

East Towne Chrysler Motors, Inc. and District No. 200, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 30-CA-4569

September 29, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND MURPHY

On June 30, 1978, Administrative Law Judge Earle V. S. Robbins issued the attached Decision in this proceeding.¹ Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify her remedy to include wage increases unlawfully withheld and reimbursement for moneys discriminatorily deducted from employee Terrance Orłowski's paycheck as payment for damages to a vehicle, and to adopt her recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, East Towne Chrysler Motors, Inc., Stevens Point, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Terrance Orłowski immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent job, and make him whole, with interest, for any loss of earnings he may have suffered by reason of Respondent's discrimination against him including wage increases unlawfully withheld and moneys discrimina-

¹ As indicated in the attached Decision, the parties have entered into a formal settlement stipulation providing for a Board Order and consent decree on all issues except those relating to the discharge and deprivation of benefits to employee Terrance Orłowski. Having fully examined the settlement stipulation of the parties, we hereby approve it and make it a part of the record herein. Pursuant to the provisions of the said stipulation, we shall enter an appropriate order. Further, our Decision herein disposes of those aspects of the case that were not a part of the settlement stipulation.

torily deducted from his paycheck as payment for damage to a vehicle."

2. Substitute the attached "Appendix A" for that of the Administrative Law Judge.

IT IS FURTHER ORDERED, upon the basis of the findings of fact in this case, that the settlement stipulation is hereby adopted in its entirety.

APPENDIX A

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

After a hearing at which all parties were afforded the opportunity to present evidence in support of their respective positions, it has been found that we have violated the National Labor Relations Act in certain respects and we have been ordered to post this notice and to carry out its terms.

The National Labor Relations Act gives you, as employees, certain rights, including the right:

- To engage in self-organization
- To form, join, or help a union
- To bargain collectively through a representative of your own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all of these things.

Accordingly, we give you these assurances:

WE WILL NOT discharge employees because of their union or other protected concerted activities.

WE WILL NOT withhold wage increases from employees because of their union activities.

WE WILL NOT discriminatorily require employees, because of their union activities, to pay for damages they caused to vehicles.

WE WILL NOT discriminate against our employees by maintaining a written record of their adverse conduct.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights set forth above which are guaranteed by the National Labor Relations Act.

WE WILL offer Terrance Orłowski immediate and full reinstatement to his former job or, if that job is no longer available, to a substantially equivalent job, without prejudice to any seniority or other rights and privileges previously enjoyed by him.

WE WILL make Terrance Orłowski whole, with interest, for any loss of earnings which he may

have suffered by reason of the discrimination against him, including wage increases unlawfully withheld and moneys discriminatorily deducted from his paycheck as payment for damage to a vehicle.

WE WILL expunge from our records all memoranda of adverse conduct of our employees made commencing January 4, 1978.

EAST TOWNE CHRYSLER MOTORS, INC.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was heard before me in Stevens Point, Wisconsin on May 2 and 3, 1978. The charge and an amended charge were filed by District No. 200, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, and served on East Towne Chrysler Motors, Inc., herein called Respondent, on February 24, 1978 and March 1, 1978, respectively. The complaint, which issued on March 23, 1978, alleges that Respondent violated Section 8(a)(1) and (3) and (5) of the Act by:

1. Engaging in and creating the impression of engaging in surveillance of employees' union and/or protected concerted activities.

2. Attempting to bargain directly with employees and bypassing the Union by requiring employees to sign forms authorizing release of information to the Union.

3. Attempting to undermine the Union by telling employees Respondent would never enter into a collective-bargaining agreement.

4. Unilaterally and discriminatorily eliminating work nights for bargaining unit employees.

5. Refusing to provide the Union, as requested, with a list of bargaining unit employees, their dates of hire, rates of pay, classifications and job descriptions, a list and description of all fringe benefits and how they are computed, shift schedules, hours of work, and the method of computing incentive bonuses, profit-sharing plans, and pension plans.

6. Unilaterally changing the insurance carrier of bargaining unit employees.

7. Refusing to meet with the Union regarding the discussion of grievances.

8. Refusing to meet and negotiate a collective-bargaining contract with the Union.

9. Refusing to effectuate a wage increase promised employee Terrance Orłowski.

10. Discharging Terrance Orłowski.

A settlement stipulation, attached hereto for the Board's approval as Appendix B [omitted from publication]¹, was signed by the General Counsel and the Respondent on April 14, 1978 and by the Union on April 19, 1978. It provides that the Board forthwith may enter the Order set forth therein which remedies all of the allegations of the complaints except those alleging the discharge of Terrance

Orłowski and the refusal to grant him a wage increase. It further provides that the United States court of appeals for any appropriate circuit may, upon application by the Board, enter its judgment enforcing the Order of the Board as set forth in the stipulation.

Accordingly, the only unresolved issues raised by the complaint are whether Respondent discharged Orłowski and failed to grant him a wage increase because he engaged in activities in support of the Union. Additionally, at the hearing the complaint was amended to allege that Respondent discriminatorily required Orłowski to pay for damages he caused to a vehicle because he engaged in union activities. Also fully litigated at the hearing, though not specifically alleged in the complaint, was the issue of whether Respondent entered adverse comments into the personnel files of unit employees because of their union activities.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Wisconsin corporation, is engaged in the sale and servicing of automobiles at its Stevens Point, Wisconsin, location. Respondent in the course and conduct of its business operations during the past calendar year, a representative period, derived revenues in excess of \$500,000 and purchased and received goods valued in excess of \$50,000 directly from sources located outside the State of Wisconsin.

The complaint alleges, Respondent admits, and I find that Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. The surrounding circumstances

Respondent is engaged in the sale and servicing of automobiles at a location in Stevens Point, Wisconsin. Its president and major stockholder is Enos M. Niles. Niles, who owns controlling interest in several other automobile dealerships in various locations in Wisconsin, is headquartered in Madison, Wisconsin. Although he only visits the Stevens Point location one to five times a month, he is generally in daily contact with Rod Yarish, the general manager of the Stevens Point facility. Yarish is responsible for the day-to-

¹ The original copy of the stipulation was received into evidence as Jt. Exh. 1.

day operations of this facility. Art Napgezok² is manager of the service and parts department. Assisting him is Service Advisor Candace Peterson and Parts Manager Rick Currett. Duane Hohlstein is the office manager.³

The Union began an organizing campaign among Respondent's service, bodyshop, and parts departments employees in November 1977.⁴ Mechanic James Gaetz initiated the contact with the Union. Orlowski signed a union authorization card on November 14 and attended a union meeting held in November. Mechanics Lori Becker, James Lamb and Gaetz were the only other employees present at this meeting. They were also the only employees present at a January 17 meeting when Gaetz, Lamb, and Orlowski were selected as members of the bargaining committee.

On November 25, the Union sent Respondent letters informing it of the organizational campaign, claiming that it represented a majority of Respondent's shop employees and demanding recognition.⁵ According to Yarish, this letter was the first indication Respondent had that its employees were engaging in union activities. By letter dated December 2, Respondent declined to recognize the Union.

On December 2, the Union filed a representation petition in Case 30-RC-3254. Pursuant thereto, an election was held on January 3 in a unit of all mechanics, bodymen, and partsmen employed at the Stevens Point facility. The Union won the election by a vote of five to two.⁶

In December, according to Orlowski, Napgezok told him he knew of a company which had a union voted in. The union did not do anything for the employees, it "jumbled the business around," and it was just not a nice place to work after the union got in. Napgezok does not deny this conversation.

In December, around Christmas, Len Berry, the sales manager, had a conversation with mechanics Gaetz, Orlowski, Lori Becker, and Jim Lamb. Berry said they would not get a union in there, they were wasting their time, and that they should drop the whole thing. Orlowski said that they would have to be careful, that they would be singled out and disposed of if they were involved with the Union. He further said he would be careful to keep his employment, that the only reason he was going to stay there was to help get union representation. Berry did not testify. The record does not establish whether Berry is a supervisor within the meaning of the Act. However, Yarish testified that he was one of Respondent's supervisors and that the supervisors did report to him information regarding union activities.

On January 3 after the election, Yarish spoke to the unit employees. All of the managers were also present. Yarish said he had received a phone call from Niles saying he was displeased with the election results, that the employees had shown their disloyalty to him, and the family atmosphere at the facility was no longer in effect. He said privileges were no longer in effect, work nights were a privilege and since

the Union was voted in, effective immediately, work nights⁷ would be canceled.⁸ Yarish does not deny this conversation and Niles admits that he ordered work nights canceled because he was angry and disappointed about the results of the representation election.

On January 4, according to Candace Peterson,⁹ Napgezok told her to keep a daily record of each mechanic and anything he did, such as tardiness, job screwups, leaving early, failing to clock out on breaks, and poor work performance. He further told her that the list should be kept confidential. Thereafter, she made entries on sheets which were later placed in the employees' personnel files. All such entries were in accordance with specific instructions from Napgezok and included conduct which occurred prior to January 4.

Napgezok admits that he gave such instructions to Peterson and that he was instructed to do so by Niles and Yarish. He testified, however, that he is not sure but he thinks that he gave the instructions to Peterson sometime in December. The first entry in each record is dated January 4. I credit Peterson that she first received such instruction on January 4.

Yarish and Hohlstein also made adverse comments on employees' personnel files. According to Yarish, such a comment by him would only be of an unusual incident. Hohlstein testified that he started maintaining personnel files in November and that notations were made by him from time to time.

Niles testified initially that when Respondent first learned of the union activity, they immediately began to notice a very severe drop in service performance. At that time he instructed Yarish and the department heads to begin to keep records on employee performance, particularly the service and bodyshop employees where the greatest losses were. He admitted that such records were kept only on unit employees and then changed his testimony to state that he was not sure whether such records were kept on other employees.

Respondent's service performance records for September through February show a monthly drop in the ratio of gross profits to sales from 55.4 percent in September to 51 percent in November, a drop to 41 percent in December, then 49.2 percent in January and 48 percent in February. It also shows a steady decline in gross sales from \$16,357 in September to \$12,582 in February. Niles testified that this drop is unusual, that normally profits in the service department increase in the winter months and retail car sales decrease. However, no documentary evidence was introduced as to sales performance for prior years. According to Niles, Respondent attributed this decline to union activities.

Niles admits that, shortly after the election, he stated in anger to a group of unit employees that he would never enter into a collective-bargaining agreement with the Union.

² Napgezok is an admitted supervisor.

³ Hohlstein assists Yarish in personnel matters.

⁴ Unless otherwise indicated all dates herein will be in 1977, except those in January and February which will be in 1978.

⁵ This letter was received on November 29. Another letter informing Respondent of the organizational campaign was received on November 28.

⁶ There were eight eligible voters.

⁷ Work nights refer to Respondent's practice of keeping the shop open on certain evenings to permit employees to work on their personal cars.

⁸ This is a composite of the testimony of Gaetz and Orlowski which I find more accurately reflects what was said.

⁹ Peterson is Napgezok's assistant and is in charge of the service and parts departments when he is absent.

By letter dated January 20, the Union requested certain information, such as names, hire dates, classifications, wage rates, etc., of unit employees. By letter dated January 24, the Union requested that Orlowski be granted a wage increase as previously promised. On February 16, in response to information received from employees, Union Representative George Keip, Jr., telephoned Niles and asked if Respondent had changed insurance carriers. Niles replied yes. Keip said that the Union represented the employees and this was a negotiable item. Niles said he felt the change in carriers was for the betterment of the employees and until the Union had a contract with him, he would negotiate as he saw fit.

Keip inquired about the requested information. Niles said he felt the Union could secure such information from the employees and that until the Union had a contract with him he would run his business as he saw fit. Keip then asked to discuss Orlowski's discharge. Niles said Orlowski was discharged for destroying property and repeated that he would run his business as he saw fit. Keip asked if Niles was aware that, if he did not respond to the request for information, the changing of insurance carriers and the request to discuss Orlowski's discharge, Keip had no alternative but to go to the National Labor Relations Board. Niles replied "You do what you have to do, and I'll do what I have to do."¹⁰

On February 16, Keip wrote Niles a letter seeking to arrange a date to begin contract negotiations. By letter dated February 21, Niles informed Keip that he planned to be out of the state and the earliest date he would be available would be in April. He further stated:

If you wish to submit additional available dates, we will consider them upon receipt.

As per a previous phone call, if I receive one more threat of a filing, the meeting will never occur.

Threats neither impress nor alarm me for we know our alternatives.

Gaetz testified, without contradiction, that on March 1 he was called into Niles' office. Niles showed him a document stating that the Union had requested certain information regarding unit employees and requesting the employees to sign indicating consent to the release of this information or that the employees do not wish the information released. Gaetz signed it and left.

Later that day, Lamb, Becker and Gaetz, the only three employees who consented to the release of the information to the Union,¹¹ were called into Niles' office. Gaetz' uncontradicted testimony is that Niles told them he just wanted them to know that he knew, and the Company knew, that they were the troublemakers pushing the Union, and that none of them were certified mechanics, they were amateur mechanics who were making the best money they had ever made in their lives. He further said that they would never get a union contract. He also said that the auto industry was just coming out of a slump and the Union, raising a lot

of havoc, was not helping matters. Niles does not deny this conversation.

By letter dated March 20 and addressed to Niles, Keip again attempted to arrange a date to commence negotiations. As of the date of the hearing, no negotiation sessions had been held. Counsel for the General Counsel did concede, however, in his opening statement that it appeared as of the date of the hearing that Respondent is prepared to commence negotiating in good faith.¹²

2. The withholding of the wage increase

Orlowski was employed by Respondent as a mechanic¹³ in November 1975.¹⁴ He and other mechanics are paid on a guaranteed wage basis, with a percentage of the flat rate charged for those jobs performed by them. If the flat rate percentage falls below the guarantee, he is paid the guarantee.

In November, Orlowski's pay rate was based on a \$3 hourly guarantee and 45 percent of the flat rate. On November 21, Orlowski asked Napgezek for a wage increase to \$3.50 per hour for the base guarantee and to 50 percent of the flat rate. Napgezek said he would consult Yarish and let Orlowski know the following day. The next day, according to Orlowski, Napgezek told him the raise had been granted, that he would receive the 50-cent increase in guarantee rate immediately and the increase to 50 percent of the flat rate effective the first workweek in December.

Orlowski further testified that on November 27, during a discussion with Hohlstein regarding a change in Orlowski's insurance coverage, Orlowski asked if Hohlstein had been notified of Orlowski's raise. Hohlstein said he had and showed Orlowski a card stapled to the payroll ledger which contained a notation that Orlowski was to receive an increase to \$3.50 immediately and an increase to 50 percent of the flat rate effective December 5. Hohlstein does not deny this.

Napgezek testified that he discussed Orlowski's request for a wage increase with Yarish and they decided to grant the increase in the guaranteed rate immediately and to make an increase in the flat rate percentage contingent upon an improvement in his work habits. Napgezek informed Orlowski of the decision and told him he would have to show improvement for a minimum of 30 days, that he would have to come to work every day on time and "turn out a hundred percent."¹⁵ Napgezek further explained that Orlowski's record of tardiness and absenteeism prevented him from assigning Orlowski as much work as he would if Orlowski were more reliable. Orlowski asked Napgezek to assign him the work. Napgezek replied "You be

¹² Apparently the settlement stipulation was entered into in an attempt to avert injunction proceedings under Sec. 10(j) of the Act.

¹³ Although he was sometimes assigned other work, his regular job assignment was undercoating.

¹⁴ There was about a 10-day break in service during 1976 when he was discharged for squealing tires on a company vehicle and later rehired. Joe Brush was service manager at the time. Napgezek has been service manager since June or July 1977 and Yarish has been general manager since March 1, 1977.

¹⁵ This refers to performing a job within the time provided in the flat rate book.

¹⁰ This is from the testimony of Keip, whom I credit. Niles does not deny this conversation and such conduct is covered by the settlement stipulation.

¹¹ Yarish admits that he and Niles considered that those forms indicated the union sympathies of employees.

here and I'll have the work there." Orlowski denied that any conditions were placed on the 5 percent increase.

Yarish testified that he instructed Napgezek to grant the increase in the guaranteed rate effective the first week in December and that if Orlowski's attitude and actions substantiated a 5 percent flat rate increase, at Napgezek's discretion, it would be granted.

Orlowski never received the flat rate increase and did not receive the 50-cent-an-hour increase until January 6, 1978.

Yarish admits that he authorized the hourly pay increase to be put into effect on the same day that Napgezek told Orlowski he would receive the increase. He further admits that shortly thereafter, when Respondent was informed of the union activities, on the advice of counsel he instructed Hohlstein to withhold any pay changes. Both Yarish and Napgezek testified that Orlowski did not meet the 30-day condition for the flat rate increase since he was absent on 1 day during that period.¹⁶

On December 5, according to Orlowski, he started filling out his timecard with the 50 percent rate. Shortly thereafter Napgezek told him he could not do this. Thereafter, Orlowski talked to Keip regarding Respondent's failure to grant the raise he had been promised. Keip said there was no prohibition against granting the raise. The next day, according to Orlowski, he told Yarish what Keip had told him. Yarish said they could not give him the raise because of the union law, that it was the law and they could not interfere with it.

3. The discharge

On February 2, Orlowski did not report to work and did not call in. Napgezek contacted him at home. According to Orlowski, Napgezek reached him about 9 a.m. Napgezek asked him why he had not reported to work. Orlowski replied that he had been ill during the night and had just gotten up. He said he would not be in to work that morning but possibly he would be there in the afternoon. Napgezek said Orlowski should not bother to come in the next day and hung up.

According to Napgezek, he attempted to reach Orlowski several times that morning but Orlowski did not answer until about noon. However, Peterson testified that she heard Napgezek talking to Orlowski on the telephone about mid-morning. Napgezek contends that she was not present during the telephone call. Napgezek testified that he told Orlowski to give serious thought to whether he wanted his job and told him he was suspended for the following day.

Napgezek does not specifically deny that Orlowski said he had been ill during the night and had fallen asleep. He admits that he would consider this a valid reason for not calling in.

On the following day, Orlowski reported to work. Napgezek told him to leave, that he was suspended for the day. Orlowski did not leave. Instead, he picked up a work order and proceeded to change the oil in a car. Napgezek instructed the parts manager not to issue any parts to Orlowski. Orlowski had Peterson get a part for him.

Orlowski testified when he completed the oil change he went to Yarish for another work assignment. Napgezek

again told him that he was suspended for the day and that he did not like it any more than Orlowski did, but those were Yarish's instructions. Orlowski asked if he could work that day if he secured Yarish's permission. Napgezek said he could. This was about 8:45 a.m.

Napgezek then talked to Yarish. They agreed that Orlowski should be suspended for the day as discipline for not calling to report that he would not be at work on the previous day. Yarish then talked to Orlowski. According to Orlowski, he asked Yarish if he could work that day, that he needed the money and he could not afford to miss 2 days. Yarish said the suspension was a disciplinary action. Orlowski asked why this sort of disciplinary action had never been taken against anyone in the past. Yarish said he had to start somewhere laying down the law. Orlowski said he did not think Yarish was going about it the right way, that it was severe discipline for not calling in.

Orlowski further testified that Yarish asked what Orlowski thought he should do. Orlowski said if he were permitted to return to work that day, he would take what Yarish said about calling in as a warning and if it happened again he would know what to expect. Yarish said the next time it would not happen again and that if it did happen again, Orlowski would be terminated.

According to Yarish, he had two conversations with Orlowski on February 3. The first time he told Orlowski they had talked to him on a number of occasions. He had been instructed to call in if he was going to be late or absent and that the suspension was a disciplinary action. Orlowski said he could not afford to take a day off. Yarish replied, "You could afford to take off yesterday, why can you not afford to take off this day," and refused to lift the suspension.

Later that morning, Orlowski again asked to meet with Yarish. He told Yarish he was very sorry that he had been absent and not called in, that he realized he was not doing the job that was expected of him and he would try to do better. Yarish said he would give him one more chance, but the next time he "screwed up," it was all over, he would be terminated.

According to Napgezek, Yarish called him on the intercom and told him he was permitting Orlowski to work that day. Napgezek further testified that he believes that Yarish also said that he had warned Orlowski that this was his last chance and more than likely he would be terminated if he had another incident like this. Orlowski then returned to the service department and worked for the remainder of the day.

On February 7, Orlowski was trying to repair a new car where the dashboard was rattling against the windshield. He was using a screwdriver to pry the dash away from the windshield. The screwdriver slipped and the windshield cracked. Orlowski reported the incident to Napgezek. According to Orlowski, Napgezek made no comment at that time regarding the accident. However, the cost of the damage was deducted from Orlowski's paycheck when he was terminated several days later.

On February 10, Orlowski and another mechanic were instructed to tow a vehicle into the garage. Orlowski hooked the tow chain to the vehicle. When he unhooked it he discovered that the tow had caused a panel to bend which supported the radiator and air-conditioning condenser, pulled the bracket for the mounting bolt for the

¹⁶ Orlowski was absent on December 5, January 19, and February 2.

grille forward about an inch, and pushed the mounting studs for the grille through the plastic grate, snapping the grille in the middle. Orlowski admits that the damage, estimated at \$68, was his fault. He had not hooked up the tow chain properly.

Shortly thereafter, Yarish came out and asked Orlowski what had he done now. Orlowski showed him the damage and explained how it had happened. Yarish inspected the damage and left.

Later that day, Orlowski was called into the office. Niles and Yarish were there. According to Orlowski, Niles said he could no longer afford to have Orlowski remain in Respondent's employ, that he had accumulated an excessive amount of damage to customers' vehicles. Niles further said that he had had a discussion with Yarish regarding the incidents of February 2 and 3, that it all added up to termination and Orlowski should take his tools and leave. Orlowski returned to the shop to get his tools. At some point, Orlowski inquired if he could be paid then and was told that he would have to wait until the next payroll date, February 17.

On February 17, when Orlowski picked up his check, \$107 had been deducted for replacing the windshield he cracked on February 7. According to Orlowski, he requested an explanation from Yarish. Yarish said someone had to pay for the damage. Orlowski asked why and reminded Yarish that mechanic Lori Becker had not been assessed for damages when she was responsible for an incident where an aerosol can fell into the fan of a vehicle causing damage. Yarish said Orlowski was lucky that he had only been charged for the windshield and had not been charged for the February 10 damage, that he had gotten off easy.

General Counsel adduced evidence from both Niles and Yarish in the presentation of General Counsel's *prima facie* case. Yarish testified that Niles made the decision to terminate Orlowski because he had damaged a vehicle that day. When asked if there was any other reason, he testified, "No. Just an accumulation of things over the past that he was aware of and we had, of course, when he would come up, we would discuss employees' problems or the departmental problems." Niles testified that Orlowski was discharged solely because of his reckless use and damage of vehicles.

Yarish testified that Napgezek came to the office and explained that Orlowski had again damaged a vehicle. He, Niles and Napgezek then discussed for quite some time the disciplinary action taken against Orlowski, the counselings they had with him and that he was warned that he would be given no more opportunities to damage vehicles. Napgezek testified that he was not at work that day.

Later, when Yarish was called as a witness for Respondent, he testified that he could not remember who told him and Niles that Orlowski had damaged a car on February 10, but he thinks it was Peterson. After they inspected the damage, they had a very brief discussion. He cannot recall exactly what they said but Niles decided to discharge Orlowski. He denied that Orlowski's union activities were discussed.

During the presentation of Respondent's case, Niles testified:

Q. What led up to [Orlowski's] discharge?

A. An accumulation of all of the problems that

we've had. . . . The last incident was the damage, the reckless damage of a piece of property, a customer's property.

He further testified that his conversation with Yarish which preceded the discharge was very short. "Briefly it was 'You gave him a warning. You gave him many warnings. You gave him a final ultimatum, and he has crossed over the ultimatum.'"

According to Niles, his conversation with Orlowski was similarly brief. "I told him that as a result of all of the things that he had done that were wrong in the past, that we were not able to correct and make a better employee of him. And that the final damage that he had done and his recklessness, that I would like him to get his tools and leave. And if he needed help loading his tools, I would provide help for him."

Peterson testified that in the early afternoon on February 10, Niles asked her for the notes Napgezek had instructed her to make on mechanics. He took the notes and later that afternoon Niles and Yarish returned to the service department and questioned her as to some of the abbreviations she had used in the notes on Orlowski and Becker. She further testified that since Orlowski's discharge she has received no further instructions to make such notes.

Respondent adduced a lot of evidence as to the problems which allegedly were part of the consideration which resulted in Orlowski's discharge. The problems cited were absenteeism and tardiness, horseplay, derogatory statements regarding Respondent's managerial and supervisory staff, insubordination toward Peterson, wasting of worktime, and the reckless use of, and damage to, vehicles.

The horseplay mentioned involved such things as pitching pennies, running in the shop, water fights, throwing things at people, and playing frisbee in the shop. However, both Yarish and Niles testified that they considered these things insignificant and Niles admits that he had no knowledge of this conduct at the time of the discharge.

Napgezek testified that Orlowski would often leave work early without obtaining Napgezek's permission. Also, several times a week he would leave the work area and Napgezek would not know where he was. It would take him 15 minutes instead of 3 to pick up a part from the parts department. Another problem was he would not follow orders as to his work. For instance, if Napgezek gave him a repair order with instructions to do only certain items, Orlowski would proceed to do additional items. Sometimes it would be work that Napgezek wanted to assign to more experienced mechanics. Sometimes it would be work on a car that had to be delivered at the end of the day and there was not enough time to finish the particular job. According to Napgezek, he would discuss these problems with Orlowski and the problems would be solved temporarily. Then, Orlowski would return to the same conduct.

Peterson testified that Orlowski was reluctant to follow her orders. She also testified that all of the mechanics gave her difficulty in this regard. Primarily, the problem was that she would give an order and they would delay taking the work order. According to her, Orlowski would walk away but return in no more than 3 minutes and pick up the work order and the keys, except on one occasion on February 9

or 10. On that morning she assigned him a job. He left the area and returned approximately 45 minutes later.

Peterson testified that she did not report that specific incident, but at the end of the day she told Yarish that she was going to quit if she continued to receive the treatment that she had from all the mechanics that day. She does not recall if she mentioned the 45 minutes incident specifically. She testified that she did mention Orlowski but does not clarify in what regard.

In response to a leading question, she adopted counsel's characterization that Orlowski gave her the hardest time; however, prior to this question, she testified:

Q. Would you say that your treatment there was the same by all mechanics as Mr. Orlowski, or was his more difficult or how would you characterize that?

A. Well, he was, like I said, [Orlowski] kidded a lot and lots of times you couldn't tell if he was kidding or if he was serious; but I would say overall after Jerry [Filtz] left, Terry was one of them that likes to kid the most to me or that kidded me.¹⁷

She further testified that she never had any difficulty keeping track of Orlowski during the day, and that since he left, she does not feel that there has been any easing of the problem she has with the mechanics. Hohlstein testified that once in November, Peterson sought his assistance, stating that she could not get Orlowski to leave the parts department and return to work. The parts manager was not in and apparently Orlowski had taken it upon himself to assist a customer with a parts order.

Orlowski's time record for 1977 and 1978 shows that he was tardy numerous times throughout the period and was absent once in July, once in August, and one time each in November, December, January and February.¹⁸ He admits that on four or five occasions he did not call in when he was absent. Respondent contends that, with the exception of Jerry Filtz, Orlowski had the worst attendance record of any employee in the service department. However, Filtz was an employee that Respondent discharged in December in what Niles described as a shakeup made as a result of the decline in profit which Respondent attributed to union activity.

According to Napgezek, the only time he talked to Orlowski about his absences and tardiness was in November and December when they were discussing his request for a wage increase and twice in January. One of those times was in January when he reported to work and asked to go home. He further testified that during the last two discussions he told Orlowski if he did not improve his attendance record he would be discharged.

As to damaging vehicles, there is no dispute that Orlowski damaged vehicles on several occasions:

August 1977 or October 1977—following a road test by Orlowski, engine was damaged—\$600 to \$700 damage.¹⁹

August 1977 or October 1977—damaged car when towing it into the shop.

¹⁷ Peterson testified that she and Orlowski were personal friends.

¹⁸ His time record is not complete. He admits that the gaps may reflect absences.

¹⁹ Orlowski denies responsibility for this incident and the hoist incident below but does not deny that it occurred.

November 1977—left key buzzer on in vehicle, resulting in a dead battery.

Fall 1977—damaged door by raising hoist.

Fall 1977—broke master cylinder.

December 1977—left dome light on all night in vehicle.

December 1977—stripped oil drain plug.

January 28, 1978—cracked windshield.

February 10, 1978—damaged grille on tow-in.

Additionally, according to Orlowski, on occasion when performing undercoating, a drill bit has dented the door. He admits that during his period of employment he was responsible for some degree of damage to vehicles on 8 or 10 occasions.

It is also undisputed that other mechanics have damaged vehicles and received no disciplinary action nor were they required to pay for the damage. Thus, Phil Copeland punctured a hole in a gas tank, resulting in damages of \$50 to \$75; Kevin Harris scraped the rear quarter panel of a vehicle; Lori Becker did \$50 to \$60 damages to a radiator and fan shroud and on another occasion cracked a timing chain cover; while Dick Wodlarski, Jr., was welding under a dashboard, the wires caught fire; in April 1978, Dick Wodlarski cracked a windshield and ripped a vinyl car top; prior to March 1977, Fred Haufensberger and Steve White each forgot to put oil in cars and burned out engines; and in the summer of 1977, Dean Walker did \$800 in damages to the fender on a new vehicle as he was pulling it off the wash rack.

With one exception no discipline or charges to the employees resulted from these incidents. Yarish testified that Walker was required to pay for the damage he caused. However, the record does not reveal the circumstances surrounding this incident. Other employees, including Orlowski, have been required to repair damages on their own time. Orlowski was not given this option as to the February incidents. Moreover, he was not informed prior to February 17 that he would be charged for the windshield he cracked on February 7.

As to the derogatory statements, Hohlstein testified that in December, Orlowski remarked to some fellow employees, while they were at a bowling alley, that Napgezek and Peterson did not know what they were doing. Also, in apparent reference to something Niles had previously said, Orlowski said they were going to get Niles someday. Hohlstein reported these statements to Yarish. Orlowski testified that he said Napgezek was not doing the job he should. As to Niles, Orlowski testified that he may have said he would get what he had coming from Niles somewhere along the line. This was in the context of a discussion about Niles' reaction to the union activity.

B. Conclusions

I credit Orlowski that he was told that the 50-cent increase would be effective immediately and the 5-percent increase would be effective on December 5. He impressed me as an honest witness; his testimony is generally consistent and is corroborated in many respects. On the other hand, the testimony of Napgezek and Yarish was inconsistent and in a number of instances conflicted with each

other. Thus, Napgezsek first testified that he spoke to Yarish regarding the possibility of terminating Orlowski in November and December and at the same time discussed granting him a raise. Later, he testified that they discussed the raise, not termination. Further, he insists that on February 2 he called Orlowski every hour on the hour and could not reach him until noon. Yet, Peterson credibly testified that she heard him talking to Orlowski around mid-morning. This is more consistent with Orlowski's testimony.

Yarish testified that he, Napgezsek, and Niles discussed the possibility of terminating Orlowski for quite some time on February 10, and both he and Napgezsek recommended that Orlowski be discharged. Yet, Napgezsek was not even at work on February 10. Then when Yarish was recalled as Respondent's witness, he testified that the discussion was between him and Niles and was very brief. Yarish also testified that on February 3 he told Orlowski that the next time he "screwed up" he would be terminated, and further testified that he meant do anything wrong. Orlowski testified that he and Yarish discussed not calling in. When Orlowski said he would like to consider this as a warning and he would know what to expect next time, Yarish said if it happened again Orlowski would be terminated. This clearly appears to refer to absenteeism. Further, Napgezsek testified that Yarish told him he had warned Orlowski and more than likely he would be terminated if "he had another incident like this." This is more consistent with Orlowski's version. It appears that Yarish is now recounting the conversation to make it a basis for the February 10 action.

Napgezsek testified that he instructed Peterson to start keeping personnel notes on mechanics in December. Peterson testified that it was the day after the election, January 4, and the initial entry on each record was made on January 4.

Accordingly, I find that on November 22, Orlowski was promised an increase of 50 cents an hour in his base guarantee pay effective immediately and an increase from 45 percent to 50 percent in his flat rate pay effective on December 5. I further find that Hohlstein was instructed to make these changes in pay rate. Yarish admits that he instructed Hohlstein to withhold the pay increase and that the reason for this was the employees' union activities and the representation petition filed as a result thereof. In these circumstances, I find that Respondent violated Section 8(a)(1) and (3) of the Act by delaying the increase in Orlowski's guaranteed pay to January 6, and by failing to grant the increase in flat rate pay.

I also find that Respondent violated Section 8(a)(1) and (3) of the Act by the institution of a procedure for maintaining a written record of adverse conduct of unit employees. I reject Respondent's argument that this resulted from a drop in productivity. The decline in productivity started at least by September. Yet, no action was taken until the day after the election. In the context of Respondent's expressed hostility to the Union and collective bargaining, and its willingness to punish employees in retaliation for their selection of the Union as collective-bargaining representative as reflected by the January 3 cancellation of work-nights, it is apparent that Respondent's conduct was illegally motivated.

As to Orlowski's discharge, it is readily apparent that he was far from an ideal employee. Yet, Respondent was tolerant of his transgressions until he proved himself a disloyal

employee. Orlowski was promised a wage increase. As soon as the employees' union activities became known, the wage increase was withheld. Orlowski had made known to Napgezsek his union sympathies and Yarish admits that Napgezsek informed him of such sympathies. Further, the embellishing of the alleged reasons for discharging Orlowski, the inconsistency of the testimony as to the discussion which culminated in the decision to discharge Orlowski, are all indicative that the reason given by Respondent for Orlowski's discharge is pretextual.

In these circumstances, and in the context of Respondent's hostility to the Union, and its attempts to avoid collective bargaining and to bypass the Union, I find that Orlowski was discharged in retaliation for his union activities in violation of Section 8(a)(1) and (3) of the Act.

I also find that he received disparate treatment in that the cost of the cracked windshield was deducted from his paycheck.²⁰ I further find, in the circumstances set forth above, that this conduct was violative of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. 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 discharging Terrance Orlowski, by refusing to grant him a previously promised wage increase, by discriminatorily instituting a procedure for maintaining a written record of the adverse conduct of employees, and by discriminatorily requiring Orlowski to pay for damages he caused to a vehicle, Respondent has violated Section 8(a)(1) and (3) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

Having found that Respondent discharged and otherwise discriminated against Terrance Orlowski in violation of Section 8(a)(1) and (3) of the Act, it is recommended that Respondent offer Orlowski immediate and 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 and privileges and make him whole for any loss of pay he may have suffered as a result of the discrimination against him by payment to him of a sum of money equal to that which would have been earned as wages during the period from the date of his discharge to the date on which Respondent offers reinstatement less his net earnings, if any, during the said period, with interest thereon to be computed in the manner set forth in *F. W.*

²⁰ I have fully considered Niles' testimony that damages were deducted from employees' paychecks in his other facilities.

Woolworth Company, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).²¹

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²²

The Respondent, East Towne Chrysler Motors, Inc., Stevens Point, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because of their union or other protected concerted activities.

(b) Withholding wage increases from employees because of their union activities.

(c) Discriminatorily requiring employees, because of their union activities, to pay for damages they caused to vehicles.

(d) Discriminatorily instituting a procedure for maintaining a written record of employees' adverse conduct.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Offer Terrance Orlowski immediate and full reinstatement to his former or substantially equivalent job and make him whole for any loss of earnings he may have suf-

fered by reason of Respondent's discrimination against him in the manner and to the extent set forth in the section herein entitled "The Remedy."

(b) Expunge from its records all memoranda of adverse conduct of its employees made commencing January 4, 1978.

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

(d) Post at its facility in Stevens Point, Wisconsin, copies of the attached notice marked "Appendix A."²³ Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the settlement stipulation attached hereto as Appendix B [omitted from publication] be approved by the Board and that an Order issue as set forth therein.

²¹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

²² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²³ In the event that 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."