Invista *and* Teamsters Local Union No. 71 a/w International Brotherhood of Teamsters.[1] Case 11–CA–20703

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 13, 2005, Administrative Law Judge John H. West issued the attached decision.[2] The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.[4]

1. We disagree with the judge that the Respondent violated Section 8(a)(1) of the Act by threatening its employees by letter with unspecified reprisals in retaliation for their engaging in union activity. There is insufficient evidence to support finding a violation of the Act.

Employee Donald Smith came to the Respondent's Salisbury facility in March 2005[5] to check on the status of his retirement.[6] He testified that he observed a letter concerning the Union on the bulletin board on the first floor. The letter was from Plant Manager Tony Branecky. Smith testified that it was a "pretty negative letter and it said that he (Branecky) was aware of the union activities, that he would not tolerate—not tolerate it anymore, like he was really mad, and that the union leaders' activities would be dealt with. And their activities would be—something to that effect." Smith said the letter could have been 1- or 2-pages long. Posted beside the letter was a copy of the unfair labor practice charge which had been filed by the Union on March 17. Smith testified that the letter was posted within a few days after the filing of the charge, but before March 28, as he moved from Salisbury on that date and did not return to the facility. On cross-examination, Smith could only recall the "negativity" of the letter but nothing more specific.

Employee Lucy Henderson also testified that she observed the letter posted on the bulletin board in March. She stated that the letter was signed by Branecky and was posted beside a copy of the unfair labor practice charge and a flyer on how employees could get their authorization cards back.[7] She testified that it was a "very harsh letter from Tony Branecky stating that he was aware of the Union trying to get in, union activities. And that—I can't remember exactly how it goes, but it's something about he wasn't going to tolerate it and the Union leaders would be dealt with and he would have meetings to further explain this in up-coming." On cross-examination, Henderson stated that the letter was 2-pages long with small print. Henderson described the letter the same way she did on direct examination. She also testified that she read the letter quickly because it was long and she had to get back to her job.

The documentary evidence submitted by the Respondent reflects that the unfair labor practice charge filed on behalf of Henderson was posted on March 31. The evidence further reflects that at this time a 2-page letter entitled "Business Facts from Tony" was also posted. This letter concerns the unfair labor practice charge. Both Smith and Henderson denied on rebuttal that the 2-page letter submitted by the Respondent was the letter they observed on the bulletin board in March.

The judge credited the testimony of Smith and Henderson. Nevertheless, we do not think that there is sufficient affirmative testimonial and/or documentary evidence to sustain the judge's finding of a violation. First, the alleged threatening letter is not in evidence. Second, while Smith's and Henderson's testimony is credited, the

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] We have corrected the judge's decision to reflect the proper spelling of the name of Pat Stellute, Respondent's manufacturing manager.

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

The Respondent also contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

We do not, however, adopt the judge's characterization that witnesses called by the Respondent lied under oath or that Respondent introduced fabricated documents into evidence. To the extent that the judge thought that the Respondent's counsel introduced fabricated documents into evidence at the hearing, he could have referred the Respondent's counsel to the investigating officer for possible disciplinary proceedings pursuant to Sec. 102.177(e) of the Board's Rules and Regulations.

[4] We shall modify the judge's recommended Order to conform to the violations found. We shall also substitute a new notice in conformity with the Order as modified.

[5] All dates are 2005, unless otherwise noted.

[6] Smith was on medical leave at the time.

[7] This flyer, introduced by the General Counsel, includes an annotation that it was posted on March 28.

bulk of their testimony on this issue describes the tone of the letter, rather than the letter's actual contents. Smith and Henderson each resorted to similar descriptions such as that the signed, small print letter was "pretty negative," and "very harsh" and that Branecky was "really mad." Third, their testimony contains admissions that their recollections were imprecise. Henderson admitted reading the letter quickly, conceded that "I can't remember exactly how it goes," and qualified her recollection of the letter as being "something about" the details she attempted to recollect. Smith similarly qualified his description of the content of the letter as being "something to that effect." Thus, they testified primarily about how they perceived the letter and only secondarily about the actual contents of the letter. Neither could recall the exact date they saw the letter, and the imprecision of their recollection is reinforced by Henderson's claim that the offending letter appeared with a document posted after Smith claims to have moved away. In this context, we find that, although credited, these witnesses' summary claims, that Branecky had written that he would not tolerate union activities or that these activities would be dealt with, cannot be disentangled from the witnesses' admittedly vague or impressionistic accounts. We agree with the Respondent that the evidence is insufficient to sustain a violation of Section 8(a)(1).[8] Consequently, we dismiss the allegation.

2. We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by threatening its employees that wage raises and bonuses would be withheld in an effort to discourage support for the Union. Employee Silvia McMullen testified that on February 11, she attended a meeting conducted by Manufacturing Manager Pat Stellute. McMullen testified that Stellute showed the assembled employees an antiunion video, and afterwards made various comments about the Union and opened up the floor to questions. McMullen stated that someone asked a question about pay and bonuses, and that Stellute responded by stating that there would be no more bonuses or pay raises as long as the Union was getting in because they needed to make sure that the Union did not get in. She also testified that bonuses were usually granted in February, but they had not been granted as of February 11.

The Board has long held that an employer violates Section 8(a)(1) if it advises employees that it will withhold wage increases or accrued benefits because of union activities. *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980); *Earthgrains Baking Cos*., 339 NLRB 24, 28 (2003), enfd. 116 Fed. Appx. 161 (9th Cir. 2004). In this regard, the judge credited the testimony of McMullen, and thus found that Stellute specifically informed employees that there would be no more bonuses or pay raises as long as the Union was trying to get in. This threat clearly places the blame on the Union for the employees' not receiving a pay raise or bonus, and is unlawful.

The judge discredited the testimony of Stellute, Manufacturing Manager Vance Meak, and Supervisor Brenda Miller, all of whom testified that no question about wages and bonuses was asked. Despite this testimony, the Respondent contends in its exceptions that it was reasonable for Stellute to assume that any questions asked at the meeting sought answers about the future, in the event the Union won an election, and not about the present time during the campaign. In addition to being inconsistent with the testimony of its witnesses, the Respondent's contention does not withstand scrutiny. It is undisputed that by February 11 employees had already been given their yearly pay increases, but they had not been given their bonuses. The Respondent asserts that Branecky had previously announced that the bonus recommendation had been sent to the Respondent's corporate headquarters for approval. While this may be true, when Stellute spoke with the employees, headquarters had not yet acted. Therefore, it reasonably would be understood that any question about bonuses related to present concerns and not some hypothetical future time.[9] Further, regardless of what may have prompted the employee's question, the credited evidence as to Stellute's answer shows that it was broadly stated and not limited to what might occur in the event that the Union won the representation election.

3. We also agree with the judge that the Respondent violated Section 8(a)(1) of the Act by promulgating and enforcing a change in its work rule pertaining to the use of break rooms by employees in order to discourage their union activities. The Union's organizing effort began in August 2004. The following February, employees began signing union authorization cards at the Respondent's facility. In March, employee McMullen attended a team meeting conducted by her supervisor, Brenda Miller. McMullen testified that, during this meeting, Miller informed employees that they would not be allowed to go to other break areas, but that they had to stay in their own work areas. McMullen stated that Miller gave no explanation as to the reason for the change in the rule. McMullen testified that this was the first time any super-

[8] As a result, we need not pass on the judge's comments concerning whether the exhibit purporting to be the letter posted next to the unfair labor practice charge was fabricated.

[9] The approval came from headquarters in March and an announcement on the granting of bonuses occurred on March 15, when Branecky sent a letter to all employees announcing the distribution of performance pay.

visor had placed such a restriction on the use of breakrooms and that, prior to Miller's announcement, employees had been allowed to go to any breakroom in the plant, so long as they did not overstay their break period. There had been no restrictions placed on where employees could take breaks.[10]

The Board has held that an employer violates Section 8(a)(1) by instituting a rule preventing employees from taking their breaks in a certain breakroom in order to prevent them from engaging in union activity. *Miller Group, Inc.*, 310 NLRB 1235, 1238 (1993), enfd. mem. 30 F.3d 1487 (7th Cir. 1994). Here, McMullen's credited testimony,[11] that Miller told employees that they would not be allowed to go to other break areas, establishes the promulgation of a new rule, which placed restrictions on the use of breakrooms. There had been no such restrictions on the use of breakrooms before the Union campaign. McMullen testified that she had previously been allowed to use breakrooms in the staple area as well as filament area of the plant, and that no prior permission was required. This evidence supports the judge's conclusion that Miller's rule change was discriminatorily motivated and was intended to undermine organizational activities and restrict those employees who were engaged in Section 7 activity. Indeed, the timing of the Respondent's rule change indicates a nexus between the rule and the organizing campaign. The rule change came in the midst of the Respondent's antiunion campaign, coinciding with the Respondent's March 15 letter to employees that it was "time to end the union issue and put it behind us," and the Respondent's unsolicited instruction to employees on how to get their authorization cards back.[12] See *Dilling Mechanical Contractors,* 318 NLRB 1140, 1144–1145 (1995), enfd. 107 F.3d 521 (7th Cir. 1997) (employer violated Sec. 8(a)(1) by instituting, in response to an organizing campaign, a rule that breaks could be taken only in employees' immediate work area). See also *Southern Pride Catfish*, 331 NLRB 618, 625 (2000) (employer violated Sec. 8(a)(1) by creating a new rule restricting breaks in response to an organizing campaign).

[10] McMullen's testimony as to breakroom usage was corroborated by the testimony of employees Smith and Henderson. In addition, the judge relied on evidence that Supervisors Miller and Gayle Dennis, and Manufacturing Manager Judith Sanford all conceded that employees had previously been allowed to take breaks anywhere in the plant.

[11] The judge discredited Miller's testimony that she never told employees that they were assigned to a specific break area, or that they had to stay in their own area.

[12] The fact that McMullen subsequently moved to a different area of the plant does not preclude a finding on the merits or a remedy for the violation which had also been directed to other employees on Supervisor Miller's team.

4. We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Lucy Henderson because she joined, supported, or assisted the Union, and in order to discourage such activities. Henderson has been employed by the Respondent as a production operator first class for 14 years. She works in the spin draw department, located on the filament side of the plant, under the supervision of Gayle Dennis. Before the event in question, Henderson had never been disciplined and had won numerous awards for her service.

Henderson actively supported the Union from the start of the campaign. She solicited employees to attend union meetings and hosted union meetings at her home on numerous occasions. Additionally, Henderson has been engaged in a long-term relationship with Donald Smith, the acknowledged leader of the union effort at the plant. Henderson's and Smith's relationship was well known throughout the plant by managers and employees alike. In or about the middle of January, Henderson was called to a one-on-one meeting with Dennis. Dennis informed Henderson that she had been instructed to talk to each employee about the Respondent's position on the Union. Henderson told Dennis not to waste her breath because she had already made up her mind. Her statement effectively ended Dennis' antiunion presentation, and the meeting was terminated.

Henderson testified that she was called into a meeting with Dennis on March 11, where she was told that she was being written up. Henderson asked why and Dennis told her that she had been out of her area. Henderson asked Dennis what she meant by saying that she was out of her area. Dennis responded by telling her that she had been in the beaming breakroom. Henderson told Dennis that she had been going to the beaming breakroom for the past 9 years. Dennis replied that it had been brought to her attention that Henderson was out of her area and that Dennis had to do her job. Dennis did not tell Henderson who reported her for being out of her area. Henderson asked Dennis if anyone had said anything about her having interfered with his or her job and Dennis said no. Dennis asked Henderson to sign the writeup and Henderson refused. Dennis said that Henderson could make a comment on the writeup and she wrote most of Henderson's comments on the writeup with the exception of the profanity. Dennis told Henderson that the writeup would go in her file. Finally, Henderson stated that when she asked Dennis where her designated area was, Dennis said she would get back to her. Dennis never did so.

The Respondent's disciplinary policy is referred to as a "Corrective Action Policy." Dennis issued Henderson a

"Supervisory Counseling," which is the first disciplinary step under the policy. The typewritten portion of Henderson's supervisory counseling form states: "Talked to Lucy Henderson on 3/11/05 about being out of her assigned area. Lucy has been instructed not to leave her assigned area to visit other operators." The handwritten portion of the supervisory counseling corroborates Henderson's account of the March 11 meeting with Dennis. It refers only to Henderson's being in the beaming breakroom. Henderson stated that, prior to March 11, she had never been disciplined for being out of her work area, and she had never been informed that she was assigned to a designated breakroom. Henderson also stated that a supervisory counseling has an impact on promotions as well as the system under which employees are awarded points in the Respondent's safety recognition program.

In response to Henderson's testimony, Manufacturing Manager Judith Sanford testified that Supervisor Bill Jordan reported the alleged incident to her. She stated that Jordan had been informed by Supervisor Donna Guy that Guy had observed four employees, including Henderson, outside their work area, in the processing area.[13] She stated that Jordan sent an e-mail to the supervisors, and she followed up on Jordan's e-mail by sending out another e-mail directing the supervisors to issue supervisory counselings to the employees named in Jordan's e-mail.[14]

Dennis testified that upon receipt of the e-mail from Sanford, she talked to Guy. However, she did not ask Guy to explain what had happened. Dennis stated that she simply asked Guy why she had not informed her (Dennis) that the employees were in her area. Thereafter, she issued the supervisory counseling to four employees, including Henderson. Dennis testified that the supervisory counseling was not issued because Henderson was in the wrong breakroom; rather it was issued because Guy told her that Henderson was in the rewinding area.

In finding that the Respondent violated Section 8(a)(3) and (1), the judge credited Henderson's testimony, found the Respondent's witnesses to be inconsistent and therefore incredible, and drew adverse inferences against the Respondent. The Respondent excepts to the entirety of the judge's analysis. We find that the Respondent's exception is without merit.

To establish a violation of Section 8(a)(3) and (1) under *Wright Line*,[15] the General Counsel must make an initial showing that the employee's union activity was a motivating factor in the employer's adverse action against that employee. To meet that burden, the General Counsel must show that the employee engaged in union activity, that the employer was aware of that activity, and that the employer had animus toward protected conduct. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). If the General Counsel meets this initial burden, the Respondent must prove that it would have taken the same action even if the employee had not engaged in union activity.

In this case, the judge properly found that the General Counsel met his initial burden of proving that protected conduct was a motivating factor in the Respondent's discipline of Henderson. The facts set forth above demonstrate that Henderson engaged in union activity. With regard to the Respondent's knowledge of Henderson's involvement in the union campaign, the judge found,[16] and we agree, that the Respondent knew that Henderson supported the Union.[17] Further, Henderson's disciplinary warning occurred against the background of unfair labor practices showing that the Respondent bore animus toward the union activities of its employees. See *Amptech, Inc.*, 342 NLRB 1131, 1134 (2004), enfd. 165 Fed.

[13] The other three employees were: Trena Brotherton, Darlene Lester, and Gladys Rhodes.

[14] Sanford acknowledged that this was the first time that she ever issued such an e-mail directing the issuance of discipline. She also admitted that she had been paying close attention to union activity in the plant and that she never talked to Guy to confirm the facts prior to the issuance of the discipline.

[15] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

[16] The judge credited Henderson's testimony while rejecting the assertions made by each of the Respondent's witnesses in regard to this matter.

[17] Circumstantial evidence supports the judge's finding that the Respondent knew or suspected that Henderson was involved in prounion activity. That evidence included a one-on-one meeting during which Henderson told Dennis not to "waste your breath" when Dennis tried to tell her the Respondent's position on the Union. The judge also agreed with the General Counsel that Henderson's close relationship with Donald Smith, Henderson's fiancée, "warrants an inference that the Respondent unlawfully discriminated against Henderson." Though that description truncates the standard, we agree that the discharge (or discipline) of an employee who is not known to have engaged in union activity, but who has a close relationship with a known union adherent may, in appropriate circumstances, give rise to an inference of discrimination based on suspicion of union activity. See *Permanent Label Corp.*, 248 NLRB 118, 136 (1980), enfd. 657 F.2d 512 (3d Cir. 1981). See also *Martech MDI*, 331 NLRB 487, 488 (2000), enfd. 6 Fed. Appx. 14 (D.C. Cir. 2001) (employee's close relationship with group of workers whose union activities were known to employer, employer's anti-union animus toward other members of group, and timing of layoffs supported inference that employer also suspected that employee was a union supporter); *Three Sisters Sportswear Co.,* 312 NLRB 853, 872 (1993), enfd. mem. 55 F.3d 684 (D.C. Cir 1995) (employee's close relationship to coworker who was union adherent and employer's constant admonishment of that employee for violating its unlawful instruction not to talk to the coworker, while accompanying the admonishment with reference to the coworker's union activities, supported finding that employer believed that employee was also a union adherent).

Appx. 435 (6th Cir. 2006). These unfair labor practices include the Respondent's threat that wages and bonuses would be withheld as long as the union was trying to get in and its change in breakroom policy. The Respondent's conduct was clearly motivated by its desire to bring the union campaign to an end.

In rebutting the General Counsel's initial showing, an employer cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place in the absence of protected conduct. *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). We agree with the judge's conclusion that the Respondent has failed to demonstrate that the disciplinary warning would have been issued absent Henderson's union activity. The evidence reflects the pretextual nature of the Respondent's explanation of the supervisory counseling.

The judge credited Henderson's testimony that she never talked to Guy about being in the processing area or being out of her area. Guy did not testify and, thus, did not attempt to refute Henderson's testimony. Moreover, the Respondent did not call Jordan as a witness to sponsor the introduction of his original e-mail message received into evidence. The e-mail that Sanford sent to Dennis instructed her to issue written warnings to four employees whom Guy had asked to leave the processing area on different occasions. However, the record evidence reflects that Dennis testified that upon receiving the e-mail, she spoke to Guy, who told her that Henderson had been in the rewinding area. Thus, in an effort to address this conflicting testimony by the Respondent's witnesses, the judge properly drew an adverse inference against the Respondent for failing to call Guy and Jordan to testify in order to clarify these conflicting versions.[18] The record is effectively silent as to when Henderson was allegedly seen out of her work area, where she was, and what, if anything, was said to her about being out of her work area. Further, Dennis acknowledged that Guy never informed her that she (Guy) ever told Henderson to leave either the processing or rewinding area.

Moreover, Henderson's credited testimony as to the substance of the March 11 meeting, coupled with Dennis' transcription of Henderson's comments during the meeting, show that Dennis wrote Henderson up for going to the beaming break room, an area where Dennis generally acknowledged that Henderson had a right to take her break. Dennis also acknowledged that Henderson was an excellent employee with no record of any prior disciplinary conduct.

[18] See *Hialeah Hospital*, 343 NLRB 391, 393 fn. 20 (2004).

Contending that Henderson was disciplined for being out of her area and not in a breakroom, the Respondent argues that it disciplined three other employees, including a known opponent of the Union, for visiting employees in undesignated work areas on the same day that Henderson was disciplined. The Respondent, however, failed to show the specific circumstances that gave rise to the discipline of these other employees, which the General Counsel did not allege to be unlawful, or what transpired during their one-on-one counselings with Dennis. None of these employees testified and, as mentioned above, neither did Guy and Jordan.

In any event, the judge found, and we agree, that Henderson was disciplined specifically for being in the beaming breakroom, where she had a right to be, not for visiting employees outside her assigned work area. Consequently, the Respondent's discipline of three other employees on the same day for a different reason than that for which Henderson was disciplined does nothing to justify the Respondent's discipline of Henderson.[19] Accordingly, as the Respondent has failed to show that it would have disciplined Henderson even if she had not engaged in union activity, we agree with the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by issuing a disciplinary warning to Henderson.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Invista, Salisbury, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the remaining paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

[19] The Respondent also contends that other employees had been disciplined for visiting employees in work areas prior to the Union's organizing efforts. Since we agree with the judge that Henderson was unlawfully disciplined for being in the beaming breakroom, a nonwork area where she had a right to be, the Respondent's contention that other employees previously had been disciplined for different conduct is of little consequence.

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that wage raises and bonuses would be withheld in an effort to discourage your support for Teamsters Local 71, affiliated with International Brotherhood of Teamsters.

WE WILL NOT promulgate and enforce a change in our work rule pertaining to the use of breakrooms by you in order to discourage your union activities.

WE WILL NOT issue a supervisory counseling or other written warning to you because you joined, supported, or assisted Teamsters Local 71, affiliated with International Brotherhood of Teamsters, or in order to discourage such activities.

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 the rule promulgated by Brenda Miller pertaining to the use of breakrooms by employees in order to discourage their union activities.

WE WILL, within 14 days from the date of this Order, remove from our files the unlawful supervisory counseling given to Dorothy (Lucy) Henderson and any reference thereto, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the supervisory counseling will not be used against her in any way.

INVISTA

Jasper Brown, Esq., for the General Counsel.
Lovic A. Brooks III, Esq. (Brooks Law Firm, LLC), of Columbia, South Carolina, for the Respondent.
Matthew S. Emmick, of Charlotte, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Salisbury, North Carolina, on June 27, 2005. The charge was filed March 17, 2005,[1] by Teamsters Local 71, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union), against Invista (Respondent), an amended charge was filed on May 18, and the complaint was issued on May 25, 2005. The complaint alleges that Respondent (1) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by threatening its employees (a) by letter in mid-March 2005 with unspecified reprisals in retaliation for their engaging in union activity, and (b) on February 11 that wage raises and bonuses would be withheld in an effort to discourage their support for the Union, and in early to mid-March 2005 by promulgating and enforcing a change in its work rule pertaining to the use of breakrooms by employees in order to discourage their union activities, and (2) violated Section 8(a)(1) and (3) of the Act by issuing a written warning to employee Lucy Henderson on or about March 11 because she joined, supported, or assisted the Union, and in order to discourage such activities. Respondent denies that it violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and Respondent,[2] I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacturing of polyester resins and fibers at its facility in Salisbury, North Carolina. It annually (a) purchases and receives at its Salisbury facility goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina, and (b) sells and ships from its Salisbury facility products valued in excess of $50,000 directly to points outside the State of North Carolina. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent's facility operates 24 hours a day. It has approximately 600 maintenance and production employees at the facility. The facility occupies about 500 acres and it has about 50 acres under roof.

Matthew Emmick, who is an organizer with the Union, testified that Respondent's employee Don Smith telephoned him in July 2004; that subsequently he spoke with Donald Smith at the home of Dorothy (Lucy) Henderson where he lived; that in August 2004 he held meetings with the various crews of Respondent's employees; that in September 2004 he and about 10

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

[2] Respondent's unopposed motion to correct the transcript to reflect that the correct spelling of "Gail" (and not "Gayle" as in the transcript) Dennis be, and it is hereby granted.

of Respondent's employees, including Donald Smith, handbilled at Respondent's gate; that several members of management came out and saw the handbillers; that, according to employees, Judith Sanford came out, took a handbill and went back into the facility;[3] that there were meetings with employees in October, November, and December 2004, and the employees indicated that they wanted to wait until after the holidays; that the meetings started again in January 2005, and in February 2005 employees began signing authorization cards at the Respondent's facility when they were not working; that Smith's girlfriend, Henderson, helped sign up employees in the plant in February and March 2005; that on her breaktime Henderson went to various break areas to talk to workers; and that when Henderson received a disciplinary warning she contacted the Union which filed an unfair labor practice charge with the National Labor Relations Board. On cross-examination, Emmick testified that the handbilling, which occurred on Highway 70, could not be seen from the plant but people did come down in a car to watch the handbilling.

Donald Smith, who worked for the Respondent for 16 years, testified that he contacted Emmick in the summer of 2004; that he participated in the union campaign; that he has been engaged to Henderson for 4 years, and they have been dating for 10.5 years; that he visited her regularly and ate lunch with her; and that their relationship is known in the plant.

In the fall of 2004, Supervisors Tommy Ellis and Gordon Hudson came into the area where Donald Smith worked to make an antiunion presentation to the seven employees in that area. Smith testified that he told Ellis and Gordon that he had already made up his mind that he was for the Union.

Henderson testified that Manager Sanford commented about Henderson's longstanding relationship with Smith, who she has been dating for 10 years and been engaged to for 4 years; that during the union organizing drive Emmick came to her house to discuss the Union and the steps the employees would be taking; and that she talked to employees about the Union, informing them when there were meetings for the various crews. On cross-examination Henderson testified that she did not wear union buttons or union paraphernalia during the organizing drive and her union activity consisted of Emmick and employees meeting in her home and her informing employees when the Union would hold meetings.

In mid-January 2005, Henderson attended a meeting with her supervisor, Dennis. Henderson testified that the employees were called into the coordinator's office for a one-on-one; that Dennis told her that the Union would probably confront her about signing a union authorization card and she should be careful about signing a card she could not get it back; that she interrupted Dennis and told her that she had already made up her mind; that Dennis told her that she had to do her job and she was told to talk to each employee; that Dennis said "here's the paper, if you want to read it, if not, sign here" (Tr. 52); and that she "signed a little initial paper stating she talked to me" (Tr. 52).

Dennis testified that she had a one-on-one conversation with Henderson on the topic of the Union; that she did not know the date or even the month of the conversation; that she had a newsletter from Tony (Branecky) and she called all of her operators in one-on-one just to share the knowledge; and that Henderson, during their meeting, said that she was "not giving anybody none [sic] of my money" (Tr. 176). On cross-examination, Dennis testified that Henderson did not cut her off and tell her that she had already made up her mind; that she did not recall Henderson saying anything else during this meeting; that she did not know that Henderson supported the Union; and that during these one-on-one meetings she told the employees that she was opposed to the Union but she did not recall Henderson telling her that she supported the Union.

With respect to supervisory counselings, Respondent's employee Silvia McMullen testified that in 2004 she was called into the office, her supervisor read what had been written, her supervisor asked her to sign it, and her supervisor told her that this would go into her, McMullen's, folder. On cross-examination McMullen testified that she received the supervisory counseling for taking her safety glasses off to clean them; that she has received a corrective action and it is different in that with a corrective action "you can almost get fired" (Tr. 45); and that the supervisory counseling she received was not a verbal warning, the supervisor had written it out, she read it, as directed she signed it, and she was told that it would go into her folder, the one the supervisor has.

On February 11, McMullen attended a meeting in Respondent's training room. McMullen testified that Pat Stellute, who is one of Respondent's managers, conducted the meeting; that about 20 employees were present; that first the employees watched an antiunion film; that after the film, Stellute told the employees that PillowTex was sold because of the union; that someone, she did not recall who, asked about the pay and bonus because the employees, who usually get their bonus in February, had not received their bonus yet; and that although the employees had been told that there would be a bonus, Stellute "said that there would be no more bonuses or pay raises as long as the Union was getting in, because they would need, you know, everything to make sure that the Union didn't get in. Necessary [sic] that they didn't get in." (Tr. 36.)

On cross-examination, McMullen agreed with the attorney for Respondent that the affidavit she gave to the Board does not refer to the fact that someone asked Stellute about the pay and bonus. McMullen testified that her supervisor, Barbara Miller, was at this meeting; that she did not see Manager Vance Meak at this meeting; and that her affidavit indicates that this meeting occurred on February 11. On redirect, McMullen testified that on pages two and three of her affidavit to the Board she did in fact refer to a question being asked by an employee during this meeting. There was no recross.

Meak, who is Staple Manufacturing superintendent, testified that he reports to Staple Manufacturing Manager Stellute; that he attended eight meetings in February 2005 where a video was shown on the topic of Unions; that Stellute held these meetings; that it was intended that all of the Staple employees attend one

[3] Counsel for the General Counsel indicated that this was background and it was not being offered for the truth of the matter asserted with respect to the identity of the individual who took the handbill and went back into the plant.

of these eight meetings; that the meetings were all similar in that they were 30-minute meetings, the primary purpose was to show the 20-minute video, and Stellute gave a prelude and later took questions; that he did not specifically recall Miller's D-crew meeting; that he did not recall any questions being posed about pay increases or bonuses during the union campaign; that Stellute did not "make the statement, in any of the meetings that . . . [he] attended, that pay increases or bonuses, or both, would be held up or withheld during the course of the Union campaign" (Tr. 136); that the employees' last wage increase was in the fall of 2004; that the employees received a bonus in March 2005; that before Stellute's February meeting he thought that Tony Branecky, who is the site manager, mentioned the bonus in the quarterly plant-progress meeting held for the whole plant; and that Branecky said that the bonus had been submitted to headquarters in Wichita and he was waiting for approval. On cross-examination, Meak testified that basically the video was about signing a union authorization card.

Stellute testified that he held eight meetings in which he showed a video to employees; that there were two for crew A, two for crew B, two for crew C, and two for crew D; that the meetings were held on February 9, 10, 11, and 14; that the form of the meetings was identical; that he told the employees the purpose of the meeting, he showed the video about signing union authorization cards, he summarized the purpose of the meeting, and he fielded questions from the employees; that he did not remember any questions being asked other than about benefits; that he did not recall receiving any questions about pay raises or bonuses during the union campaign; that he did not make any statements about a union campaign's impact on wages or bonuses; that he absolutely did not tell employees that a wage increase or a bonus would be held up because of the pending union campaign; that he did tell employees that once collective bargaining started, then the Company had to negotiate through that and until that contract was agreed to there may not be a raise or bonus or anything else because everything is subject to negotiations; and that he is clear in his recollection that there was no discussion about pay and benefits in the context of being held up by the campaign.

On cross-examination, Stellute testified that he told employees that as far as collective bargaining was concerned, they may not receive a raise during the period that the Employer was negotiating; that he did not tell employees that if they had a regularly scheduled wage raise that had been going on for a number of years, despite the bargaining, they would be entitled to that regularly scheduled pay raise; that he told employees that there is a possibility that they would not get these raises because the Union was attempting to get something else, such as dues checkoff; that he could not say he did or did not tell employees that they may not get any bonuses because the Union may be attempting to get something else; that he did bring up the issue of pay raises in terms of collective-bargaining negotiations; that no one questioned him about his comments on raises; that he did not recall anything about bonuses; that the only question he recalls "why do our benefits stink . . . . why are we paying more and getting less for our medical benefits" (Tr. 150 and 151); that he talked about plants that had been closed which had been unionized; that he only discussed card signing and collective bargaining; that he did tell the employees that during the period of negotiations, they may not get a raise; that he said, "[D]uring the bargaining period, raises, bonuses—I don't remember if I actually said anything about bonuses, but raises wouldn't happen until a contract is negotiated" (Tr. 157); that he told employees that during the negotiation process, the employees may not get a pay raise, may not get any raises; and that he did not explain or address that comment in any way.

On redirect, Stellute testified that benefits and insurance were a hot topic in February 2005 because they were paying more and getting less in medical insurance; that they received word on the bonus in early March and the bonus was paid; that the pay increase and bonus took place during the union campaign; and that Branecky held the plant progress meeting in January 2005.

Miller testified that she and her crew attended a meeting in which Stellute showed a video in late February; that Meak was present; that "[t]he meeting consisted of a video showing of a sign of cards" (Tr. 118); that there were a few questions afterwards and she recalled just one, namely about insurance; that she did not recall any questions about pay increase or bonus; that "[n]o" (Tr. 118) she did not "recall . . . [Mr.] Stellute making—did . . . Stellute make any comment about pay increases or bonuses" (id.); that "[n]o" (Tr. 119) "Stellute [did not] make any statement that bonuses or pay increases would be withheld during the course of the Union campaign" (Tr. 118); that McMullen worked for her at the time of the meeting; and that the meeting with Stellute and the video took place in Staple team room 1 and she was certain of this. On cross-examination, Miller testified that while she remembered one question being asked at this meeting, there may have been other questions asked; that she was in the meeting the entire time; and that bonuses were not a concern of the employees at that time. On redirect, Miller testified that the bonuses were not a concern at that time because "[w]e already had a plant progress meeting prior to that stating that the bonus had been submitted to Wichita and we . . . [were] waiting on word then and we would receive it by the end of February or the first of March" (Tr. 132); that the bonus was paid about the middle of March 2005; that employees are notified in the fall or the first part of winter when they are going to get a pay increase; that "[y]es . . . ." (Tr. 132) a pay increase did "happen in the Fall or the first part of Winter of 2004" (id.); and that the wage increase was not a topic of discussion 2 months later.

Donald Smith testified that he did not know that Respondent had a breakroom policy and there was never a designated breakroom while he was there.

McMullen testified that before March 2005, employees were allowed to go on break wherever they wanted to go as long as they were back on time; that employees were not restricted to their particular breakroom; that she attended a meeting held by Supervisor Miller in March 2005 where the subject of breakrooms came up; that Miller told McMullen and the rest of "D" crew that they would not be able to go to other breakrooms and they had to stay in their own area; and that no other supervisor had told her this before. On cross-examination, McMullen testified that the facility is huge, there are two separate parts, namely the staple side and the filament side; that in the past she

went from the staple side where she worked to the filament side during her breaks and she did not need permission to do this; and that she was never told about safety issues relating to going into a different area as far as response time.

Miller, who is the supervisor of almost 30 employees on crew D on the Staple side, testified that on February 14 she held a meeting with her employees after she had observed a couple of her operators crossing over "into the Staple department" (Tr. 122); that she wanted to let her employees know that they should not go to the other department; that she did not tell her employees that they had a set break area that they had to use or that they had to stay in their own area but she did tell them that if they needed to go across to the filament side for some reason, she would like to know; that she wanted to know for safety reasons or if something happened and she needed someone; and that Respondent has different evacuation routes for the staple and filament areas of the plant.

On cross-examination, Miller testified that she told employees that they were not to go over to the filament area and that was a safety concern because there are different safety rules in certain areas; that she told her employees not to go to the filament side in the work area but she did not tell her employees not to go to the break area on the filament side; that at this meeting employees were told to tell her if they needed to go over there so she would know; that there had never been any restriction on what break areas employees could use; that this was the first time that she told employees to inform her if they were going to a break area on the filament side; that she was not told to tell the employees this but rather she did it on her own because she saw one of her operators staying on the filament side for 1 hour; and that she did not discipline or issue a supervisory counseling to the operator because his machines were down but she decided to tell all of her employees that they should not be over in the filament department visiting; and that she did not put in writing the requirement that employees inform her if they were going to the filament department.

General Counsel's Exhibit 2 reads, as here pertinent, as follows:

> SALISBURY HUMAN RESOURCES POLICY MANUAL
> Section: EMPLOYEE ADMINISTRATION
> Subject: *CORRECTIVE ACTION*
> Effective Date: 1/1/2000
> *PRINCIPLE:*
>
> Each member of supervision must provide the kind of climate that stimulates employees to give their best efforts. However, when an employee fails to act in a manner consistent with the plant's goals and objectives, the immediate Supervisor must make reasonable efforts to correct the undesirable behavior. Depending on the severity of the problem, this is done through the following steps: Supervisory Counseling, Written Corrective Action and Final Corrective Action.
>
> . . . .
>
> *Policy:*
> 1. Types of Corrective Action
>
> a) Supervisory Counseling
>
> 1) This step normally involves a problem in the early stages of undesired behavior and generally involves pinpointing a behavior, which if continued, would call for further corrective action.
>
> 2) The immediate Supervisor records the discussion in the department file and/or on the employee's performance observation sheet.
>
> 3) The immediate Supervisor makes the employee aware of the availability of EAP services and, if requested by the employee, arranges for an appointment with the EAP Administrator.
>
> 4) Normally, a supervisory counseling does not require prior approval; however, the immediate Supervisor should advise the Unit/Area Superintendent of the action.
>
> b) Written Corrective Action
>
> 1) This step generally results from repeated or serious deviations from desired behavior.
>
> . . . .
>
> 4) A copy of the Corrective Action Form and corrective action plan is retained in the department file and the employee's personnel file in Human Resources.

Henderson testified that she received a supervisory counseling on March 11; that before March 11 she had not received a disciplinary warning in the 14 years she has worked for the Company; that her supervisor, Dennis, called her into the coordinator's office in her department; that Dennis locked the door after she, Henderson, entered the room; that just she and Dennis were present for this meeting; that Dennis told her that she had to write her up for being out of her area; that she asked Dennis what did she mean by out of her area and Dennis responded beaming break area; that she told Dennis that she had been going back to the beaming break area for 9 years and in fact Dennis herself goes back there; that Dennis said that it had been brought to her attention that Henderson was out of her area and she, Dennis, had to do her job; that she told Dennis "this is bullshit" (Tr. 57); that Dennis said, "[L]ook, I'm just doing my job" (id.); that she asked Dennis if someone had said that she interfered with someone on their job and Dennis said nothing like that was said; that she refused to sign the write up; that Dennis asked her if she had been approached by another supervisor about this and she told Dennis "no" (Tr. 58); and that Dennis wrote on the document but she did not see what was written since she refused to sign it. The printed portion of General Counsel's Exhibit 3 reads as follows:

> Supervisory Counseling
>
> Talked to Lucy Henderson on 3/11/05 about been [sic] out of her assigned area. Lucy has been instructed to not leave her assigned area to visit other operators.
> Employee _____

The following handwriting also appears on the document:

> Lucy stated that she has always went [sic] to the beaming breakout as long as K18 has been running. Why now is it a problem? She does not hold up any operators from doing the job. A breakroom is a breakroom! What is the

problem. Lucy stated that she has never been asked to leave the area. [breakroom]

Henderson further testified that before this she was never told that the beaming break area was a break area to which she could not go; that Dennis told her that it did not matter whether she signed the form or not, it was going into Henderson's file; that, based on her reading of the document at the trial herein, the comments that Dennis wrote on the form reflect what she, Henderson, said, except Dennis left out "this is bullshit" and Henderson's question to Dennis, namely where is my designated area; that Dennis did not answer this question but indicated that she would get back to her on it; that Dennis never did get back to her to indicate where her designated area was; that before March 11 she had never been told that she had a designated break area; that she had never been issued any type of discipline for being out of her work area; and that the supervisory counseling she received can have an impact on her possibility for promotion within the plant in that the bid form for jobs in the plant, General Counsel's Exhibit 6, contains the following:

ELIGIBILITY REQUIREMENTS:

Operators from **all units and pay classifications** may apply as long as the following criteria are met:

. . . .

(2) Not have received a written corrective action or final corrective action within the last (12) months.

Additionally, Henderson testified that under Respondent's cash awards safety program, as described in General Counsel's Exhibit 7, she would be penalized 10 points for receiving a counseling action for unsafe behavior; that she won the safety award for the past 2 years; that she won several perfect attendance awards; that she won an award for cost reduction; and that she has always received excellent reviews at the end of the year and this counseling can affect her review.

On cross-examination, Henderson testified that three other employees were counseled on March 11, namely Darlene Lester, Trina Brotherton, and Gladys Rhodes; that she received the supervisory counseling for being in the wrong break area, not for the same thing the other three employees were counseled for; that the original Board charge included Lester but the amended charge does not include Lester, nor does the complaint; that with respect to General Counsel's Exhibit 3, which she did not see at the time, Dennis never said, as printed on the form, "Lucy has been instructed to not leave her assigned area to visit other operators"; that Dennis told her that she had to write her up for being out of her designated area in that she was in the beaming break area; that her only familiarity with the corrective action policy, General Counsel's Exhibit 2, is from what supervisors have told her; that with respect to an end of the year review, you have to maintain a certain number of points to receive an above average rating and the supervisors give the employee a list of how many points are taken away based, apparently at least in part, on what is in their file; that if she was competing with another employee for a job, it was a close call between them, and the other person had a perfectly clean record, she would lose the job to the other person because of the writeup or supervisory counseling she received on March 11; that the fact that on March 11 she was told that she was out of her designated area meant to her that "[u]ndesignated area means you're out of your area which is not a safety area" (Tr. 79); that she did not appeal the supervisory counseling because the other employees had unsuccessfully appealed to Superintendent Sanford while she was at home; that Dennis was supposed to talk with whoever complained and get back to her; that Dennis told her to continue going back to that breakroom and she told Dennis that she would not because she felt that she was being set up; that she asked Dennis what her designated area was; that Dennis asked her to sign the supervisory counseling before Dennis wrote on it; and that she did not ask to see what Dennis wrote on the form.

Thomas Halley, Respondent's manager of human resources (HR) at its Salisbury facility, testified that Respondent's corrective-action policy is on the internet for people to look at; that a supervisory counseling is a discussion that the supervisor has with the employee about some kind of behavior that they would like to see changed; that the supervisor usually documents it in performance notes which are not in the official personnel file but are usually kept by the supervisor; that if corrective action under the policy is necessary, "normally" (Tr. 95) the supervisory counselings do not "come into play" (id.); that he has never terminated anyone for a supervisory counseling; that "typically" (Tr. 96) job opportunities would not be impacted in any way by a supervisory counseling; that the written corrective action and final corrective action referred to in the job opportunity application, General Counsel's Exhibit 6, are defined differently in Respondent's policy than a supervisory counseling; that he did not "think her [Henderson's] supervisory counseling would be classified as unsafe behavior" (id.); that Respondent's solicitation/distribution policy, Respondent's Exhibit 2, is communicated to management personnel; and that the Respondent has a rule that worktime is for work and this comes from Respondent's solicitation/distribution policy. On cross-examination, Halley testified that supervisory counseling is the first step in Respondent's corrective-action policy; that while Respondent's corrective-action policy, paragraph 6(e) of General Counsel's Exhibit 2, specifies "[a]ll corrective actions as well as other performance indicators are retained for five (5) years in the respective personnel files," he thought that referred "mainly to written and final corrective actions" (Tr. 108); that the language in paragraph 6(e) does not make an exception for supervisory counselings but they would not be in the personnel files in HR; that supervisory counselings may be kept in the supervisor's employee personnel file; that a supervisory counseling could be a consideration in determining whether an employee is terminated; that a supervisory counseling could "remotely" (Tr. 109) affect an employee's upward mobility; that it is possible that if two employees were competing for a job, the fact that one of them received a supervisory counseling would be a consideration; and that he believed that before March 11 an employee has been issued a supervisory counseling for going to a breakroom outside the employee's immediate area but he did not have that information when he testified at the trial herein. On redirect, Halley testified that in practice, on a day-to-day basis supervisory counselings are not forwarded to HR for

placement in personnel files; that a supervisory counseling would be placed in the personnel file in HR when there are "[c]ontinual undesirable behaviors that lead to something more serious" (Tr. 113); and that generally Respondent does not expect employees to cross the hall, referred to as Hollywood and Vine, between the staple and filament areas.

Dennis, who is Henderson's supervisor in C-crew and spin draw which is on the filament side, testified that there is a clear distinction between the filament and Staple sides of the plant; that she supervises 43 employees; that Sanford is the manager in charge of the entire filament area; and that on March 11 she received an e-mail from Sanford, Respondent's Exhibit 4, which reads, as here pertinent, as follows:

> From: Sanford, Judith S
> Sent: Friday, March 11, 2005 2:18 PM
> To: Dennis . . . .
> Cc: Jordan, William
> Subject: RE: Operators out of their assigned work area
>
> Let's be very clear . . . . These operators need a documented supervisory counseling, if they have not received one already. If these operators are seen in another work area after TODAY, they are subject to a WCA. Remember the WCA is subject to my review prior to issuing. We are not conducting tea parties folks. This is work and they need to be in their work areas.
>
> -----Original Message-----
>
> From: Jordan, William
> Sent: Friday, March 11, 2005 1:26 PM
> To:. . . Dennis. . . .
> Cc:. . . Sanford, Judith S
> Subject: Operators out of their assigned work area
>
> All supervisors should have received communication about operators leaving their assigned work areas and visiting other departments. If you observe operators out of their assigned areas, please take immediate action to remove these operators from your area. Please report this to their supervisor for proper counseling.
>
> It had been reported that operators are leaving their assigned work area and visiting other areas. Donna on "C" crew has reported that she has asked Darlene, Trena, Gladys and Lucy to leave the processing area on different occasions.
>
> Mary on "B" has observed Dee Mills visiting in the processing area also.
>
> Please counsel these operators on requirements about not visiting other work areas.
>
> If this does not stop the off limit visiting, please go the next level of corrective action.
>
> Please monitor your area
> Thanks, Bill

Dennis further testified that after receiving the e-mails she spoke with Beaming Supervisor Donna Guy, who told her that Henderson was in the rewinding area; that the complaint did not concern any of the involved employees being in the break area but rather she was told that all of the involved employees were in work areas talking with other employees; that she then prepared the supervisory counselings for the employees who work for her, namely Darlene Lester, Trena Brotherton, Gladys Rhodes, and Henderson[4]; that she spoke to these employees individually; that sometime before her counseling Rhodes told her that she was against a union; that during her counseling session, Henderson said that she always went to the beaming break area and she did not hold up operators from doing their job, a breakroom is a breakroom, she had been using that break area since the A team came up, and she had never been asked to leave that break area; that her counseling did not concern the break area Henderson was using but rather it was just about her being out of her assigned area; that based on her conversation with Guy, it was her understanding that Henderson was talking to a rewinding operator who works right across the aisle from where Henderson works; that Henderson looked at what she wrote on the supervisory counseling; that she offered Henderson the opportunity to sign the counseling but she did not; that she did not tell Henderson that the supervisory counseling was going into her personnel file and it did not; that she put the supervisory counseling in the file on Henderson that she keeps in the filing cabinet in her office; that she did not send a copy of it to Halley or Mary Smith in HR since it is not a written corrective action; that an employee has the right to appeal a supervisory counseling but she did not know if Henderson appealed; and that she thought Brotherton appealed; that all four employees denied that they were visiting; and that prior to this she did not see nor was she told that her employees were visiting other employees outside their area when they were supposed to be working.

On cross-examination, Dennis testified that before this discussion she knew that Henderson had a longstanding relationship with Donald Smith, who she heard was trying to get the Union into the plant; that she did not think that Respondent's Exhibit 4 indicates that Donna Guy had spoken to the four involved employees about leaving the processing area on different occasions; that Respondent's Exhibit 4 does say that; that she did not indicate in her supervisory counseling to Henderson that Guy had asked Henderson to leave the area; that Henderson asked her what area she was referring to and she told Henderson that it was the rewinding area; that she did not refer to

[4] R. Exhs. 6, 5, and 7; GC Exh. 3, respectively. Dennis wrote the following on Respondent's Exhibit 6:

> Darlene stated that she was in the beaming area to get transports. She speaks to operators because she is a friendly person. She only goes to that area when asked. She only takes yard to where it needs to go, and gets transports or she would have to doft [?] in the floor! Darlene would like to talk [to] someone about this issue . . . [including] the person that is complaining.

On R. Exh. 5 Dennis wrote "Trena stated that she had not been in beaming since Judith saw her. Trena said that she has talked to Judith and apologized for the incident after the meeting on 3/10/05." And on R. Exh. 7 Dennis wrote "Refused to sign. Gladys would like to have feed back from the complaint because she never leaves the area. She did state that she does go to the area that the yarn has been sent. But does not visit! She is only doing her job. She said." None of the four supervisory counselings was signed by an employee. The printed portion of all four reads as follows: "Talked to . . . on 3/11/05 about been [sic] out of her assigned area. . . . has been instructed to not leave her assigned area to visit other operators."

the rewinding area in her supervisory counseling to Henderson; that Henderson asked who had seen her out of her area, and she told Henderson it was a member of management and she did not recall if she named Guy; that she did not indicate in the supervisory counseling that it was Guy; and that the gist of what was said during her conversation with Henderson included the following:

> And you told her that she was observed in the beaming breakroom and she . . . said to you that she had been going to the beaming breakroom as long as she had been there; and in fact, you had even gone to the beaming room.

Dennis further testified that the supervisory counseling was not for the breakroom but rather it was for the rewinding area; that she did not write anything about the rewinding area in the supervisory counseling; that she thought that Henderson asked her where her designated breakroom was; that she told Henderson that she could break anywhere; that Henderson is an excellent employee with no disciplinary conduct or corrective actions in her file; that Guy never told her that she spoke with Henderson about being in the rewinding area; that after she received the e-mail she went to Guy's office and asked Guy why she did not tell her about this; and that Guy never told her the particulars as to when she talked to Henderson and what she told Henderson about leaving the processing area.

Sanford, who is the manufacturing manager for the filament side, testified that she sent Respondent's Exhibit 4, which is the e-mail described above; that Jordan reported to her that Guy told him that she had seen certain employees in her processing area talking; that Guy gave the names to Jordan who in turn sent his e-mail; that she wanted to follow up and make sure that the supervisors understood that supervisory counselings were needed and employees needed to understand that they needed to stay in their areas and do their work; that employees are not supposed to interfere with other employees' work; that the policy or practice regarding visiting and being in other work area has been in place for at least the 11 years she has been at the Salisbury plant; that she does not receive copies of supervisory counselings that are given to employees; that she would not become aware of a supervisory counseling if there were not any future problems; that she never saw the four supervisory counselings Dennis issued on March 11; that there is no centralized file on supervisory counselings; and that Respondent's Exhibit 8 is a multipage document containing a summary she prepared for this proceeding and examples of supervisory counselings she obtained from supervisors at the behest of Respondent's attorney.[5]

On cross-examination, Sanford testified that she did not discuss the matter with Guy before she issued her March 11 e-mail, Respondent's Exhibit 4; that as long as it is on the filament side, Henderson can break anywhere but she would be counseled for being in the staple area; that Respondent likes for employees who work in the filament area to take their breaks on the filament side, and employees who work in the Staple area to take their breaks on the staple side; that this has been a practice which has been in effect for the 11 years she has been at the plant; that as demonstrated by Respondent's Exhibit 8, counselings have been given for this for years; that the counseling she referred to indicates only that the employee was taking a break in the staple area and being out of area, but it does not indicate that the employee was out of his area in another break area; that she has never instructed her employees that they must stay in the break areas in the filament section; that employees are not allowed to go to break areas anywhere in the plant, it is the practice to stay in the area, and if an employee goes outside of his or her area, they would receive a counseling; that since this is a practice and not a policy, it is not in writing; that she had been paying attention to whether or not there had been union activity in the plant; that this is not the reason she issued her above-described March 11 e-mail; and that she could not recall any other prior e-mail about this specific issue.

On redirect, Sanford testified that Lester and Rhodes appealed the counselings; that Lester called her about 10:30 p.m. on the night she received the counseling and she told Lester, who was very upset, that she was in bed and she did not think that she needed to be woken up to talk about a supervisory counseling because after all that's all it was; that she told Lester that there was no need to tear it up and it would not make a difference because there is no further corrective action if she complied; that Rhodes did go through the formal appeals process and talked to Joseph Lee; that Rhodes subsequently discussed the matter with her; that Henderson did not contact her about her supervisory counseling; and that after March 11 she had the following conversation with Brotherton:

> . . . she came walking into the beaming area and I was in the middle of the area, and she came walking in. And this was after our meetings and I said, what are you doing here? She said, I'm coming here to talk with that woman over there. And I said well, whoever it is that you're coming to talk to—if it's on the beaming floor, she's working. I said, if you've got something to discuss you need to try to coordinate your break times and you can talk in *whatever break area you would like.* [Tr. 208 and 209 and emphasis added.]

Mary Smith, who is the HR superintendent, testified that she has responsibility for personnel files, and supervisory counselings do not go into personnel files; that neither HR nor anyone else keeps any kind of records as to what supervisory counselings are issued by supervisors on an ongoing basis; and that she would become aware of supervisory counselings when a written or final corrective action is involved in that it will generally reference supervisory counselings.

Donald Smith testified on rebuttal that during his period of employment with the Respondent there were never any restrictions on him going from one department to another while on break going to a breakroom; that he had never heard of such restrictions; and that he was allowed to go anywhere in the plant to a breakroom as long as he was back on time.

Henderson testified on rebuttal that she works in the filament department; that she has never been told that she is restricted to the breakroom in the filament department; that her job does not

[5] The summary contains 28 entries from July 2000 to June 2005 describing counselings or corrective action collectively for, among other things, employees being out of their area, excessive socializing, interfering with operators' work, and going to the Staple area to take breaks.

require that she go to the staple department; that, with respect to whether Guy ever talked to her about being in any processing area or being out of her work area, she has "never talked to Guy" (Tr. 230); that, with respect to the meeting she had with Dennis on March 11, and whether Dennis mentioned anything about Guy telling Henderson that she was out of her work area, "I asked her [Dennis] who, she said she couldn't disclose who; and it was in the beaming breakroom. That's exactly what she said, the beaming breakroom" (Tr. 230); that Dennis never mentioned Guy; and that she has never had any restrictions on her as far as breakroom privileges.

General Counsel's Exhibit 4 is a letter from Respondent's site manager, Tony Branecky, which is the highest management position at the Salisbury facility, to "Fellow Employees" dated March 15 which reads, as here pertinent, as follows:

> I continue to hear that there are discussions about the Teamsters at the site and that union authorization cards are being pushed by Teamster organizers. Many of you have also complained about excessive pressure by fellow employees to try to get you to sign a card and the divisiveness and conflict that the union's presence is causing in the plant. Such is the nature and world of unions.
>
> Please do not let these high pressure tactics coerce you into signing a union authorization card. These tactics are typical of the Teamster union and the way they do business. Please read what you are being asked to sign. You cannot be forced or coerced to sign a union card. If you have signed a union card under these conditions—ask for it back. See what happens!
>
> We will be providing you with more information over the next couple of weeks on the Teamsters. Don't forget that the annual dues potential of $318,000 is the only reason that the Teamsters are here.
>
> Many of you have asked what you can do to oppose the union. You have the same right to speak out and make known your feelings as do those pushing the union.
>
> . . . .
>
> It is time to end the union issue and put it behind us. We have more important things to work on: the success of the plant and what is best for you and your family and our future.
>
> Sincerely,
>
> Tony Branecky
> Site Manager

The copy of the letter introduced by counsel for General Counsel is not signed by Branecky. Henderson testified that she received a copy of this letter in her mail days before she saw a "harsh" letter from Branecky, described below, on the Company's main bulletin board.

Donald Smith testified that in March 2005 he saw a document on the company bulletin board regarding the Union; that the involved locked bulletin board is on the first floor by the double doors; that at the time he was on medical leave and he was in the plant to see about his retirement; that before he entered the plant people had told him about the letter which was signed by Branecky; that the letter referred to the charge which was filed with the Board (as noted above, on March 17) regarding Henderson; and that

> It had her copy of where she had filed this grievance against the Labor Board [sic]. It was a pretty negative letter and it said that he was aware of the union activities, that he would not tolerate—not tolerate it anymore, like he was really mad, and that Union leaders' activities would be dealt with. And their activities would be—something to that effect. [Tr. 26–27.]

Donald Smith further testified that he never got a copy of the letter. On cross-examination, Donald Smith testified that he took a medical leave of absence beginning January 5; that he retired on April 1; that he went to the plant to talk with Alice Richey, who is the benefits clerk; that when he went into the plant he did not go directly to see Richey but rather took a detour to see the bulletin board because employees, including James Thor, Terry Brown, and Gary Bailey telephoned him and told him about the letter; and that he wanted to see the letter for himself. Donald Smith testified as follows on cross about the letter:

> Q. And it was—well how did it appear? Was it on company letterhead?
>
> A. Yes—well, I don't remember the exact letterhead, but it was right there with her—where she had filed the grievance with the Labor Board.
>
> Q. So, were there two pieces of paper on the bulletin board, is that our testimony?
>
> A. I'm thinking there were three.
>
> Q. One was the charge, was that on a single page?
>
> A. Yes, sir.
>
> Q. And one was this document, what was the second one—was it a two page document?
>
> A. I don't know. I just read the negativity of it and I just shook my head and turned around and walked off, because it was just—it was just a threat.
>
> Q. Was it in letter form?
>
> A. Yes, sir.
>
> Q. Did it—
>
> A. And it was signed by Tony Branecky.
>
> Q. You recall Tony Branecky's signature on that document?
>
> A. Yes, sir.
>
> Q. How did it begin, Dear Employee, or—
>
> A. It says—I don't know exactly how—I don't remember exactly how it—but you could—I just remember the parts—the negativity of it.
>
> Q. Can you give us any exact specific words you recall other than the tone?
>
> A. Yes. Union leaders would be dealt with at a later date. And that he was aware of the Union activities.
>
> Q. And—
>
> A. And that he would not tolerate—let's see, he would not tolerate anymore—we talked about—I talked about it to Jasper [Brown, who as noted above, is counsel for General Counsel,] and it was like—I'm trying to recall it, but that's' basically what it said. [Tr. 30, 31.]

Donald Smith further testified on cross that he only saw the letter on one occasion and he had no personal knowledge when the letter was first posted and when it was taken down.

Henderson testified that in March 2005 she saw a notice on Respondent's main bulletin board "under glass, lock and key" (Tr. 53); and that

> It was, I'd say, a very harsh letter from Tony Branecky stating that he was aware of the Union trying to get in, Union activities. And that—I can't remember exactly how it goes, but it's something about he wasn't going to tolerate it and the Union leaders would be dealt with and he would have meetings to further explain this in up-coming. [Tr. 53, 54.]

Henderson further testified that Branecky signed this notice; that the charge which was filed with the Board with her name in it was also on that bulletin board at that time; that in the notice Branecky indicated that he would not tolerate union activities and union leaders, and he would deal with the union leaders; that he would have upcoming meetings with the employees at a later date; that General Counsel's Exhibit 4, which is described above, is not the letter she saw posted on the main bulletin board; and that the following was posted on the main company bulleting board with the "harsh" letter from Branecky:

INVISTA

HOW TO GET YOUR CARD BACK

> Several employees have said they signed cards, but have had second thoughts about signing them. They have asked us if there was some way to get their cards back. There is a procedure to '**revoke**' your card. ***Whether you do anything or not is strictly up to you.***
>
> We are providing this information to everyone. If you want to cancel your card, you need to write to the Union.
>
> You can simply state:
> To whom it may concern:
> I work at INVISTA Salisbury. I want to
> revoke by card. Please send it back to me
> [Signature]
>
> You can use any words you want, such as "cancel my card," "I withdraw my signature," anything, as long as it means "I changed my mind."
>
> The Teamsters address is:
>
> . . . .
>
> If you decide to send them a letter like this, make sure you *sign it* and *date it.* It's also a good idea to keep a copy for your own records. You might want to send it certified mail, so you can prove the union got the letter. [Emphasis in original.]
>
> Post: 03/28/05
> Remove: 03/31/05
> Approved: MDS

This posted memorandum, General Counsel's Exhibit 5, does not have Branecky's printed or signed name on it.

On cross-examination, Henderson testified that there were four pieces of paper on the bulletin board in that there was a copy of her charge, the 2-page "harsh" letter from Branecky, and the instructions on how an employee can get his or her union authorization card back, General Counsel's Exhibit 5; that Branecky's letter was on white paper with small print but she could not say whether it was on Invista letterhead; that someone told her that her charge was on the bulletin board, she read it, she also saw Branecky's "harsh" letter, and she speed read the "harsh" letter because it was so long and she had to get back to her job; that Branecky's "harsh" letter indicated "that he was aware of the Union activities in the plant and that the Union leaders and activities would be dealt with and that he would have upcoming meetings with us to discuss this further" (Tr. 85); that she discussed Branecky's harsh letter with Smith both before and after Smith visited the plant; that before Smith went to the plant she "told him that Tony had posted a harsh letter about the Union and that my grievance [charge with the Board] had been filed and I wanted to know what he thought was behind that. Why did he post it for everybody to see. Was it supposed to scare somebody off from the Union or what" (Tr. 86); and that Smith told her, after he saw Branecky's letter, that he thought it was funny.

Halley testified that during the union organizing campaign he reviewed written communications to the employees, involving legal counsel if necessary, and approved them for posting or mailing; that Mary Smith keeps a record of what was posted and made sure that it was posted for a certain period; that Branecky would not personally mail his own letters to employees or post notices for employees but rather "he might ask for it to be done or ask me to look at it" (Tr. 101); that Branecky did not "during the campaign, either mail . . . or post a letter which threatened Union supporters or said that he would deal with them . . . . [or] [a]nything of the kind of nature or effect" (id.); and that the Teamsters had three prior organizing campaigns at the involved facility, namely, in 1979, 1980, and 1981. On cross-examination, Halley testified that in the latest campaign there was only one mailing, namely on March 15, but there were between 30 and 50 postings mostly in February and March 2005; that he saw and approved all of the postings; that Respondent has a book that has every posting that was posted and the dates that it was posted on locked bulletin boards; that the charge filed with the Board on or about March 17 was posted on the Company bulletin board, along with other documents, one of which spoke to "the nature of the charge" (Tr. 105); that Branecky could have signed one of these postings; that there was a posting in which Branecky indicated that "he was angry . . . ." (Tr. 106) at the Union for filing the charge; and that he knew who Donald Smith is and he heard that Donald Smith supported the Union. On redirect, Halley testified that Mary Smith is the custodian of the book of postings. Subsequently Halley testified that the letter Branecky posted in which he indicated that he was angry in reference to some allegations involving the Union was posted prior to the Board charge; and that he would have to pull the notice to determine what allegations Branecky was angry about.

Mary Smith testified that she is the custodian of employment records at the Salisbury plant; that part of her responsibilities includes being the custodian of any written communications distributed on the topic of the Union; that she was responsible for overseeing the bulleting board postings on the topic of the

Union; that there are 11 bulletin boards in the plant; that she has a permanent record of everything that was posted on the bulletin boards concerning the topic of the Union; that she maintained a notebook in which she recorded post dates and removal dates; that Respondent's Exhibits 9, 10, 11, 12, and 13 are all the Branecky postings from January 1 through April 1; and that if there had been other postings she would have known about them. On cross-examination, Mary Smith testified that she, Halley, Branecky, and Lovic were involved in writing the postings. On redirect, Mary Smith testified that charge naming Henderson was posted on March 31. On re-cross, Mary Smith testified that Respondent's Exhibit 13 was the memo which was posted along with the copy of the charge. The 2-page memorandum, which has "INVISTA" at the upper right hand corner, reads as follows:

BUSINESS FACTS FROM TONY

The Teamsters Are Saying:

We violated the law. We are posting for your information an Unfair Labor Practice charge the Teamster organization filed with the NLRB.

The True Facts Are:

The NLRB will investigate the charge and either dismiss it or send it to a hearing if there are factual disputes. We have not been provided the details of the Union's claims, but we are confident of the outcome.

The Teamsters have repeatedly said in their leaflets that "The best predictor of the future is the past." It's the only thing they have said with which I agree. The Teamsters are famous for filing charges with the NLRB as a campaign tactic when they feel that are losing support. Although I was not here, we have records of the Teamsters filing over 100 allegations of illegal conduct during their last campaign at this site. That campaign officially ended on August 26, 1983, when the NLRB dismissed the Teamsters' last 16 Objections to their overwhelming defeat in the August 1981 election. Interestingly, two of the claims then are the same as the ones now.

The Teamsters claimed then, as they do now, that the Company threatened employees with withholding a wage increase because of the Union. The NLRB ruled that the Company lawfully told employees that wage increases could be delayed or even lost as a result of contract negotiations if the employees voted for Union representation.

The Teamsters also claimed then, as they do now, that the Company discriminated against Union supporters by counseling a union supporter for being out of his area talking with an employee while that employee was working. The NLRB ruled that the Company lawfully enforced the policy which still exists today against such conduct. (I understand that some or maybe all of the employees counseled recently say they were out of their area for legitimate reasons. That being the case, they need not be concerned about corrective action in the future. Also, my door is always open to hear concerns.)

I found the NLRB case interesting reading. The Teamsters vigorously pursued (although ultimately unsuccessfully) 15 of their 16 Objections. They withdrew one objection at the hearing when they were required to offer legal proof. Objection 9, which the Union withdrew, said the Company falsely stated the Teamsters pension fund was controlled by organized crime. I wonder why they withdrew this objection. Do you?

Your supervisor has a copy of this case if you would like to read it. Or, if you would like to read it in the privacy of your home and you have a computer capable of viewing "pdf" (Adobe) files, you can find it at the official NLRB Web site, www.nlrb.gov. Click "Decisions" under "NLRB Documents" on the page and then search for "Fiber Industries." This case will be the first in the search results.

Tony Branecky
Site Manager
Post: 03/31/05
Remove: 04/04/05
Approved: MDS

The copy of this memorandum introduced by the Respondent has no signature. It is noted that all of the other posted Branecky memorandums introduced by Respondent are signed "Tony." Additionally, the "Post," "Remove," and "Approved" entries on Respondent's Exhibits 9, 10, 11, and 12 are on the right bottom corner of the documents. Unlike all of the other introduced posted Branecky memorandums, on Respondent's Exhibit 13 the "Post," "Remove," and "Approved" entries are on the left bottom corner of the document.

Donald Smith testified on rebuttal that that he did not see Respondent's Exhibit 13 posted in the plant; that Respondent's Exhibit 13 shows that it was posted on March 31, and he had already moved out of the Salisbury area to the beach; that he returned to the plant about his retirement before he moved to the beach on March 28; and that this was not the document that he saw.

Henderson testified that she never saw Respondent's Exhibit 13 posted in the plant but she quit reading the postings after Respondent posted her grievance, she quit even going to the bulletin board; that Respondent's Exhibit 13 is not the document she referred to in her earlier testimony; and that the document she referred to was a whole lot smaller type, "[i]t was so small I couldn't even read it with my bifocals hardly" (Tr. 229). On cross-examination, Henderson testified that Respondent's Exhibit 14 is the Board charge she saw posted but she did not look at the post, removal and approved information when she saw the charge on the bulletin board and therefore she could not identify that portion of the document.

On surrebuttal, Mary Smith testified that Respondent's Exhibit 14 was posted during the same time as Respondent's Exhibit 13, which refers to the posting of the charge; that the charge was not posted on more than one occasion; that it was taken down after Sanford told her that Lester was upset; and that there was not a second posting or an earlier posting.

Respondent's Exhibit 10, which has "INVISTA" at the upper right hand corner, reads as follows:

BUSINESS FACTS FROM TONY

Fellow Salisbury Employees,

I have been open, honest, and candid with you throughout my tenure as your Site Manager. I have shared with you our business situation—the good, the bad, and everything in between—although I am by nature positive and optimistic in my outlook of the future.

Our relationship and the success of this site require this approach. Mutual respect and trust are essential to any working relationship. Working together is our only hope for a secure future. You have my commitment I will not alter my ways just because of the Teamster organizing campaign. You can count on me for the truth.

I am angered and upset about some of the things that have happened since the Teamsters entered the picture last summer. I am angry about some of the misleading statements and outright falsehoods about our company and business situation and what the union can and cannot do about it. I worked in a unionized plant for much of my career. I know firsthand the real meaning of unionization. I am upset that this lingering union campaign has distracted us too from the important business challenges we face and must overcome for survival. I want this matter ended one way or another. We can no longer afford the distraction.

I will share with you in the next couple of weeks some of [the] things I am hearing from the union supporters and set the record straight on truth and fiction. I believe history teaches a valuable lesson and can be a predictor of the future, so we are sharing information on the teamsters' record with you. At the same time, I remain focused on the present task at hand and what we must do to have a future here at the Salisbury site.

Sincerely,
Tony Branecky
Site Manager
Post: 03/17/05
Remove: 03/21/05
Approved: MDS

This letter is signed "Tony."

Analysis

Taking the alleged 8(a)(3) violation first, paragraphs 9 and 10 of the complaint allege that Respondent violated the Act by issuing a written warning to employee Lucy Henderson on or about March 11 because she joined, supported, or assisted the Union, and in order to discourage such activities.

Counsel for the General Counsel on brief contends that Henderson was engaged in the union campaign since its inception in that she solicited employees to attend union meetings and she hosted union meetings at her home on numerous occasions; that Henderson was engaged to and lived with Donald Smith (in her home), the acknowledged leader of the union effort at the plant; that Henderson told Dennis not to bother when Dennis tried to tell her Invista's position on the Union; that the handwritten portion of Henderson's supervisory counseling corroborates Henderson's testimony; that the plain language of the corrective action policy and Halley's admissions demonstrate that supervisory counselings are an integral part of Respondent's formal corrective action policy; that Sanford admitted that she never talked to Guy to confirm the facts prior to the issuance of the discipline; that while Dennis testified she spoke with Guy before issuing the supervisory counselings, Dennis did not ask Guy to explain what happened or give the particulars in regard to this matter; that Dennis' testimony not only calls into question the basis for the issuance of the supervisory counseling, but it clearly shows that there was no legitimate investigation of the matter prior to the issuance of the supervisory counseling; that since Respondent failed to call Guy and Jordan, the record is silent as to when Henderson was allegedly seen outside of her work area, where she was and what was said to her about being out of her work area; that Respondent's failure to call Guy and Jordan requires that an adverse inference against Respondent be drawn, *International Automated Machines,* 285 NLRB 1122, 1123 (1987); that while Guy is alleged to have instructed Henderson to leave the processing area, Dennis asserted that Guy instructed Henderson to leave the rewinding area; that Dennis' supervisory counseling to Henderson shows that Dennis wrote Henderson up for going to the beaming breakroom; that Henderson's close relationship with Donald Smith, whose union activity was well known in the plant, warrants an inference that Respondent unlawfully discriminated against Henderson, *Permanent Label Corp.*, 248 NLRB 118, 136 (1980), enfd. 657 F.2d 512 (3d Cir. 1981); that Respondent's antiunion animus is demonstrated by Respondent's unspecified threat to union leaders, its threat to withhold wages and raises, and by Respondent unlawfully changing its breakroom policy; and that Respondent has not shown that the same action would have taken place in the absence of protected conduct in that there is no evidence that the circumstances which gave rise to the discipline of the other three employees is identical to the facts found here.

Respondent on brief argues that the record does not support a finding that Respondent had knowledge of Henderson's union activity; that Sanford, the decisionmaker, had no knowledge of Henderson's union sentiments; that Donald Smith's limited known union activity coupled with his complete absence from the facility for a couple of months prior to the supervisory counseling precludes reliance on the exception to the requirement that the General Counsel must show employer knowledge of the employee's union activity, *Tomatek, Inc.*, 333 NLRB 1350 (2001), and *TelTech Holdings, Inc.*, 333 NLRB 402 (2001); that Rhodes was an open and vocal opponent of the Union and, therefore, even if Henderson was a known union supporter, any inference of discrimination would be rebutted by the identical treatment of Rhodes for the identical reason; that while there is a line of cases where a union opponent is included among those disciplined, those cases do not apply here since none of those counseled was known to be a union supporter; that Dennis counseled Henderson for visiting operators in the beaming area; and that there is no remedy since Henderson received a documented supervisory counseling and not a formal corrective action under Respondent's corrective policy.

As set forth in *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991):

In *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982),[4] the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.[5] The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence.[6] The finding may be inferred from the record as a whole.[7]

[4] Approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[5] *Shattuck Denn Mining Corp. v. NLRB,* 362 F. 2d 466, 470 (9th Cir. 1966).

[6] *Association Hospital Del Maestro,* 291 NLRB 198, 204 (1988); *White-Evans Service Co.,* 285 NLRB 81, 82 (1987).

[7] *ACTIV Industries,* 277 NLRB 356, 374 (1985); *Heath International,* 196 NLRB 318, 319 (1972).

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

On direct, Henderson testified that on March 11 she asked Dennis if someone had said that she interfered with someone on their job and Dennis said nothing like that was said. When she was subsequently called as a witness, Dennis testified that when Henderson asked who it was who saw her out of her area, she told Henderson that it was a member of management but she did not recall if she told Henderson that it was Guy. Guy is not named in Henderson's supervisory counseling. On rebuttal, Henderson testified that she never talked to Guy about being in the processing area or being out of her work area; that when she asked Dennis on March 11, Dennis said that she could not disclose who, and it was in the beaming breakroom; and that Dennis never mentioned Guy on March 11. Guy did not testify on surrebuttal. Indeed, Guy never testified at the trial herein. So, on the one hand we have Henderson testifying that she never talked to Guy about being in the processing area or being out of her work area. On the other hand, Guy does not testify so Guy does not even attempt to refute Henderson's testimony. That being the case, Henderson's testimony is credited. Consequently, the validity of at least a part of Respondent's Exhibit 4 has been placed in question. Respondent did not call Jordan as a witness to sponsor the introduction of his original message of the e-mail received as Respondent's Exhibit 4. Counsel for the General Counsel requests an adverse inference. His request is granted. It is found that Guy and Jordan were not called because their testimony would not have supported the position that Respondent is taking regarding Henderson's March 11 supervisory counseling. That being the case, the following question must be asked: is a portion of Respondent's Exhibit 4 a fabrication. With Sanford, Respondent offers up a third-hand account of its position. Sanford is not a credible witness. Sanford lied under oath about the breakroom practice. After testifying that the practice was that employees are not allowed to go to break areas anywhere in the plant, and the employee would receive a counseling if he or she went outside his or her area, Sanford testified that after March 11 she told Brotherton, who worked on the filament side and was in the beaming area to speak with an employee, that she, Brotherton, needed "to try to coordinate your break times and you can talk in *whatever break area you would like.*" (Tr. 209, emphasis added.)[6] Dennis did not deny Henderson's testimony on rebuttal that Dennis refused to disclose who complained. It is one thing to protect an employee who complained but it is something else to refuse to disclose the name of a supervisor in this situation. Dennis knew what was going on. Dennis more than once told Henderson that she was just doing her job or had to do her job. Dennis also knew that Henderson supported the Union. Dennis lied under oath when she testified that she did not recall Henderson telling her that she supported the Union. Once again Dennis told Henderson that she had to do her job when she had the one-on-one about Respondent's position regarding the Union. In other words, Dennis was doing what she was told to do. Dennis did not specifically deny Henderson's testimony that she told Henderson that if she did not want to read Respondent's paper, she should sign a document given to her by Dennis, and Henderson did indeed sign the document signifying that Dennis talked to her. Dennis knew Henderson supported the Union. And Dennis' testimony that Henderson said she was "not giving anybody none [sic] of my money" (Tr. 176) is a fabrication conceived by someone who also wrote "[t]alked to Lucy Henderson on 3/11/05 about been [sic] out of her assigned area," General Counsel's Exhibit 3, and then repeated this same mistake in Respondent's Exhibits 5, 6, and 7. Sanford did not deny Henderson's testimony that she commented about Henderson's longstanding relationship with Donald Smith, who Henderson had been dating for 10 years and to whom she had been engaged for 4 years. Henderson's unchallenged testimony is credited; Sanford knew about Henderson's relationship with Donald Smith. Halley conceded on cross-examination that he knew who Donald Smith is and he heard that Donald Smith supported the Union. In March 2005, Respondent posted a notice, General Counsel's Exhibit 5, in which it explained to employees how to

[6] Sanford protected herself as much as she could. She testified that Jordan reported to her that Guy told him that she has seen certain employees in her processing area. Sanford did not specifically testify that she had a conversation with Jordan about what it was that Guy saw and said. In other words, Sanford did not take it beyond Jordan's original message in the e-mail received as R. Exh. 4. Moreover, Sanford testified that she did not discuss the matter with Guy before she issued her March 11 e-mail.

get their union authorization card back. Additionally, in March 2005 Branecky (1) mailed a memorandum to employees indicating, among other things, that "[i]t is time to end the union issue and put it behind us," General Counsel's Exhibit 4, (2) according to Respondent, posted a memorandum to employees indicating, among other things, "I want this matter [the union campaign] ended *one way or another. We can no longer afford the distraction*," (emphasis added) Respondent's Exhibit 10, and (3) according to Respondent, posted a memorandum in which he indicated, among other things, "I understand that some or maybe all of the employees counseled recently say they were out of their area for legitimate reasons. That being the case, they need not be concerned about corrective action in the future," Respondent's Exhibit 13. The logic of the next two preceding sentences escapes me. In effect, in these two sentences Branecky is telling employees that even if they are out of their area for legitimate reasons, they have to be concerned about receiving a corrective action because if it happened before, it can happen again. In other words, the Respondent is in control and it will not matter whether there is a justification for its actions. There is no velvet glove over this iron fist. If Respondent's Exhibit 13 was ever posted, there would be a question of whether this language was a threat. All of the employees who received supervisory counselings on March 11 refused to sign the document and some appealed Respondent's action apparently to no avail. Respondent created a situation so that it could use the situation to bring the union organizing campaign to an end.

As quoted above, the Board in *Fluor Daniel, Inc.,* supra, held that

> It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. The finding may be inferred from the record as a whole.

Respondent's stated motive for its supervisory counseling to Henderson is a fabrication. Respondent knew Henderson supported the Union. Respondent knew that Henderson had a longstanding relationship with Donald Smith, who was very active in support of the Union. Branecky wanted to bring the union organizing campaign to an end, and so Respondent made an example of Henderson. Two other employees, along with an employee who was against the union—apparently all innocents—were included to create a smoke screen. Respondent's actions with respect to Henderson, in addition to the violations found below, demonstrate how deep its antiunion animus runs.

Halley is not a credible witness. His equivocal testimony, namely "usually," "normally," "typically," "mainly," "could be," "remotely," and "generally" is not credited. Contrary to Respondent's argument on brief, what was done to Henderson is a wrong that can and should be remedied. Henderson's supervisory counseling will be expunged. Respondent violated the Act as alleged in paragraphs 9 and 10 of the complaint.

Paragraph 8(a) of the complaint alleges that by Tony Branecky's mid-March 2005 letter Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals in retaliation for engaging in union activity.

Counsel for the General Counsel on brief contends that while all of the notices posted by Branecky in March are dated in the lower right hand corner and signed by Branecky with the use of his first name "Tony," Respondent's Exhibit 13, which Respondent purports to be the notice posted beside the charge, is dated in the left hand corner and it is not signed by "Tony"; that in view of the inconsistent and vacilitating testimony of Mary Smith, coupled with Respondent's failure to call Branecky to testify, the authenticity of Respondent's Exhibit 13 has been rendered unreliable and untrustworthy; and that threatening union leaders with unspecified reprisals tends to coerce and restrain union proponents from attempting to persuade other employees to engage in union activities for fear of reprisals, and therefore violates Section 8(a)(1) of the Act, *Bestway Trucking, Inc.*, 310 NLRB 651, 654 (1993).

Respondent on brief argues that there is a conflict between Donald Smith's and Henderson's testimony in that Henderson testified that General Counsel's Exhibit 5, the instructions on how to get a card back, was posted at the same time as the "harsh" letter; that General Counsel's Exhibit 5 was posted on March 28 and removed on March 31, and Donald Smith testified that he moved to the beach on March 28, and his visit to the plant had occurred earlier than that date; that the only supportable finding is that Respondent's Exhibits 9–13 constitute all the postings by Branecky and they were posted and removed on the dates stated on the documents; and that the posting that accompanied the posting of the unfair labor practice charge was Respondent's Exhibit 13, which explains the purpose of posting the charge.

Henderson and Donald Smith testified about what they saw. Branecky did not testify so he personally does not deny their testimony. Both Henderson and Donald Smith impressed me as being credible witnesses. So, on the one hand we have the testimony of two witnesses who in my opinion are credible. On the other hand, we do not have the testimony of Branecky, just like we did not have the testimony of Guy or Jordan with respect to fabricated documentation Respondent used to justify Henderson's supervisory counseling. As determined above, Halley is not a credible witness. Mary Smith works under Halley. She impressed me as being, like Dennis, the type of person who would just do her job or, in other words, would do what she was told to do. The Branecky posting, Respondent's Exhibit 13, which assertedly was posted with the charge is different from the other Branecky postings Respondent introduced in that it is not signed by "Tony" and the "Post," "Remove," and "Approved" entries are not on the same side as the other Branecky postings. Also, before Respondent's Exhibit 13 was introduced, both Donald Smith and Henderson testified that Branecky signed the letter in which he threatened to deal with the union leaders. Respondent provided no explanation for why Branecky would not have signed what Respondent asserts is the Branecky posting which accompanied the posting of the charge. Also, before Respondent's Exhibit 13 was introduced, Henderson testified that the Branecky posting, the "harsh" letter which

accompanied the posting of the charge, had small print. As compared to General Counsel's Exhibit 4, the body of Respondent's Exhibit 13 has what cannot be described as small print. After Respondent introduced Respondent's Exhibit 13 and Henderson had a chance to see it, she testified that Respondent's Exhibit 13 was not the document she saw posted with her charge, the document she saw posted with her charge "was a whole lot smaller type and it was . . . . so small . . . [she] couldn't even read it with . . . her bifocals hardly." (Tr. 229.) Donald Smith also testified on rebuttal that he did not see Respondent's Exhibit 13 posted in the plant. In my opinion counsel for General Counsel has demonstrated that Branecky threatened employees with unspecified reprisals in retaliation for their engaging in union activity. In view of Respondent's propensity to fabricate, I do not credit the "Post," "Remove," and "Approved" entries on the documents introduced by the Respondent. Indeed, the documents introduced by Respondent and the testimony elicited by the Respondent from its witnesses with respect to Branecky's posted threat, to the extent it is not corroborated by a reliable source, it is not credible. Respondent violated the Act as alleged in paragraph 8(a) of the complaint.

Paragraph 8(b) of the complaint alleges that by Pat Stellute on February 11 Respondent violated Section 8(a)(1) of the Act by threatening its employees that wage raises and bonuses would be withheld in an effort to discourage their support for the Union.

Counsel for the General Counsel on brief contends that while Stellute asserted that Branecky had previously announced that the bonus recommendation had already been sent to Respondent's headquarters for approval, Branecky was not called to testify and no documentary evidence was furnished to corroborate Stellute; that the granting of the bonuses was not announced until March 15, well after the alleged violation; that it is a violation of Section 8(a)(1) of the Act for an employer to attribute to the Union its failure to grant a benefit, *Centre Engineering*, 253 NLRB 419, 421 (1980); that Stellute admitted (a) that he told employees that they may not get any raises during negotiations, and (b) that he did not explain to employees that terms and conditions of employment included their regularly expected wage increase and bonuses; that Respondent violated the Act by suggesting that wages and bonuses would be frozen during negotiations, compare *General Motors, Acceptance Corp.*, 196 NLRB 137 (1972); and that the testimony of McMullen, who testified under subpoena against her own interest, should be credited and a finding should be made that Respondent directly threatened employees with denial of wages and bonuses because of the Union, *Adco Electric,* 307 NLRB 1113, 1119 (1992).

Respondent on brief argues that the allegation that Stellute made a statement to employees regarding wage increases or bonuses during a union campaign makes no sense in that Respondent gave a wage increase in the fall of 2004, and Branecky announced to employees in December 2004 and January 2005, that a decision by corporate officials would be made on the bonus in late February or early March 2005; and that Stellute did tell employees in his meetings with them what would happen with wages and benefits if the employees selected union representation.

When Stellute spoke with the employees in the eight meetings, corporate officials in Wichita had not yet made a final decision on the bonus. On cross-examination, Stellute conceded that he did tell the employees that during the period of negotiations, they may not get a raise and that he told them "during the bargaining period, raises, bonuses—I don't remember if I actually said anything about bonuses, but raises wouldn't happen until a contract is negotiated." (Tr. 157.) Stellute also conceded on cross-examination that he did not explain his comment in any way, he did not tell employees that if they had a regularly scheduled wage raise that had been going on for a number of years, despite the bargaining, they would be entitled to that regularly scheduled raise. In the twenty first century one has to wonder why Respondent would not have given the employees a computer printout position statement to read and keep, or made an audio or video recording of what Stellute said at these meetings. Indeed Respondent took advantage of modern technology when it showed a video to the employees to try to convince them not to support the union, and not to sign union authorization cards. Did Respondent believe that it would be more advantageous from its point of view not to record exactly what Stellute told the employees? I find McMullen to be a credible witness. Neither Meak not Miller testified that Stellute told employees that "during the bargaining period raises, bonuses— . . . raises wouldn't happen until a contract was negotiated" (Tr. 157). McMullen testified that Stellute discussed the selling of a plant because of the union. Stellute admitted on cross-examination that he talked about plants which had been closed because they had been unionized. Neither Meek nor Miller mentioned this. McMullen testified that someone asked about pay and bonus because the employees, who usually get their bonus in February, had not received their bonus yet. Contrary to the impression that Miller tried to convey, the bonus was not approved by corporate in Wichita when Stellute held his eight meetings with the employees. The announcement that the bonus was approved in Wichita would not come until March 2005, about 1 month after Stellute spoke with the employees. Respondent did not show that McMullen's testimony that the involved employees usually receive their bonus in February is false. Consequently, the fact that the involved employees usually receive their bonus in February and they had not received it when Stellute spoke with them gives credence to McMullen's testimony that an employee asked about the bonus and pay because the involved employees had not received their bonus yet. Whatever Stellute said, McMullen's perception was that although the employees had been told that there would be a bonus, Stellute "said that there would be no more bonuses or pay raises as long as the Union was getting in. . . ." (Tr. 36.)[7] Respondent attempts to make a distinction between statements about withholding bonuses and pay raises during a campaign vis-à-vis during negotiations. In the real world one has to wonder whether such a distinction, if indeed it was meaningful in

[7] As noted above, McMullen also testified that ". . . because they would need, you know, everything to make sure that the Union didn't get in. Necessary [sic] that they didn't get in." (Tr. 36.) It is not clear whether this is something McMullen was adding, i.e., ". . . you know. . . ." Id. or this is what Stellute said.

the involved context, would be lost on factory workers who do not have a legal degree and some experience in labor law. Could what Stellute was telling the employees during the campaign be reasonably interpreted by them to mean that if the Union got in, the bonus they usually received in February ". . . wouldn't happen until a contract is negotiated?" (Tr. 157.) If Stellute took pains to fully explain the nuances, exceptions, qualifications, and limitations, and fully explain what he was saying to the employees, that would be one thing. But here, Stellute conceded on cross-examination that he did not explain the possible exceptions to his statement about bonuses and raises. It is easy to understand how a factory worker could walk away from the meeting with Stellute with the understanding that he had been promised a bonus, he normally received the bonus in February, he had not received the bonus yet, and he was being told that the bonus was in jeopardy because of the Union. It is noted that the test as to whether employees were threatened is not a subjective test but rather it is an objective test. As noted above and below, Respondent engaged in other misconduct. Respondent engaged in an unlawful campaign to end the Union's attempt to organize Respondent's employees. In my opinion General Counsel has demonstrated that Respondent by Stellute on February 11 violated Section 8(a)(1) of the Act by threatening its employees that wage raises and bonuses would be withheld in an effort to discourage their support for the Union.

Paragraph 8(c) of the complaint alleges that by Brenda Miller in early to mid-March 2005, Respondent violated Section 8(a)(1) of the Act by promulgating and enforcing a change in its work rule pertaining to the use of breakrooms by employees in order to discourage their union activities.

Counsel for the General Counsel on brief contends that the testimony of McMullen, Donald Smith, and Henderson demonstrates that prior to March 2005, there were no restrictions placed on where employees could take their breaks; that in March 2005, Miller told employees that they would not be allowed to go to break areas other than their own; that Miller admitted that in the past there had never been any restrictions placed on where employees took their breaks, and this was the first time she had ever told employees who worked in the staple area of the plant to inform her prior to going to a break area on the filament side; that Miller admitted that she told employees that if they left the staple side to go to the filament side, they were required to notify her; that Miller's admission that she required employees to notify her prior to taking their breaks outside the department amounted to the promulgation of a new rule which placed restrictions on the use of breakrooms; that Miller intended to restrict employees who were engaged in union activity in the plant; that in view of (a) Respondent's unlawful threat to deal with union supporters, (b) the timing of the break rule change, (c) Respondent's attempt to put an end to the union activity in the plant at that time, and (d) Respondent's instructions to employees on how to get their union authorization cards back, an inference is warranted that the new rule was discriminatorily motivated, *Miller Group, Inc.*, 310 NLRB 1235, 1238 (1993), and *Southern Pride Catfish,* 331 NLRB 618, 625 (2000).

Respondent on brief argues that it appears that McMullen may have interpreted "our area" to mean her immediate work area; that this clearly was not Miller's intent; that it is undisputed that Respondent does not have a policy prohibiting employees from selecting among different break areas within their respective areas of the plant; and that McMullen no longer works in the staple area, there is nothing to remedy, and to the extent McMullen perceived a policy, its applicability to her ended in early March when she moved to the filament side.

Not only did McMullen, Donald Smith, and Henderson testify that before March 2005, there were no restrictions on where an employee could take a break in the involved facility but Miller herself testified on cross-examination that there had never been any restriction on what break areas employees could use and her March 2005 dictate was the first time that she told employees on the staple side to inform her if they were going to a break area on the filament side. Additionally, Sanford eventually testified that after March 11 she told an employee from the filament side, Brotherton, that she could "coordinate your break times [with an employee from the beaming area] and you can talk in *whatever break area you would like.* (Tr. 209 and emphasis added.) Also, as noted above, Dennis testified that she told Henderson she could break anywhere.[8] Respondent did not want employees on break to go to a breakroom in another area of the plant to discuss the Union. As pointed out by counsel for the General Counsel, in view of (a) Respondent's unlawful threat to deal with union supporters, (b) the timing of the break rule change, (c) Respondent's attempt to put an end to the union activity in the plant at that time, and (d) Respondent's instructions to employees on how to get their union authorization cards back, an inference is warranted that the new rule was discriminatorily motivated, *Southern Pride Catfish,* supra. As alleged in paragraph 8(c) of the complaint, Respondent by Brenda Miller in early to mid-March 2005 violated Section 8(a)(1) of the Act by promulgating and enforcing a change in its work rule pertaining to the use of breakrooms by employees in order to discourage their union activities. The fact that McMullen may have moved to a different area of the plant does not preclude either this finding or a remedy for this violation.

CONCLUSIONS OF LAW

1. By threatening its employees (a) by letter in mid-March 2005 with unspecified reprisals in retaliation for their engaging in union activity, and (b) on February 11 that wage raises and bonuses would be withheld in an effort to discourage their support for the Union, and in early to mid-March 2005 by promulgating and enforcing a change in its work rule pertaining to the use of breakrooms by employees in order to discourage their union activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing a written warning to employee Lucy Henderson on or about March 11 because she joined, supported, or

[8] It should be noted that as pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950), "[i]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

assisted the Union, and in order to discourage such activities Respondent violated Section 8(a)(1) and (3) 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.

Respondent will be required to expunge from its records the unlawful supervisory counseling given to Dorothy (Lucy) Henderson and any reference thereto.

Respondent will be required to rescind the rule promulgated by Brenda Miller pertaining to the use of breakrooms by employees in order to discourage their union activities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Invista, Salisbury, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with unspecified reprisals in retaliation for engaging in union activity.

(b) Threatening its employees that wage raises and bonuses would be withheld in an effort to discourage their support for the Union.

(c) Promulgating and enforcing a change in its work rule pertaining to the use of breakrooms by employees in order to discourage their union activities.

(d) Issuing a written warning to an employee because that employee joined, supported, or assisted the Union, and in order to discourage such activities.

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

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

(a) Within 14 days from the date of the Board's Order, remove from its files the unlawful supervisory counseling given to Dorothy (Lucy) Henderson and any reference thereto, and within 3 days thereafter notify the employee in writing that this has been done and that the supervisory counseling will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its facility in Salisbury, North Carolina, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2005.

(c) 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.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] 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."