Five Star Manufacturing, Inc. *and* Teamsters Local Union No. 245, affiliated with International Brotherhood of Teamsters. Cases 17–CA–22626, 17–CA–22757, 17–CA–23037, and 17–CA–23129

December 27, 2006

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On May 4, 2006, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel filed an answering brief.[1]

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

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

The judge found, and we agree for the reasons set out in his decision, that the Respondent violated Section 8(a)(3) and (1) by discharging employee David Tanksley on February 11, 2004; Section 8(a)(3), (5), and (1) by confiscating employees' keys to its facility and changing employees' work schedules on February 12, 2004; Section 8(a)(3), (4), and (1) by reassigning Tanksley to different and more difficult work on April 19, 2004, and to a different work location on May 20, 2004; and Section 8(a)(5) and (1) by continuing to award or deny discretionary bonuses and vacation pay after the Union's certification.[4] We also adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Tanksley for a second time on April 26, 2005.[5]

AMENDED REMEDY

The judge recommended a narrow cease-and-desist order, enjoining the Respondent from in "any like or related manner" interfering with, restraining, or coercing

[1] The Respondent excepted to the judge's findings that it violated Sec. 8(a)(3) and (1) by discharging employee David Tanksley on February 11, 2004, and on April 26, 2005; Sec. 8(a)(3), (4), and (1) by moving Tanksley to a different job on April 19, 2004, and to a different work area on May 20, 2004; Sec. 8(a)(3), (5), and (1) by requesting that certain employees return their keys to the Respondent's facility and changing the employees' work schedule on February 12, 2004; and Sec. 8(a)(5) and (1) by continuing to award or deny discretionary bonuses and vacation pay after the Union's certification.

In addition, the Respondent stated generally that it took exception "to each and every adverse finding, reference, and conclusion of the [judge]'s decision." In accord with precedent and the Board's Rules and Regulations, we will not treat that statement as expanding upon the specific exceptions stated in the foregoing paragraph, but will deem the Respondent to have waived any other exceptions. Sec. 102.46(b)(2) of the Board's Rules and Regulations ("Any exception . . . not specifically urged shall be deemed to have been waived."); *ACS, LLC*, 345 NLRB 1080, 1080 fn. 3 (2005).

[2] 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that those contentions are without merit.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall also conform the notice to the Order. The Order and notice recite the unit description as alleged in the complaint and admitted in the Respondent's answer.

[4] We agree with the judge that, once the Union was certified as the employees' bargaining representative, the Respondent could no longer exercise its sole discretion in awarding or denying bonuses and vacation pay to unit employees. In adopting the judge's finding, we additionally rely on *Goya Foods of Florida*, 347 NLRB 1118, 1120 (2006). There, in defending an 8(a)(5) unilateral change allegation, the employer argued that it had no obligation to bargain with the union concerning changes to drivers' routes after the union's certification because it was maintaining its past practice. The Board rejected that argument, finding that the employer failed to establish a past practice that would justify making the changes without bargaining. Instead, the employer there, like the Respondent here, relied upon a historic right to act unilaterally, as distinct from an established past practice of doing so. That right to exercise sole discretion, however, "changed once the [u]nion became the certified representative." Id.

[5] The judge found that the General Counsel satisfied his initial *Wright Line* burden to show that Tanksley's union activity was a substantial or motivating factor in the Respondent's decision to discharge him on April 26, 2005. The judge also found, primarily on the basis of his credibility determinations, that the Respondent failed to show that it would have discharged Tanksley even in the absence of his union activities. We affirm those findings, and agree with the judge that the reasons proffered by the Respondent for Tanksley's discharge were pretextual, thus leaving intact the inference of wrongful motive established by the General Counsel's initial showing. *North Hills Office Services*, 346 NLRB No. 96, slip op. at 4 fn. 18 (2006). In doing so, however, we do not pass on any implication in the judge's decision that Tanksley was engaged in conduct protected by the Act when he told another employee to shut up. Specifically, we find it unnecessary to pass on the judge's statement that "Tanksley telling [Nicole] Newberry to shut up, under the circumstances existing here, was not so egregious that he lost the protection of the Act."

In addition to the evidence of pretext found by the judge, the record also showed that employee Wurtz was only orally warned for saying the "'f' word" to his immediate supervisor on February 6, 2004. While the Respondent's position was that Tanksley was discharged for telling an office worker to "shut up," we find, after comparing the two incidents, that the Respondent treated Tanksley more harshly than another employee who engaged in more serious misconduct. Coupling this with the circumstances of Tanksley's discharge, particularly the numerous unexcepted-to and contemporaneous unfair labor practices directly targeted at Tanksley, we find that the Respondent's discharge of Tanksley for saying "shut up" to another employee was pretextual. Cf. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1183–1184 (2004) (finding that employer did not satisfy its rebuttal burden to show that discharge was justified where it treated discharged employees more severely than other employees who engaged in more serious misconduct).

employees in the exercise of the rights guaranteed them by Section 7 of the Act. In *Hickmott Foods*, 242 NLRB 1357, 1357 (1979), the Board stated that a broad cease-and-desist order, enjoining a respondent from violating the Section 7 rights of employees "in any other manner," is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." In either situation, the Board reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests "an attitude of opposition to the purposes of the Act to protect the rights of employees generally," which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights. *Postal Service*, 345 NLRB 409, 410 (2005).

When the Respondent was initially informed of its employees' efforts in the Union's organizing campaign, Jim Woodward, the Respondent's president, predicted that the employees were "finding themselves a way out of there."[6] Faced with the Union's successful organizing campaign, the Respondent engaged in a wide variety of egregious unfair labor practices, most of which were committed by Woodward. He followed through on his earlier prediction by discriminatorily discharging union supporter Tanksley on the day of the election, within minutes of the close of balloting. The morning after the election, the Respondent changed the locks on its facility, which denied employees the early morning access that they had enjoyed for many years prior to the election, and Woodward demanded that employees return their keys to the building and unilaterally changed employees' work schedules and breaktimes, all without bargaining with the Union and in retaliation for the employees' selection of the Union as their bargaining representative. During the course of the morning after the election, Woodward also made statements to employees implying that the Union's election victory had caused the Respondent to confiscate their keys and that rejection of the Union would improve working conditions. Following the Union's certification, Woodward continued awarding and denying employees discretionary bonuses and vacation pay without bargaining with the Union.

Although the Respondent later reinstated Tanksley to his former position, albeit without backpay, the Respondent did so only after he filed a charge of discrimination with the Board. Upon Tanksley's reinstatement, Woodward discriminatorily reassigned him to more onerous work and to a different work location, both in retaliation for his prior union activity and because he filed a charge with the Board. The Respondent also began recording any infraction by Tanksley, however minor, in order to find some reason to discharge him. The Respondent then began discriminatorily toying with Tanksley when he attempted to pick up his paychecks, which precipitated his telling another employee to "shut up," which in turn led to Tanksley's second discriminatory discharge.

The Respondent's unlawful conduct continued when it unilaterally implemented new disciplinary procedures, which were used for the first time in Tanksley's second discharge. During the course of this discipline, Woodward denied Tanksley his *Weingarten* rights by refusing to permit a union representative to participate in Tanksley's disciplinary hearing, refused to bargain with the Union concerning procedures used to discipline unit employees, and withdrew recognition from the Union.[7]

Given the serious and wide-ranging nature of the Respondent's violations, we find that the Respondent's misconduct demonstrates a general disregard for its employees' Section 7 rights, justifying imposition of a broad cease-and-desist order. *Hickmott Foods*, supra. Accordingly, we will order the Respondent to cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act. See, e.g., *Flamingo Hilton-Laughlin*, 324 NLRB 72 fn. 3 (1997) (sua sponte issuing broad order instead of recommended narrow order in light of the respondent's repeated and egregious violations of the Act), enfd. in pertinent part review granted in part 148 F.3d 1166 (D.C. Cir. 1998); *Western Plant Services*, 322 NLRB 183 fn. 1 (1996) (egregious and widespread misconduct justified broad order).

Although the Respondent does not have a prior history of violations of the Act, we find that a broad order is nevertheless appropriate. Our remedial focus here is not the Respondent's proclivity to violate the Act, but rather the egregious and widespread nature of its misconduct. The mere fact that the Respondent has no prior history of violations does not, in and of itself, undermine the necessity for a broad order. *Trailmobile Trailer, LLC*, 343 NLRB 95 fn. 2 (2004); *NLRB v. Blake Construction Co.*, 663 F.2d 272, 285–286 (D.C. Cir. 1981) ("[T]hat the Company has no prior record of NLRB violations does not, in itself, dissipate the egregiousness of the conduct

[6] We recite this statement merely to provide context for the Respondent's subsequent misconduct. It was neither alleged nor found to be a violation of Sec. 8(a)(1). The judge, however, did find that it was evidence of the Respondent's animus toward its employees' Sec. 7 activities, and there are no exceptions to that finding.

[7] The Respondent did not specifically except to many of these unfair labor practice findings.

involved in this proceeding."), enfg. in pertinent part 245 NLRB 630 (1979).[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Five Star Manufacturing, Inc., Crane, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restraining and coercing employees by making statements that implied the selection of the Teamsters Local Union No. 245, affiliated with International Brotherhood of Teamsters, as the bargaining representative of unit employees caused Respondent to confiscate employees' keys to the facility and that rejection of the Union by unit employees would improve working conditions.

(b) Demanding that a union representative leave the facility and telling employees that the Union could not represent them in disciplinary matters.

(c) Telling employees that the Union was not their collective-bargaining representative and that the Respondent was a nonunion employer.

(d) Discharging or suspending employees, moving them to different and more difficult job positions, moving them to different work locations, refusing to allow them to complete their regular work shifts, changing their work schedules and breaktimes, confiscating their keys to the facility, changing rules and procedures regarding their receipt of paychecks, changing rules and procedures regarding their discipline and discharge, or otherwise discriminating against any employee for supporting the Union or any other labor organization, for engaging in other protected concerted activities, or for filing a charge with the Board.

(e) Changing the work schedule and breaktimes of unit employees and confiscating their keys to the facility without providing the Union notice and an opportunity to bargain.

(f) Awarding or denying discretionary bonuses and vacation pay to unit employees without providing the Union notice and an opportunity to bargain.

(g) Changing its rules, requirements, and procedures regarding the receipt of unit employees' paychecks without providing the Union notice and an opportunity to bargain.

(h) Changing its rules, requirements, and procedures regarding the discipline and discharge of unit employees without providing the Union notice and an opportunity to bargain.

(i) Refusing the Union's request to bargain collectively regarding the discipline and discharge of unit employees.

(j) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production employees, including Welders, Fabricators, Shipping and Wash employees, employed by the Respondent at its facility located at 104 Industrial Drive, Crane, Missouri, but EXCLUDING office clerical employees, guards, managerial and supervisors as defined by the Act, and all other employees.

(k) In any other 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) Restore the terms and conditions of employment which were in effect and applicable to employees in the above-described unit before the Respondent unilaterally began changing those terms and conditions of employment on February 12, 2004, in the manner set forth in the remedy section of the judge's decision.

(b) Make whole all unit employees for losses suffered as a result of those changes, and as a result of the denial of bonuses and vacation pay after October 25, 2004, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, offer David Tanksley 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.

(d) Make David Tanksley 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 judge's decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and suspension of David Tanksley, and within 3 days thereafter, notify him in writing that this has been done and that the discharges and suspension will not be used against him in any way.

(f) Recognize and, on request, bargain with the Union as the exclusive representative of employees in the unit

[8] In joining his colleagues in issuing a broad order, Member Schaumber agrees, as discussed above, that the Respondent has engaged in a widespread and persistent pattern of attempts, by varying methods, to interfere with legislatively protected rights. Additionally, he agrees that this pattern of misconduct demonstrates a general disregard for fundamental statutory rights and raises the threat of continuing and varying efforts to frustrate those rights in the future. Cf. *Postal Service*, supra at 412–415 (Member Schaumber dissenting).

described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(g) 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.

(h) Within 14 days after service by the Region, post at its Crane, Missouri facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2004.

(i) 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.

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 restrain and coerce you by making statements that imply that the selection of the Teamsters Local Union No. 245, affiliated with International Brotherhood of Teamsters, as your bargaining representative caused us to confiscate your keys to the facility and that your rejection of the Union would improve your working conditions.

WE WILL NOT demand that a representative of the Union leave the facility, or tell you that the Union cannot represent you in disciplinary matters.

WE WILL NOT tell you that the Union is not your collective-bargaining representative and that we are a nonunion employer.

WE WILL NOT discharge you, suspend you, move you to a different and more difficult job position, move you to a different work location, refuse to allow you to complete regular work shifts, change your work schedule or breaktimes, confiscate your keys to the facility, change the rules and procedures regarding receipt of your paychecks, change the rules and procedures regarding your discipline and discharge, or otherwise discriminate against any of you for supporting the Union or any other labor organization, for engaging in other protected concerted activities, or for filing a charge with the Board.

WE WILL NOT change your work schedule and breaktimes or confiscate your keys to the facility without notifying and bargaining with the Union.

WE WILL NOT award or deny discretionary bonuses and vacation pay to you without notifying and bargaining with the Union.

WE WILL NOT change the rules, requirements, and procedures regarding the receipt of your paychecks without notifying and bargaining with the Union.

WE WILL NOT change the rules, requirements, and procedures regarding the discipline and discharge of employees without notifying and bargaining with the Union.

WE WILL NOT refuse the Union's request to bargain collectively regarding the discipline and discharge of employees.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production employees, including Welders, Fabricators, Shipping and Wash employees, employed at our facility located at 104 Industrial Drive, Crane, Missouri, but EXCLUDING office clerical employees, guards,

[9] 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."

managerial and supervisors as defined by the Act, and all other employees.

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

WE WILL restore the terms and conditions of employment which were in effect and applicable to employees in the bargaining unit before we unilaterally changed the terms and conditions of employment beginning on February 12, 2004.

WE WILL make whole, with interest, all unit employees for losses suffered as a result of those unilateral changes.

WE WILL, within 14 days from the date of the Board's Order, offer David Tanksley 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 and privileges previously enjoyed.

WE WILL make David Tanksley whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and suspension of David Tanksley, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharges and suspension will not be used against him in any way.

WE WILL recognize and, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

FIVE STAR MANUFACTURING, INC.

Lyn R. Buckley, Esq. for the General Counsel.
Jason N. Shaffer, Esq., of Springfield, Montana, for Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Springfield, Missouri, on November 29 and 30, and December 1, 2005.[1] The charge in Case 17–CA–22626 was filed by Teamsters Local Union No. 245, affiliated with International Brotherhood of Teamsters (the Union) against Five Star Manufacturing, Inc. (Respondent or Five Star) on February 23, 2004, and amended on April 1, 2004. A complaint issued on April 21, 2004. The charge in Case 17–CA–22757 was filed by the Union against Five Star on June 7, 2004, and a consolidated complaint issued on July 23, 2004. The charge in Case 17–CA–23037 was filed by the Union against Five Star on February 14, and amended on April 25. A second consolidated complaint issued on April 29. The charge in Case 17–CA–23129 was filed on May 20, and a third consolidated complaint (hereinafter referred to as the complaint) issued on July 27.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by (a) restraining and coercing employees by making statements that implied the selection of the Union as the bargaining representative of the unit employees[2] caused Respondent to confiscate employees' keys to the facility, and that rejection of the Union by unit employees would improve the working conditions of unit employees, (b) demanding that a union representative leave the facility and telling employees that the Union could not represent employees in disciplinary matters, (c) telling employees by letter that the Union was not their collective-bargaining representative and the Respondent was a nonunion employer, (d) discharging its employee David Tanksley on February 11, 2004, (e) moving Tanksley to a different and more difficult job on April 19, 2004, after reinstating him, (f) refusing to permit Tanksley to complete his regular work shift on May 19, 2004, (g) moving Tanksley to a different work location on May 20, 2004, (h) issuing disparate rules, requirements, and procedures regarding receipt of Tanksley's paycheck in mid-March 2005 and on various dates thereafter, (i) issuing disparate rules, requirements, and procedures regarding disciplinary actions issued to Tanksley's on April 7, 13, and 18, (j) suspending Tanksley on April 7, and issuing a notice of possible discharge to Tanksley, (k) issuing a further notice of suspension and possible discharge to Tanksley on April 13, (l) issuing a preliminary notice of suspension and possible discharge to Tanksley on April 18, (m) discharging Tanksley on April 26, (n) on February 12, 2004, changing the work schedules and break time of its employees, and confiscating the keys to the facility that had been in the possession of employees Noel Henry, Kerry Stultz, and Jamie Holt, (o) without prior notice to the Union and without affording the Union the Union an opportunity to bargain, on February 12, 2004 changing the work schedule and break times for employees in the unit, and confiscating keys to the facility that had been in the possession of certain Unit employees, denying annual bonuses and vacation payments to unit employees since mid-October 2004 and on various dates thereafter, changing its rules, requirements, and procedures regarding the receipt of employees' paychecks since mid-March, and on April 7, 13, and 26, changing its rules, requirements, and procedures regarding the discipline and discharge of employees, (p) since April 13, failing and refusing to bargain collectively as requested by the Union regarding the discipline and discharge of

[1] All dates are 2005, unless otherwise indicated.

[2] The complaint alleges that on February 11, 2004, a representation election was held and on April 19, 2004, the Union was certified as the exclusive collective-bargaining representative of the unit since February 11, 2004; and that the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All full-time and regular part-time production employees, including Welders, Fabricators, Shipping and Wash employees, employed by Respondent at its facility located at 104 Industrial Drive, Crane, Missouri, but EXCLUDING office clerical employees, guards, managerial and supervisors as defined by the Act, and all other employees.

unit employees, and (q) on April 18 withdrawing recognition from the Union as the exclusive collective-bargaining representative of the employees in the unit.

The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by the conduct described in (d) - (n) in the next preceding paragraph. Additionally, the complaint alleges that Respondent violated Section 8(a)(1) and (4) of the Act by the conduct described in (e) through (m) in the next preceding paragraph because Tanksley was named in charges filed with the National Labor Relations Board (Board) and he gave testimony to the Board in the form of an affidavit. And finally, the complaint also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by the conduct described in (o) through (q) in the next preceding paragraph.

The Respondent denies violating the Act as alleged.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures aluminum ramps[3] at its facility in Crane, Missouri, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Missouri. 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

Jim Woodward, who has been part owner of Respondent since it was formed in 1984 and has been president of Respondent since 1993, testified that he took charge of the company from his father, Doyle Woodward, in 1993; that his mother, Lorene Woodward, has been part owner and a manager of Respondent since 1984; that his wife Nancy Woodward has supervised some of Respondent's employees since about 1995; that Respondent has four supervisors, namely Charles R. (Rick) Looney Sr., who is the floor supervisor, Brenda Smith, who was a shipping supervisor, and Dustin Woodward, who (a) is his son, (b) became part owner of the Respondent sometime after February 11, 2004, and (c) is the washroom and warehouse supervisor; that his wife and mother have authority to hire, fire, discipline and reward employees, but he has final say; and that his daughter, Nicole Newberry, who became part owner of Respondent after February 11, 2004, works in Respondent's main office along with his mother and wife.

Noel Henry started working as a welder for Respondent in 1991. He retired on January 10. Henry testified that he worked with Tanksley, who was working at the Respondent when Henry started. According to Henry's testimony, Tanksley did "a neat job of welding" (Tr. p. 20); he did good work, and while the welds on some of the welders' arched ramps would break when they were rolled, Tanksley's never did break.

Tanksley testified that he began working for Five Star on March 5, 1992; that at that time Doyle Woodward, ran the operation; that the first year at Five Star Doyle Woodward asked him to work 10 hours a day sometimes 6 days a week; that a Government agency became involved with respect to the overtime; that subsequently Five Star's operation moved to a new facility and Jim Woodward became his boss; that he asked Jim Woodward if the welders should have received overtime and Jim Woodward told him that they should; that approximately 1 year later he asked Jim Woodward about his overtime pay and Jim Woodward told him that he had not earned any; that, after the overtime problem, Jim Woodward told the welders that they could work all the hours they wanted but they could not show more than 40 hours on their timecard; that when Jim Woodward switched him back to piece rate he was doing twice the amount of welding for one-and-a-half of the amount of money he previously received; and that he also had a verbal exchange with Jim Woodward over a medical insurance check that he received and Jim Woodward wanted.

Ben Lawson, who owns OSHA MO, Incorporated, testified that Five Star is one of his approximately 165 clients; that he advises his clients that his primary goal is to keep their employees safe and his secondary goal is to keep the client within Federal and State regulations; that he began representing Five Star in late 2001; that for Five Star he provided safety and health programs, the appropriate manual, advice on audits of the building and the equipment, and services for personnel training, and personnel problems regarding safety and health issues; and that his company performed routine or random inspections of the plant, speaking with the employees.

On cross-examination Lawson testified that he believed that he discussed personnel policies or a personnel handbook with Jim Woodward in 2001; that he probably discussed a handbook with Jim Woodward in 2002 but he was not sure whether they did or not; and that he believed that he supplied a generic handbook to Jim Woodward but he could not recall if he did this in 2001.

Henry testified that welders were allowed to work all the hours that they wanted but they had to keep it at 40 hours or under on their timecard; that Jim Woodward, who managed the facility, told the welders to do it that way; that the welders were not paid an hourly rate but rather they were paid $1.80 a piece; that when Respondent's welders did not work on a holiday some of them did not work on the following Saturday; that welders were required to clean the welding rooms but they were not paid for the time they spent cleaning; that on occasion welders were required to work on equipment but they were not paid for the time they spent working on equipment; that on occasion welders had to wait for parts and they were not paid for this time; that occasionally welders had to go get parts and they were not paid for that time; and that welders had to purchase their own welding leads which cost somewhere in the neighborhood of $150.

Dale Leuschen, who welded the cross members (rods) and the fingers on the end of the arch ramps, testified that he was a finisher; that Tanksley welded the frames first on the arch

[3] The ramps are used to load motorcycles, riding mowers, and ATVs, etc. onto pickup trucks or other vehicles.

ramps; that after Tanksley welded the frames they were rolled and then he, Leuschen, received them for the finishing welds; that sometimes he, Ron Atkinson, and Andy Anders did the finishing welds on the arch ramps; that Tanksley was the only welder who did the framing unless someone on the night shift did that work; and that for a long time it was just primarily Tanksley doing the frame welding. On redirect Leuschen testified that he could tell if Tanksley welded the frame because Tanksley had more experience and Tanksley's welds were better, they looked better, and everything was level; and that on the non-Tanksley welded frames he might observe missed welds and when he did he welded in the holes.

In April 2003 Tanksley had a heart attack. Tanksley testified that before the heart attack he worked from about 5:15 a.m. until 3 or 3:30 p.m.; that Jim Woodward told him that he needed 200 frames welded per day and the aforementioned hours are what it took for him to do this; and that after the heart attack he reduced his hours to eight a day (5:30 a.m. to 2 p.m. without an afternoon break) and this resulted in reduced production. On cross-examination Tanksley testified that other welders could out produce him but there was a difference in their welds and Jim Woodward stated that he did good work; that Jim Woodward said that he wanted 200 frames a day; and that he met this goal by working 8.5 to 9 hours a day, but after his heart attack his production dropped to approximately 175 a day.

Jim Woodward testified that he might have had a night crew before Tanksley's heart attack.

Aaron Busby, who has worked as a welder for Five Star for different periods beginning in 2000 and was an employee of the Respondent at the time of the trial herein, testified on cross-examination that he was asked to come off night shift and to take Tanksley's place welding frames when Tanksley had a heart attack; that he has been asked at Five Star to do different types of welds; and that he was supposed to go back to the night shift when Tanksley returned to work but he quit instead.

The General Counsel's Exhibit 2 reads as follows:

NOTICE

AS OF TODAY OCT. 15, 2003

FOR EACH *UNEXCUSED* 2 DAYS ABSENCE
—YOU LOSE 1 VACATION DAY—

AFTER 12 ABSENCES
— YOU LOOSE ALL VACATION
AND YEARLY BONUS

* Unexcused absence—no doctor's note, no phone call (Jim [Woodward] will decide if excused or not), no prearrangement with JIM, etc
*Jim Woodward has final say whether excused or unexcused. [Emphasis in original]

Henry testified that he saw this notice posted on the bulletin board by the timecards at Respondent's facility sometime after October 1, 2003. On cross-examination Henry testified that he saw this notice posted before the union election; that he saw the notice the first day it was posted; that after he saw this notice he realized that the company had an attendance policy; and that before this posting he did not believe that the company had an attendance policy with respect to welders, who worked on a piece basis.

Tanksley testified that welders led the union organizing drive in that they held a couple of meetings, they passed out union authorization cards to be signed, and they discussed the Union amongst themselves and with other employees; that he became aware of the union activity in November 2003, he attended two union meetings in welder Leuschen's home and the following were present at the first union meeting he attended: Randy Looney, Rick Looney Sr., Rick Looney Jr., Brenda Smith, Jamie Holt, Jamie's brother, David Hilton, and Helen Hilton; that it was determined that Smith, Rick Looney Sr., and Randy Looney were supervisors and they did not vote in the election; that at the second union meeting he attended Truman Zinn showed up about 5 to 10 minutes into the meeting; that Zinn appeared to be pretty agitated; and that apparently no one had consulted with Zinn about the Union because it appeared that Zinn and Jim Woodward were good buddies and "we weren't wanting this to get back to Jim before we decided what we were going to do" (Tr. p. 212). On cross-examination Tanksley testified that at the time of the union organizing there were nine welders; that he believed that seven or eight welders were involved but he only had personal knowledge that Leuschen hosted the two meetings he attended and Leuschen passed out union authorizing cards; that he did not pass out union authorization cards, or host union meetings, or wear a union pin, or tell Jim Woodward that he supported the Union; that he did speak at the two union meetings in favor of the Union; that he wanted his involvement with the Union to be kept confidential; and that he did not tell Truman Zinn, who attended a union meeting, that he was going to vote for the Union.

Harvey Ritter, a union organizer and assistant business representative, testified that he attended two of the organizing meetings at Leuschen's house; that Richard Wurtz asked him to come to the meetings; that he thought the union authorization cards were passed out by Wurtz, Leuschen, and Ron Atkinson; and that Tanksley expressed interest in the Union at one of the organizing meetings he, Ritter, attended, and Tanksley asked questions.

Leuschen, who worked as a welder for Respondent from 1995 to January 2005, testified that he had a couple of union organizing meetings at his house; that the welders were primarily responsible for bringing in the Union; and that Randy Looney, Rick Looney, and Brenda Smith attended a union meeting at his house.

On December 4, 2003, Ritter, who was in his office, received a telephone call from Jim Woodward. Ritter testified that Jim Woodward asked him what the paperwork, which had his name on it and he received in the mail, was about; that he told Jim Woodward that it reflects that Five Star employees had expressed interest in joining the Teamsters Union and organizing; that Jim Woodward then said that "he didn't want any Teamsters in his plant and all his employees were doing was finding themselves a way out of there by doing that" (Tr. p. 349); that Jim Woodward then said that he was going to call his attorney;

and that this telephone conversation occurred right after the Union had filed a petition for an election.

Jim Woodward testified that Tanksley did not work the Saturday after the New Years Day, January 1, 2004, he did not call in, and he never explained why he did not come in. Tanksley conceded that it was posted that the employees were to work on Saturday January 3, 2004, he did not work that Saturday, he had been asked to work Saturdays before and refused, he was not disciplined in the past, and no one told him that they had a problem with his absence on Saturday January 3, 2004. Jim Woodward sponsored Respondent's Exhibit 10 which reads as follows: "JANUARY 3, 2004, David Tanksley did not show up for work. No phone call or any type of notice. Today was a mandatory Saturday." The document is signed by Jim Woodward, his mother and his wife. Jim Woodward testified that he considered this conduct insubordination and Respondent's Exhibit 10 was included in Tanksley's personnel file. On cross-examination Jim Woodward testified that according to General Counsel's Exhibit 13, in 2004 Aaron Busby missed 28 days of work and the heading on the sheet is unexcused absences; that he had no idea if anything like Respondent's Exhibit 10 was placed in Busby's file for any one of the 28 absences;[4] and that the 28 absences were not insubordination, "[n]ot that I know of" (Tr. p. 524). On redirect Jim Woodward testified that postings were put up throughout the building for a mandatory work Saturday on January 3, 2004; that this is not done for every work day; that this is an unusual event taken by management; that to his knowledge no other welder failed to appear for work on January 3, 2004; and that Busby's production was a lot better than Tanksley's.

On January 15, 2004, Tanksley arrived at work at about 5:15 a.m. Tanksley testified that there were no parts available and the floor crew did not come to work until 7 a.m.; that it would take them at least 1 hour to get the parts ready for him to work on; that he was not paid for the waiting time when there were no parts available; that he went home for the day; and that no supervisor or manager told him that leaving that day was a problem.

On January 26, 2004, Henry overheard Jim Woodward and Tanksley talking about Tanksley cleaning the welding room he worked in. Henry testified that Tanksley cleaned the room; that someone had spit chewing tobacco "it looked like" (Tr. p. 37) around the jig (an apparatus used for setting up parts to be welded); that Tanksley did not chew chewing tobacco; that what he observed on the floor was not a byproduct of welding; that he did not observe or hear anything unusual about Tanksley's radio that morning; that employees have radios at work and they listen to them during the day; and that he has never been asked to clean up anything like what he observed on the floor in Tanksley's room that day. On cross-examination Henry testified that he cleaned up his work area; and that if Woodward asked him to clean up tobacco stains he would do it but he would not have liked doing it.

When called by counsel for General Counsel, Jim Woodward testified that he told Tanksley to clean his room because the night crew welder had cleaned it up the week before and it was Tanksley's turn; that he had to ask Tanksley two or three times to clean the room; that Tanksley turned his radio louder; that he told Tanksley to either clean the room or go home; and that Tanksley made a few smart remarks about it, slammed the door, slammed things around and "halfway . . . [cleaned] it up." (Tr. p. 82)

Tanksley testified that on Friday, January 23, 2004, about five minutes before he was about to leave work, he had a conversation with Jim Woodward regarding cleaning the area; that Jim Woodward told him to sweep the room; that he had cleaned the room last and it was the practice that he would clean the room one week and the night crew would clean the room the next week; that he told Jim Woodward that he needed to get the night crew to take its turn to clean the room; that Jim Woodward told him that the night crew cleaned the room last and it was his turn; that he was carpooling at the time and he had to pick someone up so he only had five minutes to clean the room; that he picked up the big stuff but he did not totally sweep the floor; that on the following Monday Jim Woodward met him at the door to his welding room at 5:15 a.m. and told him to sweep the room before he started to work; that he probably discussed the need for the night crew to do their part; that it was unusual for Jim Woodward to be at work at 5:15 a.m.; that it is possible that he told Jim Woodward that "this is bullshit" (Tr. p. 222); that he took 30 minutes to clean the room thoroughly; and that his radio was on that day but he did touch the volume button during or after his conversation with Jim Woodward.

Richard Wurtz, who was employed as a welder by the Respondent, testified that one day he asked Jim Woodward about other shift employees restocking parts and leaving his workroom messy; and that Jim Woodward told him that he himself needed to settle it with the other shift employees.

When called by Respondent, Jim Woodward testified that after he unsuccessfully asked Tanksley to clean his room once, he told Tanksley to either clean the room or go home; that Tanksley said that it was the night shift's turn; that he told Tanksley that it was his turn; that Tanksley slammed the door, turned the radio loud, and slammed things around and swept; that the night shift welder at the time was Derrick Tudor; and that at his request Tudor submitted a handwritten statement regarding the incident.[5] The typed statements of Jim and Dustin Woodward regarding this incident were sponsored by Jim Woodward and were received as Respondent's Exhibits 1 and 3, respectively.[6] Jim Woodward also sponsored Respondent's Exhibit 6. He testified that the undated handwritten statement is signed by Truman Zinn, who is a welder who worked on the night shift at some point; that Zinn oversaw the night shift for

[4] Jim Woodward answered "[y]es, pretty close to the same, yeah" when asked if making a Saturday a mandatory workday elevated the Saturday to the equivalent of a Monday through Friday workday. (Tr. p. 526.)

[5] Jim Woodward sponsored the handwritten statement which was received as R. Exh. 5. As here pertinent, it indicates that Tanksley did not clean the room every other week. According to Jim Woodward's testimony, the undated statement was placed in Tanksley's file.

[6] A follow-up memorandum titled "FEW DAYS AFTER THE INCIDENT ON JANUARY 26, 2004" was received as R. Exh. 2. According to Jim Woodward's testimony, these three memorandums were placed in Tanksley's personnel file.

him; and that Zinn told him about the cleaning problem and he asked Zinn to put it in writing. The undated statement refers to the fact that, as here pertinent, the night shift had to clean the room three weeks in a row in late December through January. On cross-examination Jim Woodward testified that he did not show Respondent's Exhibits 1 and 3 to Tanksley; that he wrote this statement the day of the incident or the next day; that he did not recall exactly when he asked Tudor to write the statement; and that he asked Zinn to submit a statement about one week after the incidents.

Henry testified that he thought that the welders began the Union campaign; that before the Board election on February 11, 2004, three union meetings were held in welder Leuschen's house; and that Leuschen was the union observer at the Board election. On cross-examination Henry testified that Tanksley did not hold any union meetings but he attended them.

Busby testified that he returned to work at Five Star before the Board election in February 2004; that he was approached regarding organizing by Wurtz, who gave him a union authorization card to sign; and that Wurtz convinced him to sign the card.

Lawson testified that sometime before February 11, 2004, Jim Woodward told him that Tanksley and Leuschen were not meeting certain production requirements; that at that time, before February 11, 2004, he was aware that several employees had keys and access to the building, and he told Jim Woodward that "keys to numerous employees was not permissible, in my opinion" (Tr. p. 586); that before February 11, 2004, Jim Woodward told him some of the things that Tanksley was allegedly doing at the plant and he recommended to Jim Woodward that Tanksley be either suspended or terminated; that Jim Woodward told him that Tanksley's alleged behavior had been going on from before he, Lawson, became involved with Five Star in late 2001; that Five Star is liable for the actions and conduct of employees who are off property during business hours; that it was his belief that Five Stars hours prior to February 11, 2004, were always 7 a.m. to 3:30 p.m.; that either in late 2001 or in 2002 he learned that some of the employees were not adhering to those hours, and he told Jim Woodward that this was not a good idea in that there has to be consistency in policy that management runs the employees; that he recommended to Jim Woodward that Five Star have a consistent starting and quitting times unless overtime was required, and supervision should be supplied for overtime; that this had all been discussed prior to any union activity or union talk; that he observed that Tanksley's attitude was very poor; and that he observed Tanksley laying down in an area used by forklifts where people are coming and going, which was an unsafe condition.

On cross-examination Lawson testified that the focus of his business is OSHA and EPA (Environmental Protection Agency); that records of what his company did at Five Star are not kept so that they cannot be subpoenaed by OSHA; that in 2004 his company visited Five Star's plant once a month or more if the need arose; that OSHA conducted air tests at Five Star, and then OSHA requested to come back to Five Star's facility; that OSHA would not accept his air tests of Five Star and he refused OSHA permission to take an additional air test; that he was not aware that Five Star had a night shift in 2004 or 2005, and if there was a night shift without supervision present that would have been a concern to him; that it was his understanding that when there was overtime, management was there at the time; that he did not recall any discussion regarding a flexible schedule; that he did not recall what recommendation he made regarding Tanksley in 2003 if he made one; that he did not recall the first time in 2004 that he discussed Tanksley with Jim Woodward; that he saw Tanksley laying down in the plant on three or four occasions but he could not recall when this occurred; that in 2002 or 2003 would be the first time he saw Tanksley laying in the hall; and that he never discussed in a safety meeting the fact that Tanksley was laying down on the floor. On redirect Lawson testified that Nancy Woodward does maintain an OSHA 300 log, which is a Federal document in which all accidents and injuries, lost workdays, and restricted duty are noted, which is audited by OSHA, and which goes to the Bureau of Labor Statistics at the University of Tennessee.

Subsequently Lawson testified that he probably first spoke with Jim Woodward in 2002 about employees having keys to Five Star's facility and about work schedules.

At the trial herein Respondent stipulated that on February 11, 2004, a representation election was conducted among the employees in the above-described unit; that the election was conducted from 2:30 to 3:30 p.m.; that a pre-election conference was held before the election on the day of the election; that the ballots were counted and the results announced following the election; and that the count was on the day of the election, immediately after the election or soon after the election.

Henry testified that he finished work at 2 p.m. on the day of the Board election, February 11, 2004; that while he sat in his car in Respondent's parking lot waiting for election time, he saw Union organizer Ritter coming out of Respondent's building, with Jim Woodward walking just behind him; that Ritter spoke with Tanksley in the parking lot for about 15 seconds, and then Ritter got into his car and drove away; that Woodward was standing on the porch of Respondent's building at the time; that before he went into the election he saw Tanksley get out of his car and walk up to Jim Woodward and speak with him and Monroe Freeman briefly; that Tanksley then got back into his car; and that Woodward and Freeman were standing on the porch of Respondent's building, which is right in front of the parking lot. On cross-examination Henry testified that Freeman is one of the owners of Five Star.

When called by counsel for General Counsel, Jim Woodward testified that on February 11, 2004, Monroe Freeman, who is a part owner of Respondent but is not a regular employee at the company, was at Respondent's facility because it was the day of the Board election; that Tanksley was discharged on February 11, 2004; that at about 3 p.m. on February 11, 2004, he, his mother, his wife, and Freeman, in consultation with Respondent's attorney, made the decision to terminate Tanksley; that the discharge of Tanksley had been discussed two or three different times before February 11, 2004, he had spoken with Respondent's attorney about it, and he believed that he was told by the attorney not to do anything until the election; that the first time the discharge of Tanksley was discussed was sometime in 2004 but he did not know when and the discussion was not documented; that he did not remember if Tanksley received

any written warnings before February 11, 2004; and that he never gave Tanksley a written warning, and he had not discharged Tanksley before February 11, 2004.

In response to questions of Respondent's attorney, Jim Woodward testified that before the Board election on February 11, 2004, he did not have any policy regarding paperwork, and all disciplining was done verbally; that after the 2004 election he moved away from the low paperwork policy at the advice of Donald Jones, who was Respondent's attorney at that time, OSHA consultant Ben Lawson, and insurance representative Emil Deluca; that after the election Jones provided some personnel policies to govern employee relations, Jones submitted them to the Union sometime before the 2005 discharge of Tanksley, and the Union objected to them, but the Union did not submit counterproposals; that prior to the Board election Respondent did not have an attendance policy in place but nonetheless welders would be considered absent or late if he did not show up for work by 7 a.m.; that the policy of the company was that the workday was from 7 a.m. to 3:20 p.m. but "some of the welders just took advantage of being there earlier" (Tr. p. 157); that prior to the Board election he did not have very much control over the welders regarding who was present at the facility and it was starting to hurt production; that before February 11, 2004, he discussed the possible discharge of Tanksley "[n]umerous times" with his wife (Tr. p. 186) ; that he did not fire Tanksley before the day of the election because Jones advised him not to; that "as soon as I had a chance after he voted [on February 11, 2004], before the polls … closed, I fired him . . . ." (Tr. p. 186); that the first discharge had nothing to do with Tanksley's union activities, he was not sure where Tanksley stood as far as the union was concerned, no one told him about any alleged Tanksley union involvement, and he did not know whether Tanksley attended any Union meetings; and that there was no paperwork for Tanksley's first discharge.

When called by Respondent, Jim Woodward testified that he had to stay outside the building at the time of the election; that either his wife or his mother came out and told him that there was a problem; that his wife explained the problem to him; that prior to February 11, 2004, he had discussed Tanksley's work ethic and work history with his wife, his mother, his daughter, and Freeman; that his daughter told him that Tanksley was "taking up more space than he was doing us good" (Tr. p. 466); that his daughter recommended that Tanksley be fired because of his attitude, rudeness, and lack of productivity; that when his wife told him that they needed to let Tanksley go, he told her that Respondent's counsel said that they could not discharge him; that his mother told him about a conversation she had with Tanksley after his heart attack where he told her (a) his job was affecting his blood pressure and he needed to find a different job, (b) he could not find one that paid as good and had the benefits he had, and (c) he could not get along with her son Jim and he figured one day there would be a confrontation and he might just hurt Jim Woodward[7]; that his son Dustin complained to him that Tanksley was rude to him and sometimes would not answer when Dustin asked him how many ramps he had done; that after his heart attack Tanksley produced around 150 to 165 ramps a day; that before February 11, 2004, he spoke to Tanksley about his production; that he considered Tanksley's failure to come to work on Saturday, January 3, 2004, insubordination; that one morning Tanksley did not have any parts to work on, he told Tanksley that they would get him some parts "in just a little bit" (Tr. p. 475), he himself prepared enough 712 rails to keep Tanksley busy for one hour, but Tanksley had left without letting him know he was leaving; that Freeman had told him that there was no need to put up with that kind of attitude in a place of business and he should get rid of him; that he discussed Tanksley with Respondent's OSHA consultant, Lawson, and he said that Five Star should be able to fire him; that he told Lawson "well, I'm in the process of wanting to get that done, but counsel won't let me right now" (Tr. p. 482); that he did not fire Tanksley before the day of the election because Five Star's attorney, Jones told him that he should not; that with the Tanksley incident with his daughter in the middle of the voting he could no longer tolerate any more; that he telephoned Jones who told him what to do; that he discharged Tanksley on February 11, 2004; that the incidents described in Respondent's Exhibits 1 through 6 occurred prior to February 11, 2004, and they were considered by him as part of the basis for the discharge of Tanksley; that he was "sure" (Tr. p. 493) that before Tanksley's first discharge he and his wife asked Nicole Newberry to determine whether Tanksley was suffering low production; and that

> I told Nicole, or Nancy one, to either one of them to do it, to pull up his records and get the history of what he was doing long before he had problems and after he had problems to - - have a comparison on what he has done for production now. [Tr. p. 492.]

Jim Woodward sponsored Respondent's Exhibit 7, which is a typed one page statement which reads as follows:

> I HAVE REVIEWED BRIEFLY DAVE TANKSLEY'S EMPLOYEE FILE. I LOOKED AT TIME CARD BEFORE HIS HEART ATTACK. THEN HE WAS WORKING 8 HOURS A DAY USUALLY AND MAKING ANY WHERE FROM 200-250 RAMPS A DAY. ONCE HE HAD HIS HEART ATTACK HE WAS OFF FROM WORK FOR A WHILE. WHEN HE CAME BACK HE ASKED JIM IF HE COULD EASE BACK INTO IT. JIM SAID THAT WOULD BE OKAY. SO HE CAME IN ON 6-05-03 ON A FRIDAY AND WORKED 8 HOURS MADE 152 RAMPS. SATURDAY HE WORKED 8 HOURS MADE 167 RAMPS. SUNDAY HE WORKED 8 HOURS AND MADE 175 RAMPS. TO THE BEST OF MY RESEARCH THE HIGHEST AMOUNT OF RAMPS HE HAS PUT OUT SINCE IS 170 RAMPS IN 8 HOURS.
>
> AFTER 8 MONTHS OF BEING BACK TO WORK HERE A[T] FIVE STAR MFG INC HE HAS NOT BEEN ABLE TO PROCUCE [SIC] WHAT HE USED TO BEFORE HE HAD HIS HEART ATTACK. NOT ONLY HAS HE NOT BEEN ABLE TO DO THE SAME PRODUCTION, HE HAS NOT IMPROVED AT ALL. HE HAS STAYED THE SAME OR EVEN HAS LOWERED HIS PRODUCTION *AROUND THE SAME TIME ALL THE UNION AND LABOR ISSUES*. SOME DAYS HE ONLY PUTS OUT 90 RAMPS IN 8 HOURS. ["PAY PERIOD OF 7-23-03"

[7] Subsequently Jim Woodward testified that he is 49 years old, is 6 feet 4 inches tall, and weighs around 220 pounds.

APPEARS IN THE MARGIN] HE IS WASTING HIS TIME AND FIVE STAR'S WELDING ROOM.

FIVE STAR HIRED A NIGHT WELDER AND HE STARTED OUT MAKING WELL OVER WHAT DAVE EVER PUT OUT. WE COULD PUT SOMEONE ELSE IN THERE DURING THE DAYS PUTTING OUT OVER 200 AND THAT WOULD HAVE GREAT BENEFITS FOR FIVE STAR MFG INC. NOT ONLY WOULD WE GET THE PRODUCTION OF RAMPS, BUT ALSO WE WOULD NOT HAVE TO PUT UP WITH THE ATTITUDE AND ABUSE THAT DAVE TANKSLEY SO FREELY GIVES US.

TERMINATING DAVE TANKSLEY WAS ONE OF THE BEST MOVES FIVE STAR HAS BEEN ABLE TO MAKE IN SEVERAL MONTHS. THE WORK ENVIRONMENT IS A LITTLE MORE STABLE FEELING.

THANK YOU FOR YOUR TIME,

APRIL NICOLE NEWBERRY [Emphasis added.]

The document is signed. Jim Woodward testified that the lack of productivity was one of the reasons for Dave Tanksley's discharge; and that Respondent's Exhibit 7 was included in Tanksley's personnel file. On cross-examination Jim Woodward testified that Respondent's Exhibit 7 is not dated.

Newberry testified that she created Respondent's Exhibit 7 in response to a request made by management; that the information contained in this document was true and accurate; and that she looked at several months before Tanksley's heart attack and several months afterwards.

Jim Woodward sponsored Respondent's Exhibit 8, which is an undated typed statement of Nancy Woodward. Jim Woodward testified that he did know for sure that the representations made in this statement were provided to him by his wife prior to Tanksley's discharge on February 11, 2004. The statement reads as follows:

DAVE TANKSLEY HAS SHOWN ANGER TOWARD ME EVER SINCE WE TOLD HIM WE COULD NO LONGER MAIL HIS MAIL FOR HIM. EVERYTIME I MEET HIM IN THE HALLWAY HE GLARES AT ME RUDELY & HATEFULLY. WHEN HE COMES IN FOR HIS CHECK ON WEDNESDAY *HE STANDS THERE & BREATHES HEAVILY ALMOST SNORTING TIL WE GIVE HIM OUR ATTENTION.* WHEN WE HAND HIM HIS CHECK HE'LL GRAB IT RUDELY & ALMOST BUT NOT QUITE SLAMS THE OFFICE DOOR ON HIS WAY OUT. THEN ONCE IS [SIC] OPENS THE OUTSIDE DOOR HE DEFINETLY SLAMS IT HARD.

HE IS TRYING TO BE INTIMIDATING. I TALKED THIS OVER WITH LORENE ON FEB. 4. DURING OUR CONVERSATION SHE REMINDED ME ABOUT A STATEMENT THAT DAVE ONCE *MADE A COUPLE OF YEARS AGO*. HE STATED THAT HE WAS AFRAID ONE DAY HE WOULD HURT JIM.

I HAVE THOUGHT HE SHOULD BE FIRED FOR SOMETIME NOW. HIS ATTITUDE HAS GOTTEN WORSE LATELY. BUT WITH ALL THE UNION CONFLICT WE DIDN'T.

THE WEEKEND OF FEB 7 & 8 WE HAD A SHOW IN KANSAS CITY MO & I DISCUSSED THIS WITH ANOTHER OWNER OF FIVE STAR MFG INC[.] HE SAID GET RID of him. We don't need that kind of attitude & threats.

THE WAY DAVE HAS BEEN ACTING TOWARD MANAGEMENT OF FIVE STAR MFG INC I FELT UNSAFE. ON FEB 4, 2004 WHEN HE CAME INTO THE OFFICE FOR HIS CHECK HE LOOKED AT ME LIKE A CRAZY PERSON HE LOOKED AWFUL. THAT IS WHEN I TALKED WITH LORENE, ABOUT DAVE ACTING MEAN. I FELT THAT HE COULD GO OVER THE EDGE AT ANYTIME.

I TOLD JIM HOW I FELT & HE DISCUSSED IT WITH ME. I TOLD HIM I THOUGHT WE NEEDED TO FIRE HIM. JIM DIDN'T WANT TO BECAUSE OF ALL THE UNION AND LABOR ISSUES. BUT WHEN I WALKED INTO THE OFFICE ON FEB 11, 2004 & SAW MY DAUGHTER IN TEARS AFTER DAVE TANKSLEY LEFT THAT WAS THE LAST STRAW. I HAD A CONVERSATION WITH JIM AND MONROE FREEMAN (ANOTHER OWNER) AND WE DECIDED TO LET HIM VOTE SO IT WOULD BE FAIR & THEN WE WOULD FIRE HIM. THAT IS WHAT HAPPENED THAT DAY OF FEB 11, 2004.

NANCY WOODWARD [Emphasis added.]

The document is signed. Jim Woodward testified that it was included in Tanksley's personnel file.

Newberry testified that when she saw Tanksley at Five Star he would stare at her with a grin on his face trying to get her to break eye contact, he would make noises like he was gagging, and he would hold his ground and not give way when they were walking in the opposite direction; that Tanksley acted this way almost any time she saw him; that when he came to work in the morning he would say "[a]nother day in paradise" (Tr. p. 628); that Tanksley "would puff his chest up and pull his shoulders back and just walk around like he was going to intimidate whoever was in his way" (Tr. p. 629); that Tanksley started acting this way between late 2003 and February 11, 2004; that she told her parents before and after February 11, 2004 that she did not believe that Tanksley should keep his job; that on February 11, 2004 she was in the main office on the telephone when Tanksley and Wurtz came into the office; that Tanksley began breathing heavily; that when she got off the telephone Tanksley just said "[c]heck" (Tr. p. 634); that she gave Wurtz his check first because she came to it before she came to Tanksley's; that Wurtz said "[c]heated" (Id.); that they walked out, shut the door, she heard a loud stomp and some very loud laughing, and then they went out the main door to the parking lot and slammed it; that she was upset because Tanksley had been rude to her and she broke into tears; and that previously Tanksley slammed doors.

On cross-examination Newberry testified that management held meetings with employees before the election and Five Star took the position that a union was not necessary; that she believed that Tanksley laughed after Wurtz made the snide remark "[c]heated" [Tr. p. 670]; that this did not make her cry; that the snorting and the huffing and puffing and pacing and rustling around made her uncomfortable and made her cry; that she did not recall an incident where she cried before at work but she could not swear that she did not cry at work before; that it was the breathing loud and the rustling around that made her cry; that what Wurtz did did not upset her; that Wurtz was the only one she could remember speaking during the incident; that Tanksley's conduct on February 11, 2004, was "just the straw that broke the camel's back for . . . [her]" (Tr. p. 672); that while all of the welders are men, some of the production workers are women; that there was a chance that some of the em-

ployees occasionally swore out on the floor and she might have heard it; that she did not pay any attention to it unless it was loud or directed toward her; and that her father might have told her to go back to work and leave the welders alone but she did not remember that.

Nancy Woodward testified that prior to February 11, 2004, if Tanksley was pulling a pallet jack in the hall and she was walking in the opposite direction, Tanksley would kind of veer over into her "way of walking" (Tr. p. 719); that she believed that Tanksley tried to impede her path of walking; that other times when he saw her he would smirk or grin; that he would either stare at her with a "hateful stare" (Tr. p. 721) or "he was being very sexual look to it, like looking up and down. . . ." (Id.); that she and Nicole were out in the hallway, she heard a gagging noise, and it was Tanksley; that later she went to Tanksley's room and told him that he needed to stop making rude noises and "if he had something to say be man enough to come out and state his problem with whoever he was having a problem with" (Tr. p. 722); that Tanksley would cross his arms and puff out his chest; that Five Star is a small plant and she knows where employees are supposed to be and when; that the problems with Tanksley started when he came back from his heart attack and she believed that Tanksley underwent a personality change; that her mother-in-law told her that one day Tanksley told her that he was afraid that he was going to hurt Jim Woodward one of these days; that the weekend before February 11, 2004, she told another owner, Dale Adams, how Tanksley was acting and what she and her mother-in-law discussed and Adams said that Tanksley should be fired in that there was no point in putting up with that kind of attitude and threats, and it was unsafe; and that prior to February 11, 2004, a decision had not been reached by management as to Tanksley.

On cross-examination Nancy Woodward testified that it was the first or second week in February 2004 when Lorene Woodward made her statement about Tanksley commenting two years before that one of these days he was afraid that he would hurt Jim Woodward; that the following weekend she told one of the owners about this at a show in Kansas City; and that she did not memorialize in a document Tanksley looking at her from head to toe.

Jim Wooten sponsored Respondent's Exhibit 9, which is a typed statement of April Nicole Newberry dated February 11, 2004. He testified that the document was not available to him before Tanksley's discharge on February 11, 2004, but he was aware of what happened at that time because he spoke with his daughter before Tanksley was terminated. The statement reads as follows:

> DAVID TANKSLEY GOES BY DAVE AROUND FIVE STAR. THAT IS WHO I WILL BE REFERRING TO AS DAVE.
>
> TODAY DAVE CAME INTO THE OFFICE WHILE I WAS ON THE PHONE. I ENDED MY CONVERSATION AND BY THEN RICHARD WURTZ WAS IN HERE TOO. I ASKED CAN I HELP YOU. DAVE SAID 'MY CHECK'. RICHARD SAID 'CHECK'. I HANDED RICHARD HIS FIRST BECAUSE I CAME TO IT FIRST FROM THE BACK. I GAVE DAVE HIS. *RICHARD SAID RIP OFF CHEATED*. DAVE SMIRKED WITH A LAUGH AND RICHARD LAUGHED. RICHARD ASKED FOR A COPY OF HIS TIME CARD. I TOLD HIM HE WOULD HAVE TO WAIT UNTIL NANCY GOT IN HERE. THEY WALKED OUT OF THE OFFICE AND STOMPED THEIR FEET AS TO A [SIC] GESTURE WHAT THEY WOULD LIKE TO DO TO ME OR THAT THEY WERE MAD. BOTH CACKLED, WENT OUT OF THE OUTSIDE DOOR WITH A LOUD SLAM.
>
> DAVE TANKSLEY WAS VERY RUDE THE WHOLE TIME HE WAS IN HERE. WHEN I WAS ON THE PHONE WITH A CUSTOMER HE WAS STANDING THERE GETTING VERY ANNOYED THAT I WAS ON THE PHONE. *HE WAS HUFFING AND PUFFING LOUDLY* BECAUSE HE WAS JUST DISGUSTED I WAS NOT WAITING ON HIM RIGHT THEN AND THERE.
>
> AFTER THEY LEFT I STARTED TO CRY. A PERSON SHOULD NOT HAVE TO TOLERATE SUCH RUDENESS AT THEIR JOB. BUT DAVE HAS BEEN VERY RUDE TOWARDS ME LATELY. ACTUALLY HE HAS BEEN RUDE AND HATEFUL TO ANYONE WHO IS FAMILY OR WHO IS IN A MANAGEMENT POSITION. ALL I WAS DOING WAS MY JOB. MY CONVERSATION I KNEW WAS ABOUT TO END SO I DIDN'T PUT THEM ON HOLD. THERE WAS NOT [SIC] EXCUSE FOR DAVE *OR RICHARD* TO ACT LIKE THAT.
>
> MONROE FREEMAN AND DUSTIN WOODWARD WALKED IN SHORTLY AFTER DAVE AND RICHARD LEFT THE OFFICE. SO DID KERRY STULTZ A WELDER HERE. ALL OF THEM WITNESSED ME CRYING.
>
> DAVE TANKSLEY HAS BEEN VERY RUDE AND TRIES TO PULL A POWER STUNT EVERY [SIC] SINCE THE FIRST OF DECEMBER. NOT 1 DAY HAS WENT BY THAT HE DOES NOT SLAM THE FRONT DOOR WHEN HE LEAVES.
>
> HE HAS SHOWN INSUBORDINATION ON NUMEROUS OCCASIONS.
>
> APRIL NICOLE NEWBERRY [EMPHASIS ADDED.]

The document is signed.

> Newberry testified that Respondent's Exhibit 9 are her notes; that they accurately reflect what occurred on February 11, 2004; that she believed that she included all relevant information; that she told her mother what happened and then shortly after that she told her father why she was crying; that before February 11, 2004 no one discussed with her whether Tanksley was involved in the Union or not; and that Five Star is a small company, and she kind of knows what everybody does.

Subsequently Newberry testified that she believed that when Wurtz said "rip off, cheated" he had looked at his check already; that it was her understanding that he was referring to his check when he made that statement; that it was a negative statement as far as the Company is concerned in that what he was saying is that he felt that he was cheated with respect to his pay; that according to what she wrote in Respondent's Exhibit 9 both Wurtz and Tanksley then laughed; that she was not looking and she did not know whether Tanksley or Wurtz was the last one, between the two of them, to leave the main office; that she included both Wurtz and Tanksley in her reference to stomping their feet; that she did not know who stomped their feet; that she could hear both Wurtz and Tanksley laughing loud (cackling according to her entry) in the hall; that she did not see and has no personal knowledge as to who slammed the outside door; and that she did not believe that Wurtz was disci-

plined for his conduct on February 11, 2004. When asked "Why not," Newberry gave the following answer:

> He [Wurtz] hadn't ever had run-ins with me like that before. He—I was upset because of Dave [Tanksley]. Richard [Wurtz]—like I—you can look, I took a lot from Dave. The grins, the puffing up, just being hateful. I can take quite a bit and then everyone has got a breaking point. Richard [Wurtz] hadn't been rude like that in the hallways. [Tr. pp. 689 and 690.]

Tanksley testified that he never received any discipline at Five Star prior to February 11, 2004; that on February 11, 2004 when he finished work at 2 p.m. he went, along with other employees, to Five Star's main office to get his paycheck; that he did not speak with Jim Woodward's daughter when he was in the office, he was not rude or disrespectful, he did not stomp out of the office, he did not slam the door, he did not do anything to upset Jim Woodward's daughter, and she was not crying while he was in the office; that while he was sitting in his car in Five Star's parking lot waiting to vote in the 2:30 p.m. Board election, Ritter came out of the Five Star facility; that he waved to Ritter who told him that they were not supposed to be communicating until after the election; that he said to Ritter "well, I think we got it made"; that Ritter got into his car, which was parked next to Tanksley's, and drove to the end of the property; that he saw Jim Woodward and Monroe Freeman in front of Five Star's building and Jim Woodward was looking toward him and Ritter; that Jim Woodward "was enraged pretty much is what the look I seen on his face" (Tr. p. 215); that while he sat in his car he finished calculating what he was owed for his piece rate work and he determined that there was a discrepancy between his records of what work he did and his paycheck; that he walked over to Jim Woodward and Freeman and asked Jim Woodward who he needed to see about getting his paycheck corrected; that Jim Woodward told him that they were not supposed to be communicating until after the election and for him to get back in my car; that at 2:30 p.m. he voted and then he went into the main office to see about getting his check corrected; that Jim Woodward, his mother, his wife, his daughter, and Freeman were in the main office; that he asked Jim Woodward if he could get his paycheck corrected, and Jim told him to get his personal effects and bring his timecard back to the office; that Jim's wife then told him that his services were no longer required; that he did as instructed; that when he returned to the main office with his timecard he asked Jim Woodward why he being fired and Jim Woodward said "no reason" (Tr. p. 217); that Jim Woodward's wife corrected the paycheck, apparently adding $40, he got in his car and drove to the end of the parking lot where Ritter was sitting, and he told Ritter what had happened; that the Union won the election; that before February 11, 2004, during the 12 years he worked for Five Star, he had never received a write up for any reason and he was never told he had an attendance problem; and that a charge was filed over his February 11, 2004 discharge and he gave an affidavit or affidavits to a Board agent during the investigation of the Board charge.

Wurtz, who was a welder with Five Star from April 2000 until he voluntarily quit on March 7, testified that on February 11, 2004, he picked up his paycheck in Respondent's main office; that Tanksley was standing behind him; that Nicole Newberry handed him his paycheck and then she handed Tanksley his paycheck; that he heard Nicole say something but he did not recall what it was; that he and Tanksley exited the room and Tanksley walked back into the plant; that neither his nor Tanksley's behavior to Nicole was rude or disrespectful; that he and Tanksley did not (a) stomp out of the office, (b) slam the door, or (c) do anything to upset Nicole; that no one was visibly upset while he was in the office; and that Nicole was not crying when he was in the office.

Nancy Woodward testified that she was not in the main office on February 11, 2004, when Tanksley picked up his paycheck; and that when she later entered the main office

> Nicole was crying and I said, well, what is the problem. And she said, well, Dave [Tanksley] was in here doing his usual stuff, giving me a hard time, *he* said something about she cheated *him* on *his* check and went out and stomped *his* feet and slammed the door, again. [Tr. 730] [Emphasis added.]

Nancy Woodward testified further that she went out and found her husband and Monroe Freeman, told them what happened, and told them that she thought they needed to let Tanksley go.

Ritter testified that after the pre-election conference on February 11, 2004 he was leaving Five Star's premises for the 1 hour window before the vote; that his vehicle was parked next to Tanksley's vehicle and the two vehicles were facing in the opposite direction so that the driver's side of his vehicle was facing the driver's side of Tanksley's vehicle; that Tanksley was sitting in his vehicle and he asked him how it was going, how he was doing, or "something like that" (Tr. p. 350); that he told Tanksley that he really could not talk at that time and "[w]e'll know in about an hour" (Id.); that as he backed out of the parking space he saw Jim Woodward standing at the entrance to the plant observing him leave; and that Jim Woodward had followed him out of the plant.

Leuschen testified that he was the observer for the Union at the Board election and Gibson was the observer for the Company at the February 11, 2004 election; and that the Union won the election, and the votes were counted in front of the employees immediately after the voting took place. On cross-examination Leuschen testified that after the election his job remained the same and he was not moved from the area he where he worked; and that no manager threatened him.

On February 12, 2004, when Henry arrived at work at 5 a.m. he saw a note on the door which indicated that all employees would start at 7 a.m., they would take a break at 10 a.m. they would take lunch at 12 noon and there would be no exceptions. Henry testified that he went home and returned to work at 7 a.m.; that Jim Woodward had him come into his office; that Jim Woodward said that he was collecting all keys and he gave the key he had used every morning for some time to open Respondent's facility at 5 a.m. back to Jim Woodward; that he told Jim Woodward that he hated to give up the key and Jim Woodward said "maybe things will get better" (Tr. p. 28); that he thought that welder Randy Looney and maybe welder Kerry Stultz also had a key to Respondent's facility; that before February 12, 2004, welders just wrote down their time on the card and they

were not required to come to work at a certain time; that before February 12, 2004, he seldom took a morning break and he would only take 5 or 10 minutes for lunch; that before February 12, 2004, he usually left work at 1:45 p.m.; that before February 12, 2004, the other welders who came in before 7 a.m. included Leuschen, Ron Atkinson, Andy Anders, Tanksley, and Looney; that before February 12, 2004, welders would leave work when they finished the number of ramps that they wanted to get done; that in the past he arrived at work as early as 3 a.m. to avoid working during the hottest part of the day in the summer since the welding rooms were not air conditioned; that after February 12, 2004, (a) if he did not quit work at 10 a.m. for a break, Jim Woodward would get him and tell him that it is breaktime, (b) he was not allowed to work through lunch, (c) he was not allowed to leave work until 3:30 p.m., (d) welders were still paid by the piece and not by the hour, and (e) whereas in the past the welder wrote the number of pieces he completed on his time card, after the election there was an employee in the washroom (where the ramps were washed in a solution) assigned to counting the number of ramps that each welder completed; that Respondent's production workers were paid by the hour; and that it was the practice of welders to go get a snack, pop, coffee, or water or go to the restroom other than at break time, and Jim Woodward was aware of this.

On cross-examination Henry testified that at one point Atkinson had a key and then prior to the election he did not have the key anymore but he did not know why Atkinson lost his key; that before the Board election when he and other welders worked at about 5 a.m. sometimes neither Jim Woodward nor any other representative of management was present; and that when the hours were flexible for welders, they could come and go as they saw fit, and management could not be sure which welders would be there at a given time. On redirect Henry testified that welders had flexible schedules from 1991 until the Board election. And on recross Henry testified that when he was first hired by Five Star he was working by the hour and he worked from 5 p.m. to 2 a.m. On further redirect Henry testified that he worked for Jim Woodward's father Doyle when he first started with Five Star; that he worked by the hour; that he quit; that subsequently Jim Woodward telephoned him and asked him if he wanted to do some welding; that when he returned to Five Star he worked for Jim Woodward in the old building; and that Jim Woodward told him when he returned that he would be working on a piecework basis.

Jim Woodward testified that on or about February 12, 2004, he took keys for Respondent's facility back from Henry, Stultz, and Holt, none of whom are supervisors, and he posted a notice informing welders that without exception their hours would be 7 a.m. to 3:30 p.m., with set break times in the morning, at lunch, and in the afternoon; that he did not notify the Union that he was getting the keys back from the three employees; and that he did not notify the Union that he was making the above-described changes. In response to questions of Respondent's attorney, Woodward testified that he took the key to Respondent's facility away from Atkinson sometime before the Board election because he did "a few things that wasn't right" (Tr. p. 153); that in the past he had taken keys away from other employees; that he took back the keys after the Board election in February 2004 because he was having a problem with the involved door lock, he had a locksmith redo the whole key system, and he gave the old keys to the locksmith; that the keys he took back from the employees on February 12, 2004, would not have worked in the new door lock; that in essence the locks had been changed; that the employees did not receive keys to the new lock because it was decided that nobody but the owners or Five Star should have a key; that before the Board election certain employees had keys so that they could come into work early and work on Saturdays when he was not there; that he posted the notice setting forth the hours, breaks and lunch time on February 12, 2004, because he needed to get the situation regarding welders under control so that they would be at work at the same time and leave at the same time; that this change was occasioned in part by the recommendations of Respondent's OSHA consultant and Respondent's insurance agent regarding liability; that he was told in November or December 2003 that he needed to put a stop to allowing employees to work in the facility without a management representative being present, but that he could not do anything about the situation until at least election day; that one of the concerns was that there was no one around to take an employee to a doctor if he got hurt; that another concern was that welders who left early and were off Respondent's property could expose Respondent to liability; that the new policy requires employees to clock out before leaving the property; that Respondent did not have a time clock before the Board election in February 2004; and that even after the welders had to punch a time clock they continued to be paid on a piecework basis. In response to questions of counsel for General Counsel, Jim Woodward testified that he did not notify the Union before he installed the time clock, but he told Respondent's counsel and Jones may have notified the Union; and that Zinn was his night supervisor but he did not hold the title, he did vote in the election, and Respondent did not take the position that he was a supervisor at the time of the election.

Ritter testified that Five Star neither notified the Union before February 12, 2004, of Respondent's intent to (a) change the welders' start and quit time, and break and lunch policy, and (b) take keys from welders which affected their hours and working conditions, nor did Five Star afford the Union a meaningful opportunity to bargain before taking these actions.

Wurtz testified on cross-examination by Respondent's attorney that he worked on the night shift when he was first hired in 2000; that no employee on the night shift was designated as a supervisor or as the company representative; that before the Union election in February 2004 he was working on the day shift; that Jim Woodward told him to come to work at either 6:30 or 7 a.m. before the election; and that while Jim Woodward was flexible with respect to the welders' hours before the election, after the Union election in February 2004 Jim Woodward was more firm about hours and breaks.

Leuschen testified that he arrived at work on February 12, 2004, at 5:30 a.m.; that usually welders Henry, Atkinson, Andy Anders, and Tanksley are at work before 7 a.m.; that none of the welders were there that morning when he first arrived; that he saw the note on the door indicating "[o]ur hours are 7:00 to 3:20. Break at, mandatory breaks at 10:00 to 10:10 and 12:23

[sic]. No exceptions" (Tr. p. 378); that he returned to work at 7 a.m.; that before this he usually worked from 5:30 or 6 a.m. to 1:30 or 2 p.m.; that before February 12, 2004, he usually took just one 30 minute break, at 10:30 a.m., during the workday; that he did not have a set schedule before February 12, 2004, and therefore, he was able to do farm work and side jobs such as logging after he finished for the day at Five Star; that with the change, in the summer he would have to work in a welding room that was not air conditioned during the hottest part of the day; that the change worked a hardship on him; and that he was not given a reason for the change by any supervisor or manager.

Jim Woodward testified that after Tanksley's discharge on February 11, 2004, a charge was filed by the Union with the Board and he received a copy of the charge; that Respondent's attorney recommended that Tanksley be reinstated and he was in early April 2004; that when Tanksley was discharged in February 2004 he was welding frames for the arch ramps; and that Tanksley had worked in the same welding room from the time Respondent started using its new building. In response to questions of Respondent's attorney, Jim Woodward testified that no one told him prior to the election of 2004 that Tanksley was in any way involved with the Union or the attempted unionization of Five Star; that the problem with Tanksley started in 1993 when some of Respondent's employees filed an action against Five Star under a wage and hour claim and Five Star had to pay some penalties for hours worked over 40 hours; that some of the employees received back pay; and that when Tanksley did not he expressed his displeasure to him.

Jim Woodward sponsored Respondent's Exhibit 4 which is dated "2-16-04" and reads as follows:

> DAVID TANKSLEY'S ATTITUDE IN THE LAST 3 MONTHS HAS COMPLETELY CHANGED FOR THE WORST. IT WAS TIME I FELT LIKE DAVE NEEDED TO BE DISMISSED FROM FIVE STAR MFG, INC.
>
> ALSO I CANNOT GIVE A SPECIFIC DATE, BUT I REMEMBER SOME TIME AGO WHEN DAVE CAME INTO THE OFFICE AND SAID 'HE WAS AFRAID HE WOULD HURT JIM WOODWARD'. EVER SINCE THEN I HAVE BEEN UNSURE ABOUT DAVE'S ATTITUDE AND STABLENESS.
>
> LORENE WOODWARD

The document is signed. Jim Woodward testified that it was placed in the employee's file.

Tanksley testified that since 1996 he had been welding frames for the arch ramps; that when he was reinstated in April 2004 he was told by Jim Woodward to come to work at 7 a.m.; that Jim Woodward met him at the door to his welding room and told him that the starting time was 7 a.m., there were mandatory breaks at 10 a.m., noon (30 minutes for lunch), and 2 p.m., and he could not leave the premises until 3:30 p.m.; and that this was a change with respect to starting time, quitting time, and when he took breaks, including lunch.

Lawson testified that he did not agree with the decision to reinstate Tanksley.

Nancy Woodward testified that she did not support the reinstatement of Tanksley; and that Tanksley's conduct in the hallways of the plant after he was reinstated "[p]robably worsened." (Tr. p. 737)

Newberry testified that Tanksley's alleged conduct, which is described above, got worse in that Tanksley would not use his time wisely, he went to the vending machines when it was not a scheduled break, and he just did as he pleased; that Tanksley's production was low; that one of the big companies that Five Star has is Wal-Mart and it is not uncommon to receive an order from Wal-Mart that needs to be completed in a short time; that very rarely did she see an employee other than Tanksley outside of a scheduled break going to the vending machines; and that she told her parents after he was reinstated that she did not believe that Tanksley should keep his job.

Rod Gibson, who was hired as an hourly production employee by Respondent in May 2003, testified that he believed that immediately before the Board election on February 11, 2004, he was moved from production to the washroom to count ramps that welders brought to the washroom to be further processed; that before this the welders counted their own ramps; that his supervisor in the washroom is Dustin Woodward, who, as indicated above, is the son of Jim Woodward; that he was not aware of any occasion where Tanksley did not respond to questions posed by Dustin Woodward; that there were instances (not more than five) where Tanksley did not respond to his questions, namely how many ramps he had after he, Gibson, had counted them; that this was information he needed to confirm his count; that possibly Tanksley did not hear him; that Tanksley was the only welder who did not answer him; that it is possible that he might have said something to Dustin Woodward about this but he did not recall; that he never saw Tanksley handle his ramps on a pallet jack in a manner that was inconsistent with other welders; that when he greeted Tanksley, he usually was unresponsive; that there was never an occurrence where Tanksley would be coming down a hallway, the same hallway he, Gibson, would be coming face to face, walking toward each other, and Tanksley would not move out of the way; that Tanksley had the lowest production of the welders; that it was his understanding that the quota for arch ramps was 80 and Tanksley was producing on average 40 to 50; that on one occasion Tanksley stared at him in the break room; that Tanksley never made faces at him or any type of odd noises; that Tanksley did greet him "every morning" (Tr. p. 438) by saying "[a]nother day in paradise" (Id.); that Tanksley was disrespectful to Dustin Woodward in that when he, Gibson, and Dustin Woodward counted the ramps and asked Tanksley if that was how many ramps he had, Tanksley always had the same answer, namely "yep or that's what I got" in a loud tone without a smile on his face.

On cross-examination Gibson testified that he was the observer for the Respondent at the Board election on February 11, 2004; that he is a friend of Dustin Woodward, he takes him trapping, he has hunted with him, he rides to lunch with him, and he has gone over to his house; that he is an hourly employee; that under the old system the welders counted their own ramps; and that he presumed the quota was 80 but he has no personal knowledge as to the targets.

Subsequently Gibson testified that he has walked down a hall with Tanksley coming in the opposite direction and Tanksley accommodated him.

James Dustin Woodward testified that usually both he and Gibson counted the ramps to verify the welder's production; that prior to February 11, 2004, Tanksley had the lowest production amongst the welders; that there were times in the washroom when Tanksley walked away if he asked him something or he would just turn his back and walk away or would "rudely reply back to him" (Tr. p. 799); that by "rudely reply back" he meant that if he asked Tanksley if that is right, he "would say yes real—just real hateful like. Or, that is what I got, kind of hatefulish" [sic] (Id.); that on any given day he would say to Tanksley this is the number I got and Tanksley "just would turn his back and walk away. He wouldn't say yes, no, nothing" (Tr. p. 800); that he has approached Tanksley in Five Stars plant when they were walking in the opposite direction and it seemed like Tanksley would veer towards him and he would have to change his course of walking to go around Tanksley; that two or three times when he operated a forklift Tanksley would get in the middle of the hallway and cause him to stop and wait until Tanksley moved; that Tanksley stared at him until he looked away; and that Tanksley grinned at him.

On cross-examination Dustin Woodward testified that Tanksley's smile was "not a normal … smile. It wasn't a friendly smile. It was a smug, I can't stand you type smile" (Tr. p. 812); and that his count of ramps, and not Tanksley's, was the official count.

Jones, Respondent's original labor lawyer, testified that on April 5, 2004, Five Star withdrew objections to the election; and that he sent Respondent's proposed collective bargaining agreement, Respondent's Exhibit 17, to Ritter about the same time so the Union would have it for their first bargaining session.

Jim Woodward sponsored Respondent's Exhibit 12 which is a handwritten statement dated April 13, 2004. It reads as follows:

> At 3:10 pm I Dustin Woodward told David Tanksley to stop shutting his welding room light off because the night crew welds behind him. And David Tanksley delibritly [sic] turn [sic] and walk away and would not even acknowledge what I said to him.

The document is signed. Jim Woodward testified that this document was included in Tanksley's file. Dustin Woodward testified that he drafted the memorandum; and that the involved lights take 20 to 25 minutes to cool and turn back on, and the night crew would have to stand around waiting for the light to kick on instead of being able to work.

At the trial herein Respondent stipulated that on April 19, 2004, the Union was certified as the exclusive collective-bargaining representative of the unit.

Jim Woodward testified that for the eight years before his discharge in February 2004, Tanksley's primary job was welding frames for arch ramps; that a week or two after he was reinstated in April 2004, Tanksley was assigned to a different job; that he needed more production out of the room Tanksley was in but he could not recall any unusual ramp orders at the time; that he needed more production on the arched ramps so that other welders, who apparently worked on the arched ramps after they were rolled, would have work; that Tanksley was placed in a room building item number 400 ramps because Respondent was not in such a hurry for them; that it is possible that he changed Tanksley's job and then several weeks later he changed Tanksley's room; that up to this reassignment, Tanksley had worked in the same room since Respondent started using the new building; that Randy Looney was moved into Tanksley's room but he did not weld the arched ramp frames; that Aaron Busby did the work that Tanksley previously did; that maybe he had Jamie Holt also welding the frames for the arched ramps; and that sometimes he had three employees welding the frames for the arched ramps.

Henry testified that sometime after his reinstatement Tanksley was moved to a different welding room to weld different parts; and that up until that time Tanksley had worked in the same room since the new building opened. On cross-examination Henry testified that some of the welders were asked to perform a variety of welds; that he did different welds; that Tanksley at times was asked to do different welds; that in May 2004 Tanksley was performing work similar in nature to work that he, Henry, had performed; that on occasion Tanksley would share his welding room with Aaron Busby; and that nightshift welders would use his and Tanksley's welding room.

Tanksley testified that on April 19, 2004, Jim Woodward came into his welding room and told him to tear down what he was using to build the frames for the arched ramps, and to set up to start building for 400 folding ramps; that with the 400 folding ramps, unlike the frames for the arched ramps, he spent one half the day bent over into a stoop for half of his welds; that this tore up his back; that he had not done this work for a long period in the last 8 years of his employment with Five Star; that before he started welding the frames for arched ramps he told Jim Woodward that working on the 400 folding ramps tore up his back; that on April 19, 2004, he told Randy Looney, who was in his room helping him transfer over to the 400 folding ramps, that Jim Woodward was doing this because he knew that it would kill his back and Jim was trying to get him to quit; and that welding supervisor Randy Looney replied "[w]ell, you know how things are going around here" (Tr. p. 231). On cross-examination, Tanksley testified that he never gave Five Star a written notice from his doctor restricting what job duties he could perform; and that he never filed a workers' compensation claim with respect to his back injuries because he did not sustain the injury at work but it was aggravated by work.

Nancy Woodward testified that Tanksley never came to the office and produced any doctor's note restricting his work on the 400s; that she and her husband would be aware if an employee has a medical restriction with respect to the parts he can work on; that Tanksley never conveyed to her any type of doctor's note restricting the type of work he could do; that Tanksley did not come to her or her husband and express any concern about his back or the pain to his back after he started to work on the 400s; and that Tanksley did not miss any time off work because of his back injury after he was put on the 400s. In response to certain of Respondent's attorney's questions Nancy Woodward gave the following testimony:

Q. Were you even aware that he [Tanksley] had some type of back injury?

A. No. Well I knew he occasionally had problems with it but—because he—

Q When he was reassigned to the 400s did he reassert his back injury or—

A. No.

Q. —back issues?

A. No. [Tr. pp. 696 and 697]

Nancy Woodward also testified that Tanksley never filed a request for a workers' compensation injury, and he never had an injury which had to be recorded on the OSHA 300 log.

Jim Woodward testified that when Tanksley was reinstated Respondent protested paying his unemployment; that Respondent informed the Division of Employment Security that Tanksley was terminated for insubordination; that no other reason was given for the termination; that there was an employment hearing which Tanksley was present for; that Tanksley reported to Respondent late that morning for work after the unemployment hearing; that he sent Tanksley home because he did not know how long Tanksley was going to be gone and he had someone else doing the work in Tanksley's room; that he had no place to put Tanksley; that he could not say who was working in Tanksley's room that day, he did not know where the individual came from, it may have been a "night guy" (Tr. p. 90) but he did not remember who came in; that he could have called a night shift person to work the day shift but he did not remember who was in Tanksley's room; that he needed Tanksley's production that day but he did not have any place to put Tanksley; that Respondent has ten welding rooms and some are occupied by more than one welder; that Tanksley did not tell him that he would be in for work that day and he did not expect Tanksley to return to work after the unemployment hearing; and that when Tanksley did return to work he did not have "work available for him to do" (Tr. p. 184).

By letter dated May 18, 2004, Respondent's Exhibit 14, Jones advised Ritter as follows:

> Thank you for your letter of May 12, 2004. My client has requested that you send any communication to me and not send him copies, and that will hopefully help avoid confusion.
>
> We will defer putting the work rules and personnel policies in effect except to the extent that they announce policies that have been observed by the company in the past, pending further discussion with you about any specific issues.
>
> We are available to meet here at my office at 6:30 p.m. on Thursday, May 27, 2004. . . .

Jones testified that prior to this Five Star did not have any written work rules which were presented to him; and that he tried to incorporate Respondent's unwritten work policies into the written personnel policies which were drafted.

Tanksley testified that on May 19, 2004, there was a hearing on the unemployment compensation for the time he was off; that the hearing began at 9 a.m.; that he attended the hearing along with Jim Woodward's wife and daughter; that the day after he received the notice, he showed supervisor Randy Looney the notice regarding the hearing, and Randy Looney said that he would let Jim Woodward know about it; that he also told Randy Looney at that time that he did not know for sure if he would be coming to work afterwards because he did not know what time everything would be settled; that subsequently he found out that the Union was going to be working on a contract and on May 18, 2004, the day before the unemployment hearing, he told supervisor Randy Looney that he definitely would be back to work after the unemployment hearing; that when he got to work on May 19, 2004, at 10:40 a.m. Jim Woodward met him at the door; that he was trying to enter into the building to go to work and Jim Woodward said that he had something going on in my room and he told me to just go home and come back tomorrow; that he started to leave, he decided to use the restroom before he left but the employee door to the building was locked, which was usually only done when the business was not open; that he believed that he should let someone know that he showed up for work that day so he waited in the parking lot until noon and when Randy Looney came out he told him that he had showed up for work at 10:40 a.m. and Jim Woodward told him to go home; and that he also told Randy Looney about the door being locked. On cross-examination Tanksley testified that at the unemployment hearing he testified that Jim Woodward had been treating him like a dog for 10 years.

According to his testimony, on May 20, 2004, Tanksley was taken out of the welding room he had used for approximately 12 years. On cross-examination Tanksley testified that when he moved to the other room Wurtz worked in the same room with him; that he did not know Justin Kline; and that he did not work within 5 feet of Kline.

By letter dated May 27, 2004, Respondent's Exhibit 16, Jones advised Ritter and the bargaining committee as follows:

> At our first meeting on this date, as the chief spokesman for the company in this bargaining, I want to thank you for meeting with us at this time and place.
>
> We have an important responsibility to work together to try to accomplish three things:
>
> (1) First, we need to discuss the company's personnel policy booklet which has been prepared and distributed to you and which we would like to implement as soon as possible. We recognize that you have a right to comment on this. After considering your comments, we will take those into consideration in connection with the final rules that we will post and publish for the information of all employees.
>
> This company has always had rules of conduct that have been expected of its employees. However those rules have not always been written down. The employees deserve to have these rules written down so they can see what is expected of them and that is what we have attempted to do.
>
> The company has an inherent management right to have rules of conduct, and this is not a matter that we have to negotiate to a final agreement on like a collective bar-

gaining agreement, as the company has a right to post rules and to require them to be followed, pending negotiation. Anything in a final collective bargaining agreement that is reached, that is different from the rules will supersede the rules. But until we reach some other agreement, the rules will be applicable to all employees.

(2) Second, we have litigation to settle. We have an NLRB trial coming up July13. We had a settlement conference with the Regional Office yesterday. . . .

(3) Finally, we have a duty to seek to reach a bargaining agreement. In order to do this, the company has been indicating that it would bargain with the union since April 5. At that time, we voluntarily withdrew the objections to the conduct of the election or to conduct affecting the results of the election and asked the NLRB to certify the union as the representative so we could commence bargaining. We will do our best to bargain with the union for a one-year agreement of the type that we have proposed. We will be glad to discuss any issues, but we would suggest that we go through that proposal and agree on those sections that we can and see what issues remain.

. . . .

We will make tentative agreements as we proceed, and it is understood that no tentative agreement is binding on either party until the entire package has been agreed upon for presentation to ratification. . . . . Our side has full authority to reach tentative agreements subject to ratification by the company's board of directors. We assume the union has a right to reach tentative agreement subject to the ratification of the members or the bargaining unit. We assume that the union will tell us otherwise if that is not accurate.

Jones testified that the first bargaining session was held in his office in Springfield; that thereafter the Union wanted to meet at a different location; that after the first meeting, he requested a Federal mediator attend the meetings; that the Federal mediator scheduled the meetings, and they met in a building in Aurora once or twice; that the Union did not submit to him a written collective-bargaining agreement; that at the bargaining sessions they reviewed Respondent's proposal; that Respondent's Exhibit 16 is a letter that he handed Ritter at the first bargaining session in his, Jones', office; that scheduling was hampered by the fact that his mother passed away in April 2004; and that he has bargained for various companies "over the past 30 or 40 years that . . . [he has] been practicing labor law here in . . . [Springfield]." Tr. p. 548) On cross-examination Jones testified that he could not recall the specific discussion on the management rights clause; that Respondent did not reach agreement with the Union on the grievance and arbitration procedures Five Star proposed;[8] that he told Ritter during the bargaining session that if he was offering anything of substance he should put it in writing; that the Union did present its own proposal of the article one preamble; that the first bargaining session, which was held in his office, started at 6:30 p.m.; that he ended the first bargaining session after about two hours because they were going through substantial portions of Five Star's proposed collective bargaining agreement and "it was like cross examining me about what—each proposal was about. . . . It was a very long and tedious process. It was sort of a waste of time" (Tr. p. 568); and that he did not know if the Union and the employee bargaining committee wanted to understand what he was proposing.

Greg Turner, who began working as a welder for Respondent on May 31, 2004, testified that he did not have any interaction with Tanksley and that was probably his, Tanksley's, choosing; that when he said good morning to Tanksley he did not reply; that Tanksley could hear him; that Tanksley spoke to other employees, and responded to other employees' inquires; that he did not complain to management regarding Tanksley's conduct toward him; that he made management aware of Tanksley's conduct towards him ("[y]es" in response to a leading question of Respondent's attorney, Tr. p. 407); that Respondent did not ask him to meet certain production limits; that there was no expectation of the employer for a certain amount of production from his area; that "[e]very day we had to have quantity" (Tr. p. 408); that he looked at the number of units completed handwritten on other employees' timecards; that based on his observation "during . . . most of the time after I got accustomed to it I was doing more ramps than anyone else" (Tr. p. 409); that he was asked by other welders not to do so many ramps (he answered "[y]es" to a leading question asked by Respondent's attorney who called him as a witness (Tr. p. 409); that "[y]es" (in response again to a leading question of Respondent's attorney (Tr. p. 412)) he did speak to a supervisor regarding the conversation; and that if he was walking in the hall in the opposite direction of Tanksley, he would make sure he was not in Tanksley's way.

On cross-examination Turner testified that the timecards are in a rack and only the top two inches of the timecard is visible when it is in the rack; that when the card is in the rack he could see the name, the date and maybe one entry; that the one entry that he maybe could see while the timecard was in the rack was "[d]aily time, what that person put down on that day for quantity of parts fabricated that day" (Tr. p. 415); that he did not believe that he told employees that he was not fond of the Union; that he circulated a petition trying to get the Union out; that he is 42 years old, a hunter and a fisherman; and that he has "welded from 330 feet in the air swinging on the ball of a chain in 30 mile an hour winds to 42 feet underground with the walls caving in on me." (Tr. p. 417.)

On redirect Turner testified that he found out about a decertification petition from an fellow employee who found the information on his computer; that he obtained the signatures of his fellow employees on the decertification petition; that he

[8] The Respondent's proposal, R. Exh. 17, includes the following language in art. 3, sec. 3.8:

> The arbitrator's power and authority and jurisdiction in connection with the arbitration of a discharge-type grievance shall be limited to deciding whether the Company violated any law or abused its managerial discretion in making any discharge or in announcing any decision at the conclusion of the investigation of the grievance as aforesaid. The Union shall have the burden to prove its claim by competent evidence (not based on hearsay) that the discharge was unjust and an abuse of managerial discretion, which burden of proof shall be by clear and convincing evidence.

welds mostly bifold ramps; that he uses wood blocks underneath the bifold ramps to raise them up so that it is easier for him to get at; that "[y]es" (Tr. p. 420) this is done "[t]o *reduce* the strain on your back" (Id. with emphasis added); and that the wood blocks are available to all welders.

Subsequently, Turner testified that he is "[s]ix three and three quarters" (Tr. p. 421) tall and he weighs 225 pounds.

Nancy Woodward testified that all of the welders write the number of ramps they do on their timecards; that she created a summary, Respondent's Exhibit 30, which compares the production of Tanksley, Busby, and Henry between January 5, 2004 and June 16, 2004; that at the time Five Star had 12 welders; and that in February 2004 Tanksley was the least productive welder.

By letter dated June 17, 2004, Respondent's Exhibit 18, Jones advised Ritter, as here pertinent, as follows:

> Attached is a letter I have drafted for my client to give to Mr. Tanksley to assure him that his rights are not being violated under the NLRA. As you will note in this letter, I have asked my client to agree to arbitrate any claims that David Tanksley has if the union is willing to do so under the arbitration agreement we have proposed as a part of the collective bargaining agreement. . . . [Emphasis added.]

By letter dated June 17, 2004, (The attached letter mentioned above.) Respondent's Exhibit 13, Jim Woodward advised Tanksley as follows:

> It has come to my attention that the union has claimed that you have been discriminated against in connection with your work assignments on April 19, May 19 and May 20. I understand there is a claim that you had a conversation with Randy Looney, as your supervisor, in which you apparently stated or claimed to have said that I had reassigned you to a different work outside of welding frames in order to tear up your back and force you to quit.
>
> There was a claim made, as I understand, that Looney responded 'You know how it is going around here' or something to that effect.
>
> Although I do not understand how you could construe that conversation as being a threat of discrimination or unlawful in any way, I wanted to give you this written assurance that nothing that was said by Randy Looney to you was intended to be an indication of a threat or unlawful conduct on this company's part in any way. Randy Looney knows he is not to make any statements that would be unlawful and he has assured me that he has not made any such statements. If any such statements were made that were wrong, he and the company both retract any such statements, and give you this written assurance that you will not be discriminated against because of any Labor Board charges or any testimony that you give in support of any such charges, or because of whether you are for or against any union or participate in protected concerted activities.
>
> Furthermore, as you may know, the company has offered to enter into a collective bargaining agreement with the union, which would provide for binding arbitration of any claims of the sort that we understand you are making. I am sending a copy of this letter to your union or having my attorney do so, to indicate that this company is willing to agree to resolve any disputes or problems you have through the grievance and arbitration procedure that we have offered to the union, if the union is willing to do so, and if you want to fill out a grievance form of the type that we are furnishing you herewith, to enable us to have the information necessary for us to process such grievance and arbitration.
>
> Concerning the fact that you did not appear for work here on May 19, or whatever date it was that you had the unemployment hearing, you did not make arrangements with us in advance to be gone, and you did not make any arrangements with us to work a part of that day. Since you were gone, we did have someone else assigned to perform the work that was needed that day and we did not have anything to put you on at 10:40 or 11 a.m. on that date.
>
> As you know, all of our welders are in one bargaining unit, and their work is required to be interchangeable. We do not have the need for two persons welding frames at this time, and the person who is welding frames is keeping up with the work in such a manner that it is more efficient to use you in another capacity. However, again, if you and the union want to use the grievance and arbitration procedure that we have proposed to the union, you should get the union to assist you in filling out the attached ADR Form No. 3, and get it back to me within three to five work days or have your union send it to our attorney within that time. We will be glad to process your grievance under the procedure, investigate the specifics or your claim, and take any appropriate corrective action or if we believe that claims are disputed, we will be glad to take the matter to arbitration under the proposed grievance and arbitration procedure that we have proposed to the union.
>
> You are not required to sign the attached grievance form and send it back to us. The union is not required to do so. However, we want to make this offer to you and to the union to show our good faith in this matter, and to show that we are not taking any action against you or any other person because of any protected activities in which they have engaged. Five Star Manufacturing, Inc. pledges to you and the union and to the NLRB that we have not and will not coerce and intimidate employees to discriminate against them in violation of their federally protected rights under the NLRA.

Jones testified that his office prepared this letter for Jim Woodward; and that a grievance form was attached to the letter.

Respondent's Exhibit 20 is a "NOTICE POSTED FOR EMPLOYEES OF FIVE STAR MANUFACTURING, INC." dated June 18, 2004. As here pertinent it reads as follows:

> The attached Personnel Policies have been proposed and discussed with the Union.
>
> The Union has indicated that it has no objections to us putting into effect the first paragraph under Section 1, and the third and fourth paragraphs under that section. We are still discussing the second paragraph of Section 1 and it may be modified.

> The Company has indicated it intends to use Section 2 but the Union has requested that we hold that for further consideration. [The notice goes on to indicate which sections of the personnel policies the Union allegedly has indicated it has no objections to, and which sections are under further consideration.]
>
> . . . .
>
> THIS IS THE NOTICE TO ALL EMPLOYEES NOT COVERED BY THE TEAMSTERS COLLECTIVE BARAINING UNIT, ARE SUBJECT TO THESE PERSONNEL POLICIES EFFECTIVE AS OF JUNE 18, 2004.
>
> The employees covered by the Teamsters Bargaining are subject to those provisions of these rules which have been agreed to by the Union as indicated above, and those rules that are under further consideration are matters that the Company will enforce as its policy as soon as the Union has had an adequate opportunity to consider these items and if the Union does not provide some sufficient reasons why those policies should not be placed into effect. We hope to clarify this matter as soon as possible through the further negotiations with the Union for a Collective Bargaining Agreement. Any terms of the Bargaining Agreement that are reached with the Teamsters Union which conflict with those policies in any way will supersede any inconsistent policy.
>
> Jim Woodward, President
> June 18, 2004

Respondent's present attorney indicated that the purpose of introducing this exhibit, sponsored by Jones, was to show what Jones recalled regarding agreements reached between the Union and Five Star.

The Respondent's personnel policies were received as Respondent's Exhibit 15. The document is 17 pages, with the last page being a receipt the employee signs to indicate that he has received a copy of the policies. Topic headings include (1) Introduction and Welcome, (2) What we expect of you as an employee, (3) Policies against unlawful discrimination, (4) General work rules and disciplinary procedures,[9] (5) Regular employees and part-time employees, (6) Attendance, time records and pay dates,[10] (7) Time off and other matters,[11] (8) Miscellaneous policies, (9) Returning to work, (10) Employment status, (11) Grievance procedures, (12) Amendments and management rights, (13) Other matters, (14) Interpretation and construction, (15) Exclusive representation,[12] and, as indicated above, Receipt of personnel policies.

By letter dated June 23, 2004, General Counsel's Exhibit 15, Ritter advised Jones as follows:

> I am in receipt of your letter of June 16, 2004. While we would like to meet to negotiate as quickly as possible, we understand your scheduling issues. Please let me know a list of your available dates at your earliest convenience. Additionally, we reaffirm our position that future collective bargaining meetings should be held near the plant.
>
> The Union is prepared to present its language proposals at the next bargaining sessions. We would rather do this in face-to-face negotiations so that we can explain said proposals. I also believe that it is appropriate that the Union respond to the company's proposals at the bargaining table. The Union does not want to negotiate by letter.
>
> With respect to your position on the personnel policies, we demand that you do not implement any changes until full agreement is reached. We believe that you are incorrect that your only obligation is to discuss these matters with the Union. The employer's obligation is to maintain the status quo during the course of negotiations. Thus, it is improper for you to demand a final position on all items in the policy. These are matters that are subject to negotiations. If you implement these items unilaterally, we will take the appropriate action.
>
> With respect to your notice as to the items that we agreed upon, our position is that the employer cannot implement these items piecemeal. These agreements were made as part of negotiations and should be part of the collective bargaining process. I further note that there are several mistakes in your June 18 notice. With respect to subsection A of Section 7, it is my recollection that the phrase 'whenever possible' was agreed to be added after the word 'occurrence.' With respect to Section 8, subsection E, it is my recollection that the parties agreed that 'company owned' tools would not be taken off premises.
>
> Additionally, we think that your notice misstates the applicable law. Your client's obligation is to bargain con-

[9] This topic heading includes (A) 23 specified first level offenses, (B) 10 specified second level offenses, (C) 13 specified third level offenses, (D) management discretion to discharge for any level of offense, (E) improper moonlighting and conflict of interest policy, (F) rules concerning distribution, solicitations and access on company property, (G) Company policy as to smoking, and (H) mandatory attendance of meetings.

[10] This topic heading includes (A) assignment of duties, (B) work hours (Monday-Friday, 7 a.m. to 3:20 p.m. plus mandatory Saturdays) lunch, breaks, restroom, housekeeping, (C) work time is for work, (D) tardiness, (E) time records–work schedule, and (F) pay policies.

[11] This topic heading includes vacations and bonuses. With respect to the former, the policy includes the following:

> Vacation pay, when otherwise available, is deemed to be in the nature of a discretionary bonus on the part of the company for employees who have the required years and time of service. Thus, any employee who quits or is discharged prior to the vacation eligibility date or prior to taking any accrued vacation benefits shall be deemed to have forfeited any rights to vacation pay, unless otherwise provided by law.

[12] The language of this paragraph reads as follows:

> For those employees who are covered by a certified NLRA exclusive bargaining representative, under the National Labor Relations Act, the employee may have the services of the union which is his exclusive bargaining agent to represent the employee in connection with any matters involved herein and these rules will be interpreted as being subject to any collective bargaining agreement that the employer and such exclusive bargaining agent may enter into in writing. The grievance and arbitration procedure herein applies to any matter that is not covered by the union grievance and arbitration procedure in such collective bargaining agreement if any should be signed by the company.

cerning mandatory subjects of bargaining. It is not the Union's burden to provide 'sufficient reasons' as to why certain policies should not be placed in effect. Thus posting any such notice, in our opinion, constitutes bad faith bargaining in violation of Section 8(a)(1) and (5) of the Act.

Please contact me with a list of your available dates to negotiate. Please contact me if you have any questions concerning this letter.

By letter also dated June 23, 2004, Respondent's Exhibit 21, Ritter advised Jones as follows:

> I received your letter dated June 17, 2004. . . . The Union is not willing to submit to 'arbitration' the matters concerning Mr. Tanksley. As you are aware, the parties have not reached a collective bargaining agreement. The parties have not negotiated concerning a grievance and arbitration provision. The Union is not willing to accept the grievance procedure that was part of the employer's initial proposal. We believe that your client has continued to threaten, coerce, and discriminate against Mr. Tanksley. We believe that the proper forum to address these issues is before the National Labor Relations Board. Please contact me if you have any questions.

By cover letter date August 23, 2004, Respondent's Exhibit 19, Jones forwarded a copy of Respondent's proposed collective bargaining agreement to the Federal Mediation & Conciliation Service. One paragraph of the letter indicates "[b]y copy of this letter, I am renewing my request to the Union that they provide me . . . their complete proposal . . . ." The letter indicates that the only "cc:" is Jim Woodward. Jones testified "this letter apparently wasn't sent to the union, it was just sent to the mediator" (Tr. p. 549); that the letter was not sent certified, return receipt requested; and that he did not have any proof that the letter was received by the Federal Mediator other than the fact that the letter was allegedly mailed from his office.

Respondent's Exhibit 31 contains two memoranda from Dustin Woodward. The first handwritten note reads as follows:

> Tuesday Oct 12, 2004
>
> I Dustin Woodward was counting David Tanksley's ramps like I or Rod Gibson do everyday along with everyone else's ramps.
>
> Dave was being very careless with his pallet of ramps while dragging them back for us to count. While we were counting he was very impatient and rude. After we finished counting he took off with his pallet he was again … very careless with the pallet by ramming his pallet of ramps into another and slamming it onto the floor.

The memorandum is signed by Dustin Woodruff and Rod Gibson.[13] This same incident is also memorialized in Respondent's Exhibit 11, which is described below. Dustin Woodward testified that he made the entry in Five Star's computer for the October 12, 2004, above-described incident. That entry reads as follows:

> 10-12-04
>
> DAVE CAME INTO WASH ROOM AND TOLD ME TO COUNT HIS RAMPS. I TOLD HIM HE WOULD HAVE TO DRAG THEM BACK HERE FROM NOW ON. HE HUFFED AND PUFFED, DRAGGED THE PALLET JACK AROUND RUNNING INTO THINGS. HE BROUGHT HIS RAMPS BACK AND STOOD THERE BREATHING HEAVILY, HE WAS BEING RUDE AND INSUBORDINATE. I COUNTED HIS RAMPS, HE THEN TOOK THEM OUT IN THE OTHER PART WHERE HE SLAMMED THEM DOWN LOUDLY AND QUICKLY BANGING INTO OTHER THINGS.
>
> DUSTIN

When asked for the second time why he did not just type his handwritten note into the computer, Dustin Woodward testified

> the reason I wrote [actually typed] he huffed and puffed and dragged his pallets around and I didn't write that . . . . [in the handwritten note] is I— just—I kind of remembered that is what his actions was [sic].
>
> . . . .
>
> This one here [the handwritten note] was just a quick reminder of what it was, of the incident. I wrote this out quickly. [Tr. p. 816]

When he was first asked why he did not just type his handwritten notes into the computer, Dustin Woodward testified "I just handed it—I don't know. I just wrote it out by hand. (Id.) The second handwritten memorandum of Respondent's Exhibit 31 reads as follows:

> Friday October 15, 2004
>
> At approx 3:05 I was counting David Tanksley['s] ramps and after I had finished counting I asked him a direct question and he ignored my question and turned his back and walked off. He was being very hateful and rude by purposely ignoring me.

The memorandum is signed by Dustin Woodward. The corresponding entry in Respondent's Exhibit 11 reads "10-15-04, DUSTIN HAS AN INCIDENT WITH DAVE SEE HIS FILE." When asked why he did not type the handwritten note dated October 15, 2004, into the computer, Dustin Woodward testified that he is usually very busy, he did not "mess with the computer much. . . . I am really never on the computer" (Tr. p. 817), and he believed that someone input that into the computer because he had made a handwritten note about it; and that he did not know who actually made the entry into the computer.

General Counsel's Exhibit 3 reads as follows:

> BENEFITS FOR EMPLOYEES FOR 2004 OR AS LONG AS FIVE STAR MFG, INC. DECIDES TO KEEP THEM, DUE TO THE RISING COST OF HEALTH INSURANCE.
>
> 1. IRA SIMPLE PLAN AFTER 3 MONTHS OF EMPLOYMENT.
>
> 2. INSURANCE WITH A WAITING PERIOD OF 60 DAYS. PLEASE LET OFFICE KNOW AFTER 30 DAYS OF EMPLOYMENT (FOR NECESSARY PAPERWORK)

[13] The following appears under Gibson's signature: "partial witness." As noted above, Gibson testified that he never saw Tanksley handle his ramps on a pallet jack in a manner that was inconsistent with other welders.

> 3. AFTER *3* FULL YEARS OF EMPLOYMENT YOU QUALIFY FOR A YEARLY BONUS. THE BONUS PAY SCALE IS AS FOLLOWS. THE SCALE IS BASED ON FIVE STAR W-2 FORM FROM THE PREVIOUS YEAR.
>
> 3 YEARS YOU GET 2%
>
> 5 YEARS YOU GET 3%
>
> 10 YEARS YOU GET 4%
>
> 4. X-MAS BONUSES ARE PAID $25.00 FOR EACH YEAR YOU HAVE WORKED WITH A MAX. OF $150.00
>
> 5. *1 WEEK OF VACATION* BASED UPON A 40 HOUR WORK WEEK AFTER EMPLOYMENT OF 1 FULL YEAR. [Emphasis in original.]

Jim Woodward testified that items 3 and 5 described above were in effect in 2004 and 2005.

By letter dated November 17, 2004, General Counsel's Exhibit 16, Ritter advised Jones as follows:

> I received your letter of November 10, 2004. It appears to me that both the health insurance and production issues mentioned in your letter are mandatory subjects of bargaining. Your client's obligation is not to 'discuss' these matters. It is your client's obligation to bargain in good faith concerning them.
>
> I have been trying to schedule negotiations with you for a long time. If you would simply provide me with a list of your available dates, we should set a negotiation session as soon as possible. In the interim, the Union objects to any unilateral changes in health insurance or production requirements, or any other matter. While I am sure that these issues are a vital concern to your client, they are also a vital concern to the employees that we represent. I look forward to hearing from you.

Regarding bonuses, Jim Woodward testified that Tanksley did not receive a bonus in November 2004 because, while he was eligible for a bonus, Tanksley missed two months of work after his heart attack in 2003; that he decided who receives a bonus based on his decision as to whether an absence was excused or unexcused; that he made the decision whether an employee should receive vacation pay using his discretion in this area; and that before he used his discretion in these ways, he did not notify the Union.

Busby testified that he did not receive a bonus in October or November 2004 because he had taken some personal leave; and that General Counsel's Exhibit 13 reflects his absences in 2004 from Five Star on scheduled work days.[14]

Jim Woodward testified that collectively in 2004 and 2005 his mother, his wife, his daughter, employees Turner, Gibson, Busby, and Jason Klein, and Supervisor Randy Looney complained about Tanksley; that Respondent had about 25 employees in 2004; that as a part of its new policy regarding paperwork, some of the complaints were recorded in a time line and placed in Tanksley's personnel file as instructed by Respondent's attorney Jones; that other employees received write ups but he could not recall exactly who; that after he was reinstated Tanksley would take naps in the material hall in open view during break time or lunch time; that Tanksley got drinks and food either before or after breaks when he should have been working; and that Tanksley's production did not improve after his reinstatement. In response to the questions of Counsel for General Counsel, Woodward testified that after Tanksley was reinstated, Respondent recorded when he got snacks or went to the restroom other than at break time; that this continued through January or February 2005; that Respondent did not have reason to keep such records for anybody else; and that while other employees went to the vending machines or the restroom they did not do it on a regular basis, "[t]en minutes before break and ten minutes after every day, three times a day, or four." (Tr. p. 192.)

Wurtz testified that in 2004 and 2005 nothing was said to employees going to the vending machines or to the restroom at times other than break time; that he saw employees, including office personnel doing it; and that supervisors and managers saw it and he saw them doing it.

On cross-examination Leuschen testified that he and Tanksley would usually pick up their paychecks on Wednesday at the same time; that "[a] lot of times Dave [Tanksley] [after he was reinstated] would go in first and they seemed like they was handing 'em out in order 'till Dave, and … usually they'd do the people behind Dave and then they would give [him] his check. . . ." (Tr. p. 396)

Leuschen testified that when he left Five Star in January 2005 he expected that there would be five days of vacation pay in his final paycheck; that he did not receive his vacation pay; that Nancy Woodward told him that Jim Woodward said that since he, Leuschen, had quit, he forfeited his vacation days; that Supervisor Smith is his wife's cousin; that Smith told him that when she left Five Star she received her vacation pay; that there were occasions during work time in 2005 when he would leave his welding room, other than on breaks or at lunch, to go to the restroom or to get a drink; that he would see other welders and production workers going to the vending machines when they were not on breaks; and that he saw Jim Woodward and supervisor Randy Looney beside the vending machines when it was not break time and other employees were there. On cross-examination Leuschen testified that on January 17, he told Five Star that he was quitting and he did not work for Respondent beyond that day; and that Smith told him that she did not give Five Star any advance notice that she was leaving.

Kline started working as a welder for Five Star on March 1, 2005. Kline testified that Tanksley shared a welding room with him when he, Klein, started working at Five Star; that he tried to start conversations with Tanksley but he just ignored him; that he never asked Tanksley much because Tanksley never paid any attention to him; that Tanksley would say "just another day in paradise" everyday; that he did not pose a direct question to Tanksley regarding how jobs were to be done; that if he had any questions or needed assistance he would ask Turner or welding supervisor Randy Looney; that he wanted someone to talk to while he was doing his job but Tanksley was unwilling to engage in conversation; that he told supervisor Randy Looney about this; that there was never an occurrence where he was walking toward Tanksley in the hall and Tanksley would not move out of his way; and that during the

[14] The parties stipulated, as here pertinent, that GC Exh. 13 is from Busby's personnel file.

three weeks he worked in the same room with Tanksley not once did Tanksley offer to help him with his job. On cross-examination Kline testified that he did not remember exactly how he found out about the job at Five Star; that Jim Woodward hired him; that he knew the Woodwards before he started working at Five Star; and that he was a friend of the family and he went to school with the youngest Woodward boy.

Jim Woodward sponsored Respondent's Exhibit 11. It is titled "FILE ON DAVE T" and it has 17 pages of entries ending with one for "4-7-05" and beginning with one for "4-7-04." The entries refer to alleged misconduct of Tanksley, including going to the vending machines to get food while not on break, not working, laying down on the floor during his break, staring, walking directly in someone's else's path, going to the water fountain (in July 2004) when it is not a break, going to the bathroom, making a gagging sound, smiling, huffing and puffing and breathing heavily when he operated a loaded pallet jack in October 2004, and not coming to the office to take phone calls. Five of the entries should be quoted in full. They read as follows:

> 3-2-05
>
> NICOLE AND I WAS WORKING IN JIM AN MINE'S OFFICE ON SOME PRIVATE ISSUES. WE HAD BEEN DISCUSSING THINGS AND PUTTING DATA IN THE COMPUTOR WHEN I LOOKED DOWN AND SAW ON THE COMPUTER SCREEN IT WAS 3:28 I SAID OOPS I NEED TO GO HAND OUT PAYCHECKS, I GOT UP AND SAW DAVE T STANDING BEHIND ME. I DON'T KNOW HOW LONG HE HAD BEEN STANDING THERE LISTENING TO PRIVATE INFORMATION. I TOLD HIM NEXT TIME TO EITHER KNOCK OR LET ME KNOW HE IS IN THE OFFICE. THE DOOR HAD BEEN AJAR JUST A LITTLE BIT I GUESS SINCE I DIDN'T HEAR HIM COME IN. I ALSO TOLD HIM TO KNOCK NEXT TIME OR LET ME KNOW HE WAS THERE. I ALSO TOLD HIM I WOULD HAND OUT CHECKS IN THE HALLWAY OR THE MAIN OFFICE. USUALLY IF I'M NOT IN THE MAIN OFFICE AT HAND OUT TIME SOMEONE WILL COME GET ME TO DO THIS.
>
> DAVE JUST SMIRKED AT ME WHEN I TOLD HIM THIS.
>
> NANCY AND NICOLE
>
> . . . .
>
> ???
>
> RUTH CAME INTO THE OFFICE & WANTED TO TALK TO DAVE, I PAGED HIM AND HE CAME RIGHT AWAY TO THE OFFICE WHICH WAS UNUSUAL FOR HIM. RUTH THEN ASKED IF DAVE COULD HAVE HIS CHECKS AND I SAID YES HE MAY BEFORE I COULD GET THEM THE PHONE RANG SHE SAID DAVE WOULD PICK THEM UP WHEN HE CAME BACK IN FROM GETTING HER AN EXTRA SET OF KEYS (SHE HAD LOCKED HERS IN HER VEHICLE OR SOMETHING.) DAVE NEVER CAME BACK INTO THE OFFICE THAT DAY TO RECEIVE HIS CHECKS.
>
> ???
>
> RUTH CALLED ME AROUND 6:00 PM ONE NIGHT AND ASKED WHERE DAVE WAS SUPPOSED TO PICK UP HIS PAYCHECKS. I TOLD HER 'DAVE WAS SUPPOSED TO COME TO THE OFFICE LIKE EVERYONE ELSE DOES IF I'M NOT IN THE HALLWAY HANDING THEM OUT. SHE SAID SINCE THERE SEEMS TO BE A PERSONAL ISSUE WITH HIM & US, THAT I SHOULD PUT HIS PAYCHECKS WITH HIS TIMECARD. I SAID HE HAS ISSUES WITH ALL THE EMPLOYEES, THAT HE DOESN'T GET ALONG WITH ANYONE. I ALSO TOLD HER DAVE NEEDS TO DO HIS OWN ASKING AND STOP HIDING BEHIND HER. ALL REQUESTS NEED TO MADE BY EMPLOYEES NOT THEIR GIRLFRIENDS.
>
> . . . .
>
> 4-6-05
>
> IT WAS 3:25 OR SO DAVE CAME INTO THE OFFICE WHERE MOM AND I WERE. FIRST WORDS OUT OF HIS MOUTH WERE 'WHAT IS THE DEAL DO I STAND IN THE HALLWAY OR COME IN THE OFFICE?' MOM REPLIED 'YOU DO WHAT EVERYONE ELSE DOES DAVE IF I'M IN THE HALLWAY GET OUR CHECK THERE IF NOT COME IN THIS OFFICE.' HE REBUTELED BACK 'I WAS TOLD NOT TO COME INTO THE OFFICE' MOM SAID 'I TOLD YOU TO LET ME KNOW THAT YOU WERE IN THE OFFICE' HE STATED 'YOU CAN BLAME THAT ON NICKI SHE KNEW I WAS IN THERE' I INFORMED HIM THAT I WAS NOT HIS BABYSITTER. PLUS I DIDN'T KNOW HE WAS THERE THAT DAY I WAS WORKING ON PRIVATE INFORMATION WITH MOM ON THE COMPUTER. IN THAT OFFICE IF YOU ARE ON THE COMPUTER OF MOM'S YOUR BACK IS TURNED TO THE DOOR. YOU HAVE NO IDEA SOMEONE IS IN THERE UNLESS THEY MAKE A NOISE OR YOU TURN AROUND AT THE RIGHT TIME. ANY WAY HE DEMANDED HIS 3 CHECKS MOM SAID 'THANKS FOR ASKING I WILL GET THEM FOR YOU' SHE HANDED HIM THE TWO THAT WERE ON HER DESK. HE SAID 'ONE SHORT' SHE SAID LET ME GO FIND IT. I TOLD HER SHE WOULD HAVE TO ASK DAD. DAVE IN RETURN SAID 'SHUT YOUR MOUTH I WAS NOT TALKING TO YOU' I SAID YES YOU WERE HE SAID FIVE MINUTES AGO. HE STARTED RAISING HIS VOICE SAYING SOMETHING AND I TOLD HIM HE WAS A LOSER. AT THIS POINT BOTH OF US WERE HOLLERING. MOM HEARD US AND TOLD DAVE TO GO WAIT IN THE HALL WHILE SHE FOUND HIS OTHER CHECK. SHE LEFT THE DOOR TO THE OFFICE OPEN. I COULD SEE DAVE OUT THERE LEANING UP AGAINST THE DOOR FRAME TO DAD'S OFFICE HE LOOKED AT ME A SMIRKED THE BIGGEST GRIN HE COULD. I SAID POLITELY 'DAVE YOU SURE LOOK CUTE WHEN YOU SMILE' HE HUFFED UP EVEN BIGGER. BY THIS TIME MOM HAD FOUND HIS CHECK AND GAVE IT TO HIM. HE WALKED INTO THE BUILDING A LITTLE FURTHER TO WAIT UNTIL IT WAS TIME TO CLOCK OUT. THE WHOLE TIME HE WAS WAITING HE HAD A SMIRK ON HIS FACE (AS USUAL). HE ALWAYS PUTS ON A SMARTASS GRIN WHEN HE SEES ONE OF US OR IF HE WANTS TO TRY TO SHOW HIS ASS. WHEN HE TOLD ME TO SHUT MY MOUTH I WAS MAD. FIRST OF ALL I WAS NOT SPEAKING TO HIM I WAS TELLING MOM SHE'D HAVE TO ASK DAD WHERE HIS CHECK WAS. SECONDLY HE HAS NO RIGHT TO TELL ME TO SHUT MY MOUTH EVEN IF I WAS SPEAKING TO HIM. THIRDLY HE CAME IN THE OFFICE RIGHT OFF WITH AN ATTITUDE THAT HE WAS THE MANAGEMENT AND THE ONE THAT CALLS THE SHOTS AROUND HERE. BARKING AT MY MOM. HE IS THE RUDEST HUMAN BEING I HAVE EVER HAD THE DISPLEASURE OF WORKING WITH. PEOPLE DO NOT NEED THAT KIND OF ATTITUDE AT A WORK PLACE. MY FATHER, MOTHER AND GRANDMOTHER ARE NOT ALLOWED TO TREAT PEOPLE WITH DISCRIMINATION AT THE WORK PLACE, SO IN RETURN DAVE TANKSLEY SHOULD NOT BE ALLOWED EITHER. HE SHOULD HAVE TO HAVE RESPECT AND CONTROL HIS

> BEHAVIOR. HE DOESN'T MAKE THE RULES AROUND HERE AND HAS NO STOCK IN THE COMPANY. THIS IS THE SECOND TIME I HAVE HAD TO PUT UP WITH SUCH BEHAVIOR IN THE OFFICE, LET ALONE OUT IN THE HALLWAYS.
>
> NICOLE
>
> . . . .
>
> 4-7-05
>
> DAVE SOMEHOW GOT BEHIND ME ON THE WAY HOME LAST NIGHT. HE FOLLOWED ME A WHILE, AND THEN HE GOT CLOSER AND CLOSER TO MY VEHICLE. HE WAS TRYING TO INTIMIDATE ME. HE GOT SO CLOSE THAT I COULD NOT SEE HIS HEADLIGHTS AT ONE POINT. WHEN I TURNED OFF AT THE TURN OFF HE GOT AS CLOSE TO MY VEHICLE AS POSSIBLE WITHOUT HITTING ME WHEN HE WENT AROUND ME.
>
> THIS WAS AROUND 3:54 PM YESTERDAY.
>
> NICOLE [THE PUNCTUATION OR LACK THEREOF, THE GRAMMAR, AND THE SPELLING IN THE MATERIAL QUOTED ABOVE IS AS IT APPEARS IN THE ORIGINAL. NO ATTEMPT IS MADE TO CORRECT OR DISCLAIM ([SIC]) THE ERRORS.]

According to Jim Woodward's testimony, with Respondent's 11 Five Star wanted to show poor use of time and poor production.

Newberry testified that Respondent's Exhibit 11 is a documentation of some of the things they saw Tanksley do; that her negative interactions with Tanksley were too numerous to list them all; that Jones and Lawson recommended that they keep track of Tanksley; and that her entries accurately reflect what she observed and what others told her had occurred. On cross-examination Newberry testified that when she was in the main office if she heard the vending machines being used she would look to see who was using the machines and 98 percent of the time it was Tanksley; that Jones and Lawson advised Five Star to record Tanksley's conduct but she did not know the purpose of keeping such a record; that she was told that if she had any run-ins with Tanksley she should record them; that she considered her entries in Respondent's Exhibit 11 to be run-ins; that she made the entry '11/4/04 time is 9:51. Dave had gone to the bathroom instead of waiting 'til break. Nicole' (Tr. p. 681) because in nine minutes it would have been the 10:00 o'clock break and "[a] grown man can't wait nine minutes to use the restroom" (Tr. p. 682); and that she thought that this entry was important to write down.

Subsequently, Newberry testified that in writing " WHEN HE SEES ONE OF US OR IF HE WANTS TO TRY TO SHOW HIS ASS" she did not mean that literally Tanksley tried to show a part of his anatomy.

Nancy Woodward testified that Respondent's Exhibit 11 "was just chance incidents that we would be out in the hall and we started documentation on him [Tanksley]" (Tr. p. 741); and that Respondent's Exhibit 11 does not contain all of the infractions that were observed "because I just got tired of writing every little incident down" (Id.). On cross-examination Nancy Woodward testified that the first entry in Respondent's Exhibit 11 was made shortly after Tanksley was reinstated, and after the Board charge was filed on Tanksley's behalf; that there is nothing like Respondent's Exhibit 11 in any other personnel file; that Respondent started this list at the advice of legal counsel to start documenting everything that was going on whether it involved Tanksley or any other employee; and that nothing like Respondent's Exhibit 11 was written for any other employee because Five Star did not have cause to do it for any other employee. On cross-examination Nancy Woodward testified that everyone uses vending machines but most of them used them during their break time; that "[o]ccasionally. Very seldom" (Tr. p. 774) some of the employees used the vending machines at times other than at break time; that she has seen other employees use the vending machines at other than break time; and that since Tanksley was paid on a piece basis, he was not being paid when he was in the hallway at the vending machines.

Jim Woodward testified that in March and April 2005 Tanksley failed to pick up three consecutive weekly paychecks; that on the day that Tanksley finally insisted on his pay being brought up to date he decided to fire Tanksley again; that he had the authority to make that decision; that Tanksley worked every day during this three-week period; that he, his mother, and his wife, in consultation with Respondent's attorney decided to discharge Tanksley again; that the decision was made on the day Tanksley was given the three paychecks; that on that day his wife came to his office and asked where one of Tanksley's paychecks was; that he heard yelling in the main office, his wife told him the Tanksley was screaming at their daughter in the main office, and he gave Tanksley's paycheck to his wife; that it was his understanding that Tanksley came into the main office asking for his paychecks, his wife gave Tanksley the paychecks, Tanksley said that there was one more paycheck owed him, his wife said that she would get it, his daughter said that the other paycheck was in her father's office, and Tanksley told his daughter to shut her mouth because he was not talking to her; that there were several reasons for this discharge and the incident in the main office was the "camel that broke the straw" [sic] (Tr. p. 105); that the 2005 discharge of Tanksley was discussed before the day he told his daughter to shut her mouth; that he could not remember the dates of these discussions but they had to do with Tanksley's misuse of time, and it was the same situation it had been for over a year and it kept getting worse; that several times Tanksley had been told to take his breaks at break time instead of during work hours; that Tanksley was fired in 2005 for mostly attitude, low productivity, and rudeness to other people; that a new employee, Kline, asked to be moved because Tanksley would not talk to him; and that when Tanksley walked down the hall, he would not move out of the way. Jim Woodward further testified that while employees can go into the main office, they are not allowed to enter his private office without permission; that Tanksley did not come and get the involved paychecks; that Tanksley not getting his paycheck "went on for about three or four weeks. And it was getting to be a joke that he wouldn't come and get his check[s]" (Tr. p. 178); that Tanksley never asked him for his paychecks; that Tanksley attempted to have his wife or girlfriend get his paychecks even though he was coming to work every day; that Respondent did not give the paychecks to the girlfriend because it is not company policy to give a paycheck to someone's spouse unless the employee has telephoned Respondent in advance and asked it to do this; that

while he was in his office on the day Tanksley asked for his paychecks he heard yelling in the main office; and that there had been a previous history between Tanksley and his daughter, Newberry.

In response to questions of counsel for General Counsel, Jim Woodward testified that he, his mother, his wife, and his daughter thought it was getting to be a joke that Tanksley would not come and get his paychecks, "[i]t wasn't a laughing joke. It was just kind of one of them deals like, what is the matter with him. Can't he come in and get his own check or does he got [sic] to have somebody hold his hand" (Tr. p. 199).

Tanksley testified that the normal practice with respect to picking up paychecks was to go to the main office and get it; that problems developed with regard to him getting his paycheck in or about early March 2005; that on a payday he was standing in the hallway between the main office and Jim Woodward's office; that both office doors were closed; that he saw Ron Atkinson enter Jim Woodward's office and exit with his paycheck in hand and he assumed that was where the paychecks were; that he went into Jim Woodward's office to collect his paycheck; that Jim Woodward's wife and daughter were sitting facing a computer with their backs to him; that Jim Woodward's daughter turned and saw him as he entered the room; that he stood there quietly waiting for two to three minutes to get his paycheck; that Jim Woodward's wife stood up and told him that she did not like him standing behind her and that from now on he "needed to wait out in the hallway to get . . . [his] check" (Tr. p. 236); that at that point in time he received that paycheck; that the following week Nancy Woodward was passing out the paychecks while standing in her doorway; that he was about third in line, Nancy Woodward passed out paychecks to the two employees in front of him and when it was his turn Nancy Woodward turned and went back into her office; that he did not follow her into the office because he had been told to stay out of the office and wait in the hall; that "I just went ahead and left because we was [sic] already having problems" (Tr. p. 237); that the following week Dustin Woodward was standing in the hallway handing out paychecks; that when Dustin Woodward handed him his paycheck he told Dustin Woodward that there should be another one; that while Dustin Woodward told him that he needed to talk to the office about that, he did not go into the office because he had been told to stay out of the office; that at one point his roommate, Ruth Feltz, drove to the Five Star facility to get a key to one of his vehicles; that he was called over the intercom to come to the office; that he found Feltz standing in the office doorway; that after Feltz told him what she was there for, Feltz asked Nancy Woodward if Tanksley could get his paycheck; that Nancy Woodward just ignored Feltz; that as he took his keys off his key ring to give to Feltz, Feltz asked Nancy Woodward "What does Dave need to do to get his check" (Tr. p. 238); that Nancy Woodward again ignored Feltz; that he told Feltz not to worry about it and just go on home; that he went back to work; that the following week there was no one standing in the hallway to pass out paychecks but he did not go into the office because he had been told to stay out of there; that the following Wednesday he was trying to get three paychecks; that he was hurting financially so he went into the office and he asked Nancy Woodward what he needed to do to get his paychecks; that he told Nancy Woodward that she told him not to come into the office, wait out in the hallway; that Nancy Woodward said that she told him that she did not want him standing behind her; that he told Nancy Woodward that her daughter saw him walk into the office; that Nicole Newberry said "I am not your baby sitter David" (Tr. pp. 239 and 240); that Nancy Woodward then said "[t]hat is right, David. We are not your baby sitters" (Tr. p. 240); that Nancy Woodward gave him two paychecks and he asked her where the third paycheck was; that Nancy Woodward said that she would have to go and find it; that as Nancy Woodward was leaving the office "Nicole started smarting off some kind of remarks and I just told her 'Nicky, nobody is talking to you. Why don't you just shut up.'" (Id.); that Nancy Woodward came back into the office and told him that he needed to go back out in the hallway and wait; that as he was standing in the hallway Nicole yelled out "Loser" (Id.); that a few minutes later Nancy showed up and apologized to him for having to wait for his paycheck; that he did not raise his voice; and that the next day, April 7, he received a notice of suspension and possible discharge from Jim Woodward as he entered Respondent's facility to go to work.

On cross-examination Tanksley testified that during his conversation with Nancy Woodward in Jim Woodward's office she told him "that from now on I needed to wait in the hallway . . . [t]o get my check" (Tr. p. 267); and that he has been in Jim Woodward's office in that the welding tips and welding gloves are kept in a closet in Jim Woodward's office, he would enter the office and ask Jim for the item or, if Jim was not it the office, he would go into the main office and tell Nancy Woodward what he needed.

Wurtz testified that in 2005 he went to the main office to pick up his paycheck and Tanksley was standing in the office; and that Nancy Woodward handed him his paycheck and walked out and Tanksley still did not have his check. On cross-examination Wurtz testified that Tanksley was already in the office when he went into the main office; that he believed that Tanksley eventually did receive his paycheck that day; and that he did not know if there was any reason for Tanksley not receiving his paycheck first.

When called by the Respondent Jim Woodward testified that it was not conveyed to him that Tanksley was complaining because he wasn't getting his paychecks; and that if Tanksley had asked him, he would have given the paychecks to him.

Gibson testified that on the day Tanksley was discharged the second time he, Gibson, went to the main office; that he walked into the office after the yelling between Tanksley and Newberry began; that he did not hear the yelling out in the hall; that he first heard the yelling when he opened the door to the main office; that when he walked into the main office Tanksley was yelling at Newberry; that he could not remember what was said; that Newberry raised her voice back to Tanksley; that he left the main office as soon as the yelling started; and that in the hallway between the offices he could still hear the yelling. On cross-examination Gibson testified that he did not recall what Newberry said in her verbal exchange with Tanksley; that Nancy Woodward was in the office when he was there and Lorene Woodward might have been there but he was not in a

position to see her; and that he did not see anyone else in the room other than Tanksley, Newberry, and Nancy Woodward.

Newberry testified that on April 6, 2005, she was working in the main office; that Tanksley entered the main office; that Five Star had maybe three of Tanksley's paychecks waiting for him; that she was not aware of any reason why Tanksley was not able to come into the main office and ask for the paychecks before April 6, 2005; that in response to Tanksley's question about the checks, her mother handed him one or two; that Tanksley said something about missing one and her mother was looking on her desk for the other check; that she told her mother '[y]ou will have to ask Dad' (Tr. p. 652); that Tanksley yelled at her to shut her mouth, he was not talking to her; that she believed that the check was in her father's office; that she probably hollered something back at Tanksley but she did not remember what it was; and that she was not sure if someone came into the office after her mother left. On cross-examination Newberry testified that her father might have told her to shut her mouth, it would not be out of the ordinary, but she did not recall such an occasion.

Nancy Woodward testified that Tanksley "even quit coming to the office to get his welding supplies. . . . he [Tanksley] just basically quit coming to the office for anything." (Tr. p. 738); that on April 6 Tanksley came into the main office to get his paychecks; that she believed that Five Star had three of Tanksley's paychecks at that time; that in the beginning of March 2005 she and Nicole were in Jim Woodward's office working on confidential reports on the computer, with the door behind them, and she realized that Tanksley was in the office; that she told Tanksley the next time he came into the office to knock or make a noise; that she told Tanksley that he could get his paycheck in the hallway if she was out there or in the main office; that the next payday she was standing in the hallway and he went right past her; that she gave Tanksley's paycheck to her husband; that the following payday she was in the hallway handing out paychecks and Tanksley walked by again; that the following pay Dustin Woodward handed out the paychecks; that she believed that there was another pay period prior to April 6 because she remembered that Tanksley's girlfriend, Ruth, came to the office to get car keys from Tanksley, Ruth asked her if Tanksley could get the paychecks he had not received, she told Ruth "yes," she answered the telephone, Ruth said Tanksley would get the checks later, and Tanksley did not get the checks later that day; that a couple of days later she received a telephone call from Ruth at her residence, Ruth asked her where Tanksley was supposed to pick up his checks, she told Ruth in the main office or in the hallway when she is out there, Ruth asked her if she could put Tanksley's paychecks with his timecard, she refused, and she told Ruth "Dave needs to be doing this phone call not you. He is the employee, not you and I hung up" (Tr. p. 762); that the following payday, April 6, Tanksley came into the main office and said "[m]y check" (Id.); that she then said "Well, thank you for asking. Here they are" (Tr. p. 763); that Tanksley said "I have another one coming" (Id.); that she remembered that Jim Woodward had the other Tanksley paycheck in his office so she proceeded to go out of the main office to get it; that Nicole said "Mom you will have to ask Dad where it is" (Id.); that Tanksley then shouted "[y]ou shut your mouth. I'm not talking to you" (Id.); that she retrieved the paycheck from her husband's office and Tanksley and Nicole were still yelling so, after she gave him the paycheck, she told Tanksley to wait out in the hallway; that she told her husband what happened; that she believed that her husband telephoned Jones; that the next day Tanksley was suspended; and that the April 6 incident was probably the main reason the Tanksley was discharged and other reasons were provided to Tanksley for his discharge, namely insubordination, work slowdown, not getting his production up, total rudeness to all the office personnel, and not getting along with other employees.

On cross-examination Nancy Woodward testified that her complaint about Tanksley is as follows: "it was just his attitude. Being insubordinate; not really so much insubordinate. I can deal with that; just trying to antagonize us by his whole attitude of like he owned the Company maybe, or I couldn't really describe what his thought was. (Tr. p. 776)

Dustin Woodward testified that there was an occasion when Tanksley asked for checks beyond the single paycheck he had to hand out and he told Tanksley to go into the office and ask his mother.

On cross-examination Ritter testified that sometime before the second discharge of Tanksley in April 2005, Respondent's then attorney, Jones, submitted a packet to the Union including a proposed collective bargaining agreement and personnel policies; that the personnel policies described procedures relating to discharge, suspension, and investigation; that the Union submitted written objections to the Jones' personnel policy proposals; that most of Jones' personnel policy proposals were mandatory subjects of bargaining and the Union wanted to bargain over these; and that he believed that before Tanksley's second discharge he contacted Jim Woodward asking him to meet in private because they were making no progress in negotiations and he thought if he could take Jones out of the equation there might be some dialogue because the Union was not able to have a dialogue with Jones. On redirect Ritter testified that when Jones submitted to the Union what he called a complete copy of the contract, he told Jones that they should look the Union's preamble also and try to put something together; and that

> I started to write some notes and suggest to him [Jones] and he said I'm not writing anything down. I can't write, I can't read my own writing, I have Parkinson's disease. And I said can somebody else here take notes? And he said no, they can't. When you have something typed that you want to submit, resubmit it to me. But I'm not taking any notes.
>
> He insisted that he, what he proposed to me was, was the only, he wasn't gonna move. [Tr. p. 374.]

On recross Ritter testified that this occurred at the second meeting he had with Jones; that the parties had a mediator at this meeting and at a subsequent meeting; and that there were a total of three meetings, and a mediator was involved in the last two meetings.

Leuschen testified that he attended two of the bargaining sessions.

The General Counsel's Exhibit 4 is a notice of suspension and possible discharge which Jim Woodward gave to Tanksley on April 7, just before he sent Tanksley home. As here pertinent it reads as follows:

> YOU ARE HEREBY SUSPENDED WITHOUT PAY FOR OFFENSES WHICH ARE DESCRIBED BELOW . . . .
>
> THE OFFENSES WHICH ARE ALLEGED . . . .
>
> 1. Insubordination to office personnel & yelling at office staff. General attitude of hostility to office staff.
> 2. Inadequate production. Lowest producing employee, not using time wisely.
> 3. Show of rudeness to other employees.
> 4. Not using allotted break time to get your snacks or drink but taking time you should be working to get a drink or snack everyday, 2 or 3 times daily.
>
> IF YOU DENY THAT YOU ARE GUILTY OF THE ABOVE ALLEGED OFFENSES, YOU SHOULD GIVE YOUR WRITTEN STATEMENT OF THE FACT TO *JIM WOODWARD*. PLEASE INCLUDE WITH YOUR WRITTEN STATEMENT OF THE FACTS A LIST OF PERSONS WHO COULD VERIFY YOUR ACCOUNT OF THE FACTS, AND BE SURE TO INCLUDE ALL FACTS YOU BELIEVE WOULD BE IMPORTANT TO YOUR DEFENSE TO THE ABOVE ALLEGATIONS AGAINST YOU.
>
> YOU ARE HEREBY NOTIFIED THAT MANAGEMENT WILL DESIRE TO QUESTION YOU AT AN INFORMAL HEARING ON THE ABOVE ALLEGATIONS, AND CONCERNING YOUR DEFENSES. THE COMPANY MAY HAVE AN ATTORNEY PRESENT AT SUCH INFORMAL HEARING, AND YOU ARE INVITED TO HAVE AN ATTORNEY PRESENT WITH YOU AS WELL. YOU ARE REQUESTED TO APPEAR WITH YOUR ATTORNEY AND WITH ANY WITNESSES IN YOUR BEHALF AT *FIVE STAR* ON THE *13* DAY OF *APRIL 2005*, PREPARED TO ANSWER ANY QUESTIONS WE MAY HAVE CONCERNING THE ABOVE-MENTIONED MATTERS. SUCH HEARING WILL BEGIN PROMPTLY AT 2:00 P.M. AT WHICH TIME YOU SHOULD BE PRESENT.
>
> IF YOU SHOULD FAIL TO PRESENT YOUR WRITTEN ACCOUNT OF THE FACTS AS REQUESTED ABOVE, OR TO APPEAR FOR THE INFORMAL HEARING, YOU WILL PROBABLY BE TERMINATED BY DISCHARGE FOR THE ABOVE OFFENSES, AND FOR YOUR REFUSAL TO FULLY COOPERATE WITH OUR INVESTIGATION. HOWEVER, IF YOU PRESENT YOUR WRITTEN DEFENSES AND ATTEND THE HEARING IN A TIMELY MANNER, WE WILL ATTEMPT TO GIVE YOU A DECISION AT THE END OF THE HEARING. [Emphasis in original.]
>
> . . . .

The form is signed by Jim and Nancy Woodward.[15]

Tanksley testified that he left Respondent's facility when he received the notice; that prior to the notice no one had told him that he needed to pick up production on the 400s he was welding; that he did not and does not know what rudeness to other employees refers to; and that for as long as there were vending machines employees could use them anytime they wanted to purchase a soda or snack. On cross-examination Tanksley testified that he used the coke machine or the candy machine other than at breaktimes, on average twice a day.

Nancy Woodward testified that Tanksley was the least productive welder at the time of his discharge.

Newberry testified that on April 7, 2005, she saw Tanksley while she was driving home; that they both take Route 413; that she turns left to go to Marionville and he continues straight to Billings; that he was behind her and she could not see his headlights when she went into the yield lane to make the left turn; and that Tanksley was following too close.[16]

On April 13 Tanksley and Ritter showed up at Respondent's facility for the meeting. There was no meeting at that time. Instead, Jim Woodward handed Tanksley what was received in evidence as the General Counsel's Exhibit 5. It reads as follows:

> FURTHER NOTICE CONCERNING SUSPENSION AND POSSIBLE DISCHARGE
>
> To: Dave Tanksley
> Date: April 13, 2005
>
> From: Jim Woodward
>
> In the notice of suspension and possible discharge recently given to you, you were requested to provide Jim Woodward a written statement in regard to whether or not you admit having engaged in the conduct alleged in that notice, and you were asked to include a statement of the facts regarding those matters and a list of persons who can verify your account of the facts.
>
> We intended to have you provide that by Monday April 11, 2005, so we would have your statement by noon on that date and have time to review it prior to the hearing scheduled for 2:00 PM April 13, 2005. However, in preparing the document, it is noted that we failed to give you

[15] The latter testified that Tanksley was not the only Five Star employee who has received a written write up. She sponsored a number of exhibits, R. Exhs. 23 (dated August 4, 2004 regarding Wurtz), 25 (dated October 26, 2005 regarding employee Angie McKnight), 26 (dated April 19, apparently in 2004, regarding employees Dave and Helen Hilton), 27 (dated February 6, 2004 regarding Wurtz), and 29 (dated April 16, 2004 regarding Wurtz, Randy Looney, Kerry Stultz, Jamie Holt, and Brian Holt). With respect to R. Exh. 27, Nancy Woodward testified that when she is not at work her daughter Nicole Newberry documents discipline and that the following writing on R. Exh. 27 is Newberry's handwriting:

> Richard [Wurtz] smarted off at Dustin at 10:10. Called lawyer said we could send home w/o pay. Jim 10:30 told Richard no more smart ass attitude or foul language. Richard lied said he didn't, told Jim to ask K.J. Jim asked K.J. & Richard smarted off & said "f" a couple of times. Jim said not sending home today next time fired on the spot.

Counsel for General Counsel and the Respondent stipulated that there are warning notes from Jim Woodward and from Dustin Woodward, all dated August 4, 2004, regarding Leuschen and Atkinson which were put in their personnel files.

[16] Newberry testified that in a later incident while she was pregnant she was driving slow in the rain and Tanksley passed her and then applied his breaks "trying to make me rear end him. . . ." (Tr. p. 658); and that she reciprocated, locking her brakes up trying to get him off her "butt" (Tr. p. 660).

a time when the written statement was due at our office and in my hands.

Therefore, we are giving you this additional notice (which will be handed to you on April 13 if you do appear at 2:00 PM that day, and will be mailed to you that day if you do not appear for the hearing at 2:00 PM on April 13 as required).

Please be sure to get to Jim Woodward your written statement of what the facts are from your viewpoint in regard to the offenses alleged in the suspension notice. Also list the witnesses you plan to have available to give testimony or evidence that would be of assistance to your position.

As soon as we get that written statement, we will let you know if there is any need for a further hearing of the type we had mentioned in your provisional suspension notice. If so, you will be given the time and place of that hearing.

If you have not provided a written statement by April 13 at 2:00 PM, then you must do so no later than forty-eight (48) hours after you receive this further notification (or no later than 72 hours after this notice is mailed).

Your failure to cooperate in presenting this statement will be considered an admission of the allegations against you and will probably result in your discharge. If you do provide a written statement in a timely manner from the date of this letter, then fail to show up at any hearing that your are notified to attend thereafter, you will also probably be discharged for lack of cooperation.

We will have our attorney involved in this investigation in order to ensure that we are given proper guidelines and follow all legal requirements in regard to this matter, and that no unlawful of improper facts will be considered by us in making the final decision on this matter.

The notice is signed by Jim Woodward. He testified that he gave this notice to Tanksley on April 13; that Ritter was with Tanksley on April 13; and that there was no meeting on April 13.

Jones testified that he advised and assisted Respondent in handling Tanksley's second discharge; and that he did not recall whether it was discussed that he would be present at Five Star on April 13, but he was not scheduled to be there.

Tanksley testified that he and Ritter went to Five Star on April 13; that he knocked on Jim Woodward's office door and Nancy Woodward opened the door; that he told her that he and Ritter were there for the meeting that Jim Woodward had set up; that Nancy Woodward said "just a second, please" (Tr. p. 242) and she closed the door; that Jim Woodward left his office, walked into Nancy Woodward's office, walked back to his office, and handed him a further notice concerning suspension and possible discharge, General Counsel's Exhibit 5, and his final paycheck; that he and Ritter asked if they could hold the meeting then since they had driven 60 miles to be there; that Nancy Woodward asked Ritter if he was Tanksley's attorney and he told her that he was not; and that Jim Woodward told them to leave the premises, and they left.

Ritter testified that he went with Tanksley to Five Star on April 13, to participate in a meeting about Tanksley's suspension and possible discharge; that they arrived a couple of minutes before 2 p.m.; that Jim Woodward said that there was not going to be a meeting and Nancy Woodward said that the only person that Tanksley could bring was an attorney; that both Jim and Nancy screamed for him and Tanksley to get off their property; that he explained that as a certified representative of the employees he had a right to be there; and that he and Tanksley left the Respondent's property. On cross-examination Ritter testified that he attended the April 13 meeting with Tanksley because he wanted to try to get him returned to work; that Tanksley asked him to come on April 13; and that he did not contact the Company or Jones to tell them that he would be attending the meeting.

When called by Respondent, Jim Woodward testified that he was not expecting Ritter to show up with Tanksley on April 13; that he was not inclined to allow Ritter to sit in on the hearing; that he might have raised his voice to let Ritter and Tanksley know that they "did need to leave, that they wasn't [sic] welcome there because he was not supposed to be there without my counsel being there" (Tr. p. 511); that when Ritter appeared, he contacted his attorney, Jones, while Ritter and Tanksley were there but Jones was not available to come to Crane; and that Jones told him to ask Ritter and Tanksley to leave Respondent's premises. On cross-examination Jim Woodward testified that Respondent's attorney, Jones, set up the April 13, 2005 meeting.

The General Counsel's Exhibit 6 is a letter dated April 14, from Ritter which reads, as here pertinent, as follows:

Dear Mr. Woodward:

Employee David Tanksley appeared at the meeting on April 13 and 2:00p.m. as requested by you. He was accompanied by me as his Union Representative. The meeting never took place as you ordered Mr. Tanksley and myself [sic] to leave. Mr. Tanksley was handed a copy of your April 13 letter and his 'final check.' Your lack of courtesy in this regard is evident. Both Mr. Tanksley and myself [sic] made a useless trip to our facility.

We attended the meeting in good faith so that Mr. Tanksley could present his evidence. Your harassment and coercion of Mr. Tanksley, as evidenced by the NLRB Complaint outstanding against your company, appears to be continuing.

Mr. Tanksley denies that he was insubordinate to any office personnel. He did not yell at any office staff. The general attitude of hostility appears to come from you and your management staff directed at Mr. Tanksley. Mr. Tanksley is a long-term employee. He had no work related problems until he engaged in his federally protected right to seek selection of a collective bargaining representative. Mr. Tanksley has a right to Union representation at any hearing that you conduct. It is clear that this is a disciplinary hearing. Please accept this letter as Mr. Tanksley's written statement. If you wish to conduct a further investigatory interview, please contact Mr. Tanksley and me to schedule a meeting. I suggest that since you wasted Mr.

> Tanksley's time at the last meeting that you agree in advance to pay for his time in any future meetings. I look forward to your response.

Jim Woodward testified that he received Ritter's letter on or about April 14.

General Counsel's Exhibit 7 is a 6-page document titled "*NOTICE OF PRELIMINARY DECISION WITH OPPORTUNITY FOR YOU TO APPEAL,*" dated April 18, from Jim Woodward to Tanksley. The topic headings of the document are (1) alleged offenses, (2) your response, (3) Mr. Ritter does not represent you, (4) preliminary decision calls for your discharge, (5) your final opportunity for reconsideration, and conclusion. The conclusion reads as follows:

> I am sorry that we have had to come to the above conclusion to preliminarily terminate your employment, but I hope you recognize that I am giving you one last opportunity to show me that you can change your attitude to one that will be one of cooperation rather than one of insubordination and work slowdowns.

The final opportunity reads, in part, as follows:

> Despite all of the above, I want to give you one final opportunity to ask for reconsideration of this decision. If you will write me a letter which states an apology for your disrespect and your insubordination in the past, and which states that you will try to do better and you will meet the production requirements or expectations that we reasonably have for the work you have been doing, we will give consideration to reinstating you to your former position. Your letter should state that you are willing to undergo counseling if we suggest a counselor that you should meet with, and if we will pay for that counseling. . . . .
>
> . . . .
>
> Please understand that the letter must come from you. You can have anyone you want to help you write the letter, but the letter must be signed by you and it will be you and me and possibly my attorney that will be involved in any meeting that we hold to consider whether your letter is a sufficient demonstration of your change of attitude to consider you for further employment with our company. We do not recognize Harvey Ritter as your representative at this time in connection with these matters because as the NLRB has ruled in the cases we have cited above, absent a collective bargaining agreement, our company still has a fundamental management rights to deal with you on an individual basis and not as part of a group or as a person represented by any persons or organization such as Harvey Ritter or his organization. Furthermore, we believe that any representational rights that Harvey Ritter or his organization had have now elapsed and that the employees have demonstrated that they no longer desire to have representation by Teamsters Local 245 as has been demonstrated by the recent decertification petition filed by the employees and by information that I have which indicates that a vast majority of our employees do not desire to be represented by that organization.

Jim Woodward testified that he sent this document to Tanksley on or about April 18; and that "I probably didn't go over it [GC Exh. 7] totally. I had my counsel take care of it. It wasn't in my hands." (Tr. p. 129) In response to questions of Respondent's attorney, Jim Woodward testified that he is not a lawyer and he does not have a college degree. At least one page of this document deals with Respondent's argument that it does not recognize the Union as the representative of its employees.

General Counsel's Exhibit 8 is a letter from Tanksley to Jim Woodward, dated April 22, which reads as follows:

> Dear Mr. Woodward:
>
> I received your letter of April 18, 2005, on April 21. My response is as follows:
>
> As I have previously informed you, I do not believe that I have ever been insubordinate to office personnel. I do not believe that I have been hostile to anyone at Five Star Manufacturing. While you and I have had disagreements in the past, I believe that we always were able to work them out. This, however, all changed when the employees decided that we wanted a union. I believe that you have been hostile toward me since that time and have been looking for a reason to terminate me.
>
> I believe that I am a hardworking employee. My production has been steady during my years of employment. Again, you never questioned my production prior to the union helping us to organize.
>
> I do not believe that I have been rude to other employees. To the contrary, I always try to get along with my coworkers. I must state, however, that you and Mrs. Woodward have been extremely rude to me.
>
> I request that you immediately reinstate me and pay me my lost wages. I believe that the conditions set forth in your April 18 letter requesting an apology, agreeing to undergo counseling, and the other requirements are retaliation against me. I would be happy to meet with you to discuss this matter. However, I request a union representative to be with me at any such meeting. I request that Harvey Ritter, Business Representative of Teamsters Local 245 accompany me to this meeting.
>
> I look forward to your reply.

The General Counsel's Exhibit 9 is a "*Notice of Final Decision*" from Jim Woodward to Tanksley, dated April 26, which reads as follows:

> This is to give you the final decision on your status concerning your suspension and the preliminary discharge notice sent to you April 18, 2005.
>
> The notice of April 18 spelled out in detail the problems we have had with you as an employee. None of those problems, to our knowledge, relates in any way to any union or unionization activities of anyone. I have not been aware and no one else in our management has been aware of any particular union activities that you engaged in.
>
> We gave you one last opportunity to indicate there would be some way that we could expect you to improve your job performance and your attitude of respect that we are entitled to have from all employees.

> While your letter of April 22, 2005, states disagreement with our conclusions that were expressed in our letter of April 18, your letter does not dispute the facts we set forth in our letter of April 18. Those facts speak for themselves and show that your denials of our conclusions are not well founded. Your letter fails to recognize that you have been guilty of any insubordination or refusal to work diligently and efficiently and improve your slow production (slower than any other employee we have ever had).
>
> Because your letter gives us no basis to believe that your performance would improve, or that your attitude would change, your letter does not meet the requirements we set forth in our letter of April 18, 2005. Therefore, we have concluded that there is no choice but to give you this notice that you have been discharged for the reasons previously stated.
>
> We are sorry that you have such a hostile attitude towards us that you are apparently blinded to any opportunity we might provide you to improve your performance. I hope you will find employment that will be better suited to your abilities and to your happiness.

Jim Woodward testified that he had never sent letters like General Counsel's Exhibits 4 through 9 to any employee before; and that he did not give any notice to the Union prior to putting these procedures in place.

Tanksley testified that he received General Counsel's Exhibit 9 on or about April 28; that he was not aware of any conflicts he had with Randy Looney while he was employed at Five Star; that he had friends at Five Star and there were employees he got along with; that he did lie down in the hall on breaks because his back was being torn up working on the 400s and the cold concrete would help ease the pain somewhat; that he was not sleeping but he did pull his hat down over his head; and that he would get up and go back to work when he heard the other employees start to go back to work. Subsequently Tanksley testified that he is 50 years old, is 5 feet 8 inches tall, and weighs approximately 185 pounds.

Respondent stipulated that Tanksley's absences were not the reason for the discharge or disciplining of Tanksley. (Tr. p. 323.)

Newberry quit working for Five Star in May 2005. Subsequently she became part owner of Five Star.

The General Counsel's Exhibit 10 is a letter from Ritter to Jim Woodward dated May 5. It reads as follows:

> It is my understanding that your Company has recently suspended and then terminated David Tanksley, your employee. The purpose of this letter is to request negotiations concerning these disciplinary actions. Please contact me immediately so that we can schedule a negotiating session concerning the suspension and discharge of Mr. Tanksley.

Ritter testified that the Union did not receive a reply to this letter; that Five Star did not notify the Union of what it intended to do with respect to Tanksley's suspension and discharge; and that Respondent did not afford the Union an opportunity to bargain over the procedures that it followed in the above-described suspension and discharge letters to Tanksley and it did not afford the Union an opportunity to bargain over the above-described April 7 through April 26 letters.

Busby testified that the General Counsel's Exhibit 14 shows his absences from Five Star on work days in 2005. The parties stipulated that the General Counsel's Exhibit 14 is from Busby's personnel file. Busby testified that he believed that bonuses had been paid for 2005 before the time of the trial herein; and that he did not get a bonus. Busby also testified that he produced more than Tanksley in that when he was doing the framing work that Tanksley was doing he, Busby, could produce 200 to 250 frames a day.

Jim Woodward testified that to his knowledge nothing like the Respondent's Exhibit 10 was created for the numerous "UNEXCUSED" 2005 absences of Busby, the General Counsel's Exhibit 14; and that Busby was not terminated for having three unexcused absences in a row without a call in because Respondent does not have such a policy.

Ritter testified that up to the time of the trial herein from mid-October 2004, Five Star, on the one hand, had been giving bonuses and vacation, and, on the other hand, it had refused to give bonuses and vacation based upon employees' unexcused absences and other discretion exercised by Jim Woodward; that Five Star neither notified the Union before these actions were implemented nor did Respondent afford the Union an opportunity to bargain before doing these things; and that Five Star neither notified the Union of its decisions with regard to whether or not employees are eligible for bonuses or vacation pay nor notified the Union before they actually paid or withheld bonuses or vacation pay.

Turner testified that he missed about 20 days of work, he received part of his vacation pay, and he did not receive a bonus in 2005.

On rebuttal Tanksley testified that there were no instances where he purposely moved a pallet jack towards any member of management or supervision; that, more specifically, he never walked toward Nancy Woodward with a pallet jack, and she never said anything to him about his steering of pallet jacks; that he did not intentionally get in Dustin Woodward's way when Dustin was operating a forklift; that when Dustin Woodward asked him to leave the lights on he did; that for a year or two before the union organizing campaign, he left his personal mail, which had stamps on it, with Five Star's outgoing mail because he did not have a mailbox at home; that one day, shortly after Five Star found out that the Union was trying to get into the shop, he found six or seven pieces of mail in his welding room, which mail he had left in the main office about six days before; that he asked Nancy Woodward about it and she told him "that now with the Union coming in that they could not be showing any preferences to any employees" (Tr. p. 822); that Nancy Woodward did speak to him about making some kind of rude noise to Nicole out in the hallway; that he had no idea what she was referring to and he asked Rick Looney Jr., who had been standing within 10 feet of the both of them, if he made any inappropriate noise, and Looney Jr. said no; that he did not knowingly make faces at or try to intimidate Nancy, Nicole, or Dustin Woodward; and that he was not aware that any of his facial features or body postures were offensive

to others, and he did not know that he made gagging sounds at anyone.

On rebuttal Ritter testified that the first bargaining session was held in Jones' office, and Jones told him that his client did not want to pay him to drive to Crane to meet; that the Union wanted to have the meeting closer to the Respondent's facility since Leuschen was on the bargaining committee and he had to go to work early the next morning; that the first session started at 6:30 p.m. and Jones ended the session by announcing that his clients were hungry; that at the first session Respondent wanted to discuss their work rules or policies; that the second bargaining session was held at the Aurora Chamber of Commerce; that at the second session he submitted a handwritten preamble, the General Counsel's Exhibit 17, and Jones rejected it, indicating that he wanted his own language; that he started to make some changes in his language in an attempt to reach some middle ground and he noticed that Jones was not taking any notes; that he asked Jones if he was going to take notes and Jones said that he did not take notes, he had Parkinson's disease; that he asked Jones if one of his clients could take some notes and Jones said no that when the Union had something typed the Union could then give it to him; that he, Jim and Nancy Woodward, Monroe Freeman, Jones, and a mediator were present at the third bargaining session on November 22, 2004; that this meeting ended when Freeman got mad, said we are not making any headway, this meeting is over, and we are going to lunch; that at the third meeting they discussed health and welfare, and the productivity standards Five Star wanted to impose; and that he told the company representatives that he did not have a problem discussing productivity but availability of parts, equipment breakdowns, and things beyond the employee's control had to be considered. On cross-examination Ritter testified that the General Counsel's Exhibit 17 is the only written proposal that the Union provided to Five Star at the bargaining table.

Analysis

Counsel for the General Counsel called Jim Woodward as a Federal Rule of Evidence 611(c) witness, four former employees of Respondent, namely Henry, Tanksley, Wurtz, and Leuschen, one present employee of the Respondent, Busby, and the involved Union organizer. Tanksley and Henry are named in the complaint, and if it is ultimately determined that the former was unlawfully discharged, he would be entitled to back pay. Leuschen was the observer for the Union at the Board election and he was on the Union bargaining committee.

Respondent called nine witnesses. Four of them are members of the Woodward family which operates the Respondent. Each one of the family members who testified is a part owner of the Respondent, and each one of these family members would undoubtedly suffer financially if the Respondent loses this case. Of the remaining witnesses, one is the attorney who orchestrated conduct which is alleged to be unlawful, one is an OSHA consultant who eventually admitted that what Jim Woodward did with respect to the keys and workers' schedule the day after Respondent lost the election was something the consultant recommended 2 years before the election, two are employees hired after the election (one of them circulated a decertification petition), and one is an employee who was the company observer at the Board election, and is a friend of and socializes with Dustin Woodward. Add to this the fact that much of the testimony elicited from Respondent's witnesses was in response to leading questions asked by Respondent's present attorney.

Paragraph 5(a) of the complaint alleges that on February 12, 2004 James Woodward restrained and coerced employees by making statements that implied the selection of the Union as the bargaining representative of unit employees caused Respondent to confiscate employees' keys to the facility and that rejection of the Union by unit employees would improve the working conditions of unit employees. Henry testified that on February 12, 2004, he told Jim Woodward that he hated to give up the key and Jim Woodward said "maybe things will get better." (Tr. p. 28) Henry impressed me as being a credible witness. His testimony is credited. At the time he testified at the trial herein he was retired. Consequently he had nothing to gain over this issue. Jim Woodward did not specifically deny making this statement. However, Jim Woodward testified that the reason he took back the keys on February 12, 2004, was that he was having a problem with the involved door lock and he had a locksmith redo the whole key system. But this is not what Jim Woodward told Henry on February 12, 2004. Jim Woodward was not a credible witness. If it was merely a lock problem, he could have exchanged the keys to the new lock with the involved employees. Jim Woodward told Henry "maybe things will get better." (Id.) As alleged, in making this statement while he was confiscating keys from employees the day after Five Star lost the Board election, Jim Woodward was implying to employees that the confiscation was caused by the Union winning the election and the situation would change back if things got better. In the circumstances existing here, employees would reasonably understand this to mean if the Union was not there. Jim Woodward restrained and coerced employees by making this statement. Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 5(a) of the complaint.

Paragraph 5(b) of the complaint alleges that on April 13, 2005 James and Nancy Woodward demanded that a union representative leave the facility and told employees that the Union could not represent employees in disciplinary matters. As pointed out by the Board in *ITT Lighting Fixtures*, 261 NLRB 229 (1982), as here pertinent, enfd. in part 719 F.2d 851 (6th Cir. 1983),[17] an employee's request for representation where there is a newly elected but not yet certified union must be honored by the employer under *Weingarten*, supra. In the instant case the involved Union had been certified at the time. Additionally, the Board held in *Glomac Plastics*, *Inc.,* 234 NLRB 1309 (1978), enfd. 600 F.2d 3 (2d Cir. 1979), that an employer's unlawful refusal to recognize or bargain with a majority union cannot defeat the *Weingarten*, supra, right of an employee.[18] More specifically, at 1310 and 1311 in *Glomac Plastics*, supra, the Board concluded as follows:

[17] Enforcement was granted with respect to that portion of the decision involved herein, namely an employee, Terry Williams', *NLRB v. Weingarten*, 420 U.S. 251 (1975), right to have a representative at an investigatory meeting. The court did not uphold and enforce another, not here pertinent, part of the Board's decision.

[18] While *Glomac Plastics*, supra is referred to by Board member Schaumber in footnote 11 of his concurring opinion in *IBM Corp.*, 341

We do not draw a distinction between union-represented employees and employees who have chosen union representation but have been deprived of the benefits of that representation as a result of the employer's refusal to bargain in good faith with their designated representative. We agree with the Administrative Law Judge that "Respondent, while appearing to bargain openly and in good faith, was actually progressively determined not to reach agreement . . . ." [Footnote omitted] In refusing to bargain in good faith with the Union, Respondent effectively foreclosed its employees from enjoying any of the benefits of collective bargaining and in particular deprived them of the 'aid or protection' of union representation.

> The Union was certified . . . bargaining ensued but . . . Respondent deliberately engaged in bargaining tactics which the Administrative Law Judge found were 'calculated to prevent final agreement,' apparently in the hope that a successful decertification petition would be filed.
>
> . . . .
>
> The national labor policy of encouraging good faith collective bargaining would be undermined if an employer were to be allowed to defeat its employees' right to have a representative present by engaging in unlawful bad-faith bargaining which the employer could then rely on to assert that no recognized union representative exists. To permit the Respondent's own misconduct thus to reduce or eliminate the employee's right to have a union representative present is to allow the Respondent's unlawful action to determine the reach and applicability of Section 7 rights. We cannot reward the wrongdoer for conduct which violated Section 8(a)(5) of the Act.

In other words, there are situations where it is not necessary to have a signed collective bargaining agreement before an employee can rightfully assert his or her *Weingarten*, supra, right.

Here (1) the April 13, 2004 meeting, as originally scheduled, was investigatory, (2) Tanksley reasonably expected that the meeting would result in disciplinary action, and (3) Tanksley, by his conduct, requested representation by Union representative Ritter.

Here, as found below, Respondent committed a number of unfair labor practices, including making a number of unlawful unilateral changes in the wages, hours, and terms and conditions of employment of unit employees, refusing to bargain collectively regarding the disciplining and discharge of unit employees and unlawfully withdrawing recognition on April 18, 2005 through June 7, 2005, from the Union as the exclusive bargaining representative of the employees in the unit.

While the April 13, 2005 meeting was delayed, Respondent did not indicate to Ritter that he was welcome to attend the later scheduled meeting with Tanksley. In fact Respondent did just the opposite. Respondent violated the Act as alleged in paragraph 5(b) of the complaint in that it interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Paragraph 5(c) of the complaint alleges that by letter dated April 18 to an employee, Jim Woodward told employees that the Union was not their collective-bargaining representative and that Respondent was a nonunion employer. Respondent's April 18 letter, the General Counsel's Exhibit 7, is described above. The letter speaks for itself. For the reasons set forth above, contrary to the assertions contained in the letter, the Union was and is the employees' collective-bargaining representative, and the Respondent is not a non-union employer. Respondent violated the Act as alleged in paragraph 5(c) of the complaint in that it interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Paragraph 6(a) of the complaint alleges that on or about February 11, 2004, Respondent unlawfully discharged its employee David Tanksley. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the General Counsel has the burden of proving by a preponderance of the evidence that animus against union activity or protected conduct was a motivating factor in the adverse employment action. Once the General Counsel proves discriminatory motivation by showing union or protected activity, employer knowledge of the activity and animus, the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the union or protected activity.

Here Tanksley attended two union meetings and he spoke at the two union meetings in favor of the Union. It is not disputed that named supervisors attended one of these two meetings and Zinn, who is described—without challenge—as a "good buddy" of Jim Woodward, attended the other meeting. Neither Zinn nor the named supervisors who attended the union meeting testified at the trial herein. Nancy Woodward testified that Five Star is a small plant and she knows where employees are supposed to be and when. Her daughter, Newberry, testified that Five Star is a small company and she kind of knows what everybody does. While both of these statements appear to refer to what goes on in Five Star's facility, the observations drive home a point, namely this is a small work force. The charges indicate that Respondent has about 25 employees. Also, Jim Woodward testified that Respondent had about 25 employees in 2004. It was not shown that Tanksley engaged in any union activity on or near Respondent's premises before February 11, 2004, and employees did, with respect to Zinn, unsuccessfully take some pains to keep him from learning something to tell Jim Woodward about what was happening. Nonetheless, I believe that the evidence is sufficient to establish that Respondent knew that Tanksley attended union meetings and he spoke in support of the Union. Additionally, on the day of the election, just before the vote, Tanksley spoke with Ritter in the parking lot. This meeting was witnesses by Jim Woodward. It is questionable whether Jim Woodward heard Tanksley say, "well, I think we got it made" to Ritter. But Jim Woodward did not specifically deny Tanksley's testimony that after he, Jim Woodward, saw Tanksley speak to Ritter, Jim Woodward "was

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NLRB 1288 (2004), neither *Glomac Plastic*, supra nor *ITT*, supra, were overruled by *IBM Corp.*, supra, to the extent that they stand for the proposition that an employee has the right to have a union representative present in the situations described in these two cases.

enraged pretty much is what the look I seen [sic] on his face." (Tr. p. 215)[19]

Antiunion animus is established by Jim Woodward's December 2004 statement to Ritter that he, Jim Woodward, "didn't want any Teamsters in his plant and all his employees were doing was finding themselves a way out of there by doing that." (Tr. p. 349.)

Respondent has not shown that it would have terminated Tanksley on February 11, 2004 even in the absence of his union and protected activity. Respondent had lived with Tanksley's alleged shortcomings up until February 11, 2004.[20] What happened on February 11, 2004, that changed this? Nothing which would cause him to lose the protection of the Act happened when Tanksley picked up his paycheck. Nicole (Woodward) Newberry's direct testimony about what happened in the main office on February 11, 2004, when Tanksley and Wurtz picked up their paychecks is not credited. Her version of what happened on February 11, 2004, in the main office and outside the main office is a fabrication, and a pretext. Jim and Nancy Woodward's participation in this fabrication undermines their credibility. Just five days before February 11, 2004 Newberry wrote the following discipline, Respondent's Exhibit 27:

> Richard [Wurtz] smarted off at Dustin at 10:10. Called lawyer said we could send home w/o pay. Jim 10:30 told Richard no more smart ass attitude or foul language. Richard lied said he didn't, told Jim to ask K.J. Jim asked K.J. & Richard smarted off & said "f" a couple of times. Jim said not sending home today next time fired on the spot.

When asked why, if Wurtz was the one who said "rip off cheated," Wurtz was not disciplined Newberry answered:

> He [Wurtz] hadn't ever had run-ins with me like that before. He—I was upset because of Dave [Tanksley]. Richard [Wurtz]—like I—you can look, I took a lot from Dave. The grins, the puffing up, just being hateful. I can take quite a bit and then everyone has got a breaking point. Richard [Wurtz] hadn't been rude like that in the hallways. [Tr. pp. 689 and 690.]

Newberry eventually admitted that she was not looking and she did not know whether Tanksley or Wurtz was the last one, between the two of them, to leave the main office; that while she included both Wurtz and Tanksley in her reference to stomping their feet, she did not know who stomped their feet; that she did not see and has no personal knowledge as to who slammed the outside door; and that she did not believe that Wurtz was disciplined for his conduct on February 11, 2004. Newberry is the one who subsequently told Tanksley that she was not his babysitter. Newberry is the one who subsequently yelled at Tanksley that he was a "looser." Newberry, who is a part owner of the Respondent, demonstrated more than once that she is not a credible witness.

The fact that Nancy Woodward subsequently testified that Newberry told her that Tanksley said something about she cheated *him* on his paycheck ends up being little more than Newberry's own mother unwittingly undermining Newberry's fabrication.

Jim Woodward testified that he spoke to Newberry before Tanksley was terminated. Since Wurtz was not disciplined, should one conclude that Jim Woodward also did not take into consideration the discipline he gave to Wurtz just five days before? And if so, why not?

Nothing out of the ordinary happened in the main office on February 11, 2004, when Tanksley and Wurtz picked up their paychecks. It has not been shown that Respondent's alleged business justification, alone or in conjunction with other alleged shortcomings of Tanksley, justified Tanksley's termination on February 11, 2004. Respondent has not shown that it would have terminated Tanksley on February 11, 2004, in the absence of his union and protected activity.

Four things should be noted. First, when Tanksley asked why he was fired on February 11, 2004, Jim Woodward said "no reason." This response was given because there was no reason other than an unlawful reason which Jim Woodward did not want to specify. Second, apparently Respondent's own attorney at the time, Jones, who is a labor lawyer with 30 to 40 years of experience and who was consulted on February 11, 2004, before Tanksley was fired, believed that Respondent could not justify the February 11, 2004 termination. Jones had Respondent reinstate Tanksley after the first termination. Nothing changed in the interim between February 11, 2004, and the trial

[19] Ritter and Henry testified that Jim Woodward followed Ritter out of the plant. While Nancy Woodward testified that she went out and spoke to her husband, no one testified that Nancy Woodward spoke to her husband between the time Ritter left the plant just before the voting, walked to his car, had a brief conversation with Tanksley, and drove off. Strictly from a timing standpoint, Nancy Woodward would not have yet had a chance to speak with Jim Woodward outside the plant. Jim Woodward had just walked out of the plant after Ritter and the Ritter/Tanksley conversation took only seconds. That being the case, and notwithstanding Respondent's attorney's leading question at Tr. p. 638, it was not shown that Jim Woodward would have been enraged at that point in time by anything other than what he witnessed in the parking lot between Tanksley and Ritter. Moreover, I do not credit the testimony of Nancy Woodward, her daughter, and her husband with respect to their allegations regarding what occurred on February 11, 2004, in the main office with Newberry, Wurtz, and Tanksley.

[20] Since Lorene Woodward is a part owner and manager of Respondent, this would include what Tanksley allegedly said to her about her son, Jim Woodward, apparently a couple of years before February 4, 2004. It is noted that while Tanksley did not specifically deny the alleged statement, Lorene Woodward did not testify at the trial herein to indicate under oath that the alleged statement was made by Tanksley. Absent her testimony, one has to question whether it was even necessary for Tanksley to deny this allegation. While Counsel for General Counsel did not object to the receipt of R. Exh. 4 and it was admitted, it is hearsay in that it is an out-of-court statement (typed) allegedly signed by Lorene Woodward offered to prove the truth of the matter asserted, namely that Tanksley made a verbal statement to her. Respondent's Exhibit 4 is not a business record as described in Federal Rule of Evidence 803(6). It does not fall within any of the exceptions to hearsay. It is an out-of-court statement offered to prove the truth of the matter alleged, namely that someone allegedly heard someone else say something. The person who allegedly heard the statement did not testify and she did not sponsor R. Exh. 4. Since neither Jim nor Nancy Woodward personally heard Tanksley make the alleged statement, their testimony and that portion of Nancy Woodward's typed statement referring to this matter, R. Exh. 8, are also hearsay. While R. Exh. 4 was admitted, I do not give it any weight.

herein other than Respondent fabricating evidence in an attempt to justify the February 11, 2004, Tanksley termination. Third, at one point Jim Woodward testified that there was no paperwork for Tanksley's termination on February 11, 2004; and that after the 2004 Board election, Jones advised him to have paperwork. As noted above, now there is paperwork. Fourth, as pointed out by the Board in *Fluor Daniel, Inc.*, 304 NLRB 970, at 970 (1991), "[i]t is . . . well settled . . . that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that respondent desires to conceal." (footnote omitted) Here the Respondent's stated motive, what allegedly occurred on February 11, 2004, in the main office when Tanksley picked up his paycheck, is false. It is a fabrication participated in by three of the members of the Woodward family. An inference is warranted that the true motive for Tanksley's February 11, 2004 termination is an unlawful one that Five Star desires to conceal. Respondent violated Section 8(a)(1) and (3) of the Act as alleged in paragraph 6(a) and (k) of the complaint.

Paragraphs 6(b), (k), and (l) of the complaint collectively allege that on or about April 19, 2004 (after having reinstated David Tanksley on or about April 5, 2004), Respondent moved David Tanksley to a different and more difficult job position because he (a) formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and (b) he was named in the charge in Case 17–CA–22626, and an amended charge and gave testimony to the Board in the form of an affidavit. As noted above, on February 11, 2004 the Board election was held. On the same day Tanksley was terminated for the first time. On April 19, 2004 the Union was certified as the exclusive collective bargaining representative of the unit. On April 19, 2004 Tanksley's job was changed in that, after working on the #712 arched ramp frames for years, he was assigned to weld #400 folding ramps. Jim Woodward conceded that it is possible that he changed Tanksley's job and several weeks later he changed Tanksley's room. Tanksley had a back problem and Jim Woodward did not deny that he knew this. Indeed Tanksley had told Jim Woodward in the past that working on #400 folding ramps tore up his back. This was caused by the fact that when he welded the # 400 folding ramps he spent one half of the day bent over in a stoop for half of his welds. On April 19, 2004 Tanksley told his supervisor, Randy Looney, who helped him set up for the #400 folding ramps that Jim Woodward was doing this to him because he knew it would kill his back and Jim Woodward was trying to get him to quit. Supervisor Randy Looney did not testify at the trial herein so Supervisor Randy Looney did not deny Tanksley's testimony that Supervisor Randy Looney said "[w]ell, you know how things are going around here." (Tr. p. 231) Tanksley's testimony is credited.[21]

Respondent called Turner who testified that he uses a wood block to raise the ramps up so that it is easier for him to get at the ramps to weld; and that this is done to *reduce* the strain on his back. Turner welds mostly bifold ramps. It does not appear that he specifically testified that he welded the #400 folding ramps. It is noted that Turner, who is 6 feet 3 inches tall, did not testify that he had a history of back problems or that using a wood block *eliminated* the strain on his back. Rather Turner testified that his approach *reduced* the strain on his back.

Tanksley, who is 5 feet 8 inches tall, has a back problem which is exacerbated by working on the #400 folding ramps. Jim Woodward knew this. Tanksley assessed the situation correctly. This changed job assignment was meant to literally cause Tanksley pain and make him consider quitting. Respondent was punishing Tanksley, who at the time had been named in a Board charge and an amended Board charge, and the punishment was meted out on the day the Union was certified. Under *Wright Line*, supra, Counsel for General Counsel has shown that Tanksley engaged in union and protected activity, at this time Tanksley was named in a Board charge and an amended Board charge, Jim Woodward received the Board filings, and Jim Woodward demonstrated his animus. Respondent has not demonstrated that it would have taken this action absent Tanksley's protected conduct. Respondent did not say anything to Tanksley about his production after he returned from having his heart attack. Respondent accepted Tanksley's production numbers up until Respondent lost the Board election and the Union was certified. There was no business justification for the action. Jim Woodward could not credibly explain what changed. It was not shown by Respondent that it was necessary to take Tanksley off welding the frames for the arched ramps. As Tanksley explained well before Nancy Woodward testified, he did not file a workers' compensation claim with respect to his back because he did not sustain the injury at work, but it was aggravated by working on the #400 folding ramps. For Respondent's attorney to later ask Nancy Woodward a leading question about Tanksley not filing a workers' compensation claim is disingenuous at best. Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged in paragraphs 6(b), (k), and (l) of the complaint.

Paragraphs 6(c) (k), and (l) of the complaint collectively allege that on or about May 19, 2004, Respondent unlawfully refused to permit Tanksley to complete his regular work shift because he (a) formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and (b) he was named in the charge in Case 17–CA–22626, and an amended charge and gave testimony to the Board in the form of an affidavit. As noted above, on February 11, 2004, the Board election was held. On the same day Tanksley was terminated for the first time. On April 19, 2004, the Union was certified as the exclusive collective bargaining representative of the unit. On April 19, 2004, Tanksley's job was changed in that, after working on the No. 712 arched ramp frames for years, he was assigned to weld No. 400 folding ramps. On May 19, 2004, Tanksley attended his unemployment compensation hearing with respect to the time he was off from work after his first termination. On May 19, 2004, Jim Woodward would not let Tanksley go to work after he returned from the unemployment hearing. Under *Wright Line*, supra, counsel for General Counsel has shown that Tanksley engaged in union and protected activity, at this time Tanksley was named in a Board charge and an amended Board

[21] Jim Woodward's subsequent letter to Tanksley does not change the situation.

charge, Jim Woodward received the Board filings, and Jim Woodward demonstrated his animus. Respondent has not demonstrated that it would have taken this action absent Tanksley's protected conduct. It was not shown that there was any business justification for the action. It was not shown by Respondent that it was necessary to refuse Tanksley the opportunity to work for the remainder of the day on May 19, 2004. Supervisor Randy Looney did not testify at the trial herein. Tanksley's testified that he showed supervisor Randy Looney the notice regarding the unemployment compensation proceeding, that supervisor Randy Looney said that he would let Jim Woodward know about it, and that he spoke to supervisor Randy Looney twice, telling him during the second conversation that he, Tanksley, would definitely come to work after the unemployment hearing. Since supervisor Randy Looney did not testify at the trial herein, this testimony of Tanksley is unchallenged. Tanksley's testimony is credited.[22] Respondent knew that Tanksley was coming to work on May 19, 2004 after the unemployment hearing. Indeed, Jim Woodward did not tell Tanksley on May 19, 2004, that he could not work because he had not advised Respondent that he was going to come back to work after the unemployment hearing. Tanksley testified that Jim Woodward told him that he had something going on in Tanksley's welding room and Tanksley should go home and come back tomorrow. Tanksley is a credible witness. Jim Woodward is not a credible witness. Tanksley's testimony is credited. Jim Woodward could not specify who was working in Tanksley's room that day. Jim Woodward testified that he did not have any place to put Tanksley, who allegedly did not tell him that he would be in for work that day, and he did not have "work available for him to do." (Tr. p. 184). So if one were to believe Jim Woodward, which I do not, he did not know Tanksley would come to work, he did not have any room for him, and he did not have any work for him. Henry testified that on occasion Tanksley shared his welding room with Busby. Consequently, Tanksley could have worked in his welding room with another person who Jim Woodward could not identify. There was no other person. I do not believe Jim Woodward. He is not a credible witness. He lied about not knowing that Tanksley would return to work after the unemployment hearing. Jim Woodward lied about there being no room for Tanksley. And Jim Woodward lied about not having any work for Tanksley to do. Indeed at one point Jim Woodward testified that he needed Tanksley's production that day but he did not have any place to put Tanksley. Jim Woodward punished Tanksley for his protected activity, including being named in a Board charge and an amended charge. Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged in paragraphs 6(c), (k) and (l) of the complaint.

Paragraphs 6(d), (k) and (l) of the complaint collectively allege that on or about May 20, 2004, Respondent unlawfully moved Tanksley to a different work location because he (a) formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and (b) he was named in the charge in Case 17–CA–22626, and an amended charge and gave testimony to the Board in the form of an affidavit. The day after Jim Woodward unlawfully refused to let Tanksley work after the unemployment hearing, Jim Woodward moved Tanksley from the room he had worked in for 12 years. Under *Wright Line*, supra, Counsel for General Counsel has shown that Tanksley engaged in union and protected activity, at this time Tanksley was named in a Board charge and an amended Board charge, Jim Woodward received the Board filings, and Jim Woodward demonstrated his animus. Respondent has not demonstrated that it would have taken this action absent Tanksley's protected conduct. It was not shown that there was any business justification for the action. It was not shown by Respondent that it was necessary to move Tanksley to another welding room which he shared with another welder. Jim Woodward's action was taken to further punish Tanksley. Jim Woodward's stated justification was that he needed more production out of the room Tanksley was in and that he needed more production on the arched ramps so that other welders who welded the ramps after they were rolled would have work. But Randy Looney was moved into the room Tanksley's had welded in for 12 years. Randy Looney did not weld the frames for the arched ramps when he was moved into Tanksley's room. Jim Woodward is not a credible witness. His explanation for the room change is not credible. Tanksley was moved from what in effect was a private room (only on occasion would Busby share this room) to a semi-private room. The only credible explanation for the change is that it was further punishment for Tanksley's protected activities. Respondent has not shown that there was a business justification for the action. Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged in paragraphs 6(d), (k), and (l) of the complaint.

Paragraphs 6(e), (k) and (l) of the complaint collectively allege that on or about mid-March 2005 and on various dates thereafter Respondent issued disparate rules, requirements, and procedures regarding receipt of Tanksley's paychecks because he (a) formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and (b) he was named in Board charges and gave testimony to the Board in the form of an affidavit. After Tanksley entered Jim Woodward's office to get his paycheck, Nancy Woodward told him from then on he "needed to wait out in the hallway to get . . . [his] check." [Tr. p. 236] Tanksley's testimony regarding what Nancy Woodward told him is credited. Nancy Woodward did not treat Tanksley the same as other employees with respect to getting his paycheck. Nancy Woodward did not specifically deny Tanksley's testimony, with respect to the first paycheck she withheld, that he stood in line, she gave paychecks to the two employees in front of him, and when it was his turn to receive his paycheck she walked away from him. Also, Nancy Woodward did not specifically deny Tanksley's testimony regarding the second paycheck that he did not receive, namely that there was no one in

[22] Jim Woodward's June 17, 2004 letter, R. Exh. 13, to Tanksley (1) is no substitute for testimony from supervisor Randy Looney, subject to cross-examination, (2) is signed by someone who has no credibility, and (3) was drafted by Jones' office for Jim Woodward's signature in an unsuccessful attempt to attempt to convince Tanksley (and others), as here pertinent, that what happened did not really happen regarding telling supervisor Randy Looney that he would work after the unemployment hearing on May 19, 2004.

the hallway to pass out paychecks on that payday.[23] Since Tanksley was told that he needed to stay out of the office and wait out in the hall to get his paycheck, Tanksley stopped going into the main office. Nancy Woodward testified that she realized that Tanksley stopped coming into the main office. Respondent knew that Tanksley wanted the two paychecks he did not receive. On more than one occasion, Tanksley's roommate, Feltz, asked Nancy Woodward about the paychecks. Tanksley asked Dustin Woodward about the first paycheck he did not receive. As Jim Woodward testified, he, his mother, his wife, and his daughter thought it was getting to be a joke that Tanksley would not come and get his paychecks, "[i]t wasn't a laughing joke. It was just kind of one of them deals like, what is the matter with him. Can't he come in and get his own check or does he got [sic] to have somebody hold his hand." (Tr. p. 199.) Under *Wright Line*, supra, counsel for General Counsel has shown that Tanksley engaged in union and protected activity, at this time Tanksley was named in Board charges, Jim Woodward received the Board filings, and Jim Woodward demonstrated his animus. Respondent has not demonstrated that it would have taken this action absent Tanksley's protected conduct. It was not shown that there was any business justification for the action. Respondent was further punishing Tanksley. Respondent did not show that other employees were required to wait in the hallway to receive their paycheck. Other employees were not subject to the same rule, requirement, and/or procedure to receive a paycheck. Respondent changed its rule, requirement, and/or procedure in mid-March 2005 for Tanksley to receive a paycheck. Respondent treated Tanksley disparately regarding his paycheck. And Woodward family members, except Dustin Woodward, viewed what was happening regarding Tanksley's paychecks as joke. Respondent violated Sections 8(a)(1), (3), and (4) of the Act as alleged in paragraphs 6(e), (k), and (l) of the complaint.

Paragraphs 6(f), (k), and (l) of the complaint collectively allege that on or about April 7, 13, and 18, 2005, Respondent issued disparate rules, requirements, and procedures regarding disciplinary actions issued to Tanksley because he (a) formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and (b) he was named in Board charges and gave testimony to the Board in the form of an affidavit. Counsel for General Counsel contends on brief that none of the procedures specified in Respondent's April 7 Notice, General Counsel's Exhibit 4, were in place prior to April 7, the Respondent did not notify the Union before putting these procedures in place, and this was another unilateral change in violation of Section 8(a)(1) and (5) of the Act. Respondent did not use the rules, requirements, and procedures set forth in its April 7, 13, and 18 Notices to Tanksley for any other employee. And the Respondent did not give the Union prior notice and the opportunity to bargain regarding these unilaterally implemented rules, requirements, and procedures. Under *Wright Line*, supra, Counsel for General Counsel has shown that Tanksley engaged in union and protected activity, at this time Tanksley was named in Board charges, Jim Woodward received the Board filings, and Jim Woodward demonstrated his animus. Respondent has not demonstrated that it would have treated Tanksley disparately absent Tanksley's protected conduct. It was not shown that there was any lawful business justification for this disparate treatment. As here pertinent, Respondent violated Sections 8(a)(1), (3), and (4) of the Act as alleged in paragraphs 6(f), (k), and (l) of the complaint.

Paragraphs 6(g), (h), (i), (j), (k), and (l) of the complaint collectively allege that Respondent on April 7, suspended Tanksley and issued a notice of possible discharge to Tanksley, on April 13, issued a further notice of suspension and possible discharge to Tanksley, on April 18 issued a preliminary notice of suspension and possible discharge to Tanksley, and on April 26 discharged Tanksley all because he (a) formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and (b) he was named in Board charges and gave testimony to the Board in the form of an affidavit.

On brief General Counsel contends that Respondent decided to fire Tanksley on the day he insisted on getting the three paychecks Respondent owed him; that Jim Woodward testified that the reasons for Tanksley's second discharge included Tanksley yelling at Newberry when he asked for his three paychecks, misuse of time, low production, going to the vending machines when not on break, attitude, and rudeness to other people; that Tanksley's production was basically the same since he suffered his heart attack in 2003 and Tanksley was never warned about his production; that Tanksley was working with a dual disability in that his heart problem precluded long hours and he had a back problem when he worked on the #400 folding ramps; that the alleged rudeness to members of the Woodward family involved non-verbal conduct and Jim Woodward testified that Tanksley's disrespect probably started in 1993; that the union activity and the charge filing activity are the main reasons for the actions against Tanksley; that after he was reinstated, Nancy Woodward and her daughter, Newberry, were determined that Tanksley should be fired again; that it "appears that this was not motivated by the actions of Tanksley but by their own blind anger and union animus" (counsel for the GC Br. p. 25); that while Jim Woodward claims that Newberry's "[t]erminating Dave Tanksley was one of the best moves Five Star has been able to make in several months" memorandum, Respondent's Exhibit 7, was written before Tanksley's first discharge, clearly the memorandum was written after Tanksley's first discharge; that apparently management was playing games with Tanksley's paychecks and the games were noted by other employees; that playing games which result in an employee not getting his paycheck is certainly extreme provocation; that Tanksley's conduct on April 6 does not appear to be out of line; that while Respondent may argue that it feared violence from Tanksley, the Woodwards have known

[23] Nancy Woodward's testimony that more than once she was out in the hallway handing out checks and Tanksley just walked on by and did not attempt to get his paycheck is not a specific denial of Tanksley's testimony. Moreover, Nancy Woodward is not a credible witness. Tanksley's testimony regarding what happened when he did not receive his paychecks is credited. I do not credit any of Nancy Woodward's testimony unless it is corroborated by a reliable witness or a reliable document, and this certainly would not include a document she authored.

Tanksley since 1989 or 1990 and there had been no violence and few cross words; that nothing like violence was listed in the extensive log, Respondent's Exhibit 11, and none of the April 2005 correspondences to Tanksley mentions a concern about violence; that Respondent did not provide documentation of other instances of discharges; and that all but one of the warnings provided post date Tanksley's first discharge.

Respondent, on brief, argues that Tanksley deserved to be fired on February 11, 2004; that Respondent reinstated him and gave him a second chance, his conduct worsened and, therefore, he deserved to be fired in April 2005; that Tanksley admitted that his production was low;[24] that Tanksley admitted that he did not get along with Jim Woodward since 1993; that Tanksley admitted that he told Newberry to shut up;[25] and that Tanksley was discharged for low production, insubordination and poor attitude, and not for his alleged union activities.

Under *Wright Line*, supra, counsel for the General Counsel has shown that Tanksley engaged in union and protected activity, at this time Tanksley was named in Board charges, Jim Woodward received the Board filings, and Jim Woodward demonstrated his animus in telling Ritter that he, Jim Woodward, "didn't want any Teamsters in his plant and all his employees were doing was finding themselves a way out of there by doing that." Respondent has not demonstrated that it would have terminated Tanksley absent Tanksley's protected conduct. It was not shown that there was any lawful business justification for Tanksley's second termination. Since Respondent did not take the adverse employment action against Tanksley until after April 6, it apparently follows that up to that point in time Respondent did not believe that it was justified in terminating Tanksley. When an employer plays games with an employee's paychecks so that the employee is denied timely remuneration for work done, then the employer, who has instigated the situation, must reasonably expect some reaction from the employee. Tanksley telling Newberry to shut up, under the circumstances existing here, was not so egregious that he lost the protection of the Act. At the time of her verbal exchange with Tanksley, the daughter of Jim and Nancy Woodward was neither a supervisor nor part owner of Five Star. When the verbal exchange occurred Newberry was performing secretarial tasks. While testifying Newberry attempted to leave the impression that Tanksley telling her to shut up came out of the blue when she told her mother that she would have to ask her father about the check. Actually, as Tanksley testified and as demonstrated by Newberry's "4-6-05" entry in Respondent's Exhibit 11, the verbal exchange between Newberry and Tanksley started earlier in the conversation on April 6, with Newberry saying "I am not your babysitter David" (Tr. pp. 239 and 240) when Tanksley was explaining to Nancy Woodward that she told him not to come into the office and he told Nancy Woodward that Newberry had seen him enter Jim Woodward's office on the earlier payday. Later in this exchange Newberry told Tanksley that he was a loser. The members of the Woodward family, except Dustin Woodward, who operate Five Star viewed, as indicated above, what was happening with respect to Tanksley's paychecks as a joke. Nancy Woodward could have given Tanksley his paycheck when he came to the main office door to give Feltz his car keys. Feltz, in Tanksley's presence, asked Nancy Woodward what Dave had to do to get his paycheck. Nancy Woodward ignored Feltz and Tanksley. Nancy Woodward testified that she told Feltz "yes" Tanksley could get the paychecks he had not received, she, Woodward, answered the telephone, and Feltz said that Tanksley would get the checks later. Nancy Woodward's testimony is not credible. She is not a credible witness. She could have given the paychecks to Tanksley at that time. But that would have meant putting an end to the game. And at the time the only one who was suffering the consequences of the game was Tanksley. The triggering event, Tanksley telling Newberry to shut up, is not itself a valid business justification demonstrating that Respondent would have taken the same action even in the absence of union and protected activity. And without the triggering event, Respondent loses its reason for taking action on April 7. It had not taken action against Tanksley up to that point in time. None of the documentation offered as justifying Tanksley's termination was given to him before April 7, while he was an employee of the Respondent.[26] Consequently, with a few exceptions, one has to rely on the Woodward family members who testified with respect to when and why the involved conduct was memorialized.[27]

As noted above, Dustin was asked why, if he took the time to write out an incident memorandum, he did not just type what he had already written into the computer. Dustin Woodward started responding that he "just handed it. . . ." (Tr. p. 816) Later, after explaining why he made additions which were not in the handwritten note and after he was asked about another entry, Dustin Woodward testified that he does not "mess with the computer much. . . . I am really never on the computer."

[24] Respondent goes on to argue on brief that Tanksley "admitted management had discussed his low production with him. (Tr. pp. 276–277)." See R. Br., p. 62. Contrary to this assertion of Respondent on brief, Tr. pps. 276 and 277 do not demonstrate that Tanksley admitted that management had discussed his low production with him. What these two pages of the transcript demonstrate is that Jim Woodward stressed that he needed 200 frames a day when he first put Tanksley on building frames, and this occurred long before Tanksley suffered a heart attack.

[25] Respondent also argues that Tanksley admitted he tailgated Newberry's car. Since this occurred after Tanksley was suspended on April 7 and it is not mentioned in any of the notices to Tanksley, it does not appear that this was an expressed consideration in the suspension and discharge of Tanksley.

[26] As noted above, Tanksley did receive the notices of his suspension and discharge beginning April 7, when he was suspended.

[27] Respondent's Exhibits 5, 6, and 31 are purportedly signed by someone who is not a Woodward family member. The first two of these exhibits are undated and refer to the room cleaning incident which occurred before Tanksley was terminated the first time. Neither was sponsored by their alleged author. Rather, Jim Woodward sponsored both. Neither of these statements was given to Tanksley before he was terminated the first time. And as indicated above, Tanksley was not told that this was a reason for his termination when he asked why he was being terminated on February 11, 2004. Gibson was never specifically asked about Respondent's Exhibit 31. He was never asked to explain the "partial witness" entry under his signature. Respondent's Exhibit 31 was sponsored by Dustin Woodward, who also signed the document.

(Tr. p. 817) It appears that Dustin Woodward handed in his handwritten note dated October 12, 2004, and either Nancy Woodward or Newberry input the information into the computer, adding the "HE HUFFED AND PUFFED" and "STOOD THERE BREATHING HEAVILY" in the "10-12-14" entry in Respondent's Exhibit 11, which language does not appear in the handwritten version. Dustin Woodward tried to make something out of nothing regarding Tanksley leaving the lights on in his welding room for the night crew but not verbally acknowledging Dustin Woodward's directive. Tanksley did what he was told to do. Prior to that Tanksley turned the lights off at the end of his workday because up to the point in time it was his understanding that was what he was supposed to do. Also, Dustin Woodward testified that usually both he and Gibson counted the ramps; that there were times in the washroom when Tanksley walked away if he asked him something or he would just turn his back and walk away or would "rudely reply back" (Tr. p. 799); that by "rudely reply back" he meant that if he asked Tanksley if that is right, he would say yes real—just real hateful like. Or, that is what I got, kind of hatefulish" (Id.); and that on any given day he would say to Tanksley this is the number I got and Tanksley would "just turn his back and walk away. He wouldn't say yes, no, nothing" (Tr. p. 800). Gibson, who according to Dustin Woodward's own testimony usually counted the ramps with him, testified that he was not aware of any occasion when Tanksley did not respond to questions poised by Dustin Woodward. Additionally, Gibson testified that while fewer than five times Tanksley did not respond to his questions regarding his count, Tanksley might not have heard him. As noted above, Gibson, who was called by the Respondent, was the company observer at the Board election and is a friend Dustin Woodward. Dustin Woodward's and Gibson's count is the official count. Henry testified that up until the Board election Respondent accepted the employees' ramp count which the employees wrote on their time cards but after the Board election Five Star conducted its own count in the washroom.[28]

After he was reinstated, Tanksley was caught in a no-win situation. If he went to the restroom 9 minutes before a break, it was a problem. If he did not socialize, it was a problem. If he smiled at a member of the Woodward family, Respondent viewed it as a problem. If he breathed heavily, which is something someone might expect from a person who suffered a heart attack in 2003 and was subsequently exerting himself, it is a problem. I did not find any of the members of the Woodward family who testified at the trial herein to be credible. As owners of Five Star, they all have a monetary stake in the outcome of this proceeding. Much of their testimony, which was not credible to begin with, was elicited by Respondent's attorney asking leading questions. Respondent violated Sections 8(a)(1), (3), and (4) of the Act as collectively alleged in paragraphs 6(g), (h), (i), (j), (k), and (l) of the complaint.

Paragraphs 7(a), (b), and (c) collectively allege that on or about February 12, 2004, Respondent changed the work schedules and break times of its employees, and Respondent confiscated the keys to the facility that had been in the possession of Henry, Stultz, and Jamie Holt because the employees formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

On brief General Counsel contends that by taking away the keys and changing the welders' hours the day after the Board election and by his accompanying statement, Jim Woodward was showing Henry and the other welders that the changes were because of the Union activity in violation of Section 8(a)(1) of the Act; that by these same actions, Respondent discriminated against the welders in violation of Section 8(a)(3) of the Act; that taking the keys away and by making the changes on February 12, 2004 Respondent engaged in acts of retribution striking an immediate and clean blow against the union activity by making these unilateral changes without bargaining with the Union in violation of Section 8(a)(1) and (5) of the Act; that *Waldoroth Label Corp.*, 91 NLRB 673 (1950), is distinguishable because in that case changes in the company's method of operation deprived the privilege of holding keys of any practical significance and the Board, therefore, did not order the keys returned; that here restoring the status quo ante is a key part of the remedy for a unilateral change and not ordering the keys restored would preclude employees from keeping the hours they did before the change, *Schwickert's of Rochester, Inc.*, 343 NLRB 1044 (2004); and that in order to remedy the discrimination and to put the parties in positions they should have been bargaining from, the Respondent must be ordered to return the working conditions for welding employees to what they were before the unlawful February 12, 2004, taking away the keys and changes in hours.

Respondent, on brief, argues that it is allowed to reaffirm its prior work schedule as stated in *Eagle Transport Corp.*, 338 NLRB 489 (2002), and *Hostar Marine Transport Systems*, 298 NLRB188 (1990); that some of the welders, who were aware of the start and end times, came in early and Five Star failed to take corrective action; that, as allowed by law, Five Star posted a notice clarifying the work schedule; that there were justifiable reasons for reinforcement or clarification of schedules, no evidence was submitted at trial that the employees suffered any hardship in the clarification of work schedule, and the employees did not suffer loss of wages; that the taking of keys is a moot issue because there was no evidence any keys were taken from any current employee of Five Star; that the door lock had been changed so that the keys were no longer operable, there was no need for the involved employees to have keys, and the lack of keys has not affected wages, hours or terms or conditions of employment, *Litton Systems*, 300 NLRB 324 (1990); that it would not be proper for the Board to order new keys to be made and provided to employees or that old keys be returned which no longer work, *Waldoroth*, supra; that the motivation for the return of the keys was not a desire to interfere with union activities, *Santa Rosa Blueprint Service,* 288 NLRB 762 (1988); and that Jim Woodward testified that he asked for the keys based on the advice of outside consultants.

Jim Woodward testified that this change was occasioned in part by the recommendations of Respondent's OSHA consult-

[28] Gibson testified that he *believed* that the change in procedure occurred immediately before the Board election. Henry was not equivocal. Henry's testimony is credited.

ant, Lawson, and Respondent's insurance agent; and that he was told in November or December 2003 that he needed to put a stop to allowing employees to work in the facility without a management representative being present, but that he could not do anything about the situation until at least election day. The only outside consultant that Respondent called as a witness was Lawson. As noted above, Lawson testified that he probably first spoke with Jim Woodward in 2002, about two years before the Board election, about employees having keys to Five Star's facility and about work schedules. Jim Woodward is not a credible witness. He lied at the trial herein about a number of things. This is one of them. He also lied about there being a problem with the lock. Henry, who is retired and who I find to be a highly credible witness, testified that before February 12, 2004 welders just wrote down their time on the card and they were not required to come to work at a certain time; that before February 12, 2004, he seldom took a morning break and he would only take 5 or 10 minutes for lunch; that before February 12, 2004, he usually left work at 1:45 p.m.; that before February 12, 2004, the other welders who came in before 7 a.m. included Leuschen, Ron Atkinson, Andy Anders, Tanksley, and Looney; that before February 12, 2004 welders would leave work when they finished the number of ramps that they wanted to get done; that in the past he arrived at work as early as 3 a.m. to avoid working during the hottest part of the day in the summer since the welding rooms were not air conditioned; that after February 12, 2004, (a) if he did not quit work at 10 a.m. for a break, Jim Woodward would get him and tell him that it is break time, (b) he was not allowed to work through lunch, and (c) he was not allowed to leave work until 3:30 p.m.; and that welders had flexible schedules from 1991 until the Board election.[29] As noted above, Leuschen testified that before February 12, 2004, he usually worked from 5:30 or 6 a.m. to 1:30 or 2 p.m.; that before February 12, 2004, he usually took just one 30 minute break, at 10:30 a.m., during the workday; that he did not have a set schedule before February 12, 2004 and, therefore, he was able to do farm work and side jobs such as logging after he finished for the day at Five Star; that with the change, in the summer he would have to work in a welding room that was not air conditioned during the hottest part of the day; that the change worked a hardship on him; and that he was not given a reason for the change by any supervisor or manager. Respondent has not shown with a reliable document or a reliable witness that it had a non-flexible work schedule for its welders, including specified breaktimes, which was in effect before February 12, 2004. Respondent's posting and enforcing of its February 12, 2004 notice is a violation of the Act. On February 12, 2004, Respondent unilaterally altered the welder's work schedules without first notifying and bargaining with the Union. This was (a) retribution and (b) a part of Respondent's attempt to undermine the Union's relevance with respect to employees' terms and conditions of employment. It was meant to and it did damage the bargaining relationship between Respondent and the Union. And, as demonstrated by the employees' credible testimony, they suffered hardships with this change. As here pertinent, Respondent violated Sections 8(a)(1) and (3) of the Act as alleged in paragraphs 7(a), (b), and (c) of the complaint.[30] Regarding returning to the status quo ante, Respondent will be given a choice. It can have someone at the facility beginning at 3 a.m. so that any welder who wants to work early, especially to avoid working in an non-air-conditioned room in the hottest part of the day in the summer, can come in at 3 a.m.[31] If Respondent's management and/or supervisors want to sleep in until later in the morning, then Respondent can give the welders keys so that they can let themselves in. As counsel for General Counsel points out, Respondent must return the working conditions for welding employees to what they were before the unlawful February 12, 2004 confiscation of keys and the changing of work schedules and breaks. This means that the change regarding scheduled hours will be rescinded, the change with respect to scheduled breaks and lunch will be rescinded, and welding employees will have the prerogative of working flexible hours beginning at 3 a.m., whether this involves giving them keys or having someone there to let them into Respondent's facility. If Respondent wants to change this situation, it can—after returning to the status quo ante, give the Union notice of a proposed change and bargain with the Union.

Paragraphs 9(a) through 9(g) of the complaint collectively allege that the following subjects relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purpose of collective bargaining; and that without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and its effects on terms and conditions of employment of unit employees, Respondent (a) on or about February 12, 2004, changed the work schedule and break times for employees in the unit, (b) on February 12, 2004, confiscated keys to the facility that had been in the possession of certain unit employees, (c) since in or about mid-October 2004 and on various dates thereafter, denied annual bonuses and vacation payments to unit employees, (d) since on or about mid-March 2005 changed its rules, requirements, and procedures regarding the receipt of employees' paychecks, and (e) on about April 7,13, and 26, 2005 changed its rules, requirements, and procedures regarding the discipline and discharge of employees. The conduct described in (a) through (e) in this paragraph coincides with the conduct described in paragraphs 9(a) through 9(e) in the complaint.

The conduct described in paragraphs 9(a), (b), (d), and (e) has been found to be unlawful above. Additionally, as alleged in paragraph 9(f), this conduct relates to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purpose of collective bargaining. And as alleged in paragraph 9(g) Respondent made these changes without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with re-

[29] Lawson's equivocal testimony that it was his *belief* that Five Star's hours prior to February 11, 2004, were always 7 a.m. to 3:30 p.m. is not credited to the extent it refers to welders as opposed to production workers. Lawson did not become involved with Five Star until 2001. Henry worked at Five Star for a decade before Lawson started making his visits to Five Star. Henry is a credible witness. His testimony is credited.

[30] The 8(a)(5) violation will be treated below.

[31] Obviously the remedy applies year round.

spect to this conduct and its effects on the terms and conditions of employment of unit employees. Since Respondent engaged in the unlawful conduct described in paragraphs 9(a), (b), (d), (e), (f), and (g), it violated Section 8(a)(1) and (5) of the Act. There remains for consideration paragraph 9(c).

On brief the General Counsel, as here pertinent, contends that throughout the 10(b) period [from October 25, 2004 on—the 6 months prior to the April 25, 2005 filing date of the charge in Case 17–CA–23037, General Counsel's Exhibit 1(v)] bonus and vacation pay were given and withheld based solely on the discretion exercised by Jim Woodward and the written policy did not set parameters; that during the 10(b) period Jim Woodward exercised his discretion to deny vacation and bonus pay to some employees while giving vacation and bonus pay to other employees; that Jim Woodward exercised discretion to grant or deny vacation and bonus pay and did so without notifying the Union thereby violating Section 8(a)(1) and (5) of the Act; that Board law is clear that an employer is obligated to bargain regarding a policy in place which reserves to itself unlimited discretion; that where there is no reasonable certainty as to timing and criteria, the employer must bargain before it makes changes, *Eugene Iovine, Inc.*, 328 NLRB 294 (1999); that the Board and the courts have consistently held that such discretionary acts are precisely the type of action over which an employer must bargain with a newly certified union; that the certification of a bargaining representative ends the right of an employer to unilaterally exercise its discretion regarding wages, hours, and working conditions, *Adair Standish Corp.*, 292 NLRB 890 (1989); that an employer must bargain with the union before utilizing considerable and undefined discretion; that there is no established term or condition of employment unless there is reasonable certainty at to timing and criteria, *MEMC Electronic Material, Inc.*, 342 NLRB 1172 (2004); that where the decisions regarding timing and criteria are made during the time of union representation, the employer must bargain before making changes; that Five Star had set no criteria for when bonuses and vacation pay would be granted to employees other than the unlimited discretion of Jim Woodward; that once a union represented the unit employees Respondent could no longer give bonuses or vacation pay based upon its unlimited discretion, but rather had an obligation to bargain; and that here, Respondent did not notify the union nor did it bargain before granting vacation pay and bonuses, in violation of Section 8(a)(1) and (5) of the Act.

Respondent, on brief, argues that employees other than Tanksley did not receive a bonus; that employees who received bonuses met their production quotas or returned to work after separation of employment; that the bonus system was in place before the union election and was continued in the same manner after the election; and that Tanksley's poor conduct, poor attendance, low production, and poor attitude does not justify a bonus for a job well done.

With respect to annual bonuses and vacation payments to unit employees, the contentions of Counsel for General Counsel are correct. As noted above, General Counsel's Exhibit 2 reads as follows:

NOTICE

AS OF TODAY OCT. 15, 2003

FOR EACH *UNEXCUSED* 2 DAYS ABSENCE
—YOU LOSE 1 VACATION DAY—

AFTER 12 ABSENCES
—YOU LOOSE ALL VACATION
AND YEARLY BONUS—

* Unexcused absence---no doctor's note, no phone call (Jim [Woodward] will decide if excused or not), no prearrangement with JIM, etc

**Jim Woodward has final say whether excused or unexcused*. [Emphasis in original.]

As demonstrated by a number of examples on the record, and as contended by counsel for General Counsel, Jim Woodward exercised unfettered discretion with respect to the payment of bonuses and vacation days. Bonuses and vacation days relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purpose of collective bargain. After the Union won the Board election on February 11, 2004, and was certified as the collective bargaining representative of the employees in the unit, Five Star was obligated to bargain with the Union over these subjects. Jim Woodward could no longer exercise his discretion with respect to bonuses and vacation days. See the cases cited by counsel for the General Counsel on brief, as set forth above. As indicated by counsel for the General Counsel on brief, the 6-month period before the filing of the involved charge means here that any unilateral action that Jim Woodward took with respect to the denying or granting of bonuses or vacation pay from October 25, 2004, on violated Section 8(a)(1) and (5) of the Act. Respondent violated the Act as alleged in paragraph 9(c) of the complaint.

Paragraphs 10(a), (b), and (c) of the complaint collectively allege that since on or about April 13, 2005, the Union has requested that Respondent bargain collectively regarding the discipline and discharge of Unit employees, the Respondent has failed and refused to bargain collectively regarding this, and these subjects relate to wages, hours, and terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining.

As noted above, on May 5, Ritter sent a letter to Jim Woodward, General Counsel's Exhibit 10, requesting negotiations concerning the suspension and discharge of Tanksley. Respondent did not challenge Ritter's testimony that Five Star did not reply to this letter; that Respondent did not notify the Union of what Five Star intended to do with respect to negotiations regarding Tanksley's suspension and termination; and that Respondent did not afford the Union an opportunity to bargain over the procedures that it followed in the above-described suspension and discharge letters to Tanksley, and it did not afford the Union an opportunity to bargain over the above-described April 7 through April 26 letters. Ritter's testimony is credited. Respondent violated Sections 8(a)(1) and (5) of the Act as alleged in paragraphs 10(a), (b), and (c) of the complaint, except that the correct date is May 5. By engaging in the unfair labor practices described above, Respondent extended

the certification period. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

Paragraph 10(d) of the complaint alleges that on or about April 18, 2005 through June 7, 2005, Respondent withdrew recognition from the Union as the exclusive collective-bargaining representative of the employees in the unit.

On brief the counsel for General Counsel contends that Five Star ended the negotiation sessions which were held; that Five Star refused to fully discuss the Union's proposals at bargaining sessions that were held, insisting that proposals be submitted in writing; that on the day of the election Respondent unlawfully terminated Tanksley; that on the day after the election Respondent unlawfully changed the hours of the welders; that Respondent then proceeded to grant paid vacation time and bonuses to whoever it wanted; that bargaining in good faith was not possible from this point; that Respondent demonstrated to employees that it could and would do whatever it wanted, whenever it wanted, without notice to the Union and without consulting with the Union; and that Respondent's unfair labor practices had an adverse effect on negotiations and contributed to the parties inability to reach agreement by moving the baseline for negotiations, and under such circumstances, unremedied unfair labor practices hamper the parties' ability to reach a negotiated contract, *Duane Reade, Inc.*, 342 NLRB No. 104, (2004) and *Lafayette Grinding Corp*, 337 NLRB 832, 833 (2002).

Respondent did not make any specific arguments on brief regarding the allegations in paragraph 10(d) of the complaint.

In its 6-page document titled "*NOTICE OF PRELIMINARY DECISION WITH OPPORTUNITY FOR YOU TO APPEAL*," dated April 18 from Jim Woodward to Tanksley, General Counsel's Exhibit 7, Respondent, as noted above, advised as follows:

> we believe that any representational rights that Harvey Ritter or his organization had have now elapsed and that the employees have demonstrated that they no longer desire to have representation by Teamsters Local 245 as has been demonstrated by the recent decertification petition filed by the employees and by information that I have which indicates that a vast majority of our employees do not desire to be represented by that organization.

The Board in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001), indicates:

> After careful consideration, we have concluded that there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions' majority status. We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* [*Corp*., 95 NLRB 664 (1951)] and its progeny insofar as they permit withdrawal on the basis of good faith doubt. Under our new standard, an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.
>
> . . . .
>
> We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support *at the time the employer withdrew recognition*. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5). [49] [Emphasis added]
>
> [49] An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence. If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority support by a preponderance of all the evidence.

Five Star did not prove by a preponderance of the evidence that the Union had, in fact, lost majority support at the time Five Star withdrew recognition. Since Five Star did not make this showing, it did not rebut the presumption of majority status which, with Respondent's unfair labor practices, is extended beyond the original certification year.[32] As pointed out by the Court in *NLRB v. Katz*, 369 U.S. 736 (1962), unilateral changes by an employer during the course of a collective-bargaining relationship with respect to matters which are mandatory subjects of bargaining must of necessity obstruct bargaining, contrary to the congressional policy. By unilaterally changing, on the day after it lost the Board election, the hours that welders could work, Respondent was punishing the welders. In taking this action, Respondent violated the employees Section 7 rights, it discriminated against the welders, and since the action related to a mandatory subject of bargaining and it was done without affording the Union an opportunity to bargain, it undermined the Union before negotiations even began. As pointed out by counsel for the General Counsel on brief, Respondent, with its numerous above-described unfair labor practices, demonstrated to its employees that it could and would do whatever it wanted. Also as pointed out by counsel for the General Counsel, Respondent's unfair labor practices changed the status quo and moved the baseline for negotiations, making it harder for the parties to come to an agreement. Respondent unlawfully withdrew recognition from the Union in violation of Section 8(a)(1) and (5) as alleged in paragraph 1(d) of the complaint.

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.

[32] As noted above, the Respondent stipulated at the trial herein that on April 19, 2004, the Union was certified as the exclusive collective-bargaining representative of the unit.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production employees, including Welders, Fabricators, Shipping and Wash employees, employed by Respondent at its facility located at 104 Industrial Drive, Crane, Missouri, but EXCLUDING office clerical employees, guards, managerial and supervisors as defined by the Act, and all other employees.

4. Since February 11, 2004, and at all material times thereafter, the Charging Party has been the exclusive collective-bargaining representative of the unit described in paragraph 3 above, based on Section 9(a) of the Act.

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

(a) On February 12, 2004, James Woodward restrained and coerced employees by making statements that implied the selection of the Union as the bargaining representative of unit employees caused Respondent to confiscate employees' keys to the facility and that rejection of the Union by unit employees would improve the working conditions of unit employees.

(b) On April 13, 2005, James and Nancy Woodward demanded that a union representative leave the facility and told employees that the Union could not represent employees in disciplinary matters.

(c) By letter dated April 18, 2005, to an employee, Jim Woodward told employees that the Union was not their collective-bargaining representative and that Respondent was a nonunion employer.

(d) On or about February 11, 2004, Respondent unlawfully discharged its employee David Tanksley.

(e) On or about April 19, 2004 (after having reinstated David Tanksley on or about April 5, 2004), Respondent moved David Tanksley to a different and more difficult job position.

(f) On or about May 19, 2004, Respondent unlawfully refused to permit Tanksley to complete his regular work shift.

(g) On or about May 20, 2004, Respondent unlawfully moved Tanksley to a different work location.

(h) On or about mid-March 2005 and on various dates thereafter Respondent issued disparate rules, requirements, and procedures regarding receipt of Tanksley's paychecks.

(i) On or about April 7, 13, and 18, 2005, Respondent issued disparate rules, requirements, and procedures regarding disciplinary actions issued to Tanksley.

(j) On April 7, 2005, Respondent suspended Tanksley and issued a notice of possible discharge to Tanksley, on April 13, 2005, it issued a further notice of suspension and possible discharge to Tanksley, on April 18, 2005, it issued a preliminary notice of suspension and possible discharge to Tanksley, and on April 26, 2005, it discharged Tanksley.

(k) On or about February 12, 2004, Respondent changed the work schedules and break times of its employees, and Respondent confiscated the keys to the facility that had been in the possession of Henry, Stultz, and Holt.

(l) Since about mid-October 2004, Respondent denied annual bonuses and vacation payments to unit employees.

(m) Since mid-March 2005 Respondent changed its rules, requirements, and procedures regarding the receipt of employees' paychecks.

(n) Since on or about April 7, 13, and 26, 2005, Respondent changed its rules, requirements, and procedures regarding the discipline and discharge of employees.

(o) On or about April 13, 2005, the Union has requested that Respondent bargain collectively regarding the discipline and discharge of Unit employees, the Respondent has failed and refused to bargain collectively regarding this, and these subjects relate to wages, hours, and terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective-bargaining.

(p) On or about April 18 through June 7, 2005, Respondent withdrew recognition from the Union as the exclusive collective-bargaining representative of the employees in the unit.

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

(a) On or about February 11, 2004, Respondent unlawfully discharged its employee David Tanksley.

(b) On or about April 19, 2004 (after having reinstated David Tanksley on or about April 5, 2004), Respondent moved David Tanksley to a different and more difficult job position.

(c) On or about May 19, 2004, Respondent unlawfully refused to permit Tanksley to complete his regular work shift.

(d) On or about May 20, 2004, Respondent unlawfully moved Tanksley to a different work location.

(e) On or about mid-March 2005 and on various dates thereafter Respondent issued disparate rules, requirements, and procedures regarding receipt of Tanksley's paychecks.

(f) On or about April 7, 13, and 18, 2005, Respondent issued disparate rules, requirements, and procedures regarding disciplinary actions issued to Tanksley.

(g) On April 7, 2005, Respondent suspended Tanksley and issued a notice of possible discharge to Tanksley, on April 13, 2005, it issued a further notice of suspension and possible discharge to Tanksley, on April 18, 2005, it issued a preliminary notice of suspension and possible discharge to Tanksley, and on April 26, 2005, it discharged Tanksley.

(h) On or about February 12, 2004, Respondent changed the work schedules and break times of its employees, and Respondent confiscated the keys to the facility that had been in the possession of Henry, Stultz, and Holt.

7. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (4) of the Act.

(a) On or about April 19, 2004 (after having reinstated David Tanksley on or about April 5, 2004), Respondent moved David Tanksley to a different and more difficult job position.

(b) On or about May 19, 2004, Respondent unlawfully refused to permit Tanksley to complete his regular work shift.

(c) On or about May 20, 2004, Respondent unlawfully moved Tanksley to a different work location.

(d) On or about mid-March 2005 and on various dates thereafter Respondent issued disparate rules, requirements, and procedures regarding receipt of Tanksley's paychecks.

(e) On or about April 7, 13, and 18, 2005, Respondent issued disparate rules, requirements, and procedures regarding disciplinary actions issued to Tanksley.

(f) On April 7, 2005, Respondent suspended Tanksley and issued a notice of possible discharge to Tanksley, on April 13, 2005, it issued a further notice of suspension and possible discharge to Tanksley, on April 18, 2005, it issued a preliminary notice of suspension and possible discharge to Tanksley, and on April 26, 2005 it discharged Tanksley.

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

(a) On February 12, 2004, Respondent changed the work schedule and breaktimes for employees in the unit and confiscated keys to the facility that had been in the possession of certain unit employees.

(b) Since October 25, 2004, Respondent denied annual bonuses and vacation payments to unit employees.

(c) Since mid-March 2005 Respondent changed its rules, requirements, and procedures regarding the receipt of employees' paychecks.

(d) Since on or about April 7, 13, and 26, 2005, Respondent changed its rules, requirements, and procedures regarding the discipline and discharge of employees.

(e) On or about April 13, 2005, the Union has requested that Respondent bargain collectively regarding the discipline and discharge of unit employees, the Respondent has failed and refused to bargain collectively regarding this, and these subjects relate to wages, hours, and terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective-bargaining.

(f) On or about April 18 through June 7, 2005, Respondent withdrew recognition from the Union as the exclusive collective-bargaining representative of the employees in the unit.

9. The unfair labor practices described above affected commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

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

Having found that Respondent unlawfully made unilateral changes in violation of Section 8(a)(1) and (5) of the Act, I recommend that Respondent restore the terms and conditions of employment which were in effect, and applicable to employees in the bargaining unit, before Respondent unilaterally changed those terms and conditions beginning on February 12, 2004, and make whole all unit employees for losses suffered as a result of the changes, as calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[33]

The Respondent having discriminatorily discharged the same employee, David Tanksley, twice, it must offer him reinstatement with respect to the second discharge and make him whole for any loss of earnings and other benefits with respect to both discharges and his suspension, computed on a quarterly basis from date of discharges to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent will be required to expunge from its records any reference to the unlawful discharges and suspension of David Tanksley.

Having found that Respondent unlawfully withdrew recognition from the Union, It shall be recommended that Respondent recognize and bargain collectively with the Union upon request, and embody any understanding reached into a signed agreement.

[Recommended Order omitted from publication.]

[33] As noted above, I do not believe that it is necessary to order Five Star to give keys to those welders who need them to come to work as early as 3 a.m. Five Star can make the decision as to whether it wants to give the employees keys or provide someone to open the facility at 3 a.m. so that welders can come in at that time if they so desire. To return to the status quo ante, welders need only be given the ability to enter the facility to work in the early morning hours. The remedy with respect to bonuses and vacations will commence on October 25, 2004.