the Union had betrayed the Facility 5 employees during contract negotiations, but that if Facility 5 employees did not transfer to other facilities – as many had been seeking to do – they would be able to turn a profit at Facility 5, show that the Respondent and the Union had been wrong to freeze and reduce their wages, and possibly vote the Union board out of office.

By August 14, Tyler Wolfe, a union official who was in the bargaining unit and who had been one of the approximately seven persons on the Union's bargaining committee, became aware of the message that Alft had written. Wolfe contacted Berg and stated that he was "very concerned" and "felt somewhat threatened by the message . . . as far as taking revenge against the Union." In addition, Rennie was contacted by Ficken, who told her there was a threat against the Union written on a whiteboard and that Rennie should go to Facility 5.

Later that day, Berg, Rennie, and Wolfe met and conducted an investigation regarding the whiteboard message. Based on interviews with a number of employees, they ascertained that Alft had written the message. According to Berg, they also decided, before meeting with Alft, that what Alft had written on the whiteboard, together with Alft's past behavior, meant that "we were in a situation that in order to protect . . . the folks in the plant we should terminate Mr. Alft." Prior to meeting with Alft, they discussed their decision with Ficken, Kathy Drengler

(director of human resources), and Beth Brinkmann (divisional human resources manager) – all of whom approved of the decision. The Respondent's officials also made a decision to have a uniformed police officer present when they met with Alft to terminate him.

Later on August 14, Alft was called to meet with Berg, Rennie, Ficken and Wolfe. At the meeting, Alft denied that he had written the message,[2] but offered to explain how he "perceived it." He stated that the first sentence just meant that the Union had betrayed the employees at Facility 5. He stated that the second sentence meant that if employees did not transfer they could make Facility 5 profitable and show that the Respondent and the Union "were wrong for what they were doing." Alft was told that what he had written on the whiteboard, in particular his use of the word "revenge," was a threat and that he was being terminated pursuant to the Respondent's rules.[3] Alft responded that "You'd have to be insane to take that message as a threat." He likened the message he had written to when employees who supported a losing sports team say "we'll get our revenge next time."

The discharge paperwork that the Respondent provided to Alft stated that the reason for the action was that Alft "wrote a threatening message on the whiteboard." Similarly in denying Alft's grievance over the discharge, the Respondent stated: "[Alft] wrote a threatening message on a whiteboard. This is a threat to employees which is a direct violation of work rule #9 and cause for immediate termination." Although these documents gave no other basis for the discharge decision, Berg testified that the decision to terminate Alft was based on the message he had written on the whiteboard *and* on his past behavior. In that connection, the Respondent elicited testimony about three past incidents involving Alft, which the Respondent asserts provide a background against which Alft's whiteboard message should be evaluated. One incident occurred in December 2009 when Alft and his supervisor were in Brinkmann's office to discuss problems with the quality of Alft's welding work. According to Brinkmann, Alft stood up during that meeting and paced around the office. There was no evidence that Alft engaged in, or attempted, any acts of physical violence, or that he made physical contact with anyone. Neither Brinkmann, nor any other witness, recounted anything Alft said during this meeting; however, Brinkmann testified that at one point she told Alft: "That's not acceptable to be talking to me like this. You have to calm down." Alft was not shown to have been disciplined in any way for his behavior on that occasion. The second incident, which also occurred in 2009, involved a heated argument that occurred between Alft and a co-worker who had entered Alft's work station. The co-worker stated that Alft was unfit for his position because of the "way [his] welds looked." Alft told the co-worker, "get the hell out of my work bay." Alft was suspended for 3 days during the Respondent's investigation of the incident and that suspension was not rescinded following the completion of the investigation. The third incident pointed to by the Respondent occurred on October 7, 2011, when Alft's supervisor and a union steward led Alft from the production floor to the human resources department. On that occasion, Alft's supervisor told him that generally when an employee's supervisor and a union steward are asked to bring the employee to human resources it means that there has been a "death or severe accident" involving a family member. Thus, Alft was preparing himself to receive tragic news when he reached the human resources department. Instead, Alft was met there by an individual who served him with legal papers. Alft became upset, attempted to refuse service, and asked his supervisor "what the hell is going on?" The evidence did not show that the union

[2] At trial, Alft contended that he was not being untruthful during that interview because the Respondent asked him whether he had written "that threat," and he answered "no" because he did not consider what he had written to be a threat. Whatever one thinks of the merits of that contention, the fact is that even Alft concedes that the Respondent also asked whether he knew who had written "the message" and that he replied "no" to that question as well. Transcript at Page(s) (Tr.) 34, That reply to the Respondent was plainly untruthful.

[3] The Respondent stated that the action was based on company work rule 9, which states, in relevant part, that "A substantial threat of violence/harm to others is grounds for immediate discharge."

steward was in any way responsible for Alft's impression that he was about to receive news of a family tragedy or that Alft became upset with the steward. The Respondent does not claim that any disciplinary action was taken against Alft for his behavior on October 7.[4]

The record does not show that Alft ever engaged in acts of physical violence or attempted to do so. Nor was there evidence that Alft ever stated that he would physically harm anyone. No aggravating behavior of any kind – physical violence or confrontation, mention of physical violence, profanity, loud behavior, insubordination – was shown to have accompanied Alft's display of the August 13 whiteboard message.

III. Complaint Allegations

The complaint alleges that when the Respondent terminated Alft for expressing his views regarding the ratification vote it discriminated in violation of Section 8(a)(3) and (1), and interfered with employees' exercise of their Section 7 rights in violation of Section 8(a)(1).

IV. Analysis and Discussion

The Respondent defends its decision to terminate Alft based on the message to co-workers that Alft wrote on the whiteboard near his work station and in which Alft expressed dissatisfaction with the Union's actions during recent contract negotiations.[5] Since Alft's communication of his antiunion views to co-workers is clearly protected under Section 7[6] both as union activity[7] and as concerted activity,[8] the issue here is whether Alft's conduct was so

[4] There was hearsay testimony about other representations that were conveyed to the Respondent regarding these incidents, but that hearsay was not supported by competent evidence. Even if the Respondent believed those hearsay reports and considered them in reaching its decision, the reports are still not relevant because in cases where the question is whether an employee who was engaged in protected activity may be disciplined for associated misconduct the Respondent must show that the employee actually engaged in the misconduct, not that management simply had a good faith belief that he or she had. See *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), *Fresenius*, 358 NLRB No. 138 slip op. at 4 fn.7 (2012).

[5] In its brief, the Respondent mentions that, during the August 13 meeting, Alft falsely denied that he had written the whiteboard message, however, the Respondent does not rely on dishonesty as a basis for the termination decision. At any rate, the Board has held that an employer may not require an employee to reveal his or her protected activity, and thus an employee's false denial of such activity under questioning by the employer may not serve as a lawful basis for imposing discipline. *Fresenius*, 358 NLRB No. 138, slip op. at 3-4 fn.6 (2012), citing *Tradewaste Incineration*, 336 NLRB 902, 907 (2001). Moreover, as discussed in the statement of facts, the Respondent had made its decision to terminate Alft prior to the August 13 meeting, and thus his dishonesty at that meeting was not, in fact, a reason for his termination.

[6] Section 7 states, inter alia, that Employees have the right "to engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities."

[7] The fact that Alft was "engaged in antiunion activity as opposed to prounion activity is irrelevant [because] section 7 protects both types of activity." *Stanadyne Automotive Corp.*, 345 NLRB 85, 86 (2005). Section 7 guarantees employees the right to criticize their incumbent union leadership and seek to persuade others to align themselves with that opposition. *Mobile Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176, 178 (1997), enfd. 200 F.3d 230 (5th Cir. 1999); *Teamsters Local 823 (Roadway Express)*, 108 NLRB 874, 875 fn.3 (1954), enfd. 227 F.2d 439 (10th Cir. 1955).

[8] The Respondent argues that Alft's message was not concerted protected activity because he did not discuss it with other employees before or after writing it. This contention is wholly without merit. The Board has held that concerted activity exists where, as here, a single employee protests changes to conditions of employment that are common to the speaker and the listener, see, e.g., *Woldmark by Wyndham*, 356 NLRB No. 104, slip op. at 2 (2011), *Whittaker Corp.*, 289 NLRB 933, 933-934 (1988), even if he or she does not make further efforts to initiate group action, *Whittaker*, supra, at 934. Alft's whiteboard message was intended to encourage employees not to react to the contract concessions by transferring from Facility 5, but rather to remain there, make Facility 5 profitable, and

threatening or egregious as to cause him to lose that protection. *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 fn.5 (2000). The Board generally determines whether an employee's alleged misconduct is sufficiently opprobrious to strip otherwise protected activity of the protections of the Act by considering the four factors set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979). See *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 4 (2012).[9] Those factors are:

> (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

Atlantic Steel, 245 NLRB at 816. In applying these factors, the Board has cautioned that "although an employer may lawfully discipline an employee for making prounion (or antiunion) statements that threaten fellow employees (for example, with physical harm), an employer may not lawfully discipline an employee for making prounion (or antiunion) statements that merely cause another employee to feel uncomfortable," *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004), or "annoyed," *Alpine Log Homes*, 335 NLRB 885, 894 (2001), *RCN Corp.*, 333 NLRB 295, 300 (2001). See also *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001) (inquiry into whether employee's otherwise protected activity was so extreme as to lose the protection of the Act is made without reference to other employees' subjective reactions to the activity).

After considering the record in this case, I conclude that Alft's expression of antiunion sentiments was not so opprobrious as to cause him to forfeit the protections of the Act. Beginning with the location of the message, I note that Alft wrote his message on a single whiteboard next to his work station. These whiteboards are relatively modest in size – about 2-by-3 feet according to the largest estimate – and there is one at each welding work station. Alft did not write a similar message on the whiteboards at other work stations or otherwise attempt to create the impression that the sentiment was pervasive. He did not move the whiteboard to a more prominent location in the facility, but simply left it near his work station. The evidence did not show that this location was such that the message was likely to disturb customers visiting the plant and I see no reason, based on the record here, to believe that the message's location would likely result in the disruption of production or other elements of the Respondent's business. The communication of personal, sometimes controversial, messages on the whiteboards was not unusual. To the contrary, employees regularly used the whiteboards to express personal messages about a variety of subjects, including political controversies and sports rivalries, and there was no evidence that any employee had ever been disciplined for doing so. See *Corrections Corp. of America*, 347 NLRB 632, 636 (2006) (statement did not lose the Act's protection where similar language was common among employees and supervisors). I conclude that the location where Alft wrote his message weighs in favor of finding that he did not lose the protection of the Act.

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possibly vote out the Union board. The conclusion that Alft's whiteboard communication was concerted in nature finds additional support in the fact that Alft used the plural pronoun – "us" – implicitly eliciting support from co-workers, see *Woldmark*, 356 NLRB No. 104, slip op. at 3, *Whittaker*, 289 NLRB at 934, and because the concerns he raised were a "logical outgrowth of concerns expressed" by other Facility 5 employees during the August 1 meeting, *Mike Yurosek & Sons, Inc.*, 306 NLRB 1037, 1038 (1992), enfd. 53 F.3d 261 (9th Cir. 1995).

[9] The Respondent contends that the case should be analyzed under the burden shifting approach set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 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 (1983). However, it is clear that the *Wright Line* analysis "is inapplicable where, as here, an employer undisputedly takes action against an employee for engaging in protected conduct; in such cases, the inquiry is whether the employee's actions in the course of that conduct removed the employee from the protection of the Act." *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 4 fn.7.

I also conclude that the subject matter of Alft's message weighs in favor of finding that it remained within the Act's protection. The message was a clear reference to the contract negotiations that had just concluded and during which the Union had agreed to cuts in compensation for unit employees at Facility 5 while protecting unit employees at other facilities from those cuts. Employees' freedom of expression regarding collective bargaining is explicitly mentioned in Section 7 and is at the core of what the Act protects. Moreover, the Board makes allowances where, as here, employee statements concern "disputes over wages" because such disputes are "among those . . . most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

The nature of Alft's "outburst" also weighs against finding that he lost the Act's protection. First, the evidence shows that Alft's action in writing the message was impulsive. He testified that when he found out about the ratification of the proposed contract he was "saddened and frustrated" and made a spontaneous decision to write the message. Neither his conduct nor the substance of the comments was premeditated. The Board has held that when an employee's outburst is "essentially impulsive" that fact weighs against finding that the employee lost the protection of the Act. *Fresenius*, supra, slip op. at 5; citing *Kiewit Power Constructor Co.*, 355 NLRB 708, 710, 355 NLRB No. 150 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011) and *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322-1323 (2006).

Alft's statement that "revenge will be sweet to those who wait" does not exceed the wide latitude that employees have under the Act to engage in freewheeling prounion and antiunion speech. In *Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974), the U.S. Supreme Court recognized that the "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB,", and that Section 7 therefore gives employees communicating about union or concerted protected matters "wide latitude." Under the circumstances present here, there is an insufficient basis to construe Alft's statement as an unambiguous threat of physical violence or other improper retribution rather than, as Alft testified, a statement that if employees remained at Facility 5, they could prevail in the future and possibly vote out the union leadership. Alft's communication was not accompanied by aggravating factors such as physical contact, acts of aggression, mention of physical harm, or loud or other disruptive behavior. Alft simply wrote the message and then returned to his normal work duties. Under such circumstances, the Board has repeatedly held that ambiguous statements, even ones more facially threatening than Alft's was here, do not forfeit the Act's protection. In *Fresenius*, for example, the Board held that an employee did not lose the protection of the Act by writing the message "Warehouse workers, R.I.P." even though the Board found that the message could be "construed as threatening" physical violence. Supra, slip op. at 6. The Board explained that the statement was not accompanied by "any physical or otherwise threatening conduct that would warrant treating it as something other than a figure of speech." Id. Similarly, in *Kiewit Power,* 355 NLRB No. 150, slip op. at 3, the Board found that an employee's statement to a supervisor that "it was going to get ugly" and that he "better bring [his] boxing gloves" did not lose the Act's protection because that statement was not an unambiguous threat of physical violence and was not accompanied by aggravating conduct. In *Plaza Auto Center, Inc.*, 355 NLRB No. 85, slip op. at 2-4 (2010), enfd. in part, remanded in part, 664 F.3d 286 (9th Cir. 2011), an employee's outburst was still protected even though he had called his supervisor a "f'ing mother f'er," stood up, pushed his chair aside and warned that if the employer fired him it would "regret it." The Board relied on the fact that the outburst was not accompanied by aggravating conduct such as "insubordination, physical contact, threatening gestures, or threat of physical harm." Id at 4. Likewise, in *Leasco, Inc.*, 289 NLRB 549, fn.1 (1988), the Board held that an employee's statement that "if you're taking my truck, I'm kicking your ass right now" was "a colloquialism that standing alone d[id] not convey a threat of

actual physical harm" that would forfeit the Act's protection. See also *Ziak, J. & Sons, Inc.*, 152 NLRB 380, 382 (1965) (employee statements are not unprotected threats when those statements are ambiguous).

The Respondent has suggested that it could lawfully discipline Alft because two Union officials – Ficken and Wolfe – complained to management officials that they found the whiteboard message threatening and urged that action be taken regarding it. This argument fails. The Board has held that other employees' subjective reaction to an employee's protected statements cannot justify discipline based on those statements. *Consolidated Diesel*, supra. I do not doubt that Alft's message caused union officials discomfort and annoyance, but that does not transform an otherwise ambiguous antiunion message into an unprotected threat of physical violence. See *Chartwells*, supra, and *Alpine Log Homes*, supra. Indeed the Board has long held that an employer violates the Act when it takes disciplinary action against antiunion dissidents at the behest of union officials. *Pacific Intermountain Express Co.*, 110 NLRB 96, 108-109 (1954), enfd. 228 F.2d 170 (8th Cir. 1955), cert. denied, 351 U.S. 952 (1956)

The Respondent points to three prior incidents involving Alft which it claims provide background showing that Alft's August 2012 whiteboard message was properly viewed by management as sufficiently threatening to warrant termination. One of those episodes involved Alft's agitated reaction in 2009 to counseling regarding his work performance. Another concerned a heated verbal exchange that Alft and a co-worker had in 2009 when the co-worker entered Alft's work bay and criticized the quality of Alft's work. The final episode occurred in October 2011 when Alft became upset during a meeting at which he was served with legal papers, after he was led to believe that the purpose of the meeting was to inform him of a family tragedy. I conclude that none of these incidents constitute relevant background, and certainly not background showing that Alft's otherwise ambiguous whiteboard message was, in fact, a threat of violence. To begin with, Alft did not engage in any physical violence or threat of physical violence in the three episodes described. Therefore, none of those prior incidents suggest that his whiteboard message was not a colloquialism, but rather an unambiguous threat of violence. In addition, none of the prior episodes involved the Union in any meaningful way or suggest that Alft was dangerously hostile towards the Union. And third, none of the episodes accompanied Alft's writing of the whiteboard message or were close in time to that conduct. Thus consideration of those episodes in no way changes my view that the nature of Alft's "outburst" weighs against finding that his otherwise protected antiunion message forfeited the Act's protection.

The fourth *Atlantic Steel* factor is whether the outburst was provoked by unfair labor practices. In this case the evidence did not show that Alft's decision to write the whiteboard message was provoked by an unfair labor practice by the Respondent. However, the Board has concluded that where, as here, the employee's message is directed towards co-workers rather than the employee's supervisor "the lack of employer provocation neither weighs in favor of nor against finding the conduct protected." *Fresenius*, slip op. at 7, citing *Beverly Health & Rehabilitation Services*, 346 NLRB at 1322. Thus the final *Atlantic Steel* factor is neutral in this case.

To sum up, I find that three of the *Atlantic Steel* factors weigh against viewing Alft's message as sufficiently opprobrious to forfeit the Act's protection, and the other factor is neutral. On that basis I conclude that, under *Atlantic Steel*, Alft's otherwise protected conduct in communicating to co-workers a message that was critical of the Union and the Union's performance during the recent contract negotiations did not lose the protection of the Act. Therefore, the Respondent's termination of Alft based on that communication violated Section 8(a)(3) and (1) of the Act.

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 Respondent discriminated against Alft and discouraged employees from engaging in protected union and concerted activities in violation of Section 8(a)(3) and (1) of the Act by discharging Alft on August 14, 2012, because he communicated to co-workers a message that was critical of the Union and the Union's performance during the recent contract negotiations.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[10]

ORDER

The Respondent, Greenheck Fan Corporation, Schofield, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for communicating to other employees views that are critical of the Union and/or the Union's performance during contract negotiations in 2012.

[10] 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.

(b) 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) Within 14 days from the date of the Board's Order, offer Keith Alft, Jr., full reinstatement to his former job 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.

(b) Make Keith Alft, Jr., whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Keith Alft, Jr., in writing that this has been done and that the discharge will not be used against him in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facilities in Schofield, Wisconsin, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 30, 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 August 14, 2012.

[11] If this Order is enforced by a Judgment of the 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."

(f) 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.

Dated, Washington, D.C. March 21, 2013

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PAUL BOGAS
Administrative Law Judge

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 discharge or otherwise discriminate against any of you for expressing viewpoints critical of the Union or the collective bargaining agreement that the Union agreed to in 2012.

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

WE WILL, within 14 days from the date of this Order, offer Keith Alft, Jr., full reinstatement to his former job 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.

WE WILL make Keith Alft, Jr., whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Keith Alft, Jr., for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Keith Alft, Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

GREENHECK FAN CORPORATION

_____
(Employer)

Dated _____ By _____

(Representative) (Title)

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

310 West Wisconsin Avenue – Suite 700W
Milwaukee, WI 53203-2011
Telephone: (414) 297-3861
Hours of Operation: 8:00 a.m. to 4:30 p.m. (CST)

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 414-297-3819.