

Aluminum Casting & Engineering Co., Inc. and United Electrical, Radio and Machine Workers of America (UE). Cases 30-CA-12855, 30-CA-12902, 30-CA-12943, 30-CA-12944, and 30-CA-12949

April 9, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On May 12, 1998, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief in answer to Respondent's exceptions and in support of his cross-exceptions. The Charging Party filed an answering brief. The Respondent also filed an answering brief in opposition to the General Counsel's cross-exceptions and reply briefs to the General Counsel's and the Charging Party's answering briefs.

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 exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, except as modified below, and to adopt the recommended Order as modified and set forth in full below.³

1. The Respondent has excepted to the judge's finding that the Respondent violated Section 8(a)(3) and (1) by failing to implement a wage increase. For the reasons set forth below, we find no merit in this exception.

The judge found that, during the Union's organizing campaign, the Respondent raised the wage increase mat-

ter with employees on several occasions. At a meeting held in October 1994,⁴ the Respondent advised employees of its policy of reviewing wages on a yearly basis and announcing adjustments in January, but added the following proviso: "That's what happens . . . when there is no union."

In a meeting held by the Respondent on December 7—less than a month before the election—the Respondent again reminded employees that its "past and present practice" was to announce a wage increase in late December or early January, and "to put the increase into effect in February." However, the Respondent added a caveat:

Obviously, if a union comes in, wages would be subject to the process of bargaining and wage programs could not be changed (up or down) during that process. The law does not provide time guidelines as to how long negotiations could last. That could take months or years.

After the election of January 5 and 6, 1995, which the Union won and to which the Respondent filed objections,⁵ the Respondent, despite having conducted its annual wage survey, informed the employees that it would not grant any increase until the election results were certified. Then, in a March 27, 1995 leaflet to employees entitled, "When will it end?" the Respondent stated that employees were "wondering what happened to the union's big promises of wage increases you were supposed to get months ago" and that employees were asking "when this mess will finally end." The leaflet continued: "The fact is we are a long way from the end. The union has denied the obvious errors in the election and has insisted on a long hearing. We are probably months away from a final decision." The leaflet concluded as follows: "Tired of all the mess? There is only one solution. Say *NO* to the union, *don't* sign their cards, and vote *NO* when you get the chance." (Emphasis in original.)

Finally, in a June 27, 1995 leaflet to employees, the Respondent explained that employees had still not received a wage increase because the Union "stuck its nose in." The Respondent then posed the following question: "Weren't we all a lot better off [before the Union]?"

Withholding a wage increase during a union organizing campaign has been found to be an unfair labor practice "if the employer attempts to blame the union for the withholding." *NLRB v. Otis Hospital*, 545 F.2d 252, 254-255 (1st Cir. 1976). Here, we agree with the judge that "by at least June, the Respondent had explicitly blamed the Union ('the UE stuck its nose in') for the failure to grant the wage increase." In addition, we rely

¹ No exceptions were filed to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employees; by telling employees to stop supporting the Union and blaming union supporters for damage to vehicles; by circulating a memo on February 2, 1995, requesting employees to inform the Respondent if approached to sign authorization cards; and by enforcing a no-solicitation rule to prevent employee Jeffery Greuel from discussing the Union with other employees.

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

We adopt the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by suspending and ultimately discharging employee Greuel. Although agreeing with the judge that Respondent did not violate the Act by suspending and discharging Greuel, Member Hurtgen does not find that the element of timing is supported by the record. Thus, in Member Hurtgen's view, the General Counsel has not met his burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of showing that Greuel's protected activity was a motivating factor in the Respondent's decision to suspend and terminate him.

³ We modify the judge's remedy section to provide that the Respondent shall pay interest on the backpay due employees as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁴ All subsequent dates are in the second half of 1994 and the first half of 1995.

⁵ The Board sustained two of the Respondent's objections and set aside the election.

on the evidence that as early as October, and again in December, the Respondent suggested to employees that the presence of the Union could affect its practice of announcing wage adjustments in January and implementing them in February. Further, in March, the Respondent expressly blamed the Union for “the mess,” a not too subtle reference to the employees’ failure to receive a wage increase in February. In sum, the record shows that the Respondent initially cautioned employees that the Union would be an obstacle to their timely receipt of the annual adjustment and then, when the employees nevertheless voted for the Union in January, the Respondent unambiguously attributed to the Union the responsibility for the absence of the wage increase.

Contrary to the Respondent’s contention, it was not caught between the proverbial “rock and a hard place” in deciding whether to grant the increase. “[N]either [granting nor withholding a wage increase] has been declared illegal per se. It becomes so only if the employer is found to be manipulating benefits in order to influence his employees’ decision during the union organizing campaign.” *Otis Hospital*, supra, 545 F.2d at 255. As set forth above, we agree with the judge that this is such a case of benefit manipulation, and we therefore adopt his unfair labor practice finding.

2. We adopt the judge’s finding that the Respondent violated Section 8(a)(1) of the Act by asking employees to inform the Respondent if “anyone puts you under any pressure to sign a union card or threatens you in any way because you won’t sign a card.” We limit our finding of unlawfulness to that part of the statement that directs employees to report any “pressure” put on them to sign union cards. See *Publisher’s Printing Co.*, 317 NLRB 933, 934 (1995), enf’d. 106 F.3d 401 (6th Cir. 1996).

3. We adopt the judge’s finding that the Respondent violated Section 8(a)(1) of the Act by reimbursing employees for damage to their cars if the employees attributed the damage to the Union.⁶ There was no evidence that the Respondent had any reasonable basis to believe that the Union was in any way responsible for the damage to the vehicles, and the Respondent’s past practice limited reimbursement for damage to employees’ vehicles to that which the Respondent caused or could have caused. In this instance, however, the Respondent reimbursed employees for damage to their vehicles based on the employees’ unsupported assertions that the damage had occurred on or near its property and was caused by union supporters. The effect of the Respondent’s conduct was to communicate a message to its employees that it was willing to act in a disparate manner and contrary to past practice if they would accuse union supporters (and no others) of being responsible for the damage to their vehicles.

⁶ The judge found that the Respondent’s facility is located in an industrial area where damage to cars occurs occasionally.

4. We also adopt the judge’s finding that the Respondent violated Section 8(a)(1) of the Act by maintaining in its employee handbook the statement that it was the Respondent’s “intention to do everything possible to maintain our company’s union-free status for the benefit of both our employees and [the Company].”⁷ We find that the statement, in the context of actual unlawful conduct, reasonably conveyed the message that the Respondent would do anything, including unlawful conduct, to maintain its union-free status.⁸ Relying on Section 8(c) of the Act, our dissenting colleague says that the Respondent has no obligation to qualify this statement, even if made in the context of the commission of actual unfair labor practice conduct. In response, we note that the applicability of Section 8(a)(1) turns on whether a given statement would reasonably tend to interfere with, restrain, or coerce Section 7 rights. Thus, while we agree that Section 8(c) affords an employer the right to state its views on unionization, the Respondent’s statement does not just simply set forth such views. Rather, in this context, it sets forth what the Respondent would *do* to prevent unionization.

5. Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by maintaining in its rules of conduct a no-solicitation rule that prohibits employees from “[s]oliciting or selling on company premises except when all concerned are relieved from duty.” Although our dissenting colleague claims that this rule is “unambiguous,” the Board has squarely held that “duty” time rules such as this one are ambiguous and overbroad because they “reasonably could be understood to mean that [employees] were prohibited from [engaging in] protected concerted activity from the time that they came on duty or began their shift, including during breaks or meal periods.” *Central Security Services*, 315 NLRB 239, 243 (1994). Citing *Southeastern Brush Co.*, 306 NLRB 884 fn. 1 (1992), the *Central Security* Board analogized a “duty” time rule to an overbroad and unlawful “company” time rule, and implicitly distinguished a “duty”

⁷ Member Hurtgen does not, however, agree with the judge’s finding that the statement itself conveyed to employees that the Respondent would resort to unlawful conduct to maintain its union-free status.

⁸ Member Liebman finds the handbook statement to be unlawful both for the reasons stated above and the reasons stated by the judge. Moreover, the cases relied upon by her dissenting colleague are readily distinguishable from the instant case. Thus, in *L’Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1347 (9th Cir. 1980), and in *NLRB v. Threads, Inc.*, 308 F.2d 1, 8-9 (4th Cir. 1962), the employers stated, respectively, that they would use “every lawful means possible” and “every proper means” to oppose attempts at unionization. (Emphasis added). In the instant case, the Respondent stated it would do “everything possible” to maintain its union-free status without any qualification that those means would be “lawful” or “proper.” The dissent also cites *J. D. Hinkle*, 301 NLRB 801 (1991), for the proposition that an employer may tell his employees that he would not “have a third party running [his] company.” That issue, however, is not before us in the instant case.

time rule from a “working” time rule, which is presumptively lawful under *Our Way*, 268 NLRB 394 (1983), cited by our dissenting colleague. Accordingly, we conclude that the judge properly found the Respondent’s “duty” time rule to be unlawful conduct under established Board precedent.

6. The judge concluded that Respondent’s remark about employee Shaw’s “Slave Co.” button violated Section 8(a)(1). We disagree.⁹ We acknowledge, as did the Respondent, that the button was related to the Union’s campaign. However, Respondent’s remark concerning the button was not violative of Section 8(a)(1). Respondent did not say, or even suggest, that it would terminate Shaw’s employment. Nor did Respondent suggest that being pronoun was incompatible with continued employment. Rather, Respondent simply questioned why an employee who thought he was a slave would wish to continue to work for the company and endure that slavery.¹⁰ In the context of the “Slave Co.” legend, the question would appear to be a reasonable one.¹¹ In any event, it did not interfere with, threaten or restrain Shaw’s right to wear the button.¹²

AMENDED CONCLUSION OF LAW

Delete Conclusion of Law 7 and renumber accordingly the paragraphs that follow.

ORDER

The National Labor Relations Board orders that the Respondent, Aluminum Casting & Engineering Co., Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁹ As indicated in his separate opinion, Member Brame joins Member Hurtgen in reversing the judge on this issue. Member Liebman dissents for the reasons set forth in fn. 12, *infra*.

¹⁰ We stress that Shaw’s button was an intentional exaggeration of the prevailing employment conditions at the Respondent’s facility to which Supervisor David Mekka in turn responded with a retort. In the context of such verbal sparring, Mekka’s remarks would not have reasonably conveyed the message that Shaw would suffer adverse consequences for wearing this button. Indeed, Mekka himself was not the subject of any other unfair labor practice allegations.

¹¹ Compare *Gravure Packaging*, 321 NLRB 1296, 1303 (1996), *enfd.mem. sub nom. Graphic Packaging Corp. v. NLRB*, 116 F.3d 941 (D.C. Cir. 1997). In that case, the employer did not ask a question. Rather, he affirmatively told employees that, if they wanted to work for a unionized company, “there’s the door, go work for a union.”

¹² Member Liebman agrees with her colleagues and the judge that the button was related to the Union’s campaign. However, Member Liebman disagrees with her colleagues’ contention that Supervisor Mekka merely asked employee Shaw why he would want to continue to work for a “slave” company. Rather, the credited testimony is that Mekka said, “If you don’t like working here, *why don’t you go somewhere else?*” (Emphasis added.) Thus, Mekka clearly suggested that union supporter Shaw should quit his employment with the Respondent and work elsewhere. Accordingly, Member Liebman would adopt the judge’s finding that Mekka’s statement violated Sec. 8(a)(1) because it reasonably conveyed to Shaw that his pronoun sympathies were incompatible with continued employment. See *Gravure Packaging*, *supra*, and cases cited in the Board’s decision.

(a) Threatening employees that the Company will engage in unlawful conduct to maintain its union free status, and indicating to employees that it would be futile for them to engage in union activity.

(b) Discontinuing the Company’s practice of conducting annual wage surveys, and based thereon, granting annual wage increases, because employees voted to select the Union as their collective-bargaining representative.

(c) Failing to announce a wage increase, telling employees that there will not be an annual wage increase, and telling employees that the Union is to blame for the failure to grant an annual wage increase, all because employees voted to select the Union as their collective-bargaining representative.

(d) Maintaining a rule restricting employee solicitation that does not clearly indicate that employees are permitted to engage in solicitation during nonworking times.

(e) Soliciting reports of employees who “pressure” employees into supporting the Union.

(f) Paying for damage to vehicles for those employees who claim that the damage was caused by union supporters.

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

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

(a) Rescind from its handbook, in the section entitled, “What about a Union,” the unlawful sentence described above.

(b) Rescind the unlawfully overbroad rule restricting employee solicitation.

(c) Make whole all employees who were not granted annual wage increases in 1995 to date in the manner set forth in the remedy section of the judge’s decision, as modified by the Board’s decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Milwaukee, Wisconsin, copies of the attached notice marked “Appendix.”¹³ Copies of this notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous

¹³ 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.”

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 October 14, 1994.

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

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

MEMBER BRAME, concurring in part and dissenting in part.

Contrary to the majority, I would reverse the judge and dismiss allegations that the Respondent violated Section 8(a)(1) of the Act by informing its employees that it intended to remain “union-free” and by maintaining an allegedly unlawful no-solicitation rule. In the remaining respects, I agree with my colleagues’ decision.¹

1. There is a statement in the Respondent’s employee handbook stressing its “intention to do everything possible to maintain our company’s union-free status for the benefit of both our employees and [the Respondent].” The handbook was distributed more than 3 years before any organizing activity began and the section from which the statement is taken also describes the difficult, contentious relationship the Respondent had with another union in the past. Section 8(c) of the Act specifically recognizes employers’ right to express their views about labor issues and unionization in noncoercive terms.² As the Supreme Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.”

The Respondent in this case merely exercised its First Amendment right to inform employees that it preferred to operate its business without a union. There was nothing threatening in the Respondent’s handbook statement.

¹ In agreeing with my colleagues and the judge that the Respondent violated Sec. 8(a)(3) and (1) by failing to implement a wage increase, I rely solely on the rationale that it sought to place the onus on the Union for its action.

² Sec. 8(c) of the Act states that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Unlike the majority and the judge, I cannot infer that the Respondent was notifying employees that it would resort to unlawful means to prevent unionization. In *J. D. Hinkle & Sons, Inc.*, 301 NLRB 801 (1991), the Board found that the employer did not violate the Act when its president told employees that he was “not going to have a third party running [his] company.”³

2. The Respondent maintains as part of its Rules of Conduct for employees a no-solicitation rule that prohibits “[s]oliciting or selling on company premises except when all concerned are relieved from duty.” My colleagues adopt the judge’s finding that the maintenance of this rule violated the Act based on *Ebon Research Systems*, 290 NLRB 751, 761–762 (1988), where the employer’s rule used the terms “duty hours” and “duty time” without clarification. *Ebon Research Systems* is, however, distinguishable. Here, the Respondent prohibited solicitations and sales unless “all concerned were relieved from duty.” This unambiguous language protected the employer’s interest in working time, and employees would reasonably understand that the Respondent did not permit solicitation if any of the participants was on “duty” time or working time at the Respondent’s facility. This view of the rule is consistent with the other rule, posted in the Respondent’s lunchroom and not alleged to be unlawful, which prohibited solicitation during working time. And this construction of the rule is in perfect harmony with the standard for valid no-solicitation rules that the Board established in *Our Way*, 268 NLRB 394 (1983), distinguishing between presumptively valid rules barring solicitation and distribution during working time in contrast to presumptively invalid rules prohibiting such activity during working hours.⁴ The Respondent’s rule, therefore, was presumptively valid under the Act and the General Counsel has presented no evidence here to rebut this presumption. Accordingly, I would find that the Respondent has maintained a lawful no-

³ The circuit courts also reached this conclusion in *L’Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1347 (9th Cir. 1980), modifying in relevant part 236 NLRB 354 (1978) (employer stated that it would use “every lawful means possible to avoid unionization”), and *NLRB v. Threads, Inc.*, 308 F.2d 1, 8–9 (4th Cir. 1962), modifying in relevant part 132 NLRB 452 (1961) (employer told employees that it would “use every proper means to prevent [the union] from coming into the plant.” (emphasis in original.) Contrary to my colleagues, I would not find that statement at issue unlawful because this Respondent failed to qualify its handbook statement apprising employees of its intention to remain “union-free.” I stress that employers have no such obligation under Sec. 8(c) of the Act, the free speech proviso, as the language used contains no threat of reprisal or force or promise of benefits.

⁴ Contrary to my colleagues, I disagree with the Board’s decision in *Central Security Services*, 315 NLRB 239, 243 (1994), and decline to follow it. The employer’s rule in that case provided “[o]nce on duty, the carrying and reading of any type of literature is strictly forbidden.” I find that, as in the present case, the employer’s rule in *Central Security Services* only prohibited solicitation and distribution activities during worktime and, thus, also was presumptively valid under *Our Way*, supra.

solicitation rule and would dismiss the complaint allegation to the contrary.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union.
- To bargain collectively through representatives of their own choice.
- To act together for other mutual aid or protection.
- To choose not to engage in any of these protected activities.

WE WILL NOT threaten to use unlawful conduct to maintain a union free status.

WE WILL NOT indicate that it is futile for you to engage in union activity.

WE WILL NOT discontinue our practice of conducting annual wage surveys and, based thereon, granting wage increases, because employees voted to select the United Electrical, Radio and Machine Workers of America (UE) as their collective-bargaining representative.

WE WILL NOT fail to announce an annual wage increase, tell employees that they will not receive an annual increase, or tell employees that the Union is to blame for the failure to grant an annual wage increase, all because employees voted to select the Union as their collective-bargaining representative.

WE WILL NOT maintain a rule restricting employee solicitation that does not clearly indicate that employees are permitted to engage in solicitation during nonworking times.

WE WILL NOT ask that you report employees who "pressure" employees to support the Union.

WE WILL NOT pay for damage to vehicles for employees who claim that the damage was caused by union supporters.

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

WE WILL rescind from our handbook, in the section entitled, "What about a Union," that portion determined to be unlawful.

WE WILL make employees whole for the annual wage increases that were unlawfully withheld from them.

WE WILL rescind the unlawfully broad rule that restricts employee solicitation.

ALUMINUM CASTING & ENGINEERING CO., INC.

Benjamin Mandelman and J. Edward Castillo, Esqs., for the General Counsel.

Paul E. Prentiss and Eric H. Rumbaugh, Esqs. (Michael Best & Friedrich, LLP), of Milwaukee, Wisconsin, for the Respondent.

Terry Davis and Walter Parks, Esqs., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on February 23–26, 1998. The charges in Cases 30–CA–12855, 30–CA–12902, 30–CA–12943, 30–CA–12944, and 30–CA–12949 were filed April 6, May 19, June 21 and 29, 1995, respectively; the first amended charge in Case 30–CA–12902 was filed June 23, 1995. The amended order consolidating cases, consolidated complaint and notice of hearing (the complaint) was issued December 5, 1997. The complaint alleges that Aluminum Castings & Engineering Co., Inc. (Respondent) violated Section 8(a)(1) of the Act by threatening employees with termination for engaging in union activity, failing to announce a pay raise in order to discourage union activity, telling employees that it would reimburse employees for damage to their vehicles if the employees believed that the damage was attributable to the United Electrical, Radio and Machine Workers of America (UE) (the Union), requesting employees to notify management of the identity of union proponents, informing employees that it would not decide whether or not to grant a wage increase until after the election results in Case 30–RC–5649 were certified, informing employees that the reason there had been no raises was due to the Union's organizing campaign, discriminatorily enforcing an unlawfully broad rule prohibiting employees from discussing the Union, and interrogating employees concerning their union sympathies. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and later discharging employee Jeff Greuel because of his support for the Union and by failing to implement a wage increase for employees.¹ Respondent filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, commerce and jurisdiction, labor organization status, and relevant supervisory and agency allegations. Respondent denied the substantive allegations of the complaint. Prior to the hearing the Regional Director amended the complaint to add allegations that Respondent violated Section 8(a)(1) by telling employees to stop supporting the Union and blaming union supporters for damage to vehicles, telling employees that support for the Union was incompatible with continued employment, and maintaining a rule in its handbook that impermissibly restricts employee solicitation for the Union. At the hearing the General Counsel was granted permission to amend the complaint to add an allegation that Respondent violated Section 8(a)(1) by promising an employee a wage increase if he would refrain from engaging in union activity.

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

¹ At the hearing the General Counsel's motion to amend the complaint to delete allegations concerning employees Stanley Cunningham and Carlos Azurdia was granted.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operates a foundry engaged in the manufacture of metal parts at its facility in Milwaukee, Wisconsin, where it annually sells and ships goods and materials valued in excess of \$50,000 directly to customers located outside the State of Wisconsin. 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. BACKGROUND

A. Respondent's Business

As indicated, Respondent operates a foundry. As such, it melts bar stock of ingot into liquid form, which is then poured into molds to create parts. These parts are then supplied to automobile manufacturers for use in motorized vehicles. Respondent's facility actually consists on two facilities, plant one and plant two. At the time of the hearing, Respondent employed about 320 production and maintenance employees. During 1994, Respondent employed about 410 to 420 employees in those positions. The employees work on three shifts. The first and second shifts are involved in production work; the third shift does maintenance work. As is generally the case in the foundry industry, Respondent experiences a very high turnover of employees; it finds it very hard to retain a reliable work force. This in turn requires Respondent to expend resources required to train the new employees.

James VanderMale is Respondent's director of labor relations; he is in overall charge of Respondent's labor relations' policies. He reports to Eckhart Grohmann, Respondent's president and owner.

B. The Election

On January 5 and 6, 1995, an election was conducted in a unit of Respondent's production and maintenance employees. The Union had filed a petition for an election with the Board on November 18, 1994, and the parties entered into a stipulation for an election on December 6, 1994. Of approximately 396 eligible voters, 193 votes were cast in favor of the Union and 183 votes were cast against the Union. Challenged and void ballots were not sufficient in number to affect the results of the election. Respondent filed timely objections to the election and a hearing was conducted on the objections by Hearing Officer Mary Ellen Larson on 20 days beginning February 27 and ending June 6, 1995. Hearing Officer Larson recommended that the election be set aside, and the Board agreed in an unreported decision. The Board specifically relied on the fact that the evidence showed that the election notice used to advise employees about the election contained translation errors that tended to compromise the neutrality of the Board by confusing the identity of the Board with that of the Union and unions in general. The Board directed a second election. That election has not yet been held because further processing of the representation case is blocked by the unfair labor practice charges in this case.

The evidence shows that employees engaged in union activity beginning in June 1995. VanderMale admitted that by that time Respondent was aware that an organizing campaign was underway on behalf of the Union by virtue of graffiti on bath-

room walls, authorization cards being found in the lunchroom, and union literature being found on the locker room floors.

Respondent conducted a vigorous effort to persuade employees not to support the Union. During opening statements Respondent's counsel stated that "because of the passions driving both parties the game was played at or near the edges of the law because to do otherwise in this context would be a guaranteed failure. There is no dispute about that." In direct response to the Union's organizing effort, Respondent conducted captive audience meetings with groups of employees during working time, distributed literature, and regularly engaged in one on one conversations between employees and supervisors about the Union. The literature included an assertion that, "[t]he UE is a despicable union, outcast dogs of the mainstream Labor Unions' bottom feeders." Some literature emphasized to employees that wages and benefits were subject to bargaining if the employees were represented by a union, and that as a result of bargaining employees could end with more, less or the same, and that the bargaining process can take months and even years; other literature emphasized the employee's right to select or not select a collective-bargaining representative. Respondent also conducted training for its supervisors concerning what they lawfully could say to employees concerning the Union's organizational effort. The Union also conducted a vigorous campaign and distributed literature that advised employees of their rights under the Act and what the employees could expect in terms of a response by Respondent to the union campaign.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Failure to Grant a Pay Raise Allegation

The complaint alleges that Respondent violated Section 8(a)(1) by failing to announce a wage increase on January 6, 1995, to be effective in February 1995; by announcing to employees on February 5, 1995, that it would not decide whether to grant such an increase until after the election results were certified; and by informing employees on June 21, 1995, that the reason there had been no raises for employees was the Union's campaign. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) by failing to implement a wage increase for employees on about February 1, 1995.

Respondent has several pay systems in place for its employees. The training and development program impacts employees' wages. This program was conceived in 1993 and the formal implementation began in about July 1994. Respondent hired Robert Reimer, a former high school teacher and instructor at the Milwaukee Area Technical College, on July 18, 1994, to manage and implement that program. The objective of the program was to upgrade Respondent's employee training program and allow employees to earn more money as they learned more skills and became more proficient in their jobs. The program as implemented had three tiers. Tier one consisted of 2 weeks of orientation on basic policies, rules, and work practices of Respondent, as well as teaching the employee his or her individual job. Tier two consisted of training employees how to be more efficient and productive in doing their jobs. Upon successful completion of tier two training, employees received a 25-cent-per-hour pay increase. Tiers one and two were mandatory for all employees, with minor exceptions. By January 9, 1995, virtually all hourly employees had completed training in the first two tiers. Tier three was available to qualifying employees and was designed to give them advanced training. When an employee successfully completed tier three the em-

ployee received a 50-cent-per-hour pay increase. During 1995, about 70 to 80 employees completed tier three training and received the pay increase. The reason for giving employees a pay increase after completion of training in tiers two and three was to provide incentive to employees to learn more and to compensate employees for becoming more valuable to Respondent after they completed the training.

Respondent also granted merit pay increases to its employees. These were based factors such as job performance, meeting or exceeding job standards, attendance, and the absence of major discipline. Employees also received a program pay increase that is granted automatically after an employee has been in a job classification for a specific period of time. Finally, about 15 percent of the employees received incentive pay.

Particularly at issue in this case is Respondent's practice concerning annual across-the-board pay increases. The evidence shows that on February 6, 1989, Respondent announced that its hourly employees would receive a 10-cent-per-hour wage increase effective February 13, 1989, and an additional 5-cent-per-hour increase effective August 14, 1989, and that the utility rate it paid employees would also increase by the same amounts effective the same dates; individual incentive rates paid to employees would be adjusted proportionately and Respondent's merit pay system remained unchanged. On February 5, 1990, Respondent announced that hourly employees would receive a 5-cent-per-hour increase effective August 13, 1990, and the utility rate for all employees would increase 15 cents per hour effective that same date. Again, individual incentive rates were adjusted proportionately and the merit pay system remained unchanged. In 1991 no general wage increases were given. On February 7, 1992, Respondent announced an increase effective February 17 in the utility rate for employees of 20 cents per hour; shop employees would receive an additional 5 cents per hour effective August 17, 1992. As with the earlier announcements, incentive rates were adjusted proportionately and the merit pay system remained the same. On February 8, 1993, Respondent announced an increase in the utility rate of 20 cents per hour effective February 15. In addition, shop hourly employees received an additional 5 cents per hour increase effective August 16, 1993. Incentive rates and merit pay were handled as described above. On February 14, 1994, Respondent announced an increase in the utility rate of 20 cents per hour effective February 21; in addition shop hourly employees received an increase of 5 cents per hour effective August 15, 1994. Again, incentive rates and merit pay were handled as in the past. VanderMale, in his testimony at the hearing, summarized this history by stating that Respondent basically granted a 10-cent-per-hour wage increase to hourly employees in 1989, 15 cents per hour in 1990, no pay raise in 1991, and 20 cents per hour in 1992, 1993, and 1994.

In determining whether to grant a pay increase and if so, how much, Respondent examined the increase in the cost of living, if any for the preceding 12 months, talked to other foundries to determine whether they were granting wage increases, and examined business publications put out by organizations such as the Management Resources Association. VanderMale explained that the reason Respondent did not give a wage increase in 1991 was because "[w]e made an economic decision that conditions did not warrant a wage increase." The purpose of the across-the-board increases was to ensure that the rates Respondent paid to employees remained competitive.

During the union organizing campaign Respondent raised the matter of wages in its interactions with employees. During meetings with new employees in mid-October, 1994,² which dealt with the Union's organizing effort, Respondent advised them that concerning its wage philosophy, each year Respondent "reviews what is happening in the Milwaukee market place with wages and benefits. It looks at the year's performance for the Company, and then decides what type of wage and benefit adjustment can be made. An announcement is usually made in January of each year. That's what happens each year - when there is no union." During a meeting with employees in early November, Respondent told them annual wage and benefit reviews occur each year in November and December, that Respondent conducts surveys, that Respondent was doing that "now," and that from that data changes are recommended, an announcement is made in January of each year of what the changes are, and the changes are made effective in February for all employees. This information was repeated to employees on an individual basis by Respondent's supervisors when they were asked about Respondent's wage and benefit program. On December 7, Respondent addressed employees assembled in groups concerning the Union's organizing effort. As part of its presentation Respondent said that one question it had been asked was "When will we get our next pay adjustment?" Respondent answered:

In addition to merit increases [Respondent] surveys in January the wages of comparable companies in the Milwaukee area in order to provide pay adjustments to remain competitive. This is particularly important in a tight job market as currently exists in the Milwaukee area.

Our past and present practice is to conduct the survey in the Fall, to announce the increase in late December of early January, and to put the increase into effect in February.

Obviously, if a union comes in, wages would be subject to the process of bargaining and wage programs could not be changed (up or down) during that process. The law does not provide time guidelines as to how long negotiations could last. That could take months or years.

In a memorandum to its supervisors for use in answering employee questions Respondent stated that it "annually surveys other companies in our industry and geographic area to ensure that our rates of pay are competitive. Annual adjustments to pay, in addition to merit increases, are a direct result of [Respondent's] wage surveys." On December 19, a letter from Respondent's president was distributed to employees. Attached to the letter was a list of benefits that the employees then enjoyed. Among those benefits was "Periodic Pay Increases Based on Annual Compensation Survey." Another distribution made to employees a day or two before the election repeated this information.

As indicated above, the election was conducted January 5 and 6, and the results showed that the Union won received the support of a majority of the voters. However, after the election no annual raise was given to employees. VanderMale admitted that Respondent had engaged in the process it does it each year to determine whether an increase should be given and, if so, what amount. Respondent does not assert that the failure to

² Until otherwise indicated, all dates are in the second half of 1994 and the first months of 1995.

give a wage increase in 1995 was because the normal process used by Respondent in determining annual wage increases resulted in the conclusion that no increase was justified, not does it assert that the failure was based on an inability to afford any increase.

On January 9, Respondent distributed a memorandum to its supervisors and managers explaining its failure to grant the wage increase as follows:

Since the union election of January 5 and 6 has not been certified one way or another, the most frequently asked question by our employees is, "When can changes in wages, benefits, and working conditions occur?" The answer is simply, no new changes can occur until the situation is clarified. During the period prior to the election, [Respondent] was prohibited from promising or granting promotions, pay raises, or other benefits because such changes could influence how employees voted. The same restriction continues to apply until the election is finalized (certified) by the Labor Board. It is very important that all of us in management use the above reason as to why no new changes can be made. It is *not* because the employees petitioned for a vote, or because the union is trying to win representation rights from [Respondent's] employees. It's because the Labor Board procedure put in place to ensure laboratory conditions exist so a fair election can be held is why no changes can be made. Programs like [Respondent's] merit increase program and T & D program can remain in place because they were operating before the vote on the union question was scheduled.

On February 5, Respondent distributed a leaflet to employees explaining its failure to grant the annual wage increase. In that leaflet Respondent stated:

Our statement made last November 7, 1994, in response to employee questions and *before* the union asked for an election was true. Our practice has been to survey the marketplace each December, decide what, if any, changes were needed, announce the changes in January and make them effective in February. For many reasons changes did not occur each and every year.

On December 6, 1994, all parties stipulated to hold an election under the procedures of the National Labor Relations Board. Because an election was pending, [Respondent] decided that it would be appropriate to postpone the marketplace survey and any announcement of any changes that would come from that survey, at least until the election was certified. The Labor Board has not certified the election. The sole reason for our taking this action was to avoid any interference with, or even the appearance of any interference with, the employee's [sic] free choice in the election.

On March 27, Respondent distributed a leaflet to employees entitled "When will it end." The leaflet goes on to state that a lot of employees are wondering what happened to the Union's promises of wage increases that the employees were to get months ago, and employees have been asking when this "mess" will finally end. The leaflet explained that they were "a long way from the end because the Union had denied "obvious errors" in the election and had insisted on a hearing, and they were probably months away from a final decision. The leaflet then went on to explain why, from Respondent's perspective, employees should not sign cards for the Union. Thereafter, in

June 27, 1995,³ Respondent distributed a leaflet captioned "One Year Later." The leaflet went on:

Just about a year ago, the UE started its effort to get into our plant and your pockets. Remember the big promises of \$1.00 an hour increases, new benefits and quick successes?

Since then, there have been *no* increases in wages except for those under plans started by [Respondent] before the Union. No changes in benefits have occurred.

The NLRB has just concluded four months of hearings concerning election objections. However, the legal proceedings may go on for many more months and possibly even years. We have had employees threatening other employees, employees filing charges and lawsuits against other employees. Instead of trying to bring us together, the UE has turned group against group, employee against employee.

In the one-year period before the UE stuck its nose in, you had a wage increase, a new pay for knowledge program, and benefit changes. Ask yourself - weren't we all a lot better off?

No across-the-board increases were granted in the years following 1995 for the same reason.

There is no doubt that Respondent had a practice of annual reviews to grant across-the-board pay increases to its employees. The pattern, set forth above, fully speaks for itself. The practice was certain as to time and used a specific procedure, as described by VanderMale. Moreover, in its campaign communications to employees Respondent admitted the existence of this practice. Announcements were made in early January, and wage increases were granted sometime in February. The facts here show that Respondent's wage increase practice was not haphazard or amorphous, as was the case in *Village Thrift Stores*, 272 NLRB 572 (1984), but was instead a term and condition of employment that employees could reasonably expect to receive. It is well settled that when an employer during an organizing campaign departs from its usual practice of granting benefits the Board may infer an intent to influence the upcoming election and conclude that the employer's conduct violated the Act. *Parma Industries*, 292 NLRB 90 (1988). In this case the inference is stronger than usual. This is so because not only was their practice in existence, but also during the campaign Respondent specifically confirmed the practice and told employees that it was "now" in the process of ascertaining the amount of the wage increase in "a tight job market as currently exists in the Milwaukee area." This reasonably led employees to believe that they would receive a wage increase in 1995 consistent with the past practice. The only credible explanation for Respondent's sudden decision not to grant the wage increase was the fact the election results showed that the employees had voted to select the Union as their collective-bargaining representative. Thus, Respondent's decision to withhold its annual wage increase for employees was a not too subtle punishment because the employees voted for the Union.

Respondent asserts a number of nonretaliatory explanations for its failure to grant the wage increase. It argues that the evolution and expansion of the training and development program, the expanded use of merit increases, and increased market

³ Although the leaflet is undated, both parties agree in their briefs that it was distributed in June 1995.

competition explain the decision to withhold the wage increase. The record does not support this contention. The training and development and merit increases had coexisted with the annual increase; they were not designed to supplant it. Indeed, as described above, each of the different pay increase programs was designed to meet a specific objective. Importantly, Respondent did not assert this argument as a justification in its explanations to employees concerning why Respondent had failed to grant the wage increase. It is apparent that this argument is an afterthought created for trial.

Respondent also argues that it was caught between a rock and a hard place in deciding whether to grant the wage increase. It argues that it decided not to grant the increase in order to avoid being charged by the Board with attempting to unlawfully influence the election. An exception to the requirement that an employer must follow its normal practice in granting wage increases during an organizing campaign has been allowed by the Board where the employer advises employees that an expected raise is to be deferred pending the outcome of the election to avoid the appearance of election interference. *Parma Industries*, supra; *Centre Engineering, Inc.*, 253 NLRB 419 (1980). In the latter situation the employer must take care not to place the blame for the lack of a pay increase on the union, otherwise the employer will be found to violate the Act by withholding the pay increase. *Atlantic Forest Products*, 282 NLRB 855 (1987); *Truss-Span Co.*, 236 NLRB 50 (1978). In my opinion, that exception does not apply in this case. Here, before the election Respondent lead employees to believe that they would be receiving the wage increase consistent with past practice; Respondent only changed its mind after the election results showed that the employees had voted in favor of the Union. The exception described above was not designed to be manipulated by employers as a legal cover for punishing employees for having voted in favor of a union. In any event, as argued by the General Counsel, in order to avail itself of this exception an employer must take care not to blame the union for the failure to grant the wage increase. Here, by at least June, Respondent had explicitly blamed the Union ("the UE stuck its nose in") for the failure to grant the wage increase.

Respondent relies on *Montana Lumber Sales*, 185 NLRB 46 (1970). In that case the Board concluded that statements made by an employer did not, in context, improperly blame the union for the failure of the employer to grant certain benefits. Here, the June leaflet unambiguously attributed to the Union the responsibility for the absence of the wage increase. Also, that case did not involve the situation here, where before the election the Respondent lead employees to believe that they would be receiving the wage increase, but after the employees voted in favor of the Union, Respondent reversed its course. *Uarco, Inc.*, 169 NLRB 1153 (1968), is also inapposite. There, prior to the election the employer announced that it would be withholding a normal wage increase in order to avoid the appearance of improperly interfering with the election; shortly after the election, while objections were pending, the employer implemented the wage increase retroactively. That is just the opposite of the situation here and charts a course Respondent could have followed if it was genuinely concerned about the appearance of interfering with the election. Under all the circumstances, I conclude the Respondent did not decide to discontinue its practice of conducting annual wage reviews and based thereon, of granting wage increases, in order to avoid the appearance of

impropriety. Instead, I conclude that Respondent did so in order to punish employees for having voted for the Union. Respondent thereby violated Section 8(a)(3) and (1) of the Act. It follows that Respondent also violated Section 8(a)(1) of the Act as alleged in the complaint by failing to announce a wage increase consistent with its past practice, by announcing to employees that it would not be granting a wage increase, and by thereafter blaming the Union for the failure of employees to receive the wage increase.

B. The Other 8(a)(1) Allegations

The General Counsel alleges in the complaint that Respondent has maintained in its employee handbook a statement "What about a Union?" that unlawfully indicates to employees that it would be futile for them to support a union. The evidence shows that during all relevant times Respondent maintained a handbook for its employees that addressed the subject of a union. Respondent's handbook described Respondent's past history with a union and indicated that Respondent was committed to operating on a nonunion basis. It concluded, "It is our intention to do everything possible to maintain our company's union free status for the benefit of both our employees and [Respondent]."

The General Counsel relies on *Gravure Packaging*, 321 NLRB 1296, 1299 (1996). Respondent argues that in stating its commitment to operating nonunion it is engaging in legally and constitutionally protected speech; it cites no case authority in support of its position. In resolving this issue, I note that Respondent did not confine its intention to maintain its nonunion status to engage in all *lawfully* possibly conduct. In assessing whether Respondent's statement violates the Act, I take into account "the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). I conclude that Respondent's statement could reasonably be understood by employees to mean that it would resort to unlawful conduct, if necessary to maintain its union free status, and that it would therefore be futile for employees to engage in union activity. *Gravure Packaging*, supra. Respondent therefore violated Section 8(a)(1) of the Act by maintaining the rule described above.

The General Counsel alleges that Respondent has maintained a rule that unlawfully restricted employees from engaging in solicitation on behalf of a union. The evidence shows that at all times material Respondent has maintained as part of its rules of conduct for employees the following: "Soliciting or selling on company premises except when all concerned are relieved from duty." It is this rule that the General Counsel contends is unlawful. Respondent also posts in its lunchroom another rule concerning solicitation that the General Counsel does not allege in the complaint to be unlawful.⁴ Employees had never been told which rule took precedence.

⁴ In his brief, the General Counsel suggests that the posted rule can be interpreted as placing unlawful restrictions on employees. I do not decide that issue. The matter was not alleged in the complaint, nor did the General Counsel seek to amend the complaint after the posted rules were entered into evidence. Under these circumstances, I conclude that Respondent was not on notice that the legality of the rules were being challenged by the General Counsel in the manner indicated in his brief. Respondent thus has not had a fair opportunity to defend against those allegations in this case.

The General Counsel relies on *Ebon Research Systems*, 290 NLRB 751 (1988), in the assertion that the rule is unlawful. Respondent cites no case authority to defend the rule but argues that the rule was not directed at union organizing. The Board has held that when an employer limits or restricts employee solicitation it must do so in a manner that does not leave employees uncertain as to the scope of the rule. *Our Way, Inc.*, 268 NLRB 394 (1983). In *Ebon*, supra, the Board concluded that an employer did not sufficiently clarify to employees the difference between “duty time” and “duty hours” and thus the rule was unlawfully ambiguous. The rule at issue in this case suffers from the same flaw. The fact that Respondent has other solicitation rules which are not alleged in the complaint to be unlawful does not serve to remove the ambiguity Respondent has created in the minds of its employees concerning when they might be disciplined for engaging in union solicitation. Nor is it all apparent, as Respondent argues, that the rule does not apply to union solicitation. To the contrary, it appears the rule covers all types of solicitation. Under these circumstances, I conclude that by maintaining this rule Respondent violated Section 8(a)(1) of the Act.

The General Counsel alleges that Respondent unlawfully interrogated employees as to their union sympathies on about December 5. Employee Jesus Falcon testified in support of this allegation. Falcon had been employed by Respondent for about 2 years; he worked in the core room cleaning parts. Falcon quit his employment with Respondent in 1995. While employed by Respondent Falcon signed a union authorization card, attended union meetings, and otherwise supported the Union. Falcon testified that in early December his supervisor, Jose Soto, approached him while in the lunchroom. According to Falcon, Soto asked him when they were going on strike. Falcon answered that they never planned to go on strike. Falcon continued, saying that maybe the supervisors would go on strike, but “we” did not plan to go on strike.

Soto denied that he ever asked Falcon when they were going on strike. However, based on my assessment of the relative demeanor of the witnesses, I have determined that Falcon’s testimony is more credible than Soto’s. I therefore assess whether Soto’s statements to Falcon violated the Act. I first note that there is no evidence in the record that employees were actually contemplating engaging in a strike, or that Respondent actually believed that the employees might do so. The matter of a strike instead was prominently discussed in Respondent’s campaign literature in an attempt to portray the Union as prone to engage in strikes. The Union’s literature countered that it was not prone to strike, asserting that 95 of its contracts were settled without a strike and that there had not been an UE strike in Milwaukee “in years.” From this I infer that Soto’s questioning of Falcon was not seriously designed to obtain information from Falcon concerning a strike action, and would not reasonably be interpreted by an employee as such. Instead, in context it more reasonably was an effort by Soto to engage Falcon in a discussion of the Union and probe into Falcon’s sentiments on that subject. The General Counsel cites *Fairprene Industrial Products*, 292 NLRB 797 (1989); and *Domsey Trading Corp.*, 310 NLRB 777, 790 (1993). However, those cases are not on point since in each of them it appears that the employee questioned could reasonably believe that the employer was seriously probing into the employee’s intention to strike. Such is not the case here, where it seems clear in context that Soto was attempting to commence a more general

discussion about the Union. Of course, such probing may nonetheless be unlawful, but it is measured by a slightly different test. To determine whether such probing was unlawful, the Board applies a totality of the circumstances test. *Mathews Readymix, Inc.*, 324 NLRB 1008 (1997). Applying that test to these facts, I note that Soto was a relatively low-ranking supervisor. I also note that the conversation occurred in the lunchroom, not a particularly threatening or coercive setting. The conversation was short, and Soto was not persistent when he was lightly brushed off by Falcon’s response. The conversation was not coupled with other unlawful conduct or made in circumstances that would otherwise heighten any coercive effect. While the record does not show that Falcon was an open union adherent, the record also does not show that he kept his extensive union support secret. Finally, there is no pattern of unlawful interrogations by Respondent. Under all the circumstances, I conclude that the General Counsel has failed to show that remarks made by Soto to Falcon reasonably had the tendency to coerce any employee in the exercise of Section 7 rights. Accordingly, I shall dismiss that allegation of the complaint.

The General Counsel alleges that Respondent unlawfully told an employee in mid-December that support for the Union was incompatible with continued employment. Employee Terrance Shaw testified in support of that allegation. Respondent had employed Shaw for 9 years. He worked in the trim department grinding manifolds. Shaw signed an authorization card for the Union, solicited other employees to sign cards, attended meetings, and passed out union literature; his picture also appeared in union campaign literature. About a month or two before the election Shaw began wearing a button that read “Slave Co.” (Respondent is commonly referred to as AceCo.) He testified that about 2 or 3 weeks before the election he was in the lunchroom wearing the button when his supervisor, David Mekka, upon seeing the button, said, “If you don’t like working here why don’t you go somewhere else.” Shaw did not respond; instead, he removed the button.

Shaw also testified that about 3 weeks before the election, while on the work floor, he asked Mekka to fix one of his tools, and Mekka replied, “Why don’t you get the union to do it.” Shaw did not respond.⁵

Mekka denied both the allegation in the complaint and that he had the conversations attributed to him by Shaw. Based on my observation of the relative demeanor of the witnesses, I have determined to credit the testimony of Shaw to the extent described above. The General Counsel relies on *Gravure Packing*, supra at 1303, as support for his contention that Mekka’s remarks are unlawful. Respondent cites no case authority, but

⁵ The General Counsel does not allege in the complaint that this conversation was unlawful, nor does he raise this matter in his brief. Accordingly, I conclude it is unnecessary to determine whether this incident is unlawful. Shaw also testified about a conversation he had with Mekka concerning a raise. However, Shaw’s testimony in this regard was hesitant and uncertain. I do not credit it. Shaw also testified about meetings that were allegedly held before the election where VanderMale allegedly told the employees that Respondent was not allowed to give a cost-of-living raise because the union was involved. This testimony is contrary to Respondent’s written campaign literature, described above, wherein it repeatedly emphasized its practice of granting yearly raises and never mentioned, until after the election, that the raises for 1995 would not be granted. This fact, together with my observation of the demeanor of the witness while I was questioning him on this matter convinces me that he was confused and that his testimony in this regard was not worthy of belief.

points out that Mekka emphatically denied making the statement and that even if the statement were made it would have been an entirely human reaction to what was an intended provocation. First, as to Respondent's suggestion that the button worn by Shaw was beyond the protection of the Act, I disagree. It is well settled that employees are permitted some leeway in the manner in which they express support for a union or criticize their employer in the context of a labor relations dispute. The expression contained in the button, in context obviously tied to the organizing campaign then underway, falls within that permissible range of expression. That being the case, Respondent was not free to threaten retaliation against an employee for displaying the button, even if it angered some of Respondent's supervisors. The Board has held that statements similar to the one made by Mekka that union supporters should quit their employment conveys the impression support for a union is incompatible with continued employment with the employer and as such constitutes an implied threat of retaliation. *Id.*, and cases cited therein. I therefore conclude that Mekka's statement to Shaw violated Section 8(a)(1).

The General Counsel alleges that Respondent, acting through Rick Steffenson, foundry superintendent, unlawfully told employees to stop supporting the Union and blamed union supporters for damage to vehicles in mid-December. In support of this allegation, the General Counsel presented the testimony of Jose Estrada. Respondent employed Estrada as a caster; at the time of the hearing he had worked for Respondent for 21 years. Estrada was an open union supporter. He signed an authorization card, wore a union hat and buttons, and his picture appeared with other employees in a union leaflet that was distributed to employees as part of the organizing campaign. Estrada testified that in August his supervisor, Steffenson, approached him on the work floor; another employee, Regulo Ruiz, was present. According to Estrada, Steffenson asked why they didn't stop this bullshit about the UE. Steffenson said that there were some cars that were broken into and tires that were slashed. Estrada responded that whatever was going on he was not aware of any of the damage, and that he was not the kind of man to send someone to damage cars. Estrada said that the only thing he wanted was for his coworkers to join the Union. Steffenson then smiled and said that he was glad that Estrada was "on our side." Estrada then testified that this conversation occurred a couple of months before the election of January 5, but then stated that he had a very poor memory for dates. Finally, Estrada testified that the conversation with Steffenson took place in December, as alleged in the complaint. Steffenson testified that prior to the election two or three employees complained to him that their cars had been damaged in Respondent's parking lot. These employees, who Steffenson believe opposed the Union, said that they thought union supporters caused the damage. He referred those employees to VanderMale. Steffenson also testified that he spoke to employees under his supervision and told them that if he caught anyone damaging cars they would be prosecuted and their jobs would be on the line. Steffenson denied that he made the statements attributed to him by Estrada. Steffenson has worked for Respondent for 23 years. Based on the demeanor of the witnesses and the strained nature of portions of Estrada's testimony, I have determined that the testimony of Steffenson is more credible on this matter. Since the credited testimony does not support the allegation in the complaint, the allegation must be dismissed.

The General Counsel alleges that by memorandum dated February 2 Respondent unlawfully requested employees to inform it when they were approached to sign authorization cards. The evidence in support of this allegation shows that on February 2 Respondent distributed a leaflet to employees in a question and answer format. The leaflet included the following: "Q. I believe I was threatened by the union. What should I do? A. If you think you were threatened before you voted, or even after the vote, it's very important to talk with your supervisor. [Respondent] will take every legal step to protect you from this type of union behavior." At the hearing, VanderMale testified that this was issued in response to reports that it received that employees believed that they had been threatened.⁶

In arguing this violation, the General Counsel concedes that the Board normally holds that requests from an employer to report "threats" made to employees are not unlawful. *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979). However, the General Counsel argues that in this case a violation should be found because the statement was made "in the context of extreme and continuing opposition to the Union." In this regard the General Counsel relies in part on the testimony of Estrada, described in preceding paragraphs, which I did not find to be credible. In any event, even if an employer is bitterly opposed to unionization, the employer is not deprived of its right to deal with "threats" made to employees. The General Counsel also argues that Respondent is required to be evenhanded in the sense that it must condemn threats by either union or anti-union employees. However, the evidence fails to show that Respondent was not evenhanded in attempting to deal with threats. Evidence presented by the General Counsel to show disparate conduct by Respondent concerning its treatment of union supporters versus its treatment of antiunion employees is neither sufficiently credible nor sufficiently persuasive to support such a finding. Simply because the language in the leaflet alerts employees to report threats made by union supporters is insufficient to make the statement unlawful. *Liberty Homes*, *id.*, where the employer coupled its request to report threats with a statement that "[t]his union is not going to scare Liberty Nursing Homes into rolling over and playing dead." Under these circumstances, I shall dismiss this allegation of the complaint.

The General Counsel alleges that by memorandum dated March 13 Respondent unlawfully requested employees to inform it when they were approached to sign authorization cards, thereby seeking to gain the identity of union adherents. The facts show that on March 13 Respondent distributed a leaflet that expressed Respondent's concern that employees were being pressured to sign union membership cards. The leaflet stated, "If anyone puts you under pressure to sign a union card or threatens you in any way because you won't sign a card, tell your supervisor and we'll take every legal step to see that the union stops." VanderMale testified that he had reports that employees felt pressured into signing union cards, but that he did not have any written reports on that matter. Specifically, VanderMale testified that employee Melvin Williams com-

⁶ Documents supporting this assertion were supposedly given by Respondent to the Board during the course of the hearing on objections; the General Counsel asserted that he had searched the files and had not found them. The General Counsel subpoenaed those documents, but none were provided. Respondent's counsel explained that with the many proceedings the files were in disarray and, despite a diligent search, he was unable to locate them.

plained that he felt pressured because the Union had visited his home 13 times. VanderMale admitted that Williams never suggested that he had been threatened.

In support of this allegation, the General Counsel cites *Publisher's Printing Co.*, 317 NLRB 933, 934 (1995). Respondent cites no case authority to defend the statement, but argues that the statement is protected under Section 8(c) of the Act. The Board has held that statements such as the one described above are unlawful because they encourage employees to report union activity to the employer that may be subjectively offensive to the employee, but that is objectively conduct protected by the Act. This in turn discourages the employees from engaging in objectively protected activity. *Id.*, and cases cited therein. This is different from the situation described above concerning the use of the word "threat" because there is a more common and specific understanding that that word does not cover activity that may be protected under the Act. VanderMale's testimony concerning the complaint he received does not require a different result. First, VanderMale's testimony is insufficiently specific to support a finding that conduct the employee complained of was unprotected. Although 13 visits to one's home certainly may be excessive, the record does not show how many, if any, of the visits were unwelcome. Nor does the record show when, if at all, the employee asked that the visits cease, and what the response was. In any event, even if the conduct complained of was excessive, there is no reason why it could not be effectively dealt with on an individual basis without the need for the general solicitation contained in the leaflet. Under these circumstances, I conclude Respondent violated Section 8(a)(1) of the Act by soliciting employees to report other employees who "pressure" them into signing cards.

The General Counsel alleges that in January Respondent unlawfully informed employees that it would reimburse them for damage to their cars that they believed was attributable to the Union. The evidence shows that Respondent in fact reimbursed four employees, in amounts ranging from \$40 to \$350, for repair of damage sustained by their cars. These vehicles had been parked on Respondent's property or on adjacent public streets. Respondent's facility is located in an industrial area where damage to cars occurs from time to time. The reported damage consisted of a scratch along the side of a car, punched in hubcaps, oil poured over the top of a car, and a flat tire or two. Respondent presented no specific evidence that the damage was attributable to the Union. Nor did Respondent have corroborating evidence that the damage even occurred while the employee was at work; instead, Respondent took the employees' word. Respondent does not have a written policy concerning when it will reimburse employees for car damage. In the past it has reimbursed employees for damage to vehicles when Respondent was or could have directly caused the damage, either by its action or inaction. For example, VanderMale was reimbursed for damage to his vehicle when one of Respondent's signs fell on his car.

The General Counsel argues that by this conduct Respondent rewarded antiunion employees in violation of the Act, citing *John Ascuaga's Nugget*, 298 NLRB 524, 556 (1990). Respondent argues that the reimbursements were consistent with a practice that predated the election campaign and were entirely neutral. On balance, I believe the General Counsel's argument is the more persuasive one. The evidence shows, as more fully described above, that Respondent reimbursed employees for damage to their vehicles based on the employees' unsupported

assertions that the damage had occurred on or near Respondent's property and was caused by union supporters. I emphasize that Respondent never was able to establish any union responsibility for vehicle damage, nor is there any credible evidence in the record that Respondent even obtained from the complaining employees the specific basis on which they believed that union supporters were responsible for the damage. Contrary to Respondent's contention, Respondent's conduct on this occasion was not consistent with its past practice, which had been to reimburse damages for which Respondent was or could have directly caused; there is no credible evidence in this record that Respondent in the past has reimbursed employees for damage to vehicles that allegedly was caused by third parties. I conclude that Respondent took the opportunity of the complaints made by the employees to reward them for making the assertions that the Union was responsible for vehicle damage. By rewarding such antiunion conduct, Respondent violated Section 8(a)(1) of the Act.⁷

C. The Suspension and Discharge of Greuel and Related Allegations

1. Greuel's union activity

A consideration of the record in this case persuades me that neither the case presented by the General Counsel nor the case presented by Respondent concerning Greuel can be fully credited. I therefore set out the testimony in some detail in order to explain my credibility findings.

Greuel began his employment with Respondent on July 1, 1992. He initially worked as a general laborer and then worked as a straightener. This latter position involved using a gauge to determine if a part was bent to the left or right and then, using a rubber mallet, hitting the part to straighten it. Greuel began his employment working on the first shift, but in about July 1994, he was transferred to the third shift. There his immediate supervisor was Don Leonhard.

In late July, Greuel began his efforts on behalf of the Union by attending a union meeting. About a week later, on July 24, Greuel signed a membership and authorization card on behalf of the Union. Greuel thereafter attended weekly union meetings. At one of the meetings Union Organizer Walter Parks asked Greuel if he would be the organizer on the third shift, and Greuel agreed. Greuel was given instructions concerning how he should go about his organizational efforts. Greuel then distributed union literature to employees, talked to them in an effort to persuade them to support the Union, and solicited them to sign union authorization cards. Greuel spoke to between 50 and 100 employees concerning the Union, and he was successful in obtaining about 45 to 50 signed authorization cards from Respondent's employees. Greuel also wore a union hat, union shirts, and union buttons on his clothing while at work. Other employees also openly identified themselves as being supporters of the Union.

The General Counsel alleges that Respondent unlawfully enforced a no-solicitation rule that prohibited employees from discussing the Union. The facts concerning that allegation involve Greuel. In late October, Greuel gave union literature to employees at work while he and the employees were on work-

⁷ Although the complaint alleges the violation in this issue as an unlawful statement, the parties fully litigated the matter of the actual payment for the damage. Accordingly, my finding is appropriate despite the fact that it deviates somewhat from the actual pleading.

ing time and in a working area. Leonhard saw Greuel's conduct and approached him and took the literature from Greuel, told Greuel to "keep it on my own time," and returned the literature to Greuel. Greuel admitted that Leonhard told him that he could not distribute the literature during working time while at his workstation. Greuel further admitted that Leonhard's instruction was consistent with what he had been told by the Union.

I do not credit Greuel's testimony that at one point during this incident Leonhard advised him that he could not distribute literature on "company" time. The totality of Greuel's testimony convinces me that he does not always make a distinction between "company time" and "working time" and thus is unable to testify with certainty concerning this critical distinction. In any event, I note that in his brief the General Counsel does not argue that the incident described above violated the Act, nor does he point to any other evidence in the record that supports the allegation in the complaint. Accordingly, I shall dismiss this allegation.

Returning to Greuel's union activities, union agents told Greuel to inform Respondent that he was an organizer, so in early August Greuel told Leonhard that he was organizing on behalf of the Union. Leonhard said that it was okay with him, but that Greuel could not do it on company time or words similar to this.⁸ Leonhard also said that he thought Greuel was foolish for joining the Union. Leonhard did not deny that Greuel told him he was an organizer; he did deny telling Greuel that he thought Greuel was stupid, or words to that effect, for supporting the Union. Based on the demeanor of the witnesses, I credit Greuel's version of this conversation.

On about December 9, the Union distributed a leaflet that featured a photograph of Greuel. In the accompanying article Greuel stated:

The company is throwing a lot of money out at people to get them to say no to the union. I was offered a \$1 an raise [sic]. I could see the company wanted me to stop organizing for the union. Well, I told the company that I accept the raise as a down payment on our first contract! I deserve it for the 3 years I've been with the company.

The article then went on to address other matters.

Greuel's statements in the leaflet relate to an incident that occurred shortly before the leaflet was distributed. At that time Greuel was asked by heat treat employee Charlie Robinette if Greuel was interested in performing Robinette's job since Robinette had been also assigned to do forklift driver work; Robinette's position was regarded as a higher position than Greuel's. Greuel said that he was interested in Robinette's position. A day or so later, Leonhard and Robinette approached Greuel. According to Greuel, Leonhard asked if Greuel wanted Robinette's position; Greuel replied that he did. According to Greuel, at that point Robinette left the conversation and Greuel asked if there was going to be more money in the new position; Leonhard said yes, that there would be a dollar an hour raise. Greuel said that he would take the job and Leonhard started to walk away. Then, again according to Greuel, as Leonhard was walking away he said that he was giving Greuel the dollar-per-hour raise to stop bothering people

about the Union. The General Counsel alleges that this statement violated the Act since it shows that Leonhard advised Greuel that he was being given a pay raise so he would discontinue his union activity.

Leonhard denied that he ever offered Greuel a dollar-an-hour raise for any purpose. He also denied that he ever asked Greuel to drop his support for the Union. Leonhard, however, did not specifically deny that he had a conversation with Greuel concerning Greuel performing Robinette's job. Respondent's records show that during the period December 5 to 15, Greuel in fact did do some work that normally would have been done by Robinette. Leonhard admitted that this would not have occurred without his permission. Leonhard further explained that Greuel was no longer permitted to perform that work because that position would permit Greuel to be virtually anywhere in the plant, and because of the problem Leonhard was having with Greuel being away from his workstation, "in rethinking, it just didn't seem like a good idea."⁹

Greuel told the Union about his conversation with Leonhard concerning Robinette's position and the dollar-an-hour raise. It was decided that information should be included in the leaflet described above. Greuel admitted at the hearing in this case that the portion of the leaflet indicating that he told the Respondent that he accepted the raise as a down payment on the first contract was not true and had been made up; he denied that the portion of the leaflet that indicated that "he could see" that Respondent wanted him to stop organizing for the Union was based on his perception of what Leonhard wanted as opposed to what Leonhard actually said. Greuel explained that he did want to state in the leaflet that Leonhard had directly told him this, but the union official said that it would be wrong to state it that way. The General Counsel, however, did not call the union person who helped prepare the leaflet to corroborate Greuel's testimony.

According to Greuel, after the leaflet was distributed on December 9, while Greuel was having coffee in the lunchroom at work, Plant Superintendent Joe Buelt came by and asked Greuel to come with him to the office of Supervisor Cliff Fleischmann. Buelt had a copy of the leaflet featuring Greuel at the time. Once in the office, according to Greuel, Buelt asked him if the article in the leaflet was true. Greuel answered that it was, and Buelt asked what happened. According to Greuel, he explained that he was given Robinette's job by Leonhard. Greuel did *not* initially testify that he told Buelt that Leonhard had said that he was getting a dollar-an-hour raise so that he would discontinue his union activity. Buelt then summoned Leonhard to the office and asked Leonhard whether it was true that he had offered Greuel Robinette's job. Leonhard, according to Greuel, said no, that Greuel was lying. Greuel said that Leonhard was "full of s—;" that Greuel had been doing Robinette's job for about 2 weeks. Buelt then told Greuel that he better be careful because he had just made himself a target for the Company by doing the article in the union leaflet,¹⁰ and that Greuel was to go to work. Later, during cross-examination, Greuel testified that during this meeting Buelt asked him to get a retraction from the Union because Buelt believed Leonhard's assertion that the story was not accurate.

⁸ The General Counsel does not allege in the complaint or assert in his brief that this statement is unlawful. As noted above, I am unwilling to credit Greuel's testimony to the effect that he was advised not to engage in union activity on "company time."

⁹ The General Counsel does not allege in the complaint or argue in his brief that the decision to have Greuel stop performing this work was unlawful.

¹⁰ The complaint does not allege, and the General Counsel does not contend in his brief, that this conversation violates the Act.

Greuel claimed that he then told Buelt that he would get the retraction "just to blow him off." Buelt testified that he was never present for any discussion involving the leaflet and denied the statements attributed to him and others that allegedly occurred during the meeting.

Later that same day, according to Greuel, he was summoned into an office. Present there were Plant Manager David Weber and his nephew Joe, Respondent's quality control manager. They asked Greuel if the content of the leaflet was true, and Greuel said that it was. They asked Greuel to explain the circumstances, and according to Greuel, he said that Leonhard and Robinette had asked him if he was interested in Robinette's job, and that Greuel had accepted the offer and had been doing the job for about 2 to 3 weeks. Once again, according to Greuel, Leonhard was summoned and again claimed that Greuel was lying. According to Greuel the conversation became heated as he claimed that records would establish that he had been doing Robinette's job for several weeks. Again, Greuel did not initially testify that he told the Webers that Leonhard had said that the raise was being given so that Greuel would stop his union activity. As the conversation was ending, according to Greuel, one of the Webers asked him if he was willing to issue a retraction concerning his statements in the union leaflet, and Greuel responded that at the earlier meeting with Buelt, Buelt had asked if he was willing to get a retraction from the Union, and Greuel had told Buelt that he would do so. When asked to explain why he would agree to get a retraction concerning the statement if he had been insisting that the statement was true, Greuel testified that it was "just to blow, you know, the company off. I mean I figured it would blow over in a couple days so I wouldn't worry about it." Later, in response to a leading question, Greuel testified that he did tell both Buelt and Weber that Leonhard had offered him the raise to stop engaging in union activity.

David Weber testified that no meeting such as Greuel described above ever occurred. He denied making any of the statements attributed to him by Greuel during the alleged meeting.

On December 13, VanderMale met with Greuel in VanderMale's office; also present were Supervisors Leonhard and Fleischmann. According to Greuel, VanderMale had a copy of the union leaflet featuring Greuel; he asked Greuel if it was true, and Greuel said that it was. VanderMale asked Greuel to explain the circumstances, and Greuel again explained that Leonhard had offered him Robinette's position and that he had accepted the offer. Again, Greuel did not testify that he told VanderMale that Leonhard had said that he was giving him the raise to stop his union activity. VanderMale asked Leonhard if this was true, and Leonhard denied that it was. Again, according to Greuel, he asserted that there were records that would establish that he had been doing Robinette's job for several weeks and that the conversation between he and Leonhard again became heated as words were exchanged. VanderMale then said that Greuel had told Buelt earlier that he would be willing to get retraction, and yet there still was no retraction. VanderMale then read a statement that said that the leaflet was not true. According to Greuel, VanderMale said that Greuel would have to sign the statement; Greuel testified that he told VanderMale that he would not sign the statement. VanderMale then told Greuel that if he did not sign the statement he would be terminated that morning. Greuel claims that he said he then would sign the statement, but he would write that he signed it

under duress. VanderMale allegedly again directed Greuel to sign the statement or be terminated. The General Counsel alleges that by these statements Respondent unlawfully threatened Greuel. Greuel then signed a statement that reads:

My statement suggesting the Company has offered me money in return for not organizing for the Union, that the Company is throwing money around to stop union organizing, or any comments attributed to me referring to a deal to stop my union organizing are blatantly untrue and were never said by me.

According to Greuel, after he signed the statement he was told by Fleischmann that he would go back to his old job and that he would get Robinette's job after the election. Also according to Greuel, Leonhard also told him that he would return to his old job, but that after the election he would get Robinette's position. Greuel allegedly replied that he did not think what the company had done was fair, but he had no choice. Leonhard then supposedly told Greuel to watch his step, that he was a big target now, and that if Greuel did not watch his step he would be terminated.¹¹ Leonhard denied he told Greuel that he was a "target."

At the hearing, Greuel explained that he signed the retraction because he was fearful for his job because he was on parole at the time and had to remain employed.¹² Respondent then distributed this statement to employees together with its own leaflet that quoted from the Union's leaflet and asserted that the Union's leaflet was not true.

Fleischmann testified that he was present during a conversation with Greuel concerning the leaflet that occurred in VanderMale's office on December 13. Also present was Leonhard. Fleischmann testified that VanderMale asked Greuel about the leaflet, and Greuel said that it was just something that was made up and was not really true. VanderMale then said that if the leaflet was not true, then they should be able put out a statement saying that the leaflet was untrue. Greuel agreed and then signed the retraction that was prepared for his signature. Fleischmann denied that VanderMale threatened Greuel in any way if Greuel failed to sign the retraction, or that Greuel otherwise protested signing that document. Fleischmann also denied that he told Greuel that Greuel would get Robinette's position after the election. Indeed, Fleischmann testified that he did not even know what that was referring to. Leonhard also testified that he was present at that meeting. His testimony, in general, corroborates Fleischmann's testimony. VanderMale testified that during the meeting Greuel said that the statement in the leaflet was not true and Greuel agreed to sign the retraction. VanderMale denied that he threatened to discharge Greuel if he refused to sign the retraction.

I do not credit Greuel's version of these events where his testimony is contradicted by Respondent's witnesses, except that I conclude that Greuel was offered Robinette's position by Leonhard and actually began to perform some of the functions; documentary evidence supports this conclusion. However, concerning the allegation in the amended complaint that Greuel was offered a raise to stop his union activity, I have noted above how Greuel has consistently failed to testify that he men-

¹¹ Interestingly, except as specifically indicated above, the General Counsel does not contend that Greuel's version of the foregoing events violated the Act.

¹² Greuel had been convicted of committing two felonies in 1989. The convictions were for first-degree and second-degree sexual assault.

tioned this important fact to his supervisors when they allegedly asked him about the matter. It was only in response to a leading question that Greuel testified that he did tell both Buelt and Weber that Leonhard had offered him the raise to stop engaging in union activity. I do not credit Greuel's testimony either that the offer was made or that he told his superiors about it. First, I have already noted the leading nature of the question. Also, earlier I had asked Greuel whether his first version of the conversation he had with Buelt was all that he had told Buelt about his conversation with Leonhard concerning the raise, and Greuel answered me in the affirmative. Moreover, it seems unlikely that Greuel would assert that the leaflet was true and then quickly agree to a retraction at its first suggestion. Instead, I have determined to credit Fleischmann's account of the meeting that occurred in VanderMale's office on December 13. In addition to the inherent probabilities based on the record as a whole, my questioning of Fleischmann convinces me that his testimony concerning that incident is more believable than the testimony of Greuel. I also credit the testimony of Weber and Buelt over Greuel concerning these events. It follows from these credibility resolutions that the allegations of the complaint concerning the offer of a raise to stop union activities and the threat of discharge must be dismissed.

Greuel then spoke with the Union about the matter, and the Union issued another leaflet that showed a photograph of Greuel, among other employees, that stated:

We on the third shift are tired of the company [sic] psychological campaign. We think it is outrageous for the company to call someone in the office alone and threaten their job if they don't sign something. There will be no more of this after the union wins.

The General Counsel also alleges that Respondent unlawfully enforced a rule that prohibited employees from discussing the Union during nonworktime in nonwork areas. In support of this allegation, the General Counsel relies on the testimony of Greuel that around the time the leaflets discussed above were distributed he was meeting with about 10 other employees in the lunchroom during lunchtime; they were discussing the union campaign and preparing to distribute union literature when Buelt came up to them and took the literature from the table and threw it into the garbage and told the employees to break up the meeting, that they could not do it on company property. None of the 10 employees who were allegedly present were called to corroborate this testimony. Buelt testified that he recalled an incident where Greuel was distributing literature to employees who were on worktime in a work area. He told Greuel that he could not do that and that he had to vacate the area. He denied any incident occurred as described above by Greuel. I am not persuaded by Greuel's testimony alone that this incident in fact occurred as he described it.¹³ It follows that I shall dismiss that allegation of the complaint.

¹³ Greuel also testified that shortly before the Union's reply leaflet issued he heard from employees Elem, Jones, and another employee that Leonhard had taken their union buttons off and threw them into the furnace. While these employees were together, Leonhard approached them and took the union button off of Elem's shirt and threw it on the ground. Greuel then told Leonhard that he was going to report Leonhard to Buelt. Continuing with Greuel's testimony, he then reported the incident to Buelt, who said that he would look into it. According to Greuel, the next day he and Jones were at work and Leonhard approached them and took Jones' union button off of his shirt and threw it

As indicated, the election occurred on January 5 and 6. Greuel was an observer for the Union at the election. Greuel testified that on about January 2, after he had been selected to serve as an election observer, he was approached by Leonhard who told him that he could not serve as an observer on "company time," that Greuel could not punch in on that day. Greuel replied that he knew that. Greuel also stated that Leonhard told him on that occasion that if he was late Leonhard was going to write him up. While the General Counsel does not allege that this incident constitutes an unfair labor practice, he argues that it shows animus. Based on my overall determination of Greuel's credibility, I do not credit Greuel's testimony concerning this incident.

After the election Greuel continued his union activity. On January 9, he noticed that new employees were added to his shift. At lunchtime he approached new employee Eugene Boben and spoke to him about the Union. He gave Boben some literature, and Boben signed a union membership card. Greuel put a union button on Boben's sweatshirt; as he was doing so, Greuel noticed that Leonhard was nearby.

After the election Greuel was elected to be a union steward for the third shift. Greuel then wore a button that indicated that he was a steward on behalf of the Union. On January 17, Greuel presented VanderMale with a document that listed the names of six employees and claimed that the employees were entitled to receive double time pay for working during the previous Thanksgiving holiday period.¹⁴ VanderMale replied that he would look into the matter.¹⁵

2. Greuel's work record

Greuel was disciplined for his poor absenteeism. However, the last discipline he received for this problem was August 19, 1994, and it does not appear that this was a problem thereafter. On January 7, 1993, Greuel received a verbal warning for leaving his work area and going to the locker room before the whistle sounded for the end of the shift. On February 26, 1993, Greuel received a final written warning for committing the same offense. He was warned that further such conduct will result in his termination from employment. On April 21, 1994, Greuel received a written warning for being in the locker room 20 minutes early; he was advised that he could not go to the locker room to wash up until the warning bell sounded 7 min-

on the ground, saying that he did not have to listen to Buelt. The General Counsel did not present any corroboration for this testimony, despite the fact that Jones and Elem were open union adherents. Nor did the General Counsel allege in the complaint that this conduct was unlawful. I do not credit Greuel's testimony in this regard and conclude that the General Counsel has failed to meet his burden of persuasion to establish that these events in fact occurred as Greuel described them.

¹⁴ Earlier, Greuel had claimed the extra pay on behalf of 11 employees, but he had been subsequently informed by Leonhard that not all 11 were entitled to the extra pay, so Greuel then limited his claim to 6 employees.

¹⁵ VanderMale denied that he has seen the document before the hearing in this case. I do not credit the denial. During his testimony, Greuel explained that the document that he handed to VanderMale was a result of a modification of an earlier document, and that the earlier document was modified as a result of a conversation he had with Leonhard on the subject of the document. Leonhard did not deny this testimony. Under these circumstances, I conclude that it is unlikely that Greuel would have such a conversation with Leonhard, construct a document addressed to VanderMale but then not give the document to VanderMale.

utes before the end of the shift. He was warned that if such conduct continues he will be suspended.

On January 3, Greuel was standing in the doorway between the foundry, where he worked, and the machine shop, where he was conversing with an employee of the machine shop. This conversation lasted about 5 minutes and occurred during work-time. Greuel was about 10 to 20 feet from his workstation; the other employee was about 30 to 40 feet away from his workstation in the machine shop.¹⁶ The next day Greuel was given an employee warning notice that read “leaving the work area to engage in conversation and socialization in another department where he should not have been without permission. He has been warned about this in the past.” The document indicated that it was a “written warning” and the word “final” was added; it stated that further disciplinary action up to and including termination of employment will result from continued failure to comply with company standards. It was signed by Greuel, Leonhard, and VanderMale. There is no evidence that the other employee was disciplined in any way for being away from his workstation.

VanderMale testified concerning this event; he stated that he asked Greuel if he had been in the machine shop “gas bagging,” and Greuel admitted that he had been. VanderMale then announced that he was giving Greuel a final written warning. As Respondent emphasizes in its brief, the General Counsel does not allege that this warning was unlawful.

The General Counsel alleges that Respondent unlawfully suspended Greuel for 3 days on January 10. The events leading to the suspension began on January 10, when Greuel was working in plant 2. The toilet facilities there were not usable and there was a sign posted on the door that employees should use the facilities in plant 1. At about 5:30 a.m., Greuel went to plant 1 to use the facilities. Greuel admits that while he was there he encountered a friend and they talked for about 10 minutes; Greuel was on working time while his friend was not. While they were talking a security guard observed them. Greuel completed his shift at 7 a.m., and then returned later that night to begin his next workday. At that time he was summoned into an office where Buelt and Leonhard were present. According to Greuel, he asked if he could have employee Elem as a witness for the meeting, and Buelt replied that it would not be necessary. Buelt said that Greuel was suspended and that he should go home. Greuel asked why, and Buelt answered that Greuel would find out everything he needed to know when Greuel met with VanderMale at 8 a.m. the next day. Greuel protested that the suspension was bullshit and harassment; he then punched out and went home. The next day, January 11, Greuel reported to VanderMale’s office at 8 a.m.; also present there was Leonhard. Greuel again asked for an employee witness: again this request was denied. VanderMale said that Greuel was being suspended for 3 days for being away from his work area; that Greuel had been in plant 1 at 5:30 a.m. Greuel said that he was in plant 1 using the toilet facilities because the plant 2 facilities were having problems. VanderMale replied that that was bullshit, that he knew what Greuel was doing there; that Greuel was talking and socializing instead of using the bathroom. VanderMale asked if Greuel talked to anyone while he was in plant 1, and Greuel admitted that he did. Van-

derMale said that he knew that Greuel was in plant 1 to organize for the Union and not to use the toilet facility. Greuel asked for a copy of his suspension; the request was denied. Then Greuel was asked to step out of the office. When he returned to the office a few moments later VanderMale told Greuel that he would get a copy of his suspension when he returned to work from his suspension.

VanderMale testified concerning his meeting with Greuel on January 11 using notes that he had made at the time. VanderMale testified that he asked Greuel if he remembered being given the prior final written warning, and Greuel said that he did. VanderMale then asked if Greuel was in the locker room away from his workstation, and Greuel conceded that he was there for only 10 minutes. VanderMale then asked if Greuel was there using the toilet facilities, and Greuel answered that he was not. Greuel further agreed that he had not punched out but was still on the clock at that time. VanderMale then suspended Greuel for 3 days and warned him next time he may be faced with termination.

On January 14, after serving the suspension, Greuel was given a copy of the suspension notice. According to Greuel, Leonhard told him that he had to sign the notice. Greuel refused, asserting that he did not agree with it. Leonhard finally told Greuel that VanderMale had said that if Greuel did not sign the notice, he would be fired. Greuel then signed the notice. The suspension notice indicated that Greuel was suspended for “[l]eaving work station without permission. Being away from your workstation for significant periods of time for non-emergency, non-work, non-personal hygiene reasons. You have been warned repeatedly both verbally and in writing (1-495).” The notice warned that continued failure to comply with company standards may result in termination of employment.

Leonhard testified that he did not recall the January 10 incident very well, but he did deny that he threatened Greuel with discipline if he refused to sign the suspension notice. He did recall searching in the bathroom for Greuel by himself and thereafter looking for Greuel alone. Buelt, who was no longer employed by Respondent at the time of the hearing, testified that he recalled an incident involving Greuel where Leonhard reported that Greuel was not at his workstation. He testified that he and Leonhard together looked for Greuel in the bathroom and in other areas but did not find Greuel for a period of 30 minutes, when he was encountered outside the bathroom. At that time Greuel claimed that he had been in the bathroom. Buelt and Leonhard said no, he was not because they had been in there looking for him and had not seen him. According to Buelt, Greuel became agitated and very boisterous; Buelt told Greuel to stop. Buelt then conferred with Leonhard and suggested that Greuel be suspended. Leonhard then suspended Greuel.

I have considered the conflicting testimony concerning the January 10 and related matters, and I have again decided not to credit Greuel’s version to the extent that it is contradicted by Respondent’s witnesses.

On January 19, according to Greuel, he became sick while at work. During his break he vomited outside the facility while on break; several employees witnessed Greuel’s public illness. Shortly thereafter he again began to feel sick and went to the bathroom during working time, where he remained for about 20 minutes. As he went in the bathroom he saw an employee, as he left the bathroom he again saw the employee; this time Buelt and another employee were also present. Greuel returned to his

¹⁶ Greuel testified that he was thereafter approached by Leonhard, but he gave conflicting accounts of what Leonhard told him. Under these circumstances, I do not credit that portion of Greuel’s testimony.

work area. Buelt, accompanied by Leonhard, then approached Greuel saying, "I got you. I got you." Greuel asked what Buelt was talking about, and Buelt said that Greuel had been away from his work area. Greuel then said that he had been to the bathroom. Buelt answered, "No, you weren't." Buelt turned to Leonhard and asked Leonhard if he had checked the bathroom. Leonhard said that he had done so. Buelt asked if Leonhard had seen Greuel in the bathroom; Leonhard answered no. Buelt then asked Greuel how he could have been in the bathroom if Leonhard did not see him there. Greuel replied that he did not know, but he had been in the bathroom. The conversation then became more heated as Greuel protested that they were hassling him. Buelt then said that Greuel was suspended, and he told Leonhard to escort Greuel to the locker room so that Greuel could change his clothes and leave. At some point, Leonhard told Greuel that he was to return at 8 a.m. to see VanderMale. After Greuel changed his clothing, he told Leonhard that he had to make a telephone call. Greuel explained that he did not have a car, and buses were not operating at that time so he had to call someone to pick him up and take him home. Leonhard said that because Greuel was suspended he could not use company property; that he had to use the pay telephone outside the facility. Greuel then cursed at Leonhard. As they were leaving the facility they walked through the lunchroom where there is a pay telephone. Greuel picked up the telephone to make a call, but Leonhard reached over and grabbed the telephone and hung it up saying, "I told you, you can't use company property." Greuel and Leonhard then again exchanged words. Greuel said that he had to use the telephone, that he did not know where there was another pay telephone nearby. Leonhard then said, "Okay" and sat down while Greuel made his call. Greuel then call Walter Parks, a union representative.

Greuel further testified that that same morning he met with VanderMale. Leonhard was present. VanderMale said that he had received a report from Buelt and Leonhard that Greuel was away from his workstation from 2:13 through 2:35 a.m.; he asked where Greuel was. Greuel answered that he was in the bathroom. VanderMale said that Leonhard claims that he checked the bathroom and Greuel was not there, and that Buelt and Leonhard went looking for him and could not find him until he walked out of the bathroom at 2:32 a.m. Greuel said that he did not know how Leonhard missed him. VanderMale asked him if Greuel had his feet up in the air, and Greuel answered, "[N]o." Greuel explained that he had been sick. VanderMale then asked if Greuel informed his supervisor that he had been sick. Greuel responded that he had not, and said, "This is new. When did this start? When do we have to start telling our supervisors that we were sick?" VanderMale did not reply. VanderMale asked if there were any witnesses, and Greuel named the employees and Buelt as having seen him come out of the bathroom. VanderMale said that he had spoken to one of the employees who could not be certain what time Greuel had come out of the bathroom, but the witness had indicated that Greuel went into the bathroom at 2:13 a.m. VanderMale said that they had made a decision that Greuel could go back to work if he promised that when he felt sick in the future he would inform his supervisor. Greuel agreed, and went to work later that day. There is no evidence that Respondent has a rule that employees must inform a supervisor before using the bathroom when they are sick.

Leonhard testified that Greuel was off the work floor and so he went looking for Greuel. Leonhard said that he looked in

the bathroom and in other areas and he did not see Greuel in any of these areas. He was then paged by Buelt, who advised him that Greuel was back his workstation. He went to the workstation where both Greuel and Buelt were present, and Greuel was suspended and told to report to personnel the next morning. The next morning Leonhard was present in VanderMale's office where Greuel was given one last chance to stay at his workstation and was told to return to work as scheduled. Leonhard admitted that during his testimony at the unemployment compensation hearing that followed Greuel's discharge he testified that when he met Greuel with Buelt that day Greuel explained that he had gone to the bathroom and that Greuel had a witness who saw him go to the bathroom, but Leonhard suspended Greuel nonetheless without first talking to the witness. Leonhard further admitted during that hearing that when he subsequently did speak with the witness, that the witness confirmed he did see Greuel go to the bathroom at about 2:13 a.m., although the witness did not know what time Greuel came out. VanderMale testified that his disposition of this incident was not to do anything further on the matter than already had occurred; he did not testify as to the specifics of the meeting or the reason how he reached his disposition.

I first note that the General Counsel does not allege that any of the events of January 19 constitute an unfair labor practice. I have determined to credit Greuel's testimony concerning the events of January 19. I note that Leonhard's and VanderMale's testimony were lacking in detail and was otherwise unconvincing concerning these events: Leonhard's testimony conflicted with his earlier version. Greuel, in turn, seemed more comfortable and certain testifying about these events. I infer that VanderMale learned from other employees that Greuel had, in fact, been visibly ill and therefore reasonably could have been using the bathroom facilities. This is what lead VanderMale to allow Greuel to return to work.

Greuel worked to the end of his shift into the morning of January 20. At about 6:30 a.m., according to Greuel, Leonhard approached him, gave him his check, and said that VanderMale wanted to see him. At 6:53 a.m., the normal wash\up time, Greuel says that he quit work, cleaned up, and went to VanderMale's office. Leonhard was again present. According to Greuel, VanderMale said that the Company had reversed its earlier decision concerning Greuel's absence from his work area the day before. Greuel asked what was going on since the day before they had discussed that incident and the matter was closed. VanderMale said that the Company had decided to terminate Greuel for being away from his workstation. Again heated words were exchanged. Greuel asked for a copy of his termination notice; VanderMale said no. Greuel asked for his last paycheck, and VanderMale said that Greuel could call Monday and then come pick it up. Greuel was then escorted from the building.

Steffenson testified that on the day Greuel was fired he saw Greuel in the locker room at about 6:30 a.m.; he observed Greuel sitting on a bench at his locker putting on or taking off his shoes. Steffenson did not say anything to Greuel; instead he reported the matter to his superior, Leon Weber, who advised Steffenson to pass the information on to Leonhard, which Steffenson did. Steffenson later testified that he saw Greuel in the locker room between 6:30 and 6:45 a.m. He was unable to specify whether Greuel was dressed in work clothes or whether he was wearing street clothes. Steffenson did not recall if he went to search for Greuel afterward. He returned to the locker

room to assemble his crew. Steffenson testified that he did not think that Greuel was still in the locker room at that time. Steffenson said that he wrote a report describing what had occurred. That report reads:

Incident Report

On Friday 1/20/95 at 6:40 AM I went to the mens [sic] locker room to see if I had any 1st shift employee's [sic] in there to see what jobs I could run. My employee's [sic] start at 6:45 start time. I noticed Jeff Greuel sitting on the bench with his legs crossed changing [sic] his shoes. I went back to Dave Weber [sic] office and told him Jeff was in there early. Jerry Ace/Co security guard was also in the office having a meeting with Dave. Dave ask [sic] me to call Don Leonard to have him meet me in the locker room. Don met me at 6:45 a. m. Either [sic] of us could see Jeff in there at this time. We continued to look for Jeff and I didn't see him until 6:54 and he was then washing up. I then reported the incident to Dave and he told me to suspend Jeff and to see Jim VanderMale. I escorted Jeff to Personal [sic] and asked him to wait there until Jim arrives.

Leonhard testified that he was paged on January 20 by Steffenson at about 6:35 to 6:40 a.m. and told that Greuel was away from his work station and was in the locker room changing his clothes. Leonhard proceeded to meet with Steffenson, and they went to the locker room; however, Greuel was not there. Leonhard testified that he then went to Greuel's workstation, but Greuel was not there either, and Leonhard did not see Greuel at all on the shop floor between 6:45 and 7 a.m. Leonhard was present for the meeting that followed in VanderMale's office. Leonhard testified that the only thing that he recalled was that when VanderMale asked Greuel if he had anything to say, he answered, "I screwed up." Leonhard admitted that during the unemployment compensation hearing he had testified that when he went to the locker room at 6:45 a.m. he saw Greuel there sitting in front of the locker "half changed." This, of course, was in direct conflict with the testimony he gave in this proceeding and with the testimony of Steffenson, who did not testify at the unemployment compensation hearing.

VanderMale testified that at the discharge meeting Greuel did not deny that he had left the work area; in fact, according to VanderMale, Greuel stated that he screwed up. No one raised their voice during the meeting.

Employees are permitted to leave their workstations 7 minutes prior to the end of the shift for wash up. Fleischmann testified that employees can be away from their workstations, "but not for a long duration." He explained that an employee in the heat treat department could walk from one end of the building to another part of the building, a distance of about 120 feet, and that would not be improper, but if someone left the department to go from one plant to another, that would be improper. Fleischmann clarified that a short duration of time was about 5 minutes. Fleischmann also admitted that it would not be impermissible for an employee to leave the work area to use the bathroom, but that if they were ill and frequently using the bathroom he would expect the employee to inform a supervisor of his condition, although that was not required. Concerning the seriousness of being in the locker room prior to normal wash up time, Steffenson testified that it depended on how many times it had happened. He explained that an employee would not be fired for being in the locker room early if it was the first time that it happened; that the first offense would trig-

ger a verbal response from Respondent. Then the other steps would normally be followed, including a written warning, suspension, and then termination.

Concerning the events of January 20, I do not credit the testimony of Greuel; I find his story that he was fired simply because Respondent changed its mind concerning the events of the previous day to be highly unlikely. On the other hand, I did not find the testimony of Leonhard concerning this incident to particularly persuasive either. I have determined to credit the testimony of Steffenson. His testimony is supported by his written report; there is no reason to believe that the report was not written near the time of the incident, and I conclude that it is highly unlikely that he would have completely fabricated the incident at that time. Based on Steffenson's testimony, it seems more likely that VanderMale's testimony concerning the discharge conversation is more accurate than Greuel's.

Greuel filed a claim for unemployment compensation benefits. The claim was denied on the basis that Greuel was terminated for "misconduct connected with the work for the employer" as defined by Wisconsin law. The administrative law judge in that case based his conclusion in this regard on the testimony of Respondent's witnesses, who he found more credible than Greuel.¹⁷

3. Respondent's discipline pattern

The General Counsel contends that Greuel was subjected to disparate treatment. In support of this assertion he presented evidence concerning certain other employees who were terminated by Respondent. Employee Vargas began working for Respondent on August 24, 1988, and was terminated September 15, 1993, for trying to break into lockers. In 1993, Vargas received seven written warnings before he was fired. The warnings were for work-related job performance, eating or drinking in a restricted area, overstaying his break, a work-related problem, a safety violation, again for eating in a restricted area, and for being a no-call, no-report. In total, Vargas received 19 disciplinary actions during a 48-month period. Employee Williams received eight warnings during his 15 months of employment with Respondent. Those warnings were for defective work, leaving his workstation, and attendance. The records show that despite the fact that Williams was warned that if his conduct continued he would be terminated Respondent did not terminate him but instead continued to issue him discipline short of discharge as his pattern of conduct continued. Employee Esquivel was employed from March 16, to June 1, 1993. On April 20, he received a written warning for attendance; on May 4, he was suspended because he was found sleeping in the restroom; on May 18, he received another written warning for an unexcused absence; on May 29, he received a warning for failing to follow directions, resulting in his discharge on June 1 for insubordination. Employee Daniels was employed beginning August 5, 1991. He received a warning on November 7, 1991, for failing to use ear protection; he received a warning on October 28, 1992, for failing to show up for work or call in. On November 6, 1992, he was suspended for 2 days for sleeping in the restroom. The suspension notice indicated

¹⁷ The General Counsel argues that the judge's finding in that case should be given little weight. In support of that argument he read from the transcript of that proceeding a portion of VanderMale's testimony where he refused to give the names of the employees who allegedly complained about Greuel to Respondent. I simply consider this evidence as one factor among many in reaching my credibility resolutions.

that Daniels had been warned before about disappearing from the work area for long periods of time, and this was his final warning. On June 17, 1993, he received a written warning defective and unsafe work and on July 2, 1993, he was terminated for insubordination. Employee Albert was employed from February 26 to August 19, 1994. On March 7, 1994, he received a warning for violating a safety rule by wearing jewelry; on March 10, 1994, he received a warning for poor workmanship; on March 31, 1994, he received a warning for wasting time. On May 25, 1994, he received a final written warning for being away from his workstation for about 28 minutes. On August 16, 1994, he received a written warning for unacceptable attendance. He thereafter quit when he was faced with the prospect of a 3-day suspension for attendance.

Respondent presented the following evidence. Employee Belcher was hired May 18, and fired June 3, 1993. On May 24, he received a warning for taking 13 minutes, instead of 10 minutes for break. On May 27, he received a warning for low productivity. On June 2, he received a warning for low quality and defective work; he received a written warning for again taking too long for break. Notes pertaining to Belcher's discharge indicate that he had been constantly disappearing from the worksite the day before his discharge. Employee Anderson was discharged February 8, 1993, exhibiting erratic behavior consisting of a shouting match and threatening behavior; Respondent suspected that he was under the influence of alcohol and drugs.

4. Analysis

The analysis set forth in *Wright Line*¹⁸ governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging Greuel. The Board has restated that analysis as follows:

Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.⁷ An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.⁸ Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.⁹

⁷ *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983).

⁸ See *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

⁹ See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

As indicated, the General Counsel alleges that Greuel was unlawfully suspended on January 10 and then unlawfully dis-

charged on January 20. I apply the standards set forth above to determine whether the General Counsel has met his initial burden. There is no doubt that Greuel was an active, leading supporter of the Union. There is also no doubt that Respondent was aware of his union activities; VanderMale admitted at the hearing that Respondent knew that Greuel had supported the Union. The record further establishes that Respondent was hostile to unionization. I have set forth above some of Respondent's campaign literature that graphically demonstrated this hostility. Even more importantly, I have concluded that Respondent's animus toward the Union lead it to violate the Act. I have concluded that Respondent unlawfully failed to grant employees a pay raise, maintained unlawful rules, unlawfully paid employees for damage to their vehicles, and committed other violation of Section 8(a)(1). Finally, the element of timing supports the General Counsel's case; both the suspension and discharge occurred shortly after the election results showed that Respondent had lost the election and was seeking to have the results set aside and another election held. Based thereon, I conclude that the General Counsel has met his initial burden to support the allegations.

I now examine whether Respondent has met its burden of establishing that it would have engaged in the same conduct even absent Greuel's union activity. Turning first to the suspension, I have concluded, and Greuel himself admitted, that he did engage in misconduct by engaging in a lengthy conversation with a fellow employee in the restroom. Thus, contrary to the General Counsel's argument in his brief, this is not a case of a fabrication or pretext from which improper motive may be inferred. There is no credible evidence in the record that Respondent has tolerated such conduct in the past from Greuel or from any other employee. Thus some discipline seems to be justified. Examining Greuel's record, I have set forth above his past history concerning being away from his work area. Indeed, on January 4, Greuel had been issued a "final" written warning for conduct similar to that he had engaged in on January 10, a warning that the General Counsel does not allege was unlawfully given to Greuel. Considering Greuel's past conduct and the recent warning, a suspension seems appropriate and consistent with the notion of escalating discipline. The General Counsel, in his brief, does not set forth a specific argument as to why the suspension was unlawful. I conclude that Respondent has established that it would have suspended Greuel for his misconduct even absent his union activity. I shall dismiss this allegation of the complaint.

Turning now to the discharge, I have rejected the General Counsel's argument, made in his brief, that Respondent fabricated the events that lead to Greuel's discharge. I again note that Greuel engaged in misconduct of the same type for which he had been previously first warned and then suspended. Thus, in a period of about 2 weeks, Greuel had on three occasions committed similar acts of misconduct. I cannot conclude that Respondent would have tolerated misconduct so rapidly repetitive that it borders on defiance. I have examined the work records of employees cited by the General Counsel, but I am unable to conclude that Greuel was subjected to disparate treatment. None of those employees engaged in the misconduct Greuel did in such quick succession. Under these circumstances, I am persuaded that Respondent would have discharged Greuel even if he had not engaged in union activity. I have little doubt that Respondent was not upset at the turn of events that lead to Greuel's discharge, but I conclude that it was

¹⁸ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Greuel's continuing pattern of misconduct that gave Respondent the opportunity to discharge him. I shall therefore dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. By threatening employees to use unlawful means to maintain a union-free status, and by indicating to employees that it would be futile to engage in union activity, Respondent violated Section 8(a)(1) of the Act.

4. By failing to continue its practice of conducting annual wage surveys and based thereon, granting annual wage increases in 1995 to date, because employees voted in favor of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By failing to announce a wage increase on about January 6, 1995, by advising employees on February 5, 1995, that there would be no wage increase, and by blaming the Union in June 1995 for the failure to grant a wage increase, all because employees voted in favor of the Union, Respondent violated Section 8(a)(1) of the Act.

6. By maintaining a no-solicitation rule that did not clearly indicate that employees are permitted to engage in solicitation during nonworking time, Respondent violated Section 8(a)(1) of the Act.

7. By suggesting that employees who supported the Union should quit their employment, Respondent impliedly threatened employees with reprisals because of their union activity, thereby violating Section 8(a)(1) of the Act.

8. By soliciting the identity of employees who "pressure" employees into engaging in union activity, Respondent violated Section 8(a)(1) of the Act.

9. By paying for vehicle damage to employees who asserted that the damage was caused by union supporters, Respondent violated Section 8(a)(1) 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. I have concluded that Respondent maintained in its handbook for employees a section entitled "What about a Union" that contained a sentence, described above, which was unlawful. I shall order Respondent to rescind that sentence from its handbook.

Having found that Respondent unlawfully failed to continue its practice of conducting annual wage surveys and, based thereon, of granting annual wage increases in 1995 to date, I shall order Respondent to resume that practice and make employees whole for the wage increases they would have received in 1995 and each year thereafter but for Respondent's unlawful conduct. The exact amounts of the wage increases due employees shall be determined in compliance proceedings, and shall be computed to the extent appropriate as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970). At the compliance stage Respondent shall be given the opportunity to establish that even if it had followed its normal practice concerning annual wage increases, no increase would have been given in a particular year.

Having found that Respondent maintained an unlawfully overbroad rule restricting employee solicitation, I shall order Respondent to rescind the rule.

[Recommended Order omitted from publication.]