Westinghouse Electric Corporation *and* International Brotherhood of Electrical Workers, AFL–CIO–CLC. Case 17–CA–8016

February 23, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On October 30, 1978, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions [1] and brief and has decided to affirm the rulings,[2] findings,[3] and conclusions [4] of the Administrative Law Judge and to adopt her recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Westinghouse Electric Corporation, Jefferson City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.[5]

[1] In absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's finding that the Respondent's no-solicitation, no-distribution rule A12 is lawful on its face.

[2] Respondent contends that the Administrative Law Judge's interpretation of the evidence and her credibility findings showed bias and prejudice against Respondent. Upon careful examination of the Administrative Law Judge's Decision and the entire record, we are satisfied that the contention of Respondent in this regard is without merit.

[3] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[4] We agree with the Administrative Law Judge's finding that Respondent's no-solicitation, no-distribution rule B7 is overly broad, because it is unrestricted with respect to time and location, and, therefore is unlawful on its face. Consequently, we deem it unnecessary to rely on *Essex International, Inc.*, 211 NLRB 749 (1974), cited by the Administrative Law Judge, as authority to support this finding.

[5] We have modified the Administrative Law Judge's notice to conform with her recommended Order.

APPENDIX

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

After a hearing in which all parties had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice. We intend to carry out the order of the Board and abide by the following:

The National Labor Relations Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choosing
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from any such activities.

WE WILL NOT tell you that other employees were discharged for engaging in protected union activity.

WE WILL NOT tell you that we will not tolerate a union at our plant.

WE WILL NOT ask you about your union sympathies in a manner constituting interference, restraint, and coercion.

WE WILL NOT enforce in a disparate manner against employees, because of their union activities, a rule forbidding solicitation during working time.

WE WILL NOT discharge or suspend employees, or otherwise discriminate against them with respect to hire or tenure of employment or any term or condition of employment, to discourage membership in International Brotherhood of Electrical Workers, AFL–CIO–CLC, or any other union.

WE WILL NOT maintain a rule which forbids you, without qualification as to time, to exercise these rights by means of soliciting or canvassing.

WE WILL NOT maintain a rule which forbids you, without qualification as to time or location, to exercise these rights by means of distributing literature.

WE WILL NOT forbid employees to exercise these rights by solicitation or canvassing, at times when neither the solicitor nor the employee being solicited is supposed to be actively working.

WE WILL NOT forbid employees to exercise these rights by distributing literature, in nonwork areas and at times when neither the employee who distributes nor the employee who receives the literature is supposed to be actively working.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of these rights.

WE WILL offer John Lee Suttenfield III reinstatement to his old job or, if such job no longer exists, to a substantially equivalent job without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole, with interest, for loss of pay resulting from his discharge.

Our employees are free to exercise any or all of these rights, including the right to join or assist the IBEW, or any other union. Our employees are also free to refrain from any or all such activities, except to the extent that their bargaining representative has a collective-bargaining agreement which lawfully requires employees to become union members.

WESTINGHOUSE ELECTRIC CORPORATION

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: This case was heard in Jefferson City, Missouri, on June 8 and 9, 1978, and in Kansas City, Kansas, on August 17, 1978, pursuant to a charge filed on December 8, 1977, and a complaint issued on January 13, 1978. The complaint alleges that Respondent Westinghouse Electric Corporation violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by interrogating an employee concerning union activity, informing an employee that a union would not be tolerated at the plant, threatening to discharge employees because of their union activity, maintaining a no-solicitation/no-distribution rule which is unlawful on its face, and applying such a rule in a disparate manner against an employee because of his union activity; and violated Section 8(a)(1) and (3) of the Act by discharging employee John Lee Suttenfield III.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation which manufactures electrical appliances at various plants, including a plant in Jefferson City, Missouri. In the course and conduct of its business operations within Missouri, Respondent annually purchases goods and services valued in excess of $50,000 directly from sources located outside Missouri, and annually sells goods and services valued in excess of $50,000 directly to customers located outside Missouri. I find that, as Respondent concedes, it is engaged in commerce within the meaning of the Act, and that exercise of jurisdiction over its operations will effectuate the policies of the Act.

International Brotherhood of Electrical Workers, AFL–CIO–CLC (the Union or the IBEW) is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Rules Restricting Solicitation and Distribution*

Respondent began production operations at its Jefferson City plant in 1972. At the time the plant was opened, Respondent's corporate headquarters promulgated certain written employee rules which were in effect at all material times and included the following:

> A. Any of the following types of misconduct on Company property is considered inexcusable and may result in immediate discharge.
>
> * * * * *
>
> 12. Unauthorized distribution of petitions, applications, payroll deduction authorization cards and/or membership cards of any organization during working time, or soliciting employes to sign such petitions, applications authorization and/or membership cards during working time.
>
> B. Any of the following types of misconduct is considered an offense which is not to be tolerated. The first of such actions may be punishable by three days off without pay. The second act of misconduct, not necessarily the same type of offense, may result in discharge:
>
> * * * * *
>
> 7. Unauthorized selling, soliciting, canvassing, or distribution of literature except where permitted by law.

Sections B1 through B6 of the foregoing rules forbid waste of materials, abuse of tools, violation of safety rules, concealing defective work, negligently producing defective work, "pranks," "horseplay," disorderly conduct, conduct which endangers safety, and habitual carelessness. Sections A1 through A11 of the foregoing rules forbid deliberate property damage; stealing; fighting; use of abusive or threatening language; possession or use of weapons, incendiary devices, or explosives, or conspiring to do this or to commit other violations of criminal laws; immoral conduct or indecency; wilful hampering of production; insubordination; misrepresentation or falsification of records or attendance reports; gambling; possession, distribution, or use of drugs; and sleeping during working hours. The General Counsel conceded that every time employees were caught violating Rules A1 through A11, they were dis-

charged. The parties stipulated that between January 1, 1977, and December 1, 1977, eight employees were discharged for such violations, and that five more employees were discharged therefor between December 1, 1977, and the second day of the hearing, June 9, 1978. Suttenfield aside, as of June 9, 1978, no employee had ever been disciplined for violation of either Rule A12 or Rule B7.

Paul E. McGrath has been the personnel manager at Respondent's Jefferson City plant since 1971, before it began production operations in 1972. He testified that he does not know why Respondent needs two no-solicitation rules. He testified that Rule B7 but not Rule A12 would be applicable to an employee who during his "personal time" (see *infra*) verbally urged another employee to vote for a candidate for political office, or who during working hours passed out "literature." McGrath further testified that Respondent regarded Rule A12 as applicable to an employee who distributed "union material" on working time. When asked how he determined whether a solicitation fell under Rule A12 (with a possible penalty of discharge) or under Rule B7 (with a possible penalty of a 3-day suspension), he testified, ". . . in the signing of applications and having payroll deduction authorization cards and membership cards, none of which is described in B7. They're not joining anything in B7 that I am aware of." When asked why Respondent's rules considered the distribution of membership cards more egregious than the distribution of literature, he replied that he did not know.

McGrath testified that he would not consider an employee to be violating the rules of conduct if he distributed material set forth in Rule A12 during the lunch break, or distributed or solicited the material set forth in Rule A12 after the completion of his regularly scheduled shift or in the plant before the employee's shift began. McGrath further testified that an employee had to get authorization from management before he could distribute anything on Respondent's premises, including distribution during "personal time" but not his lunch period.

Respondent's employee handbook states:

COLLECTIONS AND DONATIONS

> . . . taking or accepting collections or donations from other employees . . . is not permitted on Company property. This rule applies to any fund, including those to be used for charitable or benevolent reasons.
>
> There may be an occasion due to a catastrophe or disaster for which voluntary donations may be made in behalf of one of our employees and his family. All requests of this nature must be approved by Personnel Relations.

Once a year, management instructs employees to attend a meeting in the plant, generally for about 20 minutes, during which employees are urged by management to donate to United Way. Employees are paid for the period spent at these meetings. Such donations are usually made through payroll deductions.

McGrath has repeatedly rejected requests by both employees and outsiders for permission to engage in various kinds of solicitation activity in the plant. On five separate occasions, he has refused to permit volunteers to sell tickets in the plant during working time to a bazaar for the benefit of a hospital of whose advisory board of directors McGrath is a member. He has refused annual requests from the Veterans of Foreign Wars for permission to go through the plant to solicit contributions on working time in connection with "buddy poppy" day. Before December 1, 1977, he refused requests for permission to come onto plant premises during working time by charities concerned with muscular dystrophy, heart disease, and birth defects. Shortly before June 1978, McGrath denied an employee's request for permission to solicit in the plant, during working time, "bikeathon" card signatures undertaking to make payments, inferentially for charitable purposes, in return for a specific number of bicycled miles. In mid-May 1978, McGrath refused requests by two supervisors for permission to solicit, in the plant and on working time, signatures on a petition requesting a State "Right-to-Work Law" referendum. In August or September 1977, McGrath denied the request of former governor Christopher Bond's public relations man to solicit political support from employees in the plant during working time. About October 1976 (inferentially), McGrath refused the request of the local chamber of commerce's executive director to permit a United States Congressman to visit the plant and pass out campaign literature during working hours. In late 1977, McGrath denied an employee permission to solicit other employees to participate in a group dental program.

In 1976, supervisor Bill Haumacher asked employee Paul Robertson, who was then one of Haumacher's immediate subordinates, to buy a ticket to a Christmas dinner being given by the Jeff City Industrial Club, mostly composed of supervisors. Robertson bought a ticket. This conversation probably occurred during working time, and it consumed less than 2 minutes. In December 1977, after Suttenfield's discharge, supervisor Bob Raderman came to Robertson's work station and asked him to buy a ticket to the Industrial Club's dinner that year. Robertson said that he did not think he and his wife were going that year. This conversation consumed between 2 and 5 minutes of working time. Two or three days later, Raderman again came to Robertson at his work station and asked him to buy a ticket. Robertson again refused. This conversation consumed less than a minute of working time. On the basis of a conversation between McGrath and employee Robertson on December 2, 1977, (see *infra*, Sec. II,B,2d) I infer that McGrath knew about the 1976 solicitation activity, at least, described in this paragraph.

Employee Suttenfield, who worked for Respondent between mid-May 1976 and early December 1977, credibly testified that every month or two, as he traveled through the factory in connection with his work, an employee would approach him during working hours and ask him to buy a raffle ticket. Suttenfield further credibly testified that both on working time and on "break time," he was approached by other employees for contributions toward flowers or greeting cards for sick employees. Employee Mike Wilbers, who has been working for Respondent since 1972, credibly testified that employees in the plant sold raffle tickets, at least on occasion during working time and when Wilbers was not on break, for church picnics and for such purposes as raising money for a softball team; and

took up collections to help an employee whose house had burned down (a collection made about early May 1978, during working time and when Wilbers was not on break), to buy flowers for sick employees, and to buy Christmas presents for Wilbers' supervisor (Allen Dahlstrom, at the time of Suttenfield's December 1977 discharge and the June 1978 hearing) and fellow employees. Employee Robertson, who has worked in the plant since 1973, credibly testified that about April 1978 an employee asked him to buy a raffle ticket at his work station while he was not on break. Robertson also credibly testified, in effect, to other efforts to sell raffle tickets on plant premises.

Suttenfield testified that he had no reason to suppose that management knew about the times when he had been approached to buy raffle tickets. Wilbers credibly testified that he had not seen management observing the various raffle-ticket and collections he testified about but that such activity was not "hidden. . . . It is pretty well in the open." Robertson, who works under supervisor Ben Cunningham in the welding line of three-phase tanks, credibly testified that while he is working in the production area, his supervisors are usually somewhere on the line or sitting at a desk, and that no partitions or walls block views of the production area. The entire factory is on a single floor. McGrath's office is partitioned off, and other partitions also exist at undisclosed points. Thomas J. Francis, who is the supervisor of the test area and the repair area, is able to observe from his desk at least part of the area which is supervised by Dahlstrom and in which Wilbers and Suttenfield worked. As set forth in greater detail *infra,* both supervisor Dahlstrom and supervisor Carl E. Smith testified that they observed conversations between other employees and Suttenfield, whose immediate superior was Dahlstrom but who had occasion to work in the sections supervised by Smith (component assembly and front panel assembly). Respondent called three line supervisors as witnesses—Francis, Smith, and Dahlstrom. None of them was asked whether he had observed any of the foregoing employee activity regarding raffle tickets and collections. I infer that line supervisors were aware of at least some of this activity. Personnel manager McGrath occupies a separate walled-in office. As to the foregoing activity by rank-and-file employees, I accept his testimony that he did not know about it.

Except for a half-hour unpaid lunch period for each employee, staggered between 11:30 and 12:45 for the day shift, Respondent does not have any formal break periods. Coffee and soda machines are located in about six different areas of Respondent's manufacturing facility. Most of them are near a restroom facility. While on the clock, employees are allowed to take, without asking permission from any member of management, what Respondent's counsel referred to as "personal time" but which witnesses often described as "breaks." During these periods, employees are permitted to get a soda or a cup of coffee, which they are permitted to drink either near the vending machine or in their work area.[1] Also, on occasion, an employee will drink his "personal time" beverage while with another employee in the latter's work area, either by prearrangement to share their "personal time" or because of a chance encounter while one or both were taking their "personal time." After finishing their "personal time," employees are expected to return to their own work areas. Respondent imposes no fixed limit on the number of "personal times" an employee can take, as long as he gets his job done and does not abuse the privilege. An employee may take two or three "personal times," of perhaps 5 to 10 minutes each, in the course of a morning or an afternoon.

Respondent does not have a written policy that forbids employees to exchange casual conversation coming to or going from the restroom or the vending machines. Also, employees are in practice permitted to engage in conversations while both are taking "personal time," and in practice an employee on "personal time" is permitted to engage in short conversations with employees in other work areas who are not taking "personal time." In addition, employees are permitted in practice to engage in brief, casual conversations about nonwork matters while all participants in the conversation are supposed to be actively working. Respondent places no restrictions on the subjects which the employees can talk about during any of the foregoing periods. Also, employees are permitted to make calls on a pay telephone in the plant while they are on the clock. McGrath testified that if an employee engages in a conversation of "some length, taking away from productive time," he will be reprimanded by his supervisor. Supervisor Dahlstrom testified that he has never given a written reprimand for excessive talking, and there is no evidence that any such written reprimand has ever been issued by management for this reason.

B. *Suttenfield's Allegedly Unlawful Discharge; Alleged Unlawful Remarks by Manager of Personnel Relations McGrath*

1. Background

Suttenfield began working at Respondent's Jefferson City plant on May 18, 1976. At the time he was hired he was given copies of Respondent's rules of conduct and its employee manual; certain portions of these documents are quoted above. Also, he was told that only the United Way was allowed to enter the factory to solicit donations.

About late July 1977, some representatives of the Teamsters stood at the highway near the exit to Respondent's employee parking lot as they left. Respondent's security head walked toward them. Two or three days later, Respondent distributed a letter to the employees, signed by its division general manager and plant manager and with the greeting "Fellow Employees," which referred to the current Teamster leaflet campaign and stated, *inter alia:*

> [W]e do not believe that either your interests or the future of the plant is best served by the intervention of a union.
>
> * * * * *
>
> Please do not consider that signing the union representation card is a harmless act. Doing so may obli-

[1] Except during the lunch period, employees are not permitted to leave the production area during their shifts.

gate you to far more than you intend or are [led] to believe, because signing a union card is the first step unions use to try to get people on their rolls as dues paying members. If only 30 percent of our Jefferson City employees sign these cards, the union would be able to petition for an election. It isn't something that should be done just as a favor or because you are told someone else did.

I hope that you will consider all these things, and when you are asked to sign a card, that you will refuse to do so. Allow us to continue to prove to you that we can work together without a union just as so many other Westinghouse locations have done for so many years.

A few days after Respondent sent out this letter, Bill Camp (*infra*, fn. 2) held meetings with all the hourly employees on each shift. Camp said that Respondent's employees at the Jefferson City plant had the wages and benefits of union shops, that management and the employees had a good working relationship and good communication, that management would try to see that it stayed that way and got better, and that "we just really have no need for a union there at that facility, and . . . it could jeopardize our jobs and the plant as a whole." [2]

On October 4, 1977, Respondent distributed to the employees another letter signed by its division general manager and its plant manager, and also addressed to "Fellow Employees." This letter read as follows:

During the first week of August a leaflet campaign was held here at our plant by representatives of the Teamsters union.

Over the past few months union organizing activities have been picking up in and around Jefferson City. Because we are one of the large employers in the area, we very well could be the future target of the IBEW, IUE, or other major unions.

Union organizers are extremely professional and persuasive during campaigns. They will make all types of promises on matters of wages, benefits and working conditions. They may promise financial gain, as well as special treatment as union representatives. Another tactic is for the organizers to make visits to the homes of employes in order to persuade individuals in various sections and shifts to be sympathetic to their cause. Then the union may use the in-plant sympathizers to get cards signed as a first step to force an NLRB election. It only takes 30 percent of our Jefferson City employees to sign cards to enable the union to petition for an election.

When we came into Jefferson City in 1971 we made a commitment to provide pay and benefits equal to or better than what other employers were paying in our labor market area. We have more than fulfilled that commitment and will continue to do so. As a Westinghouse employe, you enjoy general increases, cost-of-living adjustments and improvements in all the various benefit programs in the same manner as all other Westinghouse employes wherever they are located.

We have not had a reason for a third party to come between employes and management. We are making every effort to continue and strengthen our communications through such things as Round Table discussions, Westinghouse News, and employe meetings.

You may be asked to sign a union representation card. Again, we ask you not to do so.

On November 29, 1977, IBEW representative Craig Hoepner conducted a meeting attended by 20 to 25 first-shift employees. Suttenfield arrived about 20 minutes after the meeting began. While Suttenfield was present, Hoepner told the employees not to expect great increases in wages and benefits if the Union was voted in, but that having the Union would improve job security and the handling of grievances.

At the close of the meeting, Suttenfield picked up a number of authorization cards. On the following day, November 30, he distributed cards to four fellow employees, in each case with some brief concomitant conversation. He gave out cards to material handler Lonnie Thompson, three-phase internal assembly builder Lammers, and an unidentified employee, while all the employees involved were at the soda machine buying sodas, and one card to a fork truck operator named "Harry" while both "Harry" and Suttenfield were in the restroom. At least two of these employees, Lammers and Thompson, worked in Suttenfield's department. Also, that same day, he talked in the factory area about the Union to seven or eight employees in his department to whom he did not give cards. An undisclosed number of these conversations occurred during lunch and on breaks. Most of these conversations were initiated by the other employees' questions about the union meeting on the previous day. There is no evidence that before Suttenfield's discharge, management had any specific knowledge of his November 30 activity.

On the following day, December 1, Suttenfield gave out several more cards to Thompson, and the two discussed the Union. Suttenfield also gave two cards to employee John Baxter, who worked in the same department as Suttenfield and Thompson. Baxter received his cards while he and Suttenfield were both at a soda machine. The record otherwise fails to show whether the foregoing activity occurred on the clock, or whether it occurred during "personal time." There is no evidence that before Suttenfield was discharged, management had any specific knowledge of the foregoing activity.

On direct examination, Suttenfield was not asked whether he talked to any people about the Union other than those to whom he gave cards. On cross-examination, Respondent's counsel asked him whether such conversations occurred on December 1. The General Counsel objected to this question on grounds of relevancy. Respondent's counsel declined to specify which (if any) of such incidents played a part in the discharge decision, although Sutten-

[2] Suttenfield, the only witness who testified about these speeches, testified that he thought Camp was the plant manager. Documents distributed by Respondent to the employees shortly before and shortly after Camp's speeches are signed by "D. L. Jans, Plant Manager." From the fact that Camp addressed the employees in the plant during working hours, and from employee Robertson's testimony that Camp was a member of management, I infer that Camp occupied some such position.

field had on request temporarily left the hearing room and I offered to direct all persons who under a sequestration order would be required to stay out of the hearing room to leave while counsel specified the incidents in question. Thereafter, Respondent's counsel asked Suttenfield whether on December 1, 1977, he had talked about the Union with about 25 named individuals, including Schmitz, Freeland, Hughes, and Grotewiel, but not Mike Horman or Marilyn Blackburn. As to all 25 of these individuals except Wilbers, the General Counsel successfully objected to such questions. At the conclusion of these questions, Respondent's counsel declined to make a professional representation that he had reason to suppose that Suttenfield talked to each of these employees about the Union during working hours at the plant on December 1, 1977. Then, after Respondent's counsel had concluded Suttenfield's cross-examination and again asserted that the December 1 conversations about the Union were relevant, I stated that I would have permitted these questions if counsel had represented that Suttenfield had been discharged in whole or in part because of these conversations, and stated that if Respondent produced evidence to this effect I would entertain a motion for leave to recall Suttenfield for further cross-examination.

Later, company witness Smith, a supervisor, testified about December 1 conversations between Suttenfield and Shirley Schmitz, Freddy Freeland, Shirley Hughes, Mike Horman, and Marilyn Blackburn. After Smith had been excused, I advised Respondent's counsel that he could now request permission to cross-examine Suttenfield with respect to his conversations with these five people, or could (if he wished) reserve any such motion until later in the hearing. Upon counsel's reply that he did not wish to cross-examine Suttenfield at that time as to such matters, I advised counsel that if he wished to exercise any such right subsequently, he would be expected to affirmatively claim it. Thereafter, McGrath, who testified that it was he who decided to discharge Suttenfield, testified that Smith reported soliciting by Suttenfield of Schmitz, Freeland, Hughes, Horman, and Grotewiel (in effect); but McGrath did not mention Blackburn. Supervisor Smith did not testify about any conversations between Suttenfield and Grotewiel, and denied that Grotewiel talked to Smith about Suttenfield. Although Suttenfield was present throughout the hearing, Respondent's counsel never subsequently sought to cross-examine him about his December 1 discussions with other employees concerning the Union.

2. Suttenfield's suspension interview and subsequent discharge

a. *Suttenfield's December 1 activities in the component assembly department*

Suttenfield's job title was "material handler." His job duties required him to push a cart through various departments in the plant other than his own. He picked up parts from these other departments and brought them back on the cart to his own department. From time to time, his duties required him to travel to every section of the plant. However, he usually pushed the cart on a relatively fixed route through three or four particular departments.

On December 1, Suttenfield's duties required him to enter the component assembly department on about eight occasions. That day, Smith, the supervisor of that department, observed Suttenfield "spending extensive amount of time in my section, more than usual. . . . Conversing . . . in quite a lengthy period of time." Smith did not overhear the contents of these conversations. Suttenfield's job responsibilities required him to talk about needed parts with employees in that department. Smith observed Suttenfield talking to employee Marilyn Blackburn, and told her to get back to work. Later, Smith observed Suttenfield talking to employee Shirley Schmitz while she was working.[3] Smith told Suttenfield not to bother Schmitz and to get back to work. He said "O.K." Smith also observed Suttenfield talking with employees Freeland, Hughes, and Horman, but Smith did not approach Suttenfield about the matter. That day, Suttenfield gave an authorization card to Schmitz while both of them were in her work area drinking sodas. Also that day, Suttenfield gave a card to employee Horman while they were standing in an aisle on the edge of the components department. Hughes, Horman, and Schmitz reported to supervisor Smith that "someone" was soliciting union cards. Upon observing Suttenfield talk to one of the employees in the department, supervisor Smith contacted Suttenfield's supervisor, Dahlstrom, at an undisclosed hour before the Wilbers incident which admittedly precipitated Suttenfield's suspension, and said that an employee had complained about Suttenfield's "passing union cards, soliciting union cards." There is no evidence that Dahlstrom talked to Suttenfield about what Smith had told Dahlstrom.

b. *The December 1 incident when Suttenfield gave an authorization card to Wilbers*[4]

At about 2:25 that afternoon, December 1, Suttenfield decided to take what he testimonially described as a "break," his first that afternoon. He pushed his cart out of the way, and started to walk up to the soda machines. As he walked by the work station of employee Wilbers, Wilbers approached him and asked if he had a particular part which Wilbers needed for the transformer he had been working on. Suttenfield replied no, that the part was on order. Wilbers, who had been on vacation for a few days, asked what had been happening lately with the Union. Suttenfield replied that the Union had held an employee meeting the preceding Tuesday. Wilbers asked Suttenfield if he had attended, and Suttenfield said yes. Wilbers asked what had gone on. Suttenfield told Wilbers that during this meeting, the IBEW had said that the Union would set up a "good system for having grievances addressed and job security." The two employees discussed the expense of union dues, and Suttenfield expressed the opinion that if a con-

[3] I infer that she is the same person whose name is spelled Shirley Smith in certain portions of the transcript.

[4] My findings under this heading are based on a composite of credible portions of Suttenfield's, Wilbers', Dahlstrom's, and Francis' testimony. The reasons for my credibility findings are summarized *infra*, especially fn. 5 and Sec. II,B,3.

tract were reached, it would probably call for a raise that would compensate for the dues expense. Suttenfield also expressed the personal opinion that wages and benefits would increase with subsequent contract renewals. Suttenfield further said that Hoepner had said the Union would not try to get into the plant unless 60 percent of the employees had signed cards, and that Suttenfield had picked up some blank authorization cards at the meeting. Wilbers asked Suttenfield the extent of employee interest in his card solicitation campaign. Suttenfield replied that he had handed out a few cards. Wilbers asked for a card. Suttenfield unbuttoned the flap pocket of his work shirt, pulled out a card, and handed it to Wilbers, who put it in his own shirt pocket.[5]

At this point, 3 or 4 minutes after the Suttenfield-Wilbers conversation had begun, Dahlstrom, who is admittedly a supervisor and was Suttenfield's and Wilbers' immediate superior, came up to Wilbers and said, "Can I see that?" Wilbers handed the card to Dahlstrom, who looked at it for a second and then said, "Mike, go back to work, and John, let's go up front." Wilbers then returned to his work station. Dahlstrom said nothing about breaks during this conversation. Dahlstrom and Suttenfield then walked toward the personnel-office area. After a short silence, Suttenfield asked Dahlstrom, "Is anything wrong?" Dahlstrom replied, "You are the best worker I ever had."

Thomas R. Francis, who is admittedly a supervisor over departments other than the department to which Suttenfield and Wilbers were assigned, observed them talking for 3 or 4 minutes, but without hearing what was said, and saw Suttenfield give the card to Wilbers. Francis testified that when he first observed them, both of them were standing together. Francis also testified that if he observed Suttenfield doing something that was a violation of company rules, Francis would go to Suttenfield's supervisor to inform him of that violation. Francis further testified that he did not "physically go" to Dahlstrom and say that Francis had observed Suttenfield in violation of a rule. Francis also testified that the first occasion on which he told another member of management about this incident occurred no earlier than the day after the incident, and that on this occasion he reported it to Darrell Husovitz, who worked in personnel relations under McGrath. Francis testified that he did "seek out" Dahlstrom in connection with the incident, but gave no dates or other details.

c. *Suttenfield's suspension interview; alleged interference, restraint, and coercion*[6]

Dahlstrom escorted Suttenfield to a waiting room in the personnel-relations area, and told him to sit down. Then, Dahlstrom went to find McGrath, whom he found in the hallway of the personnel-relations area. Dahlstrom gave McGrath the card Dahlstrom had obtained from Wilbers, and said that the card had been passed by Suttenfield to Wilbers in the three-phase internal assembly parts storage area during working time. Dahlstrom and McGrath then left the personnel-relations area. The record fails to show where they went. They returned to the area, came into the waiting room, and picked up Suttenfield, who by this time had been in that room for about 20 minutes. The three then went into McGrath's office.

McGrath, who had in his hand the union card Dahlstrom had obtained from Wilbers, asked Suttenfield why he had handed it out. Suttenfield asked him to "clarify himself." McGrath asked Suttenfield why he favored the Union. Suttenfield, who felt "kind of nervous," replied that he thought the campaign would get the issues of for and against the Union out into the open, and that the Union offered a system whereby the employees would have better job security and might also have some other benefits, including a better grievance system. McGrath said that Suttenfield was wrong about the issues' being aired in such a campaign, and that if enough people signed cards there would be an election and "it would either be passed or not passed." McGrath asked whether Suttenfield was having a problem communicating with Dahlstrom, and Suttenfield said no. McGrath asked whether Suttenfield was aware of Respondent's "open door" policy, and Suttenfield said he was. McGrath said that he could not understand why Suttenfield felt a need for things that already existed. Suttenfield said that other transformer plants had higher wages than those paid at Respondent's Jefferson City plant. McGrath said that Respondent followed a policy of paying wages at least equal to those paid, as shown by Respondent's wage/benefit surveys, by other employers in the labor market area.

McGrath asked Suttenfield for the employee card which he used to punch the timeclock, and Suttenfield gave him the card. McGrath said that Suttenfield had a very good record at Westinghouse. Dahlstrom said that Suttenfield was one of the best workers Dahlstrom had ever had. McGrath said that he accepted Dahlstrom's representation that Suttenfield had a good work record, but that "in a disciplinary case such as this your work record doesn't really enter into the decision as to your possible dismissal." Suttenfield said that he thought employees should sign authorization cards to express an opinion about joining the Union. McGrath said that Respondent had no rule against this if it did not take place during "working time." McGrath showed Suttenfield Rule A12 and said that he had violated it. McGrath further said that to be consistent in enforcing Respondent's rules of conduct, McGrath had to enforce Rule A12 against Suttenfield, that nothing personal was involved, and that McGrath was disappointed. Suttenfield said that he knew what the rules of conduct stated, including Rule A12, but did not think he had violated that rule, because when he had handed the card to Wilbers, Suttenfield considered himself to be "on a break" and, not on working time. McGrath said that Suttenfield had violated the rule, that he had been "on company time." Sut-

[5] My findings as to the contents of the Suttenfield-Wilbers conversation are based on a composite of credible portions of the employees' testimony. I think Wilbers was mistaken in testifying that benefits were not mentioned during this conversation, and (at one point) that Suttenfield did not say the grievance procedure was discussed during the union meeting. I reject as improbable the testimony of Suttenfield, who was trying to obtain support for the Union, that he attributed to Hoepner the statement that the employees should not expect increased benefits or wages in the first contract.

[6] My findings under this heading are based on a composite of Suttenfield's testimony and credible portions of Dahlstrom's and McGrath's testimony. Reasons for my credibility findings are summarized *infra*, sec. II.B.3.

tenfield said, "If that is the case, then when an employee is on his break it is not his own time but it is company time." McGrath said, "Yes, it is company time." Suttenfield said, "If that is the case, then we don't really have a break at Westinghouse." McGrath said, "No, you do have a break but it is company time." Suttenfield said that the union representative had told him that if Suttenfield were disciplined or discharged as a result of distributing union cards in the plant, the representative would "guarantee" Suttenfield his job back. McGrath replied that the representative who told Suttenfield that would now be given that opportunity.[7] McGrath told Suttenfield that he was on indefinite suspension and would be notified of the result the next day.

McGrath or Dahlstrom asked if Suttenfield had any personal property in the plant. Suttenfield replied that he had a jacket, and Dahlstrom left the office to arrange for Suttenfield to receive the jacket. After Dahlstrom left, McGrath said that he had previously worked for Respondent in Pennsylvania; that the Union had rendered Respondent noncompetitive with other companies in the appliance business and had thereby forced Respondent out of the appliance business; that he did not intend to see that sort of thing happen at the Jefferson City plant; that that plant had a good worker-management relationship, good communications, and excellent benefits; that "we don't have any need for a union here at the Jefferson City plant"; and that Respondent did not intend to see a union come in and destroy all that. The two men also discussed Suttenfield's plan to go to a broadcasting school in New York City and his apprehension that the cost of living there would be higher than in Jefferson City.

McGrath then checked to see if Suttenfield's jacket had been received. It had. McGrath said that since it was about the 3:30 p.m. shift-change time, Suttenfield could, if he wished, stay in McGrath's office for a few minutes to avoid the "embarrassment" of walking out when everyone else was leaving. Suttenfield said that he was not embarrassed at all. McGrath said that Suttenfield was being suspended pending the outcome of an investigation of his conduct. Suttenfield asked whether the chances were that he would be fired. McGrath said, "The chances are very good that you will be fired."[8]

During Suttenfield's December 1 conversation with McGrath and Dahlstrom, McGrath and Dahlstrom did not ask whether Suttenfield was on break when he handed the card to Wilbers or tell Suttenfield that McGrath and Dahlstrom thought he was not on break. Wilbers never received any kind of warning in connection with this incident. At no time during Suttenfield's employment with Respondent did he ever receive any warning concerning his job performance.

[7] My findings in the last two sentences are based on McGrath's testimony.

[8] My findings in the last two sentences are based on Suttenfield's testimony.

d. *Events after Suttenfield's suspension; alleged interference, restraint, and coercion; Suttenfield's discharge*

McGrath testified that a few minutes after Suttenfield left McGrath's office, supervisor Smith telephoned McGrath and said that Suttenfield had been spending what Smith considered an abnormal length of time talking with several employees in his area. McGrath further testified that Smith named, as employees whom Suttenfield solicited, Horman, Schmitz, Hughes, Freeland, and "Lester." Still according to McGrath, he asked what Smith had done about it; Smith said, "I ran him off"; McGrath asked whether Smith had had any problem; and Smith said, "No, he just said O.K. and left." McGrath went on to testify that Smith further said that employees had come to him and informed him that union authorization cards were being passed in that section. Smith testified that he telephoned McGrath close to shift-change time "concerning Mr. Suttenfield's conversations," but Smith did not testify to any further details about his conversation with McGrath. Smith did not testify to any conversations between Suttenfield and Grotewiel, and specifically denied that employee "Lester Grotewiel" talked to Smith about Suttenfield. McGrath testified that during Smith's telephone call, Smith reported that Suttenfield had been soliciting "Bernice Grotewiel, who was referred to as Lester earlier today."

Later that afternoon, McGrath asked Dahlstrom to describe what had happened in connection with the Suttenfield-Wilbers incident. Dahlstrom was not asked about this conversation with McGrath. When I asked McGrath, at the conclusion of his examination by counsel, what was said during this conversation, he testified as follows:

> [Dahlstrom] said that he had the occasion to become aware that Mike Wilbers was away from his work station for what he thought was an abnormally long period of time and I asked him why and he said, well, he had come by parts storage area and the two were standing there talking. He made checks in his area. The two were still there. He had gone down to the other end of the plant and come back and the two were still there. And then he indicated to me that he had called Tom Francis and asked Tom Francis to become aware of how long that conversation might continue since his desk apparently was in an area of closer proximity and did not want to stand and view the two people.
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> * * * * *
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> Then he related to me the events of receiving the telephone call from Tom Francis, that a card had been passed and he walked over to the two employees at that point and asked Mike Wilbers if he would allow him to see the card he had in his shirt pocket, and he allowed Mr. Wilbers said yes, and handed him the card. He also indicated to me that he asked Mike Wilbers where he had gotten the card and Mike Wilbers indicated that the card was given to him by John [Suttenfield].

On the following afternoon, before the 3:30 end of the day shift, McGrath had a conversation, at his insistence,

with supervisor Francis. Francis was not asked what was said during this conversation. When I asked McGrath, at the conclusion of his examination by counsel, what was said during this conversation, he testified as follows:

> I asked [Francis] what happened at the time when he was observing or had observed John Suttenfield and Mike Wilbers having a conversation and he described to me that he was at his desk. He stated to me that he was at his desk in full view of the parts storage area where he was able to watch and observe Mike Wilbers and John Suttenfield for a period of time and then saw the card being passed from John Suttenfield to Mike Wilbers.

McGrath testified that he was the person responsible for Suttenfield's termination, and that he was terminated for "just distributing, soliciting, and distributing employees during working time." So far as the record shows, between McGrath's conversation with Francis before 3:30 p.m. on Friday, December 2, and the Sunday, December 4, conversation when McGrath told Suttenfield that he had been discharged (see *infra*), McGrath neither sought nor acquired any additional evidence regarding such conduct by Suttenfield. As previously noted, McGrath credibly testified that during the December 1 suspension interview, he told Suttenfield that the Union would not have the opportunity to fulfill its "guarantee that his job would be given back to him and he would be reinstated." Also, as previously noted, Suttenfield credibly testified that during this interview, McGrath told him that the chances were very good that he would be fired.

At about 5:30 p.m. on Friday, December 2, McGrath had a conversation, which lasted about 45 minutes, with a group of employees on the three-phase welding line. Several of the employees questioned McGrath about various matters. Among these questioners was Greg Keeling, who asked about Respondent's educational systems program and received an explanation from McGrath. McGrath asked whether the employees had any "gripes." Robertson asked McGrath why he had fired Suttenfield. McGrath said that Suttenfield had been fired because he passed a union card. Robertson, who was a member of the IBEW in-plant committee, asked McGrath whether there was any difference between passing a union card and a supervisor's selling tickets to a turkey dinner on company time. McGrath said that there was "no difference as far as lost production, except . . . a turkey dinner would hurt no one and the Union would affect the plant from wall to wall." McGrath further said, "I fired [Suttenfield] strictly because the card had union on it." Robertson said that it was too easy for Respondent to fire people. McGrath asked for specific examples. Robertson named one employee, and McGrath said he had been fired for reading a "men's magazine." Robertson asked whether the dischargee had received any warnings, and McGrath said no, that he had been a supervisor and should have known the rules. Robertson named a second employee, and McGrath said he had been fired for sleeping in the men's room during working hours. Robertson referred to a discharged welder whose name Robertson did not know, and McGrath said he would check up on the matter and let Robertson know. McGrath and Robertson also discussed differences in the wage levels at Respondent's Jefferson City plant and at Respondent's plants in Athens, Georgia, and in St. Louis, Missouri. McGrath said that the Jefferson City employees were among the highest paid in the labor market area.

My findings as to this conversation are based on a composite of credible portions of the testimony of Robertson, McGrath, and Keeling. McGrath denied saying that he fired Suttenfield "strictly because the card had union on it" or that the Union would affect the employees "wall to wall." He testified that when Robertson asked why Suttenfield had been "fired," McGrath replied that Suttenfield "was not fired but that he was under suspension, pending the outcome of information concerning his activities in the plant." McGrath further testified that when Robertson asked the difference "between employees being solicited to sell a ticket for a Christmas turkey dinner than an employee passing out a union card," McGrath replied, ". . . we do not allow solicitation of tickets for any reason during working time but that my personal opinion would be that there would be a difference in purchasing a ticket than there would be to joining an organization. If I buy a ticket to something, I either win or lose or whatever. If I join an organization I am subjected to the rules that might be imposed upon me by an organization." Although McGrath did not advise Suttenfield of his discharge until Sunday, December 4 (a message delayed by McGrath's inability to reach him earlier; see *infra*), McGrath's and Suttenfield's credited testimony about the December 1 suspension interview indicates that McGrath already regarded a discharge decision as highly probable, and there is no evidence that McGrath planned to make any further investigation of the matter after Friday evening, December 2, when his conversation with the other employees occurred. Further, McGrath's version (but not Robertson's and Keeling's version) of McGrath's answer to Robertson's question as that question is described in the testimony of all three men misses the clear point of that question—namely, why did Respondent punish union solicitation but not turkey-dinner solicitation occurring in the same circumstances. Moreover, because McGrath's turkey-dinner testimony reveals McGrath's awareness that Robertson believed Suttenfield was being discharged for proper union activity, the omission from McGrath's testimony of any specific explanation to the employees for Suttenfield's pending discharge forms a curious contrast with the specificity of the reasons which, by his own testimony, he gave for the other discharges brought up by Robertson.[9]

For these and demeanor reasons, as to McGrath's remarks about Suttenfield I credit Robertson and Keeling and discredit McGrath. In so finding, I am aware that Keeling and Robertson attached McGrath's remarks about Suttenfield to different portions of the conversation, and that Keeling's prehearing affidavit does not say that McGrath said he fired Suttenfield because the card had union on it.[10] However, McGrath testified that Keeling asked him

[9] Indeed, as to one of these employees, McGrath investigated the matter and gave the information to Robertson at his workplace a few days later.

[10] The record fails to show whether Keeling's affidavit referred to the December 2 conversation.

questions during the conversation when McGrath admittedly talked to Robertson about Suttenfield's discharge, and did not deny that Keeling was present during the discussion on this subject.

e. *Suttenfield's discharge; subsequent events*

Following Suttenfield's suspension on Thursday, December 1, McGrath unsuccessfully attempted to reach him by telephone. The record contains no direct evidence regarding the date and hour of this attempted contact. However, in view of Dahlstrom's credited testimony that on December 1, McGrath said he would advise Suttenfield on the following day about what action would be taken with respect to him, because there is no evidence that the plant operated on Saturdays, and because McGrath did reach Suttenfield on Sunday, December 4, I infer that McGrath's unsuccessful call was made on Friday, December 2. On December 4, McGrath reached Suttenfield on the telephone and said that McGrath "had reviewed all of the circumstances surrounding his suspension and in view of our rules of conduct, there was no other alternative but to separate his employment with Westinghouse." Suttenfield replied that McGrath would probably hear from the Union.

On December 9, 1977, Respondent distributed a letter to the employees stating that a plantwide cost-of-living wage increase which was part of a package first announced in August 1976 would be effective on December 12. The letter stated, *inter alia,* that the increase was the same amount given to Westinghouse employees "in the Overhead Transformer Plant in Athens, Georgia, the Distribution Equipment Division in St. Louis and all other Westinghouse locations throughout the country. Pay increases such as these have put Westinghouse employees among the highest paid in our labor market area." The letter further stated that Respondent's fringe benefits "rank among the best in our area." The letter concluded, over the plant manager's signature, "All of these pay and benefit advantages make you some of the best compensated employees in the area and have been realized without a third party being involved. I know that we can continue to work together in this way."

3. Reasons for credibility findings

As previously noted, my findings about the Wilbers incident are based on a composite of credible portions of the testimony of Francis, Suttenfield, Dahlstrom, and Wilbers. Francis, who could not hear what was said during the Suttenfield-Wilbers conversation, testified that when he first observed them, both were standing together, and that Francis saw them talking for 3 or 4 minutes. Francis' testimony in this respect is consistent with the testimony of both Suttenfield and Dahlstrom. Suttenfield testified that his conversation with Wilbers took 3 or 4 minutes. However, Dahlstrom testified that at least 15 minutes elapsed between the time he first saw Suttenfield talking to Wilbers and the time Dahlstrom intervened in the conversation. If credited, Dahlstrom's account of his conduct during this conversation would contribute to answering the obvious question of why he failed to intervene earlier. Dahlstrom testified, *inter alia,* that when passing through the three-phase internal parts storage area en route to various other locations to which his duties called him, he repeatedly noticed Suttenfield and Wilbers talking. Still according to Dahlstrom, he telephoned Francis at his desk, said that Dahlstrom had received a call earlier in the day that an employee had complained about Suttenfield's "passing union cards, soliciting union cards," and asked Francis to watch Suttenfield because Dahlstrom did not want to stand and stare at him. Dahlstrom went on to testify that Francis agreed to watch Suttenfield, and telephoned Dahlstrom 3 or 4 minutes later that Suttenfield had just passed Wilbers a card. However, Francis not only failed in his testimony to refer to any request by Dahlstrom to watch Suttenfield, but also testified that the first member of management Francis told about this incident was Husovitz, and that Francis made this report no earlier than the following day. Furthermore, McGrath's testimony about Francis' report to him regarding the incident contains no reference to any contacts with Dahlstrom. Because of these discrepancies between Dahlstrom's testimony on the one hand and the testimony of Francis and McGrath on the other, and for demeanor reasons, I do not credit Dahlstrom's testimony that the Suttenfield-Wilbers conversation lasted as long as 15 minutes. Rather, and because Wilbers was never warned in connection with this incident, I credit Suttenfield's testimony that the conversation took 3 or 4 minutes, and conclude that Francis observed all or nearly all of it. For like reasons, to the extent inconsistent with Suttenfield's or Wilbers' testimony, I do not credit Dahlstrom's testimony regarding his part in the incident. Accordingly, and for demeanor reasons, I do not credit McGrath's testimony about the contents of Dahlstrom's report to him about the Wilbers incident, which alleged report substantially tracks Dahlstrom's discredited testimony about the incident.

Also, in view of the foregoing and other respects in which I have discredited Dahlstrom's and McGrath's testimony, and for demeanor reasons, I discredit Dahlstrom's and McGrath's testimony, which is inconsistent with Suttenfield's credited testimony, that during the suspension interview, McGrath told Suttenfield that any decision by him about the card matter would be voluntary on Suttenfield's part; McGrath's testimony that after Dahlstrom left the interview, McGrath did not (as credibly testified to by Suttenfield) discuss Westinghouse and the appliance business, or say that McGrath did not intend to see a union come in and destroy good relations at the Jefferson City plant, or say that a union would destroy everything built up at the plant, or state that a union would not be tolerated; Dahlstrom's testimony (inconsistent with McGrath's testimony) that McGrath told Suttenfield in Dahlstrom's presence that McGrath did not know what personnel action would be taken with respect to Suttenfield; and Dahlstrom's testimony that when escorting Suttenfield to McGrath's office, Dahlstrom merely said that he was a good worker, rather than the best worker he had ever had (as Suttenfield credibly testified). Further, I do not credit Dahlstrom's and McGrath's testimony that Suttenfield said the Union had promised a $1-an-hour wage increase, for the reasons set forth in the beginning of this

paragraph, because there is no evidence that the Union in fact so promised in Suttenfield's presence, and because Suttenfield impressed me as being too intelligent and sophisticated to take such a specific and optimistic representation seriously. Finally, for the reasons set forth in the beginning of this paragraph, I do not credit McGrath's testimony, which is essentially contradicted by Suttenfield's credited testimony, to the following effect: Suttenfield admitted soliciting and passing "cards" to other "employees," but said he was doing this on his break; McGrath said that Respondent did not have breaks of specific duration at specific hours; Suttenfield said that he knew about this practice and approved it; McGrath told Suttenfield that the fact he may have been on a break had nothing to do with his interfering with other employees who were at their work stations, since they were not on any type of break; and Suttenfield did not have an answer to that. In this connection, I note Dahlstrom's failure to corroborate McGrath's testimony regarding the immateriality of whether Suttenfield was on break;[11] and the undisputed testimony that Suttenfield passed out cards to, at least, Thompson, Lammers, "Harry," Baxter, Schmitz, and an unidentified employee while both parties to the transfer were taking "personal time."

Also, in view of Francis' failure to mention Baxter's name when reporting the Wilbers incident to McGrath, Suttenfield's undenied and credited testimony that he gave two cards to Baxter while both employees were at the soda machine, and the failure of Wilbers (a disinterested witness still in Respondent's employ) to mention Baxter in connection with the incident where Suttenfield gave Wilbers a card, I discredit Francis' testimony that Baxter participated therein, and credit Suttenfield's testimony that only he and Wilbers were present.

In making the foregoing findings where Suttenfield is credited, I have taken into consideration not only his financial stake in the outcome of the case, but also the inaccuracies in his testimony about the circumstances in which he gave two prehearing statements. The record shows that Suttenfield prepared in his own handwriting a statement about the matters involved in this case, dated December 21, 1977, at 2:30 p.m. A white Xerox copy of this document was inserted into the investigatory file by an unidentified person—neither field attorney Lyn R. Buckley, who conducted the field investigation in the instant case, nor the attorney who heard the case on the General Counsel's behalf. Also, on December 21, 1977, Suttenfield gave a prehearing affidavit to Board agent Buckley, which is typewritten and is on yellow paper. On cross-examination, Suttenfield testified, in substance, that he had given two affidavits to Buckley, on two different days, while both of them were in Jefferson City. He described each of these alleged conversations with some specificity, and testified, *inter alia*, that nobody else was present on either occasion. Buckley testified that the December 21 affidavit was the only affidavit which either she or any other Board agent took from Suttenfield in connection with the instant case, that the only trip she had taken to Jefferson City in connection with this case was the trip during which she took Suttenfield's December 21 affidavit, that union representative Hoepner was present throughout this interview, and that at least one employee, Robertson, was there during part of it. I credit Buckley, and agree with Respondent that Suttenfield's inaccurate testimony about the affidavit matter (particularly his testimony about two face-to-face interviews with Buckley) reflects on his reliability as a witness. However, I believe that this consideration is outweighed by the other considerations which have led me to credit other portions of his testimony. I note that Respondent makes no claim that his testimony before me differed at all from his representations in either his handwritten statement or his typewritten affidavit.[12]

C. *Analysis and Conclusions*

1. Suttenfield's discharge

I agree with the General Counsel that Respondent's discharge of Suttenfield violated Section 8(a)(1) and (3) of the Act. After McGrath had suspended Suttenfield with the statement that he would probably be discharged, and after McGrath had completed his predischarge investigation of Suttenfield, employee Robertson asked McGrath why he had fired Suttenfield, and McGrath said that Suttenfield had been fired because he passed a union card. Robertson then asked McGrath whether there was any difference between passing a union card and selling tickets to a turkey dinner, referring to efforts made by supervisors during working time to sell employees tickets to a Christmas dinner being given by a local club. McGrath said that there was "no difference so far as lost production, except . . . a turkey dinner would hurt no one and the Union would affect the plant from wall to wall . . . I fired [Suttenfield] strictly because the card had union on it." McGrath's admission as to his motives is corroborated by other evidence. Thus, Respondent permits employees to engage in a reasonable amount of conversation while they are supposed to be actively working, without restriction as to subject matter. Furthermore, although McGrath suspended Suttenfield (and said he would probably be discharged notwithstanding his fine work record) immediately upon learning that Suttenfield had passed a union card to employee Wilbers, Respondent never issued any kind of warning in connection with this incident to Wilbers, who had initiated the conversation when Suttenfield was taking "personal time." Furthermore, McGrath testified that even when management believes that an employee has engaged in excessive talking, that employee is merely reprimanded; and the record indicates that such reprimands are oral rather than written. In short, McGrath admitted—and other record evidence corroborates his admission—that

[11] Partly corroborating the less significant portions of McGrath's testimony in this respect, Dahlstrom testified that Suttenfield admitted passing out "cards" and said that he approved Respondent's practice of not having scheduled breaks. For demeanor reasons, I discredit Dahlstrom's testimony in this respect.

[12] Suttenfield inspected his affidavit about 2 weeks before June 8, 1978, when he testified and Respondent's counsel received his affidavit. On August 17, 1978, Respondent's counsel inspected Suttenfield's handwritten statement and thereafter tendered no further questions to Suttenfield, who was in the hearing room.

Suttenfield was discharged because he had solicited for a union, and not because of any breach of Respondent's no-solicitation rule or because Suttenfield's solicitation had involved any lost production. A discharge so motivated plainly violates the Act. *Wayne Home Equipment Company, Inc.*, 229 NLRB 654, 658–660 (1977).

Furthermore, and laying to one side McGrath's motivating belief that union solicitation was more reprehensible than solicitation for turkey dinners, Suttenfield's discharge was unlawful because management followed a practice of permitting, on the clock and while employees were supposed to be actively working, solicitation for other purposes, such as collections for employees who were sick or had suffered personal misfortune, sale of raffle and turkey-dinner tickets, and contributions to United Way. Of course, Respondent is not free to permit solicitations during such periods for the latter purposes but to discharge an employee for solicitation of signatures on union cards during these periods. *Florida Medical Center, Inc. d/b/a Lauderdale Lakes General Hospital*, 227 NLRB 1412, 1422 (1977), enfd. in material part 576 F.2d 666 (5th Cir. 1978); *Capitol Records, Inc.*, 233 NLRB 1041 (1977). Respondent's statutory duty not to enforce its no-solicitation rules so as to discriminate against protected activity is unaffected by McGrath's credited testimony that he was unaware of some of this solicitation activity unrelated to unions, in view of my finding that it was known to other members of management. *Jackson Sportswear Corporation*, 211 NLRB 891, 902 (1974).

Moreover, Respondent could not lawfully forbid an employee to engage in solicitation for the Union while both he and the employee solicited were on "personal time," even though "personal time" is on the clock, because during "personal time" the employees are not supposed to be actively working. *N.L.R.B.* v. *Florida Medical Center, Inc., d/b/a Lauderdale Lakes General Hospital*, 576 F.2d 666, 670 (5th Cir. 1978).[13] Furthermore, McGrath's and Smith's testimony shows that McGrath did not reach a final decision to discharge Suttenfield until after Smith had indicated to McGrath that Suttenfield had engaged in union solicitation of employees other than Wilbers, and this included a solicitation of employee Schmitz when both Suttenfield and Schmitz were drinking sodas during their "personal time." Accordingly, Suttenfield's discharge was unlawful even assuming that Suttenfield could have been lawfully discharged solely for his on-the-clock solicitations which occurred when he and/or the other employee may not have been on "personal time" (although see fn. 13, *supra*). *Ajax Magnethermic Corporation*, 227 NLRB 477 (1976). Whether McGrath himself knew the circumstances of the Schmitz solicitation is immaterial. *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *Jackson Sportswear*, 211 NLRB at 902; *Computer Sciences Corporation, Technicolor Graphics Services, Inc. and Data Processing Associates, d/b/a Computer Sciences-Technicolor Associates*, 236 NLRB 266, 279 (1978). Finally, because Respondent interpreted its Rule A12 to forbid conduct which Respondent could not lawfully forbid—namely, solicitation for a union when both the soliciting and the solicited employee were on "personal time," Respondent could not advance this rule as a valid defense to the discharge of Suttenfield for his part in the Wilbers incident, when Suttenfield was unquestionably on "personal time" even though Wilbers at least arguably was not (but see fn. 13, *supra*). *N.L.R.B.* v. *Harold Miller, Herbert Charles, and Milton Charles, Co-Partners, d/b/a Miller-Charles and Company*, 341 F.2d 870, 874 (2d Cir. 1965); *Wayne Home Equipment Co.*, 229 NLRB at 656–657; *McBride's of Naylor Road*, 229 NLRB 795 (1977); *Groendyke Transport, Inc.*, 211 NLRB 921 (1974), enfd. 530 F.2d 137 (10th Cir. 1976).

2. Other alleged unfair labor practices

I agree with the General Counsel that Respondent violated Section 8(a)(1) of the Act when personnel manager McGrath, who is admittedly a supervisor, (1) told employees on December 2, 1977, that Suttenfield had been fired "strictly because the card [he passed] had union on it," thereby threatening employees that they too would be discharged if they engaged in protected union activity; (2) told employee Suttenfield, on December 1, that Respondent would not tolerate a union at the Jefferson City plant; and (3) asked Suttenfield, on December 1, why he favored the Union. In finding that McGrath's interrogation of Suttenfield was unlawful, I note that it occurred at the interview when Suttenfield was unlawfully suspended for union activity, and that no legitimate purpose for such interrogation is shown by the record.

In addition, I agree with the General Counsel that Respondent violated the Act by maintaining Rule B7, to the extent that this rule applies to "soliciting, canvassing, or distribution of literature" which constitutes activity protected by Section 7 of the Act. Absent a showing of special circumstances not claimed to be present here, employees' Section 7-type soliciting and canvassing cannot lawfully be forbidden on the employer's property outside of the employees' working time, and most, if indeed not all, Section 7-type distribution of literature by employees cannot lawfully be forbidden outside of the employees' working time and outside work areas.[14] However, Rule B7 contains no such qualifications regarding either time or location.

Nor is there any evidence that such qualifications have otherwise been conveyed to the employees. It is true that Rule A12 forbids "during working time" conduct at least some of which is arguably forbidden by Rule B7 as well. However, Rule B7 forbids some kinds of protected activity which are not covered by Rule A12—for example, soliciting employees to engage in protected activity which does not involve signing anything (e.g., attending union meetings, voting for or against a union, and participating in an oral concerted request for higher wages or safer conditions). Indeed, at one point McGrath conceded that Rule

[13] Indeed, as a practical matter employees determined for themselves when they were on "personal time." Accordingly, for purposes of determining whether all the employees involved in on-the-clock solicitation at Respondent's plant were supposed to be actively working, all willing participants are in about the same position as those who had already made a specific, conscious decision to take "personal time."

[14] *N.L.R.B.* v. *Magnavox Company of Tennessee*, 415 U.S. 322 (1974); *Eastex, Inc.* v. *N.L.R.B.*, 437 U.S. 556 (1978); *Beth Israel Hospital* v. *N.L.R.B.*, 437 U.S. 483 (1978); *Essex International, Inc.*, 211 NLRB 749 (1974).

A12 does not apply to distribution of "literature," but that Rule B7 does. Furthermore, even assuming that every conceivable kind of protected activity described in Rule B7 is also described in Rule A12, I would not regard the qualifications in the latter as so clearly applicable to Rule B7 that employees could not apprehend otherwise, since the proscribed conduct is described in different language and is set forth in different and physically separate rules carrying different penalties. See *Chrysler Corporation, Eight Mile Road Stamping Plant*, 227 NLRB 1256 (1977). Nor do I regard Rule B7 as cured by the last phrase in the rule "except as permitted by law." Most types of soliciting, canvassing, or literature distribution are "permitted by law" and, indeed, could probably not be constitutionally forbidden "by law." Moreover, it is unclear whether this language purports to apply to "soliciting" and "canvassing," and the risk of ambiguity must be borne by Respondent, which created it. *Chrysler*, 227 NLRB at 1259. In any event, *Chrysler* held unlawful, because ambiguous and confusing to employees, plant rules which forbade "Unauthorized solicitation, except such solicitation during employees' nonworking time as is protected by the National Labor Relations Act," and "Unauthorized distribution of literature, except such distribution during nonworking time in nonworking areas as is protected by the National Labor Relations Act." Respondent's Rule B7 can hardly be described as clearer than the unlawful *Chrysler* rules. See also *Trailmobile, Division of Pullman, Inc.*, 221 NLRB 1088, 1089 (1975).

I do not agree with the General Counsel that Rule A12 is unlawful on its face. The General Counsel contends that Rule A12 forbids "union solicitation" and carries a discharge penalty, while Rule B7 (to the extent that it does not cover the same conduct as Rule A12) covers "non-union solicitation" and carries the lesser penalty of a 3-day suspension. However, Rule A12 appears on its face to cover not only conduct related to union or other protected activities, but also conduct ordinarily unrelated thereto—for example, conduct regarding petitions on behalf of a candidate for city treasurer, cards authorizing payroll deductions for the Red Cross, or cards for membership in the Elks Club. However, for the reasons set forth in connection with Suttenfield's discharge (*supra*, sec. II,C,1), I agree with the General Counsel that Respondent violated Section 8(a)(1) by enforcing Rule A12 (1) in a disparate manner against Suttenfield because of his union activities, and (2) to forbid solicitation for a union when both the solicitor and the employee being solicited are on the clock but are not supposed to be actively working.[15]

Conclusions of Law

1. Respondent is 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 the Act.
3. Respondent has violated Section 8(a)(1) and (3) of the Act by suspending and thereafter discharging employee John Lee Suttenfield III.
4. Respondent has violated Section 8(a)(1) of the Act by telling employees that Suttenfield was discharged for engaging in protected union activity; by telling Suttenfield that Respondent would not tolerate a union at the Jefferson City plant; by asking Suttenfield why he favored the Union; by maintaining a rule which forbids employees, without qualification as to time, to exercise their Section 7 rights by means of soliciting or canvassing, and without qualification as to time or location, to exercise their Section 7 rights by means of distribution of literature; by enforcing in a disparate manner against Suttenfield, because of his union activities, a rule forbidding solicitation during working time; and by enforcing that rule in such a way as to forbid, at times when neither the solicitor nor the employee being solicited is supposed to be actively working, solicitation by employees in connection with protected activity.
5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent has not maintained rules which on their face carry more severe penalties for union solicitation than for nonunion solicitation, in violation of Section 8(a)(1) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom. Because the unfair labor practices found include the discharge of an employee because of his union activity, a threat to effect other unlawful discharges, and the continued maintenance of rules which on their face or in their application call for discipline or discharge for engaging in protected activity, a broad order is called for. *Brom Machine and Foundry Co.*, 222 NLRB 74 (1976); *N.L.R.B.* v. *Southern Transport, Inc.*, 343 F.2d 558, 561 (8th Cir. 1965); *N.L.R.B.* v. *East Texas Pulp & Paper Company*, 346 F.2d 686, 689–690 (5th Cir. 1965). Accordingly, I shall recommend that Respondent be required to cease and desist from infringing on employee rights in any other manner.

Affirmatively, I shall recommend that Respondent be required to offer Suttenfield immediate reinstatement to the job of which he was unlawfully deprived, or if such a job no longer exists, a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, from December 1, 1977, to the date of a valid offer of reinstatement, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corporation*, 231 NLRB 651 (1977).[16] I shall also recommend that Respondent be required to post appropriate notices.

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

[15] The complaint does not allege that Respondent violated the Act by applying the prohibitions in Rule A12 to such periods. However, I am satisfied that the matter was fully litigated in connection with Suttenfield's discharge.

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

ORDER [17]

The Respondent, Westinghouse Electric Corporation, Jefferson, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that other employees were discharged for engaging in protected union activity.

(b) Telling employees that Respondent will not tolerate a union at the Jefferson City plant.

(c) Interrogating employees about their union sympathies in a manner constituting interference, restraint, or coercion.

(d) Maintaining a rule which forbids employees, without qualification as to time, to exercise their Section 7 rights by means of soliciting or canvassing.

(e) Maintaining a rule which forbids employees, without qualification as to time and location, to exercise their Section 7 rights by means of distribution of literature.

(f) Enforcing in a disparate manner against employees, because of their union activities, a rule forbidding solicitation during working time.

(g) Enforcing that rule in such a way as to forbid, at times when neither the solicitor nor the employee being solicited is supposed to be actively working, solicitation in connection with activity protected by Section 7.

(h) Discharging or suspending employees, or otherwise discriminating against them with respect to hire or tenure of employment or any term or condition of employment, to discourage membership in the International Brotherhood of Electrical Workers, AFL–CIO–CLC, or any other labor organization.

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

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

(a) Rescind Rule B7 to the extent that it (1) forbids employees, without qualification as to time, to exercise their Section 7 rights by means of soliciting or canvassing, or (2) forbids employees, without qualification as to time or location, to exercise their Section 7 rights by means of distribution of literature.

(b) Offer John Lee Suttenfield III reinstatement to the job of which he was unlawfully deprived, or if such a job no longer exists, a substantially equivalent job, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in that part of this Decision entitled "The Remedy."

(c) Preserve and, upon 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 or useful to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Jefferson City, Missouri, plant copies of the attached notice marked "Appendix." [18] Copies of said notice, on forms provided by the Regional Director for Region 17, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint is hereby dismissed to the extent it alleges unfair labor practices not previously found.

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

[18] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."