Frazier Industrial Company *and* International Association of Sheet Metal Workers Association, Local 60. Case 27–CA–14667

June 14, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On December 3, 1997, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent filed a reply brief to the General Counsel's answering brief.

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,[1] and conclusions and to adopt the recommended Order.

Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee John Ramirez, and violated Section 8(a)(1) when its Supervisor Dennis Haga inquired of employee Mike Jennings whether Ramirez was bothering him.

Briefly, the facts are as follows. John Ramirez began working for the Respondent on March 7, 1996,[2] and commenced his organizing activities at the plant toward the end of April by soliciting employees to sign authorization cards and by urging employees to attend union organizing meetings. Ramirez estimated that he spoke with about half of the plant's work force, and that he probably spoke with someone about unionization every day, or every other day, before being discharged on June 18. In May, an employee remarked to a group of employees seated with him in the plant lunchroom, during a break, that the employees ought to start a union. Supervisor Moosman overheard the remark, became flustered by it, and angrily told the employees that if he heard of anyone "going union . . . they'll be down the road."[3] Supervisor Hrabik received two complaints from employees in late May and early June about Ramirez' union activities. Supervisors Hrabik and Moosman met with Plant Manager Haga in early June, and Haga instructed the supervisors to warn their employees "that they could do whatever they wanted to on their own time, but on company time they need not to talk [sic] about the union or bother . . . anybody about it." Following this meeting, Moosman went to all of the welders' work stations and explained that there had been complaints about some employees "harassing" others to join a union. Moosman warned each welder, including Ramirez, that what they did on their own time was their business but that they could not "harass" employees about the Union during "company time." In addition, Moosman delivered the same instruction to a group of employees, also including Ramirez, in the lunchroom during a break. During the lunchroom meeting, Moosman also told the employees that he "wanted to know about it if someone was talking to you about the union on company time."

After these warnings, Hrabik received further complaints from two employees on June 13 or 14 that Ramirez was harassing them by repeatedly urging them to attend a union meeting. Following these complaints, Hrabik and Moosman again met with Haga, who said that "harassing" employees on company time "had to stop." Later, Moosman again told Ramirez and the other employees "that there had been complaints about some employees harassing others on worktime and that this had to stop."

The judge found that the Respondent, by the above conduct, discriminatorily promulgated and maintained a rule prohibiting employees from discussing the Union on worktime, but took no action to limit any other discussions during worktime. The judge further found that the Respondent failed to meet its burden of establishing that production or plant discipline necessitated its rule prohibiting only union discussions during worktime. The judge thus concluded that by barring only union discussions while tolerating other discussions about nonwork matters during working time, the Respondent violated Section 8(a)(1) of the Act. As noted, we agree with that conclusion. Our dissenting colleague also agrees.

On June 17, the day before his discharge, Ramirez clocked out at the end of the workday, but then saw Mike Jennings reporting for work on the second shift. Ramirez spoke with Jennings as he punched in and continued the conversation as Jennings walked to his work station. Ramirez estimated that he accompanied Jennings about 15–20 feet onto the plant floor and spoke with him for about 90 seconds in an effort to persuade Jennings to meet personally with union organizer Pettaway. When Ramirez observed Haga watching from about a hundred feet away, however, Ramirez left the building. Haga then asked Jennings if Ramirez was "bothering" him, and Jennings replied, "Yeah, he was bothering me about the

[1] 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.

[2] All dates are in 1996 unless otherwise indicated.

[3] We agree with the judge—and the Respondent does not dispute—that Moosman's remark conveyed an unmistakable threat of unlawful discharge.

damn union stuff and won't leave me alone."[4] A short while later, Haga told Moosman to pull Ramirez' timecard and to have Ramirez report to Haga's office before starting work the following day.

When Ramirez met with Haga in Haga's office the next day, Haga rhetorically asked Ramirez "what am I going to do with you, John[?]" Haga mentioned to Ramirez that he had received a good raise and that his benefits were growing, but that people were complaining about him bothering them all the time and that it was affecting productivity, so he had to change his ways. Ramirez denied that he was bothering anyone. Haga then confronted Ramirez with his own observation of him on the previous evening and of Jennings' report that Ramirez had been bothering him, but Ramirez still denied that he was bothering anyone. When Haga again stated, "what am I going to do with you," Ramirez replied, "well you're the plant manager you do whatever you have to do." By this time Haga perceived that Ramirez had "a really bad attitude about it." He informed Ramirez that he would be discharged but offered the opportunity for him to quit so there would be no record of his firing. Ramirez refused to quit, and thus was discharged.

Later that morning, Hrabik briefly spoke to employee Robert Rodriguez, who had learned of Ramirez' termination from Moosman. At that time, Hrabik pointed toward the office door and, in apparent reference to Ramirez' discharge, Hrabik remarked to Rodriguez, in effect, that Rodriguez should now understand why he should not talk about the union on company time. According to Rodriguez (who the judge found to be a truthful and forthright witness), Hrabik then "kind of giggled and kept walking toward the main office."

The judge rejected the Respondent's contention that Ramirez' union activities lacked protection, because they rose to the level of harassment, as well as the Respondent's claim that Ramirez' discharge resulted from his dishonesty and insubordination during his meeting with Haga on June 18. Rather, the judge concluded that the Respondent discharged Ramirez because he failed to adhere to the Respondent's unlawful rule barring union talk during worktime, and thus violated Section 8(a)(3) of the Act. Again, we agree with that finding.

In finding Ramirez' discharge unlawful, we note that the chain of events leading to the discharge was a direct result of the Respondent's enforcement of its unlawful rule prohibiting talk about the Union during worktime. The discharge occurred in the context of numerous other unexcepted-to 8(a)(1) violations by the Respondent: threatening to discharge employees who engaged in union activities; coercively interrogating employees about their union activities and sympathies, and those of other employees; expressing disappointment in employees who attended union meetings; threatening to close the plant if employees chose union representation; threatening to retaliate against employees for their union activities; creating the impression that employee union activities were under surveillance; and attempting to convince employees that it would be futile for them to seek representation. Further, several hours after Ramirez' discharge and in apparent reference to that discharge, Supervisor Hrabik remarked to employee Rodriguez that he (Rodriguez) should now understand why he should not talk about the Union on company time; the Respondent did not except to the judge's finding that this comment, suggesting that employees could be discharged for failing to adhere to its unlawful rule prohibiting union talk on working time, violated Section 8(a)(1).

The Respondent and our dissenting colleague essentially contend that the Respondent's discharge of Ramirez was lawful, because the union solicitation activity that motivated it was beyond the ambit of Section 7, i.e., that the solicitations rose to the level of unprotected harassment. We agree with the judge that those solicitations did not lack protection under the Act. Based on testimony credited by the judge, it is clear that—with the exception of one incident that was unknown to the Respondent before the discharge, and therefore could not have motivated it—all of Ramirez' worktime solicitations were brief and did not involve any obvious disruption in production.[5] Indeed, there is no evidence that employees whom Ramirez solicited more than once ever even told him that he was interfering with their work or that further solicitations would have that effect.

Nor do we find that the Respondent has established that it reasonably believed, based on complaints made by solicited employees to supervisors, that Ramirez was engaged in unprotected approaches to employees as opposed to merely persistent solicitation. According to credited or undisputed testimony, the reports that several employees made to the Respondent's supervisors about Ramirez' solicitations were couched in language that Plant Manager Haga had used in instructing the supervisors about prohibited solicitations and that Supervisor Moosman had used to employees. Those admonitions appeared to equate repeatedly "talking to" anyone about "the union on company time" with reportable harassment. However, an employer may not

[4] The judge found Haga's inquiry of Jennings to be coercive interrogation in violation of Sec. 8(a)(1) and, as noted, we agree with that finding.

[5] The one conversation that was more than momentary was a night-shift conversation with Jennings and Nielsen on June 6, 1996. Ramirez testified that it lasted about 20 minutes and Jennings testified that it lasted about 45 minutes. The judge did not resolve the contradiction; but in any event there was no evidence that anyone told the Respondent about this incident before Ramirez' discharge.

lawfully take action against an employee on the basis of such an assumption. As we have previously stated:

> The Board has held that employers violate Section 8(a)(1) of the Act when they invite their employees to report instances of fellow employees' bothering, pressuring, abusing, or harassing them with union solicitations and imply that such conduct will be punished. It has reasoned that such announcements from the employer are calculated to chill even legitimate union solicitations, which do not lose their protection simply because a solicited employee rejects them and feels "bothered" or "harassed" or "abused" when fellow workers seek to persuade him or her about the benefits of unionization.[6]

In the present case, there was no allegation, and hence no finding, of an independent violation based on the Respondent's invitation to employees to *report* harassing solicitations. But, it was alleged, and we have found, that the Respondent unlawfully maintained and enforced a rule that prohibited nonwork-related conversations during working time if they were about the Union—and only if they were about the Union. The Respondent admits that it discharged Ramirez because of his union solicitations. Given the evidence in the case, the Respondent's motivation is not rendered lawful simply because it equated those solicitations with unprotected harassment.

Our colleague contends that *BJ's Wholesale Club*, 318 NLRB 684 (1995), is analogous to this case and warrants finding that Ramirez' solicitations were unprotected. We find that case to be distinguishable. First, in *BJ's*, the Board noted that the legitimacy of the employer's pre-existing no-harassment rule was not in dispute and that the employee involved (Cavaliere) had previously been counseled for harassment as a result of conduct that did not involve union activity. Thus, in that case, unlike here, the employee was not disciplined for violating an unlawfully-promulgated no-solicitation rule. Second, in *BJ's*, the Board noted that the respondent employer did not solicit complaints from employees about Cavaliere's union activity. Here, Supervisor Moosman told employees that he "wanted to know about it if someone was talking to you about the union on company time," and on July 17, Plant Manager Haga asked employee Jennings if Ramirez was "bothering" him.

Our colleague contends that Ramirez' alleged dishonesty and insubordination during his meeting with Plant Manager Haga on June 18 also caused his discharge. With respect to the claim that Ramirez was being dishonest in claiming that he was not bothering employees, we agree with the judge that Ramirez was merely expressing his opinion that he was not "bothering" employees by his conduct. Further, regarding the claims of both dishonesty and insubordination, the judge found that the evidence strongly indicated that Haga had decided to terminate Ramirez before their meeting. Thus, Haga initially testified that the only reason for Ramirez' discharge was because Haga had witnessed Ramirez harassing a fellow employee during worktime, and because Ramirez had been accused of harassing other employees on two previous occasions. This is consistent with Haga having Ramirez' timecard pulled on the evening of June 17, before his meeting with him on June 18.

Thus, contrary to our dissenting colleague, we agree with the judge that Ramirez was discharged because he failed to adhere to the Respondent's unlawful rule barring union talk during working time, and thus his discharge violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Frazier Industrial Company, Pocatello, Idaho, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER BRAME, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule prohibiting only union talk during working time while permitting other nonwork discussions, as found by the judge. Contrary to my colleagues, however, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging employee John Ramirez, and I also find that the Respondent did not violate Section 8(a)(1) by Supervisor Dennis Haga's asking employee Mike Jennings whether Ramirez had been bothering him.

In concluding that the Respondent did not violate the Act by discharging Ramirez, I agree with the Respondent that Ramirez' union activities lacked protection under the Act, because, undertaken during worktime, they rose to the level of harassment and interfered with production.

The Respondent manufactures steel storage systems for warehouses. The Respondent commenced production at the Pocatello, Idaho facility at issue here in the spring of 1996,[1] employing nine welders and nine others to perform fabrication, maintenance, painting, and other operations. Ramirez applied for a welder's position with the Respondent at the request of union organizer Mike Pettaway, who expected Ramirez to assist in the organizing of the Respondent's work force. Ramirez began work as a welder for the Respondent on March 7, and commenced his organizing activities at the plant toward the end of April by soliciting employees to sign authorization cards. Further, Ramirez informed

[6] *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998), and cases there cited (footnotes omitted). Accord: *Publishers Printing Co.*, 317 NLRB 933, 934 (1995), enfd. mem. 106 F.3d 401 (6th Cir. 1996).

[1] All dates are in 1996.

employees about union organizing meetings held on June 3, 6, and 13, and urged them to attend. He also sought to persuade employees hesitant about attending the meetings to meet privately with Pettaway. Ramirez himself estimated that he spoke with someone about unionization every day or every other day before his discharge on June 18, and the judge found that Ramirez engaged in union activities during working time.

Starting in late May and early June, the Respondent received numerous complaints from employees that Ramirez was bothering them about the Union.[2] On June 13, employee Todd Chandler complained to Supervisor Hrabik that Ramirez "was harassing him to be present at [a] union meeting after work." Chandler complained to Hrabik after Ramirez had approached him during worktime on five or six occasions, over the course of several days, to attend an upcoming union meeting. Chandler explained that he did not want to stir up trouble at the plant, but that he wanted Hrabik to "drop a hint" to Ramirez that Chandler did not want to be bothered all the time.

The next day, employee James Frasure complained to Supervisor Hrabik that Ramirez would not leave him alone about the Union. Frasure complained to Hrabik after Ramirez had approached him four times in 1 day, during worktime, urging him to attend a union meeting. Frasure stopped working while Ramirez spoke with him. Frasure testified that he "kind of unloaded" on Hrabik, telling him that Ramirez was continually bothering him while he was trying to work and that he was very upset.[3]

Earlier, in late May, Ramirez had asked employee Mike Jennings to sign an authorization card during worktime. Jennings replied that he would think about it. Ramirez then asked Jennings four or five times during the succeeding days whether he wanted to attend a union meeting. Jennings complained to his supervisor, Moosman, about Ramirez' repeated soliciting of him. Ramirez also approached employee Tom Neilsen about the Union, and Neilsen told Ramirez that he did not support the Union.

Subsequent to these conversations with Jennings and Neilsen, on the evening of June 6, Ramirez visited Jennings and Neilsen while they were working on the night shift. For a period of time lasting up to 20 minutes (Ramirez' testimony) or 45 minutes (Jennings' testimony), Ramirez talked to Jennings and Neilsen together about the benefits of joining the Union and invited them to meet with Pettaway. Jennings and Neilsen both testified that they could not safely work while Ramirez spoke with them because Ramirez was in danger of getting flash burn if they began welding. Both Jennings and Neilsen testified that they tried without success to discontinue the conversation with Ramirez numerous times by stating that they needed to get back to work, and that Ramirez left only after Jennings promised to think about meeting with Pettaway.[4]

Then, on the evening of June 17, in the plant's parking lot after work, Ramirez asked employee Clair Monson if he'd like to attend an organizing meeting. Monson became very angry and began screaming at Ramirez. Employee Pat Burrington, who fled the scene because he felt that it was "going to get ugly," testified that he believed that Plant Manager Haga observed the altercation.

The events directly leading to Ramirez' discharge on June 18 are as follows. Ramirez clocked out at the end of the workday on June 17, but then saw Mike Jennings reporting for work on the second shift. Ramirez spoke with Jennings as he punched in and continued the conversation as Jennings walked to his work station. Ramirez estimated that he accompanied Jennings about 15–20 feet onto the plant floor and spoke with him for about 90 seconds in an effort to persuade Jennings to meet personally with union organizer Pettaway. When Ramirez observed Haga watching from about a hundred feet away, however, Ramirez left the building. Haga then asked Jennings if Ramirez was "bothering" him. Jennings replied, "Yeah, he was bothering me about the damn union stuff and won't leave me alone." A short while later, Haga told Supervisor Moosman to pull Ramirez' timecard and to have Ramirez report to Haga's office before starting work the following day.

When Ramirez met with Haga in Haga's office the next day, Haga asked Ramirez "what am I going to do with you, John[?]" Haga mentioned to Ramirez that he had received a good raise and that his benefits were growing, but that people were complaining about him bothering them all the time and that it was affecting productivity, so he had to change his ways. Ramirez denied that he was bothering anyone. Haga then confronted Ramirez with his own observation of him on the previous evening and of Jennings' report that Ramirez had been bothering him, but Ramirez still denied that he was bothering anyone. Haga again stated, "what am I going to do with you?" Ramirez replied, "well you're the plant manager you do whatever you have to do."

Although Haga had by then recognized that Ramirez had "a really bad attitude about it," he informed Ramirez that he would be discharged but offered him the opportunity to quit so there would be no record of "his firing." Ramirez refused to quit. After Ramirez received

[2] In early June, Supervisor Hrabik spoke to Supervisor Moosman about the complaints Hrabik had received from employees about Ramirez' union activities, and together they spoke to Plant Manager Haga.

[3] Following these complaints by Chandler and Frasure, Hrabik again spoke to Moosman and they later met with Haga.

[4] The Respondent did not know about this June 6 incident until after it discharged Ramirez.

his final paycheck, Moosman accompanied him to collect his tools and then escorted him from the plant.

The Respondent claims that its discharge of Ramirez resulted from his dishonesty and insubordination during this meeting with Haga. Ramirez denied bothering employees about the Union during worktime, even though many employees had complained to their supervisors and Haga himself had witnessed Ramirez doing so. Further, rather than recognize the Respondent's legitimate interest in maintaining produc-tion, Ramirez responded with a flippant challenge: "[Y]ou're the plant manager you do whatever you have to do." In short, despite his repeated badgering of coworkers and interference with their work, of which he could not help but be aware, particularly given his June 6 interaction with Jennings and Neilsen, Ramirez denied the obvious. Moreover, he refused to discuss any change in his behavior and, instead, dared Haga to fire him. Ramirez' calculated insubordination, coupled with his failure to consider the Respondent's interest in production, forced Haga to terminate Ramirez.

"[W]orking time is for work," and an employer may make and enforce reasonable rules governing employee conduct.[5] Even in the face of an unlawful rule, an employer may discharge an employee for solicitation which interferes with production if such interference was the basis for the discharge.[6] An examination of the facts of the instant case establishes that this is exactly what occurred here: Ramirez confronted the Respondent with a pattern and practice of harassment of his fellow employees, who complained about Ramirez' unwanted and constant harassment and later testified about his actions. This was a small unit, and the constant badgering began to affect the workplace. Ramirez interrupted Chandler five or six times during worktime over the course of several days; he interrupted Frasure four times in 1 day while Frasure was trying to work. Haga apparently witnessed an argument and near fight between Ramirez and Monson. Finally, on June 17, Haga witnessed Ramirez follow Jennings onto the plant floor while Jennings was on worktime. Jennings told Haga after this incident that he wanted Ramirez to leave him alone.

My colleagues contend that the Respondent's discharge of Ramirez was a direct result of the Respondent's enforcement of its unlawful ad hoc rule prohibiting only union talk during working time, while permitting talk about other nonwork topics. The Acting General Counsel, however, offered no evidence that these discussions about other nonwork topics ever led to employees' complaining to management or that such discussions affected production. By contrast, employees called the Respondent's attention to Ramirez' actions, and they continued to complain from late May through mid-June. What distinguished Ramirez' conduct was not the content of his message, but that he engaged in continual unwelcome solicitation of employees that resulted in complaints and confrontation. It was this aspect of Ramirez' behavior—the constant harassment of his fellow employees which interfered with production and plant discipline—that was the reason for his discharge.[7]

I would thus find that Ramirez' repeated harassment of employees about the Union constituted a sufficient reason for the Respondent to discharge him. Even with the Respondent's other conduct which the judge found to have violated Section 8(a)(1) (and to which the Respondent filed no exceptions),[8] the Respondent could still take action against Ramirez when his continual harassment of his fellow employees during worktime resulted in management receiving multiple complaints from multiple employees about his behavior. The Respondent cannot be precluded from disciplining an employee who is repeatedly harassing fellow employees, and negatively affecting the work environment, simply because other conduct by the Respondent has been found to violate the Act.[9]

Finally, there is no evidence that the Respondent sought to terminate Ramirez. Indeed, the evidence is that

[5] *Peyton Packing Co*., 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802–803 (1945), rehearing denied 325 U.S. 894 (1945).

[6] *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974) ("if an employee is discharged for soliciting in violation of an unlawful rule, the discharge also is unlawful *unless* the employer can establish that the solicitation interfered with the employees' own work or that of other employees, and that this rather than violation of the rule was the reason for the discharge") (emphasis added). In *Crestfield Convalescent Home*, 287 NLRB 328, 344–345 (1987), enf. denied on other grounds 861 F.2d 50 (2d Cir. 1988), the Board similarly held "the mere absence of a valid no-solicitation/-distribution rule does not confer on employees the absolute right to discuss union matters during worktime to the detriment of their work performance, and an employer may legitimately penalize an employee for discussing union matters during worktime on condition that such discipline is not disparately or discriminatorily applied," citing *Brigadier Industries*, 271 NLRB 656 (1984); accord: *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 805–807 (D.C. Cir. 1987).

[7] For example, in *Adco Electric*, 307 NLRB 1113 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993), the Board, in concluding that the employer's warning an employee not to leave his work and interrupt others in his solicitation efforts for the union was lawful, found that although employees could talk about anything as they worked, there was no evidence that the employer had ever tolerated employees' leaving their work to interrupt those who were working for the purpose of soliciting for some cause. Similarly, in the instant case, there is no evidence that the Respondent tolerated behavior which led to repeated complaints from employees about harassment and work interference.

[8] Inter alia, the Respondent has not excepted to the judge's finding that Hrabik's comment to employee Rodriguez subsequent to Ramirez' discharge violated the Act. The judge found that Hrabik remarked to Rodriguez that he should now understand why he should not talk about the union on company time. I note, however, that Ramirez did not simply talk to employees, he harassed them. Hence, the finding of this violation does not negate the lawfulness of Ramirez' discharge.

[9] Since Ramirez' activities did not constitute "legitimate union solicitations," the reasoning of *Greenfield Die & Mfg. Corp.,* 327 NLRB 237 (1998), cited by my colleagues, is inapplicable.

Haga sought to salvage Ramirez. First, the Respondent waited approximately 3 weeks from the time it first received complaints about Ramirez' behavior before meeting with him individually on June 18. In my view, the Respondent's 3-week delay before meeting with Ramirez individually indicates that it was not simply waiting for the first opportune moment to discharge him because of his union activities. Second, the Respondent did not maintain surveillance over Ramirez, as the June 6 second-shift incident with Jennings and Neilsen showed. Third, Haga initiated the June 18 discussion with an air of frustration: he reported complaints, effect on production, and Ramirez' raises, and asked rhetorically, "what am I going to do with you." Clearly, he invited some recognition of management's legitimate concerns. Ramirez, however, made no attempt to accommodate or discuss management's concerns, but instead responded with a challenge: "well you're the plant manager you do whatever you have to do." In the face of such a challenge, Haga had to assert the Respondent's interest in production or surrender control of working time to Ramirez.

The instant case is factually most similar to *BJ's Wholesale Club*, 318 NLRB 684 (1995), in which a known employee union proponent was issued a warning for "harassing [a] team member" while soliciting authorization cards. The soliciting employee, Cavaliere, approached a coworker, LaTorre, during her working time and asked her to sign an authorization card several times in one day. LaTorre responded initially that she was busy and would look at the card later. On a second solicitation, she told Cavaliere to leave her alone, that she was busy and did not have time to look at the card. After the third solicitation, where she was asked if she had signed the card and responded no, LaTorre became upset and complained to her manager that Cavaliere "kept buggin[g]" her, that she "didn't want to be bothered by no Union," and asked her manager to tell Cavaliere to leave her alone.[10] The manager replied that he would take care of it. The employer then issued a warning to Cavaliere stating that any further violations could result in termination. In affirming the judge's conclusion that the respondent had not violated Section 8(a)(3) of the Act by issuing the warning to Cavaliere, the Board stated, "we find that the [r]espondent lawfully responded to employee Teresa LaTorre's request, following repeated interruptions during work time, that [r]espondent stop Cavaliere from harassing her while she worked."[11] Similarly, in the instant case, the Respondent was lawfully responding to multiple complaints from multiple employees regarding Ramirez' repeated harassment of them during worktime about the Union.[12]

Thus, I find that the Respondent did not violate the Act by its discharge of Ramirez for his continued harassment of employees about the Union during worktime. Moreover, I also would find that Ramirez' dishonesty and insubordination during his June 18 meeting with Haga further supported the Respondent's decision to discharge him. Thus, contrary to my colleagues, I find that even assuming that the General Counsel has established a prima facie showing that Ramirez' protected conduct was a motivating factor in his discharge, the Respondent has met its burden of showing that the discharge would have occurred even in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accordingly, I conclude that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging Ramirez on June 18.[13]

Michael T. Pennington and *Angie L. Harmeyer, Esqs.,* for the General Counsel.

Robert Leinwand and *Michael Hoffman, Esqs. (Littler, Mendelson, Fastiff, Tichy & Mathiason),* of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Based on a charge filed by the International Association of Sheet Metal Workers Association, Local 60 (Local 60 or the Charging Party), the General Counsel alleges here that Frazier Industrial Company (Company or Respondent) violated Section 8(a)(1) and (3) of the Act. The General Counsel's amended complaint (complaint) alleges that Respondent independently violated Section 8(a)(1) by a variety of acts and statements detailed below and that the Company violated Section 8(a)(1) and (3) by discharging John Ramirez on June 18, 1996.[1] Respondent's timely answer denies that it committed the alleged unfair labor practices.

I conducted a hearing in this case at Pocatello, Idaho, on November 7 and 8. After carefully considering the record, the demeanor of the witnesses who testified, and the posthearing briefs of the General Counsel and Respondent, I have

[10] Id. at 685.

[11] Id. at 684 fn. 2.

[12] My colleagues also mention, as did the judge, that some of Ramirez' fellow employees failed to tell him directly to leave them alone. I note that they instead complained to management about Ramirez' constant solicitations. There is no requirement that an employee confront a fellow worker directly before complaining to management about that fellow worker's conduct. Rather, I find it understandable that the other employees did not want to risk entering into a direct confrontation with Ramirez about his behavior. Further, to whom the employees complained is not the relevant point; what is relevant is that they did complain, and thus management was aware that there was a widespread problem with Ramirez' continued harassment of his fellow employees.

[13] I also disagree with my colleagues that Haga's inquiry of Jennings on June 17 as to whether Ramirez was bothering him violated Sec. 8(a)(1). Although my colleagues agree with the judge that this inquiry amounted to an interrogation of Jennings, I find that Haga's questioning was lawful in view of the repeated complaints by employees, including Jennings, of harassment by Ramirez. See *Bates Nitewear Co.,* 283 NLRB 1128 (1987).

[1] Unless shown otherwise, all further dates refer to the 1996 calendar year.

concluded that Respondent violated Section 8(a)(1) and (3) substantially as alleged based on the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent, a corporation, with an office and place of business in Pocatello, Idaho, manufactures steel storage systems for warehouses. In the year preceding the issuance of the complaint, the Company's direct inflow to Idaho exceeded the dollar volume amount established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Accordingly, I find that the Board has jurisdiction to resolve this dispute and that it would effectuate the purposes of the Act for it to do so.

The Company has operations at other locations throughout the United States but this case involves only its Pocatello facility. Respondent leased the Pocatello facility in February 1996 and commenced production about a month or so later. Dennis Haga, who has been with the Company for a number of years at other locations, went to Pocatello as the plant manager. In that capacity Haga hires and fires employees, and otherwise oversees all operations. The three plant supervisors report directly to Haga. Two, Welding Supervisor Clint Moosman and Preparation Supervisor Marty Hrabik, played significant roles in the events involved here.[2]

In the plant's startup phase, Haga hired nine welders and nine others to perform fabrication, maintenance, painting, and other operations. In its initial months, the Pocatello plant operated with one shift lasting officially from 6 a.m. until 2:30 p.m. During those hours, employees received a lunchbreak plus two shorter break periods, one before and one after the lunchbreak. However, from near the beginning of operations the production schedule required that employees work 2 to 4 overtime hours per day. Finally, in late May or early June, the Company started a second shift which consisted of at least two employees, Mike Jennings and Tom Neilsen. The second shift ran from 4:30 p.m. until about 2:30 a.m. Although Haga and Moosman apparently dropped in from time to time, the second shift employees worked mostly without supervision and structured their own lunch and break periods. As Haga put it, "The boys worked by themselves so they, there was no timeclock, I told them to take their breaks when they wanted to."

The Company maintained and distributed an employee handbook containing its policies and rules at other locations but the Pocatello employees never received the Company's handbook until July after certain additions applicable to the Pocatello plant had been made and after the events pertinent to this case occurred. The manual contains a broad antiharrassment policy and the particular rules applicable to the Pocatello plant include a no-solicitation no-distribution rule.

In the meantime, the Pocatello employees learned of the Company's policies on an ad hoc basis verbally from their supervisors. As discussed below, this circumstance is of particular import in connection with the union solicitation activities of Ramirez, the alleged discriminatee in this case. Notwithstanding its written policies, the Company acknowledges—and the evidence establishes—that a relaxed plant culture existed at its Pocatello plant in the sense that employees engaged in personal conversations while working about all sorts of topics pertaining to everyday life. Thus, in his opening statement, Respondent's counsel stated:

> The question presented in this case is not whether employees occasionally speak to each other on company time about car races or personal issues, to say that doesn't happen I think is just simply to ignore the reality of the work place. No provision of the Act, however, forces an employee to work under constant badgering and harassment from a professional union organizer.
>
> When employees are badgered and harassed to the point where they go to their supervisors and complain, where there are altercations, where the harassment threatens the working environment, where the organizer refuses to cease his harassment, dishonestly denies the harassment, gives no indication that he will repent or change his behavior; the [A]ct [does] not handcuff an employer from taking corrective action.

With one exception, Ramirez' on-the-job conversations relating to the union organizing matters resulted in only momentary work interruptions, if any at all. Most other nonwork conversations on working time likewise appear to have involved only brief interruptions but a few described by some witnesses obviously resulted in significant work interruptions. No evidence establishes that Ramirez, while working, ever left his assigned work area to engage in his union activities.

When the Company initially sought workers, Ramirez, a Local 60 apprentice already employed elsewhere, applied for a welder's position with the Company at the behest of Local 60 organizer Mike Pettaway. Pettaway expected Ramirez, as a Local 60 member, to assist in organizing the Company's work force.[3] Quite clearly, Ramirez failed to include on his application form any reference to one recent employer where he had recently engaged in union organizing activities on behalf of Local 60.[4] No evidence establishes, however, that the Company routinely sought references from former employers either before it hired employees or at any time later. Nevertheless, Ramirez passed the Company's welder test and

[2] A third supervisor, Lance Harris, was never mentioned in connection with any of the events involved in this case and he did not testify.

[3] Ramirez previously cooperated with Pettaway's organizing efforts by obtaining employment with at least two other employers where he encouraged employees to unionize. In its brief, Respondent characterizes Ramirez as a "professional union organizer." No evidence shows that Ramirez received any compensation for his organizing activities. On the contrary, the only permissible inference is that Ramirez' sole source of income came from the jobs he held with various area employers although both he and other employees who attended the Union's meetings obviously received dinners and drinks paid for by the Union.

[4] Thus, the Company's employment application form requires applicants to list their three most recent employers. Ramirez omitted any reference to his recent employment at G & L Metal, another company in the area where he engaged in organizing activities on behalf of Local 60 and against which he or Local 60 filed an unfair labor practice charge concerning his termination there. The following form language preceding the applicant's signature line makes such an omission a potentially dischargable offense: "I understand that if any false information, omissions, or misrepresentations are discovered, my application may be rejected and, if I am employed, my employment may be terminated at any time." See R. Exh. 7, p. 2.

started to work on March 7.[5] Ramirez commenced his organizing activities at the plant toward the end of April by soliciting employees to sign union authorization cards.

In conjunction with Ramirez' efforts, Pettaway scheduled and held union organizing meetings on June 3, 6, and 13. Ramirez informed employees about these scheduled meetings and urged employees to attend. He also sought to persuade employees hesitant about attending meetings to meet privately with Pettaway. All told, Ramirez estimated that he spoke with about half of the plant's work force—some obviously on several occasions as he estimated that he probably talked to someone or another about unionization every day or every other day—before Haga fired him on June 18.

Following his June 18 termination, Ramirez applied for unemployment benefits with the Idaho Department of Employment. On his application, Ramirez denied that he engaged in union organizing on "plant time." Indeed, he specifically asserted that he only engaged in organizational activities "before work, [at] lunch, or after work." See Respondent's Exhibits 1 and 2. Respondent protested his claim for benefits and furnished written statements from its supervisors and certain employees seeking to establish that Ramirez had harassed employees about the union matters after he had been warned twice not to do so. Based on these submissions, the Idaho Department of Employment Determination credited Respondent's claim that Ramirez engaged in "union organizing on company time" and concluded that he engaged in misconduct warranting a denial of benefits until he again qualified for benefits by obtaining "bona fide work" providing wages of a specified amount. See General Counsel's Exhibit 4.

B. Credibility

Altogether 12 witnesses testified in this proceeding. Both the General Counsel and Respondent called plant manager Haga and supervisor Moosman as witnesses; the General Counsel called Ramirez in his case-in-chief and again on rebuttal.

Respondent vigorously attacks the Ramirez' credibility and to a lesser extent the credibility of employee Alan Wilcox. Although I share Respondent's concern about the reliability of portions of Ramirez' testimony, I am unwilling to disregard his testimony entirely. In particular, I found Ramirez' testimony and prior statements about his union activities around the plant painfully contradictory. Thus, if asked in a leading fashion whether, in effect, he engaged in union activities at the plant only on his own time, Ramirez almost invariably responded affirmatively. On the other hand, if the question called for a narrative response on this subject, Ramirez without hesitation recounted events making it unmistakably obvious that he engaged in union activities on working time. Furthermore, Ramirez denied that any of the supervisors ever warned employees about engaging in union activity on working time. Almost all other employee witnesses recalled that Moosman made a brief statement about the subject to a group of employees, including Ramirez, in the breakroom.

Yet in certain important respects Ramirez' testimony is reliably corroborated by other very credible witnesses or is uncontradicted. For example, Haga and Ramirez provided nearly identical accounts about the events leading to his discharge and in numerous other instances there is no material dispute about several events described below. However, I have relied on Ramirez' testimony essentially where it is corroborated or not materially contradicted. And, in general, where conflicts do exist, the findings made below represent my careful consideration of numerous factors such as related established or admitted facts, the inherent probabilities, reasonable inferences permitted by the record, the weight of the evidence as affected by factors ranging from the use of leading questions to the degree of unanimity among the witness, and other variant factors affecting credibility including the demeanor of the witnesses involved. *Northridge Knitting Mills*, 223 NLRB 230, 235 (1976). In certain instances below, I have further explained the basis for my finding in light of conflicting evidence; in other instances I have not but suffice it to say that in each instance the factual findings made below represent my conclusions as to the most reliable account about the nature and character of events following a consideration of all of the evidence. In brief, the version of the events detailed below is predicated on testimony which I believe to be credible, accurate, and reliable.

Finally, contrary to Respondent's argument concerning Wilcox, I have given considerable weight to his testimony as well as the testimony of employee Robert Rodriguez. Both were still employed at the company at the time of the hearing. On certain critical matters they testified adverse to their current employer and hence, their own pecuniary interest. The Board has frequently observed that such employee testimony "is apt to be particularly reliable" and logic strongly indicates this to be the case. *Gold Standard Enterprises*, 234 NLRB 618 (1978), and the cases cited therein at fn. 5. That aside, however, both of these witnesses otherwise impressed me as making a sincere effort to be truthful and forthright while testifying.

C. The Specific Allegations

1. Moosman's early threat

a. Relevant evidence

Both Ramirez and employee Robert Rodriguez recalled an incident in the plant lunchroom during a break (Ramirez placed the incident in late March but Rodriguez, although uncertain, thought it occurred in May) when an employee remarked to a group of employees seated with him that the employees ought to "start a union." Supervisor Moosman overheard the remark and became "real flustered about it." Rodriguez credibly testified that Moosman "took his hat off[,] . . . acted real pissed off and said, 'well if I hear anyone going union . . . they'll be down the road.'"[6]

b. Further findings and conclusions

Complaint paragraph 5(a) alleges, in substance, that Respondent violated Section 8(a)(1) when Moosman told a group of employees "that if he ever heard anyone talking about

[5] Pettaway also sought employment with Respondent but failed the welding test and was not hired.

[6] Moosman denied that he made any such remark but I do not credit this denial. Even though the testimony of Ramirez and Rodriguez does not precisely coincide as to the substance of Moosman's response and other incidental details about the setting, both agree generally that Moosman made a threatening remark to the group of employees after an employee made a suggestion about unionizing. For reasons specified above, I have considerable confidence in Rodriguez' testimony and regard it as the most credible account of this incident.

the Union they would be 'down the road.'" Respondent argues that no credible evidence supports this allegation. Citing *Rossmore House*, 269 NLRB 1176 (1984), Respondent further argues that if only Ramirez and Rodriguez overheard Moosman's remark, it would not amount to coercion because they were "avid" union supporters. By inference, Respondent appears to contend that the analytical model addressed in *Rossmore* and its progeny applies in this instance.

Having credited Rodriguez' account about this incident, I find that Moosman's remark that employees talking union would be "down the road" conveys an unmistakable discharge threat. His idiomatic remark is unquestionably coercive, especially when considered in the context of Moosman's described demeanor at the time. I reject Respondent's assertion that such a remark to "avid" union supporters would not be coercive. It is virtually impossible to conceive of a situation where an outright threat, angrily expressed by a supervisor, to discharge even an overtly active union supporter would not give rise to apprehension about exercising Section 7 rights around the workplace. *Rossmore* is inapposite to this type of inherently coercive remark. That case and those which follow it establish a framework for analyzing employer interrogation of employees about their union activities to determine its coerciveness. Accordingly, I find Respondent violated Section 8(a)(1), as alleged in complaint paragraph 5(a). *M. J. Mechanical Services*, 324 NLRB 812 (1997).

2. The prohibition against union talk

a. Relevant evidence

Supervisor Hrabik received a couple of "complaints" (word used in counsel's leading question rather than by witness) from employees in late May and early June about Ramirez' union activities. He spoke to Supervisor Moosman about it in early June and together they spoke with plant manager Haga.[7] When the three men met in Haga's office, Haga instructed the supervisors to warn their employees "that they could do whatever they wanted to on their own time, but on company time they need not to talk about the union or bother . . . anybody about it."

Following that meeting, Moosman went to all of the welders' workstations and explained that there had been complaints about some employees "harassing" others to join a union. Moosman "warned" each one, including Ramirez, what they did on their own time was their business but that that they could not "harass" employees about the Union during "company time."[8] In addition, Moosman delivered the same instruction to a group of employees, also including Ramirez, in the lunchroom on a break. During the lunchroom meeting, Moosman also told the employees that he "wanted to know about it if someone was talking to you about the union on companytime."

On June 13, employee Todd Chandler complained to Spervisor Hrabik that Ramirez "was harassing him to be present at [a] union meeting after work." Chandler went to Hrabik after Ramirez attempted to induce Chandler on five or six occasions over the course of several days to attend an upcoming union meeting. Although Chandler lacked interest in attending a union meeting, admittedly he never informed Ramirez of this lack of interest. Instead, he went to Hrabik in an effort to get his supervisor to drop a "hint" to Ramirez for him.

The following day, June 14, employee James Frasure complained to Supervisor Hrabik that Ramirez would not leave him alone about the Union. Frasure's report to Hrabik followed four or five work time approaches on one particular day in which Ramirez urged Frasure to attend a Union meeting. Ramirez' remarks to Frasure, though numerous, were brief and on each occasion Frasure responded to Ramirez by saying, in effect, that he would think about it. Frasure too never told Ramirez that he was upset or bothered by these numerous solicitations. However, when Frasure later encountered Hrabik while searching for a blueprint, he purportedly "kind of unloaded" on Hrabik. Frasure told the supervisor about Ramirez' solicitations and asserted to Hrabik that he was "real pissed off."

Following Frasure's complaint, Hrabik purportedly went to Moosman again and the two later met with Haga.[9] At this meeting, Haga told the two supervisors that "harassing" employees on Company time "had to stop." Later, Moosman again told Ramirez and the other employees "that there had been complaints about some employees harassing others on work time and that this had to stop."

b. Further findings and conclusions

Complaint paragraph 5(b) alleges, in effect, that Respondent, by Supervisor Moosman, promulgated and maintained a rule prohibiting employees from discussing the Union on Company time. The evidence permits the conclusion, which I have made, that Respondent established an ad hoc rule prohibiting union talk on working time but took no steps to limit any other nonwork discussions on worktime. Where, as here, Respondent sought to suppress only unionization talk during working time, the discriminatory character of Respondent's ban is self–evident. *Emergency One, Inc*., 306 NLRB 800 (1992), and the cases cited at 806. As such, the refinements in Haga's prohibition when relayed to the employees, i.e., whether it was made clear that employees were free to discuss union matters on their breaktimes and outside work hours, becomes immaterial. By barring only union discussions while tolerating

[7] I credit Supervisor Hrabik's account about the initiation of this meeting with Haga. Moosman too claimed credit for initiating this meeting but his account varied and failed to explain how Hrabik became involved. According to Moosman, he arranged for the meeting with Haga after Jennings came to him "complaining about some harassment." Aside from all else, this mischaracterizes what occurred. Rather that "complaining," Jennings merely reported to Moosman that he had been approached by Ramirez about a union and asked Moosman to explain what was going on. Moosman told Jennings that he did not know. As I credit Hrabik's account, I find that Moosman did nothing about the information received from Jennings until Hrabik later spoke to him.

[8] In his direct testimony, Moosman went to some length to sanitize Haga's instruction and his subsequent warning to the employees of any reference to a union. However, Moosman's prehearing affidavit (G.C. Exh. 8), and Haga's direct testimony each focus precisely on the relationship of the restriction to the nascent union activity. In addition, I find it highly improbable that Moosman would have gone about the plant warning employees not to harass other employees on "company time" without putting it in any context.

[9] Moosman claimed that there had been other similar complaints leading to this second meeting with Haga but no specific evidence concerning complaints other than those by Chandler and Frasure was developed and I doubt that anything other than their complaints caused this second meeting.

other discussions about matters unrelated to work during actual working time, Respondent plainly infringed on its employees Section 7 rights.

Respondent had the burden of establishing that production or plant discipline necessitated its rule prohibiting only union discussions on worktime. *State Chemical Co.*, 166 NLRB 455 (1967). In an effort to establish a production or plant discipline necessity for its discriminatory rule, Respondent called several employee witnesses in addition to Frasure. Their testimony is detailed below in the section dealing directly with Ramirez' discharge. As I have concluded for reasons stated in that section that this evidence fails to establish a production or discipline necessity for this rule, I find that Respondent's efforts to suppress only union talk during working time while permitting other nonwork discussions violated Section 8(a)(1), as alleged. *M. J. Mechanical Services,* supra; *Industrial Wire Products*, 317 NLRB 190 (1995).

3. Moosman–Rodriguez union meeting conversations

a. Relevant evidence

In early June, Rodriguez attended a union meeting. The following day, Moosman remarked to Rodriguez that he had heard a rumor about a "little bitch session" where employees talked about "stuff" they did not like about the shop. Moosman then added that he "was disappointed" in Rodriguez. As their conversation continued, Rodriguez admitted that he and others had discussed whether or not they wanted to continue working at the shop "with them three [presumably, Haga, Hrabik and Moosman] the way they were." Following this remark, Moosman took out his knife, opened it, handed it to Rodriguez handle first and stated: "well don't cut your own throat." Without responding, Rodriguez handed the knife back to Moosman and went about his work.[10]

Shortly after lunch that same day, Moosman again approached Rodriguez at his work station and asked who had attended the meeting. Rodriguez told Moosman that he had attended the meeting but declined to disclose who else had attended. Instead, he told Moosman that he would have to find that out "on his own." Moosman then told Rodriguez: "[W]ell, I just don't know if I can trust you . . . anymore. You know, you're a pretty good worker and you could go places in this business . . . you've done a great job so far for me but. . . if you continue to cut your own throat I'm not going to be able to do anything for you."

b. Further findings and conclusions

In complaint paragraphs 5(e), (f), (g), and (h), the General Counsel alleges that Respondent violated Section 8(a)(1) in the course of these Moosman–Rodriguez exchanges. In his brief, the General Counsel argues that Moosman's "bitch session" remark amounted to unlawful interrogation, created the impression of surveillance, and was otherwise coercive "because it could reasonably be interpreted to suggest that [Rodriguez] would be treated differently by his supervisor" for supporting the union. In addition, the General Counsel contends that Moosman's "don't cut your own throat" remark amounted to an "unlawful threat of unspecified consequences."

Respondent quibbles over whether the substance of complaint paragraphs 5(e) and (f) occurred in one or two conversations but I do not perceive that argument of significance.[11] In fact, for purposes of analysis I am of the view that regardless of the number of separate conversations there may have been, these post-meeting exchanges between Moosman and Rodriguez should logically be treated together as the evidence supports the conclusion that all are bound together with a common theme, i.e., Moosman's curiosity about the participants and substance of the meetings. Regardless, Respondent contends that Moosman's inquiry concerning the identity of those in attendance at the "bitch session" had no coercive quality because Rodriguez was "an open Union supporter" and because Moosman did not press the question after Rodriguez refused to answer. Respondent further contends that the "cut your own throat" statement coupled with passing the knife was, as I have found, a symbolic gesture using a figure of speech designed as a plea for Rodriguez to set aside any notion of quitting.

At the outset, I do not agree with Respondent's assessment that Rodriguez was "an open Union supporter." Although Rodriguez signed a union card and attended some of the Union meetings, no evidence merits the conclusion that Rodriguez engaged in any overt union activity around the plant or otherwise openly manifested his support for the Union. Hence, I concur with the General Counsel's argument that Moosman's initial "bitch session" remark to Rodriguez violated Section 8(a)(1) as such a statement would reasonably cause an employee to assume that his union activities had been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992). In addition, I agree that Respondent also violated Section 8(a)(1) by Moosman's expression of disappointment over Rodriguez' attendance at the meeting as that statement would reasonably restrain an employee from further exercising Section 7 rights out of fear that conduct displeasing to his supervisor would lead to some form of discrimination.

I further conclude that Moosman's later inquiry about the identity of those who attended the meeting with Rodriguez amounts to coercive interrogation but nothing more. No evidence would support a conclusion that Moosman had a legitimate purpose in making this type of inquiry. And even assuming, as Respondent contends, that Rodriguez openly and actively supported the Union around the plant, the coercive character of Moosman's inquiry becomes quite evident from his subsequent implication that Rodriguez would be "cutting his own throat" by refusing to cooperate. Therefore, I conclude that Respondent violated Section 8(a)(1) when Moosman asked Rodriguez to identify others who attended the Union meeting. *Williamhouse of California*, 317 NLRB 699, 713 (1995).

[10] No one contends that Moosman threatened physical harm toward Rodriguez and, in my judgment, any such inference would be entirely unwarranted. Even though I have not credited some portions of Moosman's testimony, he did not impress me as an individual inclined to irrationally make physical threats. On direct examination, Rodriguez testified that he did not respond at all to Moosman during this conversation but when cross-examined from his prehearing statement Rodriguez readily admitted a discussion at the union meeting about quitting over working conditions. Based on Rodriguez' cross-examination account, Moosman's use of his knife appears to be a plausible, symbolic response. Hence, I have concluded that Rodriguez referred to employee discussions at the meeting about quitting.

[11] However, my findings here are based almost entirely on Rodriguez' testimony which I credit. Regardless, some matters pertaining to this exchange are not in dispute and Moosman was never called upon to address other matters. Thus, Moosman, in effect, admits that he spoke to Rodriguez about the meeting at least once, that he asked who had attended and that he made the "cut your own throat" remark after Rodriguez disclosed that he had thought about quitting.

The General Counsel's also argues that Moosman's "go places" statement impliedly promised Rodriguez an advancement with the Company if he discontinued his support of the Union. In my judgment, the General Counsel misinterprets the fundamental nature of the transaction between Moosman and Rodriguez at the time of this utterance. As I perceive their exchanges by considering them in their entirety, Moosman sought only to have Rodriguez identify those other employees who attended the union meeting. Rather than promising Rodriguez anything, Moosman's remark after Rodriguez declined to identify others amounts to little other than the "fist in a velvet glove" treatment designed to coerce Rodriguez' cooperation.

However, the General Counsel's allegation in complaint paragraph 5(h), and his argument in support, segregates and isolates each sentence, phrase or clause from the whole in order to compound a single transaction into several isolated statements, events, and violations. Rigidly applied, this approach produces a hodgepodge of ambiguous statements and obscure events that foment unproductive argument and excursions into a world of useless abstractions at odds with the analytical scheme established by the Board long ago to differentiate lawful and unlawful interrogation. See *Blue Flash Express*, 109 NLRB 591 (1954). For this reason, I reject the General Counsel's claim that Moosman made any separate and distinguishable "implied promise of promotion or advancement . . . if Rodriguez [discontinued] his support for the Union." Hence, I recommend dismissal of complaint paragraphs 5(h).

4. Hrabik's fence and other related discussions

a. Relevant evidence

Sometime in early June, machine operator Allen Wilcox agreed build a backyard fence at Supervisor Hrabik's residence to partially pay a debt he owed to Hrabik. Pressured by his wife's concern for the safety of their children, Hrabik arranged with Wilcox to start the project after work on June 6. That evening, however, Wilcox first went to a personal, self–improvement meeting and then to a union meeting. As a result, Wilcox failed to keep his appointment with Hrabik and, presumably, never notified Hrabik.

At work the following morning, Hrabik told Wilcox (in the presence of Rodriguez and in a "real crappy" tone of voice) that it really hurt "dissing me for that meeting." Hrabik agreed that he expressed his displeasure to Wilcox but denied using any form of the colloquial expression "dis." Moreover, Hrabik claimed that his reference was to Wilcox's personal meeting rather than the union meeting. Regardless, Wilcox told Hrabik that his "life didn't revolve around him" but added, before walking away, that he would be available to work on the fence that evening and into the weekend.

Later that day when he punched out at the end of his shift, Hrabik asked Wilcox how the meeting was. When Wilcox asked if Hrabik referred to his personal meeting, Hrabik replied: "[N]o you know what meeting." Wilcox then asked who had told him but Hrabik said nothing further.

In the next few days, Wilcox worked on Hrabik's fence as promised. Rodriguez accompanied and assisted Wilcox on a portion of this project. On one occasion, Hrabik brought refreshments for the two men and the three of them conversed for awhile. During their discussion, one of the two employees asked Hrabik for his opinion about the union organizing. Hrabik told them that the Company did not "have any stock here in Pocatello." He also stated: "You know, Frazier isn't going to allow this, the union to spread to the other companies, they'll just close this plant up and . . . move on." Hrabik further told the two men that if his job was threatened he would "cut their throats" and that if he got fired "for all this stuff," they were "going down" with him.

A few days after the June 6 union meeting, Hrabik spoke to Wilcox alone at his machine. By this time Wilcox had made it clear at least to Hrabik that he favored unionization. On this occasion, Hrabik asked Wilcox why the employees wanted a union. Wilcox told Hrabik that he was not happy with his raise, that he felt the Company had lied to the employees about the raises, and that he could make more money "working construction." Hrabik responded that a couple of employees seemed very happy with their raises and asked Wilcox what he thought the Union could do for the employees. Wilcox said that he "wasn't sure, maybe better pay or better benefits including a life plan." Hrabik then told Wilcox that the Company "didn't have to give [employees] better benefits, they could just take them away." Wilcox responded that he would quit if the Company did that. At that point Hrabik stated: "[Before the Company] went union they would either hire non–union or shut the plant down."

b. Further findings and conclusions

Complaint paragraph 5(j) alleges that Hrabik's "dissing" statement to Wilcox is unlawful. Respondent contends that the General Counsel failed to prove the unlawful nature of this statement. As Respondent argues, the point of the remark "was not to find out if Wilcox was at a union meeting; it was to chastise Wilcox for not upholding his end of a bargain and was unrelated to his job at Frazier or the Union." I agree. Hrabik's "dissing me" statement—even if delivered in a "real crappy" tone of voice—related only to Wilcox's failure to keep a personal commitment he had made to Hrabik. I cannot agree at all with the General Counsel's contention that it is reasonable to presume Hrabik's extreme reaction resulted from Wilcox's choice to attend a union meeting rather than keep his prior appointment with Hrabik. Even assuming that Hrabik referred to the union meeting, every shred of evidence in this record shows that the source of his irritation that morning related solely to Wilcox's irresponsible failure keep his personal appointment with Hrabik. Undoubtedly, Wilcox knew of the considerable personal importance Hrabik placed on the fence project. Under the circumstances, I find that it is far more reasonable to conclude that Hrabik's reaction toward Wilcox's cavalier conduct would likely have been the same even in the absence of any union activity. Accordingly, I recommend dismissal of complaint paragraph 5(j).

Complaint paragraph 5(m) alleges that Hrabik's brief remark as Wilcox punched out on June 7 violated Section 8(a)(1). Where, as here, no other evidence establishes a legitimate basis for Hrabik's knowledge that Wilcox attended a union meeting the previous evening and as Wilcox's response eliminated the other meeting he attended as the basis for the question, Hrabik's remark would likely convey to Wilcox that his union activities were under surveillance.[12] Accordingly, I find that

[12] As noted, Wilcox attended two meetings the previous evening. There is no evidence that at the time of the earlier "dissing" statement, Wilcox or anyone else disclosed the fact that he also attended a union meeting.

Respondent violated Section 8(a)(1) by Hrabik's remark at this time. *Emerson Electric*, 287 NLRB 1065 (1988).

Complaint paragraph 5(k) alleges that several remarks made by Hrabik to Wilcox and Rodriguez during the refreshment break at his home violated Section 8(a)(1) Hrabik's prediction in this conversation that Respondent would close the Pocatello plant if its employees succeeded in obtaining union representation is not protected by Section 8(c) as Respondent seems to contend. Respondent's reliance on cases suggesting that a supervisor's similar remarks made in a context showing them to be solely the supervisor's opinion are inapposite. By its explicit terms, the free speech protection established in Section 8(c) excludes statements containing threats "of reprisal or force." Although, these two employees undoubtedly realized that Hrabik (or Haga for that matter) lacked authority to actually close the Pocatello plant, employees generally have no means of knowing the degree to which higher management makes lower–level supervisors privy to contingency plans. Here, however, Hrabik's subsequent forceful threats that he would (again figuratively speaking) cut throats and take others down with him if he lost his job over the organizing activities establish that he resolutely perceived that union organizing activities would lead to the plant's demise. Hence, the sheer strength of Hrabik's expressed fear of this consequence would likely lend significant credence to the plant closing proposition in the minds of the employees who overheard it. Put another way, Hrabik's subsequent threats of retaliation lifted this discussion beyond an idle backyard debate or speculative exercise. Instead, by telling employees that the plant would close if organized and that he would retaliate against those causing it to close, Hrabik effectively issued an alarm to these two employees that success in organizing could only lead to a loss of employment sooner or later. Accordingly, I find Respondent violated Section 8(a)(1), as alleged in complaint paragraph 5(k), by Hrabik's plant closing remark as well as his subsequent threats to personally retaliate against employees if he lost his job as a consequence. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969).

As the General Counsel's brief makes clear, notwithstanding the different dates alleged in complaint paragraphs 5(l) and 5(n), the conduct involved occurred in a single conversation, the one between Hrabik and Wilcox at the latter's machine. As the evidence shows that this conversation occurred a few days after Wilcox attended the June 6 meeting, the date alleged in complaint paragraph 5(l) more closely approximates the time of this exchange.

The General Counsel argues that in this conversation Hrabik unlawfully interrogated Wilcox, threatened to discriminate against union supporters in hiring, and again threatened that the plant would close. Respondent contends that "Hrabik only made a permissible inquiry into the reason Wilcox supported Local 60." Although this conversation began in the fashion described by Respondent, it certainly did not end that way. Instead, I find that Hrabik soon lapsed into statements designed to convey the futility of any organizational effort by telling Hrabik that Respondent could take away benefits, discriminatorily hire workers with antiunion proclivities and close the plant. Contrary to Respondent's apparent argument, these latter remarks do not describe the potential outcome of any legitimate collective-bargaining process; rather they describe illegal activities designed to thwart employee desires for representation. Concluding as I have that Hrabik's remarks in the latter part of this conversation were designed to unlawfully interfere with Wilcox's exercise of his Section 7 rights in violation of Section 8(a)(1), I further find that his initial questioning of Wilcox was also unlawful. *Outboard Marine*, 307 NLRB 1333, 1335 (1992). This is especially true where, as here, Hrabik had earlier engaged in unlawful conduct directed at Wilcox.

5. Ramirez' discharge and the fallout

a. Relevant evidence

At the end of his workday on June 17, Ramirez clocked out but came on Mike Jennings reporting for work on the second shift. Ramirez engaged Jennings in conversation as he punched in and continued the conversation with him while Jennings walked his work station. Ramirez estimated that he accompanied Jennings about 15 to 20 feet onto the plant floor and spoke with him for about 90 seconds in an effort to persuade Jennings to make an appointment to meet personally with Union Organizer Pettaway.[13] However, when Ramirez observed plant manager Haga watching from the area of the second upright jig, about a hundred feet away, he turned away and left the building.

When Jennings reached the area of the upright jigs, Haga ask him if Ramirez had been "bothering" him. Jennings answered, "Yeah he was bothering me about the damn union stuff and won't leave me alone."[14] A short while later, Haga told supervisor Moosman to pull Ramirez' timecard and to inform him to report to his office before starting to work the following day. Moosman did as told and, promptly after Haga arrived at the plant on June 18, he spoke with Ramirez in his office.

Haga began by rhetorically asking Ramirez, "what am I going to do with you, John[?]" Haga then pointed out to Ramirez the he had received a good raise and that his benefits were growing but that people were complaining about him bothering them all the time and that it was affecting their productivity and his productivity so he had to change his ways. Ramirez denied that he was bothering anyone. Haga then confronted Ramirez with his own observation of him on the previous evening and of Jennings' report that Ramirez had been bothering him but Ramirez still denied that he was bothering anyone. When Haga again lamented "what am I going to do with you," Ramirez told him "well you're the plant manager you do whatever you have to do." By this time Haga perceived that Ramirez "had a really bad attitude about it" so he informed Ramirez that he would be discharged but offered the opportunity for him quit so there would be no record of "his firing." Ramirez refused to quit. After Ramirez' received his final paycheck, Moosman accompanied Ramirez to collect his tools and then escorted him from the plant.

Later that morning, Hrabik briefly spoke to Rodriguez who had learned of Ramirez' termination from Moosman. At that time, Hrabik pointed toward the office door and, in apparent

[13] According to Ramirez' uncontradicted testimony, Jennings agreed during the course of this brief exchange that he and Neilsen would fix a time to speak with Pettaway.

[14] This finding is based on Haga's account. Jennings recalled telling Haga that Ramirez was bothering him and that he was "getting tired of it . . . I've had other problems on my mind and I was just getting pretty fed up with the whole deal." Ramirez claims that Jennings gave no indication to him that he felt annoyed or that he did not want to discuss any union matter.

reference to Ramirez' discharge, Hrabik remarked to Rodriguez, in effect, that he should now understand why he should not talk about the union on companytime. According to Rodriguez, Hrabik then "kind of giggled and kept walking toward the main office."

b. Further findings and conclusion

Complaint paragraphs 6 and 7 allege that Respondent violated Section 8(a)(3) by discharging Ramirez. Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by terminating employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992).

Under the causation test established by the Board *Wright Line*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. In this case, the General Counsel met that burden. Thus, the General Counsel established that Ramirez served as the Union's principal in–plant organizer, that his activities were well known to management, that Respondent's manager and supervisors engaged in numerous unlawful activities preceding Ramirez' discharge evidencing animus toward employee organizational activities generally, and that the chain of events leading to Ramirez' termination strongly suggest that it resulted from the enforcement of Respondent's unlawful no union talk rule.

Where the General Counsel establishes a prima facie case, the burden of persuasion shifts to Respondent to establish that the same adverse action would have been taken even in the absence of the employee's protected activity. *Best Plumbing Supply,* 310 NLRB 143 (1993). To meet this burden "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 even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Respondent contends that Ramirez' union activities lacked protection under the Act as union activities during working time rose to the level of harassment. The employee witnesses called by Respondent established unmistakably that Ramirez spoke with employees about the Union's meetings and the potential benefits of unionizing on several occasions during working time and he admits as much. Respondent's evidence shows that Ramirez spoke to Chandler on several occasions over the course of several days and that he spoke to Frasure, who fabricated the materials Ramirez welded, several times on one particular day. Neither of these two employees ever rebuked Ramirez for his repeated solicitations nor otherwise expressed their lack of interest in the Union, its meetings or its potential benefits. By contrast, when Ramirez spoke with Neilsen initially about the Union, Neilsen informed him forthrightly that he "wasn't really for the union." Save for the incident described below where Neilsen was present essentially as a bystander, Ramirez never spoke to Neilsen about the subject again.

Jennings, the other employee witness called by Respondent to buttress its claim that Ramirez' conduct amounted to harassment, also recounted several contacts with Ramirez about the Union. The Ramirez' solicitation of Jennings on June 17 to meet privately with organizer Pettaway, which precipitated his discharge, would be difficult to label as harassment by itself. This brief exchange enroute from the breakroom to Jennings' work area ended well before Jennings arrived at his work station. Although Jennings claims, contrary to Ramirez, that he told Ramirez that he was not interested in meeting with Pettaway, their conversation appeared to have ended at about that point when Ramirez saw Haga looking at them.[15]

Without question, Ramirez spoke with Jennings several times before June 17. In general terms, Jennings claimed that he told Ramirez on numerous occasions that he was not interested in the Union but I am unable to credit this assertion. Conduct by both Jennings and Ramirez tends to suggest otherwise. Thus, as noted, Ramirez never singled out Neilsen for further solicitation after Neilsen informed him that he had no interest in the Union. By contrast, Jennings' conduct appears substantially different and inconsistent with his professed lack of interest in the Union. Thus, when Ramirez gave him a union card to sign, Jennings told Ramirez that he would take it home and discuss it with his wife. Not unexpectedly, that prompted further inquiries about the card by Ramirez. As time progressed, Ramirez invited Jennings to meet privately with Pettaway at a local bar. Again Jennings gave an inconclusive response by saying that he would think about it. This prompted Ramirez to visit the plant on the evening June 6 at about 6 p.m. where he visited at some length with Jennings and Neilsen, the two night-shift employees. At the time Jennings and Neilsen were welding uprights.

Apart from again inviting Jennings to meet with Pettaway, Ramirez also talked about the advantages he perceived from unionization and about his organizing activities while employed at other shops. Estimates about the length of this conversation varied; Ramirez claimed it lasted about 20 minutes but Jennings said they spoke for about 45 minutes. As noted, Respondent structured the unsupervised night shift in a manner that allowed those two employees to take breaks at their own discretion. Both Jennings and Neilsen claim that they attempted without success to discontinue the conversation with Ramirez three or four times and that Ramirez left only after Jennings again promised Ramirez that he would think about meeting with Pettaway. Although Jennings estimated that the two men could have produced three or four more uprights during the time Ramirez spoke with them, Respondent adduced no evidence establishing either that the night-shift output for that evening fell short of normal or that Jennings and Neilsen were ever questioned about their low production for that evening. In fact, the evidence shows that Respondent never learned of this incident until after terminating Ramirez.

Even though Respondent's evidence establishes that Ramirez tenaciously solicited employees to sign cards, attend the Union's meetings, or meet individually with Pettaway, his persistence, in the main, resulted in those instances where he received tepid or inconclusive responses from the employees with whom he spoke. Moreover, with the exception of the lengthier night shift conversation, all of the Ramirez' worktime union solicitations were obviously brief and likely involved

[15] Ramirez claims that Jennings told him at this time that both he and Neilsen would schedule an appointment with Pettaway.

little, if any, disruption in production.[16] As for the night shift discussion, no evidence establishes that Ramirez' conversation with Jennings and Neilsen resulted in production levels out of line with that produced on other nights. Additionally, no evidence shows that Ramirez' worktime solicitations were other than courteous or produced disruptive arguments.[17]

Likewise, no evidence establishes that Moosman's warnings to Ramirez were ever couched in more than general terms. As a consequence, Ramirez had no way of knowing whether his solicitations annoyed any particular individual or whether the warnings came only as the result of management's undue sensitivity about any organizing activity. For this reason, the facts here stand in significant contrast to those in *B J's Wholesale Club*, 318 NLRB 684 (1995), cited by Respondent, where the solicited employee made it abundantly clear to the solicitor before going to management that she preferred not to be bothered. Likewise, the facts here are distinguishable from those in *Patrick Industries,* 318 NLRB 245 (1995), also cited by Respondent, where the solicitor became egregiously insulting before the employee sought management assistance.

Merely labeling Ramirez' conduct as harassment does not necessarily make it so. Based on the evidence Respondent presented, I have concluded that Respondent failed to establish that Ramirez' solicitations, though perhaps numerous, can be characterized as harassment. At best, the evidence shows that, from the outset, Respondent and some employees treated virtually any union solicitation by Ramirez as harassment. In fact, the scope and character of Ramirez' union activity appears to have been well within the bounds of other nonwork activity Respondent regularly tolerated on worktime.[18] I find, therefore, that Ramirez' worktime activities were protected.

Respondent further claims that Ramirez' discharge resulted from his dishonesty and insubordination during his meeting with Haga on June 18. In support of this contention, Haga claimed at the outset of their June 18 meeting that he had no intention of discharging Ramirez. While testifying as Respondent's witness, Haga sought to suggest that the decision to discharge Ramirez came about in the course of the June 18 meeting. Thus, he explained in that portion of his testimony that he fired Ramirez because "he was dishonest, he wouldn't admit that he was ["bothering" Jennings] . . . insubordination, I guess . . . the way he talked to me." The claim Ramirez exhibited dishonesty by refusing to admit that he was bothering Jennings the evening before lacks merit. At most, Ramirez was merely expressing his own disagreement with Haga's assertion to that effect.

Other evidence strongly suggests that Haga had made up his mind to terminate Ramirez well before their meeting. Thus, when called as General Counsel's 611(c) witness on the first day of the hearing, Haga stated that the only reason for Ramirez' discharge was, as explained in his June 18 memorandum,[19] because he had witnessed Ramirez harassing "a fellow employee [Jennings] who was on company time" and because Ramirez had been accused of harassing other employees on two previous occasions. This explanation is consistent with having Ramirez' timecard pulled on the evening of June 17 by Moosman and explains the two memos submitted to him by supervisor Hrabik on June 17 concerning reports from Frasure and Chandler the week before.[20] Additionally, Ramirez testified without contradiction that Haga had already prepared a resignation form for him to sign when they talked on June 18. Finally, none of the submissions which Respondent submitted to the Idaho Department of Employment in connection with Ramirez' subsequent application for unemployment benefits suggest that he was discharged for any reason other that the alleged harassment of employees concerning the Union. Hence, I find that Haga decided to terminate Ramirez on June 17 after he observed him speaking with Jennings who was on the clock and learned that the subject of their brief exchange was the Union.

Accordingly, I have concluded that the characterization of Ramirez' activities as harassment amounts to little more than a self-serving justification Respondent seized on to rid itself of an active and persistent employee organizer. The evidence here merits the conclusion that Respondent discharged Ramirez because he failed to adhere to Respondent's unlawful rule barring union talk on working time. For this reason, I find that Respondent discharged Ramirez in violation of Section 8(a)(3). *M.J. Mechanical Services,* supra.

Complaint paragraph 5(c) alleges that Haga's inquiry of Jennings as to whether Ramirez was bothering him violated Section 8(a)(1). The General Counsel argues that Haga was "obviously interrogating Jennings for the purpose of confirming his suspicions about the nature of the conversation." I agree. No evidence suggests that Respondent's supervisors ever took a similar interest in conversations between employees enroute to and from their machines.

Finally, the General Counsel alleges in complaint paragraph 5(i) that Hrabik's postdischarge comment to Rodriguez violates Section 8(a)(1) and argues in his brief that the comment is unlawful, because it could reasonably be interpreted to mean that he too would be fired if he engaged in protected union organizing activity. Respondent argues no 8(a)(1) violation occurred because Hrabik merely "repeated a lawful non–solicitation rule." As found above, Respondent's prohibition against only union talk on working time violates Section 8(a)(1). Accordingly, I find that Hrabik's unmistakable inference that an employee could be discharged for failing to adhere to this unlawful rule also violated Section 8(a)(1).[21]

[16] Presumably, if Ramirez' activities on the day shift interfered with production or distracted others, one of the supervisors present would have intervened. Respondent adduced no evidence of this nature.

[17] Only one employee, Clair Monson, reacted to Ramirez' union solicitation with overt hostility. Ramirez met Monson on June 17 in the plant parking lot after work and invited him to attend a union meeting. Monson became very angry and began screaming at Ramirez. Monson told Ramirez that unions did not look "out for your benefit, they're only for themselves."

[18] In his testimony, Haga alluded to Respondent's title VII antiharassment policy detailed in its employee manual and Respondent cites that policy in its brief. Although by its very terms, this policy would appear inapposite to the situation at hand, the Board has nevertheless held otherwise. See, e.g., *Patrick Industries,* supra. Regardless, the application of such policies presupposes that harassment occurred in the first place. Here, I have found that it did not and, hence, the policy is not material.

[19] See G.C. Exh. 3.

[20] See attachments to G.C. Exh. 3.

[21] Respondent also argues that Rodriguez' version of the remark should not be credited. Hrabik testified that he said: "This is the reason why we work on work time." Either way, I would still find the remark unlawful as it implied that employees would be discharged for refusing to abide by Respondent's unlawful rule.

CONCLUSIONS OF LAW

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

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

3. By threatening to discharge employees who engage in union activities; coercively interrogating employees about their union activities and sympathies, and those of other employees; expressing disappointment in employees who attend union meetings; threatening employees that it would close the plant if employees chose union representation; threatening to retaliate against employees for their organizational activities; creating the impression that employee union activities were under surveillance; attempting to convince employees that it would be futile for them to seek representation for collective-bargaining purposes; by maintaining and enforcing a rule prohibiting talk on working time only about matters pertaining to unionization; and by suggesting that employees could be discharged for failing to adhere to its unlawful rule prohibiting union talk on working time, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging John Ramirez on June 18, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Relying primarily on *Vilter Mfg. Corp*., 271 NLRB 1544 (1984), Respondent argues that Ramirez should be denied the usual reinstatement remedy because he falsified his employment application as well as his unemployment benefit application and because he lied to Haga during the discharge interview. I find *Vilter* inapposite to the circumstances here[22] and I reject Respondent's argument concerning Ramirez' reinstatement for the following reasons.

First, Ramirez' assertion to Haga in the discharge interview that he was not "bothering" Jennings represented Ramirez' own opinion about the nature of his engagement with Jennings on June 17. The fact that Haga or Jennings happen to think otherwise is a qualitative judgment rather than a matter of absolute fact. Second, although Respondent established that Ramirez failed to list a G & L Metal as a recent employer on his employment application, the language on Respondent's application form warns of dismissal only as a potential option and no evidence establishes that Respondent has routinely dismissed employees for similar omissions. Third and finally, the Idaho Department of Employment Determination finding that Ramirez' engaged in "misconduct in connection with employment" because he engaged in union organizing on "company time" applies a legal standard in conflict with the National Labor Relations Act on a matter preempted by the Act. Under the Act, in the absence of a lawful, employer–established rule prohibiting solicitations, an employee may not be lawfully discharged for engaging in union organizing even on working time if such activity does not interfere with production. *Miller's Discount Department Stores*, 198 NLRB 281 (1972). As found herein, Respondent never established a lawful rule prohibiting union organizing on worktime prior to Ramirez' discharge. However, the Determination by the Idaho Department of Employment presumed the existence of a lawful rule where, in fact, none exists. Because of this presumption, an employee would be required to assert, as Ramirez did, that he or she only engaged in those activities on nonworktimes, i.e., before and after work or on break periods, in order to qualify for benefits. In my judgment, penalizing an unlawfully discharged employee by denying reinstatement in these circumstances would be at odds with the fundamental purposes of the Act and essentially unjust.

Accordingly, the Respondent, having discriminatorily discharged John Ramirez, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent must further expunge from any of its records any reference to Ramirez' June 18 discharge and notify him in writing that such action has been taken and that any evidence related to that termination will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc*., 261 NLRB 472 (1982). As the Idaho Department of Employment Determination disqualified Ramirez' access to benefits prospectively until he requalifies, Respondent must notify that agency in writing that it withdraws its protest of Ramirez' application for benefits following his June 18 discharge and move to have that Determination vacated.[23]

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Frazier Industrial Company, Pocatello, Idaho, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[22] I do not agree with Respondent's argument suggesting that *Vilter* stands for the general proposition that false statements on unemployment benefit application forms is sufficient to warrant denial of reinstatement in discrimination cases under Sec. 8(a)(3). The result in *Vilter* turns on its own peculiar facts. There the employer maintained a progressive disciplinary system which assessed points against an employee for particular types of misconduct. An arbitrator determined that a discharged employee had not yet accumulated sufficient points to sustain a discharge under the disciplinary system but the employer declined to reinstate the employee on the ground that the employee, subsequent to his discharge, made false statements on his unemployment benefit application which merited the assessment of enough additional points to warrant his discharge. The Board agreed and dismissed the General Counsel's complaint alleging that the employer violated Sec. 8(a)(3) by refusing to reinstate the employee as ordered by the arbitrator.

[23] Under no circumstances, should the remedial action required here be construed as entitling Ramirez to both backpay and unemployment compensation benefits for the same period of time.

[24] 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.

(a) Discharging or otherwise discriminating against employees for supporting Sheet Metal Workers Association, Local 60 or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Threatening to discharge employees for engaging in union activities.

(d) Expressing disappointment in employees who attend union meetings.

(e) Threatening to close its plant if employees choose union representation.

(f) Threatening to retaliate against employees for their organizational activities.

(g) Creating the impression that employee union activities are under surveillance.

(h) Attempting to convince employees that it would be futile for them to seek representation for collective bargaining purposes.

(i) Maintaining and enforcing a rule prohibiting talk on working time only about matters pertaining to unionization.

(j) Suggesting that employees could be discharged for failing to adhere to an unlawful rule prohibiting union talk on working time.

(k) 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, or discriminating against employees because they engage in lawful union activities.

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

(a) Within 14 days from the date of this Order, offer John Ramirez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make John Ramirez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the administrative law judge's decision in this case.

(c) Within 14 days from the date of this Order, remove from its files any reference to the John Ramirez' discharge June 18, 1996, and notify Ramirez in writing that this has been done and that this discharge will not be used against him in any way.

(d) Within 14 days from the date of this Order, notify the Idaho Department of Employment that it withdraws all objections to Ramirez' application for unemployment benefits filed on June 18, 1996, and move to vacate that agency's Determination mailed July 2, 1996.

(e) Within 14 days after service by the Region, post at its Pocatello, Idaho, plant copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 27 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 April 1996.[26]

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

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discharging or otherwise discriminate against any of you for supporting Sheet Metal Workers Association, Local 60 or any other union.

WE WILL NOT Coercively interrogating any employee about union support or union activities.

WE WILL NOT threaten to discharge employees for engaging in union activities.

WE WILL NOT express disappointment in employees who attend union meetings.

WE WILL NOT threaten to close its plant if employees choose union representation.

WE WILL NOT threaten to retaliate against employees for their organizational activities.

WE WILL NOT create the impression that employee union activities are under surveillance.

WE WILL NOT attempt to convince employees that it would be futile for them to seek representation for collective-bargaining purposes.

WE WILL NOT maintain and enforce a rule prohibiting talk on working time only about matters pertaining to unionization.

WE WILL NOT suggest that employees could be discharged for failing to adhere to an unlawful rule prohibiting union talk on working time.

WE WILL NOT 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, or discriminating against employees because they engage in lawful union activities.

[25] If this Order is enforced by a judgment of the 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."

[26] This month represents the approximate date of the first unfair labor practice in accord with the requirement the Board established in *Excel Container, Inc*., 325 NLRB 17 (1997).

WE WILL, within 14 days from the date of the Board's Order, offer John Ramirez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Ramirez whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of John Ramirez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his June 18, 1996 discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, withdraw the objection we filed with the Idaho Department of Employment to John Ramirez' application for unemployment compensation benefits following his June 18, 1996 discharge and we will move to have that agency vacate its Determination on Ramirez' application for benefits.

FRAZIER INDUSTRIAL COMPANY