John W. Hancock, Jr., Inc. ***and*** **United Steelworkers of America, AFL–CIO.** Case 11–CA–18716

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On December 8, 2000, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.[2]

We affirm the judge's findings that the Respondent (a) violated Section 8(a)(1) when it threatened to close part of its facility, (b) violated Section 8(a)(1) when it threatened to discharge employee Ray Preston Connor for engaging in union activity, and (c) violated Section 8(a)(3) and (1) when it discharged employees Larry Pugh and Paul Akers because it believed they were engaging in union activity.[3] However, we reverse the judge's finding that Supervisor David Kelly's interrogation of employee Connor violated Section 8(a)(1).

The facts relevant to the interrogation finding may be briefly stated. The Respondent employs approximately 235 employees at its Salem, Virginia facility. The facility consists of two main structures, the Rack Plant and the Joist Plant, which are situated across the road from one another. The Union attempted to organize the Respondent's employees in 1986 and 1990, and it tried a third time beginning in March 2000. On May 21, 2000, the Union held a meeting at the Salem Civic Center. The next day, Supervisor Kelly was riding in a truck with employee Connor from the Rack Plant to the Joist Plant during breaktime. Kelly supervises Connor and one other employee. During their brief ride together, Kelly asked Connor "how many men were at the meeting last night?" Connor replied that he did not know, and Kelly dropped the subject. Connor was not an open supporter of the Union's 2000 organizational drive, but he had openly supported the Union during its 1986 and 1990 drives.

In finding Kelly's question unlawful, the judge first observed that Kelly was asking about the union activity of employees other than Connor, and then stated that "[a]n inquiry regarding the union sympathies of employees other than employees who have made their union sympathies known is coercive and constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act." The judge's statement announces what amounts to a per se rule making it unlawful to question an employee about the union views of other employees who have not disclosed their views. We reject the judge's statement as inconsistent with the totality-of-the-circumstances test set forth in *Rossmore House*.[4] In that case, the Board announced that deciding whether an interrogation is unlawful requires an evaluation of all of the circumstances to determine whether the questioning reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. 269 NLRB at 1177. This analysis applies, for example, even where the questioning seeks to probe the union views of employees who are not open and active union supporters, *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), or to discover the union views of employees other than the employee being questioned, *Gardner Engineering*, 313 NLRB 755 (1994), enf. in relevant part 115 F.3d 636 (9th Cir. 1997). In short, all allegations of coercive interrogation must be evaluated in light of the totality of the circumstances, as *Rossmore House* holds. In conducting that evaluation, the Board considers the employer's background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House*, 269 NLRB at 1178 fn. 20; *Bourne v. NLRB*, 332 F.2d 47, 48

[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] We shall modify the judge's recommended Order to conform to our findings, and also in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] In adopting the judge's findings that the Respondent's discharge of employee Paul Akers violated Sec. 8(a)(3) and (1), we find it unnecessary to rely on the judge's statement, in sec. II,D,2 of his decision, that the absence of discussion among the Respondent's managers regarding changing the level of Akers' discipline showed that the level of discipline did not change.

In adopting the judge's findings that the Respondent's discharge of employees Akers and Larry Pugh violated Sec. 8(a)(3) and (1), Member Cowen does not rely on the adverse inference drawn by the judge, in sec. II,D,2 of his decision, from the fact that Human Resources Manager Bill Reinholtz and Plant Superintendent Paul Wallace did not testify.

[4] 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). As authority for his statement, the judge cited *Action Auto Stores*, 298 NLRB 875, 895 (1990). Although *Action Auto* states that the employer was "not privileged to ask [employees] to reveal the sympathies of others," in finding the interrogation violation the Board in that case relied on the totality of the circumstances, citing *Rossmore House*. 298 NLRB at 895 fn. 50. Thus, *Action Auto* does not support the judge's statement.

(2d Cir. 1964). Although "strict evaluation of each factor" is not required, these "useful indicia . . . serve as a starting point for assessing the totality of the circumstance[s]." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998) (internal quotations omitted).

As to the Respondent's background, we note that the Respondent's unfair labor practices all postdated Kelly's questioning of Connor and are unrelated to that questioning.[5] Prior to the questioning at issue here, the Respondent did voice its opposition to the unionization of its work force in various ways.[6] However, none of these statements contained any threats or promises, and they are thus protected free speech under Section 8(c) of the Act.[7] In these circumstances, we do not believe that the factor of "employer background" lends any significant support to the allegation that the question here was coercive.[8]

As to the nature of the information sought, the relevant consideration is whether the questioner appeared to be seeking information upon which to take action against individual employees. *Bourne*, 332 F.2d at 48. The answer here is "no" because Kelly merely asked how many employees attended the union meeting, and the answer to that question would not have revealed the union sentiments of any one individual. Similar questions gauging nothing more than numerical support for a union have been found not to constitute unlawful interrogation. See *Farr Co.*, 304 NLRB 203, 217 (1991); *NLRB v. Champion Laboratories, Inc.*, 99 F.3d 223 (7th Cir. 1996), denying enf. in relevant part to 316 NLRB 1133 (1995); *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 108 (6th Cir. 1987), denying enf. in relevant part to 275 NLRB 1019 (1985).[9]

[5] We do not hold that after-the-fact unfair labor practices are necessarily irrelevant in any and every evaluation of the totality of the circumstances surrounding an interrogation, merely that they are so here. None of the Respondent's subsequent unfair labor practices is tied to the question directed to Connor. Thus, even if Connor was aware of that later unlawful conduct, he would not reasonably relate that conduct to the single question propounded to him by a low-level supervisor.

[6] Sometime in May 2000, the Respondent's president, John Garlow, told employees at a plantwide meeting that Hancock would do everything in its power to keep the Union out. At another employee meeting that same month, Human Resources Director Bill Reinholtz referred to employees who solicit union authorization cards as "the enemy within." The Respondent's employee handbook also states: "John W. Hancock, Jr., Inc., is a union-free company. It always has been, and we desire that it will always remain so. We prefer to deal directly with our employees instead of through a third party, and we believe that sound leadership and concern for our employees is the best way of ensuring the propriety of our company and the welfare of our employees." None of these statements has been alleged to violate the Act.

[7] Our dissenting colleague finds Reinholtz' "enemy within" remark to be an unprotected threat. We disagree. Reinholtz made this statement during a speech devoted to the entirely lawful purpose of communicating the Respondent's opposition to the unionization of its workforce. Heard in that context, the "enemy within" statement would have been reasonably understood as communicating the earnestness of that opposition, not as an implicit threat of reprisals. Employers are entitled to oppose, vigorously and strenuously, union organizational campaigns. The phrase "enemy within" is entirely consistent with that proposition. In finding to the contrary, our colleague removes Reinholtz' remark from its original context and juxtaposes it alongside another lawful statement made by somebody else in a different speech on a different day—Garlow's statement that the company would do everything in its power to keep the Union out. Of course, the Garlow statement, by itself, does not say that the Respondent would resort to unlawful conduct. Thus, it cannot render unlawful the Reinholtz statement, and certainly does not render unlawful Kelly's question to Connor.

We also recognize that the Respondent committed unfair labor practices 2 weeks later. But this conduct does not render unlawful the unrelated question by low-level Supervisor Kelly to Connor, viz, "How many men were at the meeting last night?"

In sum, we reject our colleague's effort to string together various kinds of conduct, some lawful and some unlawful, in order to find that an unrelated question was unlawful.

[8] While agreeing that the "employer background" factor does not significantly support a finding that Kelly's question was coercive, Member Cowen would go further and find that the Respondent's 8(c)-protected statements may not be considered as evidence in this case at all. Under Sec. 8(c), noncoercive statements "shall not constitute *or be evidence of* an unfair labor practice" (emphasis added). Thus, Member Cowen would find that Sec. 8(c) renders inadmissible the Respondent's noncoercive statements as evidence of a history of union hostility to support a finding that Kelly's questioning of Connor constituted an unfair labor practice. See, e.g., *Overnite Transportation*, 335 NLRB 372, 378 fn. 5 (2001) (Hurtgen dissenting); *Mediplex of Stamford*, 334 NLRB 897, 898 (2001) (Hurtgen concurring); *Affiliated Foods, Inc.*, 328 NLRB 1107 fn. 3 (1999) (Hurtgen dissenting); *Sasol North America Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002); *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998); *BE & K Construction Co. v. NLRB*, 133 F.3d 1372, 1375–1377 (11th Cir. 1997) (per curiam); *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345–1347 (2d Cir. 1990). Under extant Board law, however, noncoercive statements may, in limited circumstances, be used as evidence of an unfair labor practice. See, e.g., *Overnite Transportation*, supra, slip op. at 4 fn. 15; *Mediplex of Stamford*, supra; *Affiliated Foods, Inc.*, supra at 1107. Member Cowen would overrule these cases, and others that stand for the same principle, as contrary to the plain language of Sec. 8(c).

[9] In support of her view that the nature of the information Kelly sought favors a finding of unlawful interrogation, our dissenting colleague relies on several cases we find distinguishable. In *Excel Corp.*, 324 NLRB 416, 418 (1997), the Board found coercive an inquiry into the number of authorization cards the union had received—viewing that inquiry against a background of repeated prior coercive threats and interrogations. Here, by contrast, there is no such background. In *Cumberland Farms, Inc.*, 307 NLRB 1479 (1992), the Board found an 8(a)(1) violation where two supervisors, one of whom was highly placed, engaged in repeated, probing questioning of two employees over the course of several days. The dissimilarities from the instant case are self-evident. Among other questions posed in *Cumberland Farms*, one of the supervisors asked how many employees *in specific departments* had signed authorization cards. Similarly, a violation was found in *Champion Laboratories*, 316 NLRB 1133 (1995), enf. denied in relevant part 99 F.3d 223 (7th Cir. 1996), where a supervisor asked an employee how many people *from a particular line* had attended a union meeting. Depending upon the totality of the surrounding circum-

Turning to the identity of the questioner and the place and method of interrogation, Kelly was a low-level supervisor, and the question was posed while Kelly and Connor were taking a short ride together during breaktime. There was certainly no atmosphere of "unnatural formality." *Bourne*, 332 F.2d at 48. The question arose casually as part of an ordinary conversation, nothing in the record suggests that Kelly's tone was hostile, and no threat of reprisal, explicit or implicit, accompanied the question. *Champion Laboratories*, 99 F.3d at 227–228.

In conclusion, under the totality of the circumstances presented here, we find that Kelly's questioning of Connor did not violate the Act.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, John W. Hancock, Jr., Inc., Salem, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

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

2. Substitute the following for paragraphs 2(d) and (e).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

"(e) Within 14 days after service by the Region, post at its facilities at Salem, Virginia, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 23, 2000."

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

MEMBER LIEBMAN, dissenting in part.

Contrary to the majority, I would find that Supervisor David Kelly's interrogation of employee Ray Preston Connor violated Section 8(a)(1) of the Act, considering the totality of the circumstances, consistent with *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).[1] In its broader context, Kelly's question—"How many men were at the meeting last night?"—must be regarded as coercive, despite its seemingly innocuous nature.

To begin, the majority's analysis glosses over the question of Connor's own status with respect to support for the Union. That Connor was not an open supporter of the Union's 2000 organizational drive, a fact the majority acknowledges, is significant. See, e.g., *Sundance Construction Management*, 325 NLRB 1013 (1998). This fact is not counterbalanced by Connor's *past* open support for union drives in 1986 and 1990—10 years and more before the interrogation, and surely long enough ago that Connor's continuing support could not be presumed. Under the circumstances, Kelly's question could reasonably be understood as inquiring about Connor's current sentiments toward the Union, by eliciting information that presumed his own attendance at the meeting or other knowledge related to it.

But even assuming that Connor was an open union supporter, the fact that he was also asked about the union activities of other employees weighs in favor of finding the questioning unlawful, even if it does not establish a violation per se (as the judge seemed to conclude). See, e.g., *Excel Corp.*, 324 NLRB 416, 418 (1997); *Cumberland Farms, Inc.*, 307 NLRB 1479, 1479 (1992). Even an employee who supports the union openly, and so might be regarded as less susceptible to the potential coercive effect of an interrogation, may be chilled if he believes that his union activity could lead to adverse consequences for his fellow employees.

Next is the matter of the Respondent's background and whether it shows hostility to the Union. The majority acknowledges that before the May 22, 2000 interrogation

stances, more narrowly targeted questions such as these might reasonably be viewed as preparatory to some sort of retaliatory action. Here, however, Kelly asked a general question about the overall level of union interest *in the entire work force as a whole*. Under the totality of the circumstances present here, we find that question noncoercive.

[10] Chairman Hurtgen disagrees with the cases that Member Cowen would overrule. However, he finds it unnecessary to reach out and overrule them in this case. Chairman Hurtgen finds that, even under those cases, the questioning was not coercive under the "all the circumstances" test of *Rossmore House*.

[1] I agree with the majority's opinion insofar as it affirms the judge's findings of violations of Sec. 8(a)(1) and (3).

of Connor, the Respondent "did voice its opposition to the unionization of its workforce in various ways," but finds that none of the statements contained threats or promises and thus were all protected by Section 8(c) of the Act. Even accepting the premise that Section 8(c)–protected statements cannot factor in the analysis here–contrary to the Board's case law[2]—the majority errs in finding no threat in the May 20, 2000 employee-meeting statement of Human Resources Director Bill Reinholtz, who referred to employees who solicit union cards as "the enemy within." This statement communicates more than mere opposition to unionization. It implies a willingness to take reprisals[3]—which, in fact, were taken, as I will explain—particularly given the contemporaneous statement of the Respondent's president, John Garlow, who told employees that the Company would do everything in its power to keep the Union out. Accord: *Aluminum Casting & Engineering Co.*, 328 NLRB 8, 9 (1999) (similar handbook statement violated Section 8(a)(1), in context of actual unlawful conduct), enf. denied in relevant part 230 F.3d 286, 294 (7th Cir. 2000) (citing absence of evidence that employees would have perceived handbook statement, drafted before organizing campaign, as indicating willingness to use unlawful tactics).

Here, the Respondent went on to commit unfair labor practices within roughly 2 weeks of Kelly's questioning of Connor: it discharged two prounion employees and threatened Connor by telling him that his coworkers had been fired for their union activity. These later violations of the Act could reasonably have reinforced the coercive tendency of Kelly's question, considered in retrospect, especially because it involved the union activities of Connor's coworkers. See, e.g., *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000) ("[A] question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone.").

The majority rejects the application of this established principle because it sees no connection between the question posed to Connor and the unfair labor practices. Presumably, the majority would require—without apparent support in Board precedent—that the information sought to be elicited from Connor somehow could have facilitated the Respondent's violations. This is the point the majority makes in rejecting the idea that the question here (how many employees attended a union meeting) could have been coercive, considered on its own terms. But it seems clear that an employer inclined to commit unfair labor practices (as the Respondent was) might want to gauge numerical support for the union in deciding how to respond to union activity. Greater support, for example, might persuade the employer of the need to take counter-measures against union supporters.

The majority's assertion that no harm could come from the question because it did not seek to uncover the union sentiments of any particular employee is both shortsighted and contrary to precedent. The Board, quite correctly, has recognized that questions about the number of employees who support the union may be coercive. See, e.g., *Sundance Construction Management*, supra, 325 NLRB at 1013 (supervisor asked how many employees supported union); *Champion Laboratories*, 316 NLRB 1133, 1136 (1995), enf. denied in relevant part 99 F.3d 223 (7th Cir. 1996) (supervisor asked employee "how many people from his line" attended union meeting).

In my view, the circumstances here are sufficient to establish an unlawful interrogation, notwithstanding that the identity of the questioner (Kelly was a low-level supervisor) and the place and method of interrogation (a short truck ride during breaktime) arguably weigh against such a finding. Kelly had no legitimate reason for his question. Given the broader context of Respondent's hostility to the Union, manifested in both words and deeds, the fact that the question was asked casually and that Kelly himself did not threaten Connor are not dispositive. Accordingly, I would affirm the judge's finding that the Respondent violated Section 8(a)(1).

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to close any facility if you select the United Steelworkers of America, AFL–CIO, or any

[2] See, e.g., *Overnite Transportation*, 335 NLRB 372, 375 fn. 15 (2001); *Sunrise Health Care*, 334 NLRB 897 (2001); *Affiliated Foods*, 328 NLRB 1107 (1999); *American Packaging Corp.*, 311 NLRB 482 fn. 1 (1993); *Gencorp*, 294 NLRB 717 fn. 1 (1989); *Smith's Transfer Corp.*, 162 NLRB 143, 161–164 (1966).

[3] The Board has recognized that the use of the word "enemy" has coercive tendencies. See, e.g., *Omark-CCI, Inc.*, 208 NLRB 469, 473 (1974) (foreman's statement that any employee who voted for union was "his enemy" was implicit threat of reprisal).

other labor organization as your collective-bargaining representative.

WE WILL NOT threaten you with discharge for engaging in union activities.

WE WILL NOT discharge you or otherwise discriminate against you for engaging in union activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Larry Pugh and Paul Akers full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Larry Pugh and Paul Akers whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

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

JOHN W. HANCOCK JR., INC.

Jasper C. Brown Jr., Esq., for the General Counsel.
James F. Edwards Jr., Esq. and *Jack L. Bradshaw*, for the Respondent
Frederick W. Stroud, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Roanoke, Virginia, on October 10, 11, and 12, 2000.[1] The charge was filed on June 20, and it was amended on August 29. The complaint issued on August 31. The complaint alleges four violations of Section 8(a)(1) of the National Labor Relations Act and the discharges of Larry Pugh and Paul Akers because of their union activity in violation of Section 8(a)(3) of the Act. Respondent's answer denies all of the alleged violations of the Act. I find, except for one of the 8(a)(1) allegations, that the Respondent did violate the Act as alleged in the complaint.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, John W. Hancock Jr., Inc. (the Company), is a Virginia corporation engaged in the construction of steel joists that are used to support the roofs of large buildings at its facilities at Salem, Virginia, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the Commonwealth of Virginia. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Steelworkers of America, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

This case arises in the context of an organizational campaign by the Union at the Company's Salem, Virginia facilities. Its operations are carried out in a facility referred to as the Joist Plant that is 675-feet long and 138-feet wide. A building containing the shop office and a locker room with shower facilities for employees is about 70 feet from the Joist Plant and is connected to it by an enclosed walkway. A smaller facility, called the Rack Plant, is separated from the Joist Plant by a public road. The Company operates two shifts. First shift begins at 6:30 a.m. and ends at 3 p.m.; second shift begins at 3:15 p.m. and ends at 11:45. Approximately 180 employees work on first shift and 55 work on second shift. The vast majority of employees work in the Joist Plant rather than the Rack Plant. Although there is a fence around the Joist Plant, the gate to the parking lot is not normally locked when the plant is operating.

The Union attempted to organize the Company's employees in 1986 and 1990. There was a representation election in 1986 but not in 1990. The Union began its current campaign in March 2000. Employees Larry Pugh and Paul Akers were involved in the campaign. On May 21, a Sunday, the Union held a meeting at the Salem Civic Center, a public facility. The Company became aware of the campaign sometime prior to May and, in May, the Company's president, John Garlow, held a meeting in an area of the Joist Plant called the "bridge" at which all employees were present. On May 22, the Company held meetings in the plant cafeteria at which the employees were divided into smaller groups because of space limitations in the cafeteria. No statements in violation of the Act are alleged to have been made at either of the foregoing meetings. Employee Pugh testified without contradiction that, at the meeting he attended in the cafeteria, Human Resources Director Bill Reinholtz read a speech in which he referred to employees who were soliciting union authorization cards as "the enemy within."

B. The 8(a)(1) Allegations

1. Interrogation

The complaint alleges that Supervisor David Kelly interrogated employees about their union activities on May 22. Employee Ray Preston Connor had supported the Union during the organizational campaigns in 1986 and 1990. Supervisor Kelly admitted that he suspected that Connor was supporting the Union in the current campaign. On May 22, the day following the Sunday meeting at the Salem Civic Center, Kelly and Connor

[1] All dates are in the year 2000 unless otherwise indicated.

were riding together in a truck, going from the Rack Plant across the public road to the Joist Plant at breaktime. Kelly testified, "I just asked, I just wondered, how many men were at the meeting last night." Connor responded that he had not attended.

Respondent argues that, in view of Connor's past open support of the Union, this inquiry was not coercive. I would be inclined to agree with Respondent if Kelly's inquiry had been whether Connor had attended the meeting. Supervisor Kelly did not, however, inquire about Connor's union activity. He inquired about the union activity of other employees, seeking to discover whether a significant number of them had attended a meeting. By "wondering" about the number of employees who had attended the meeting, Kelly was probing to find out the level of support for the Union in Respondent's work force. An inquiry regarding the union sympathies of employees other than employees who have made their union sympathies known is coercive and constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act. *Action Auto Stores*, 298 NLRB 875, 895 (1990). Respondent, by asking an employee about the union activities of his fellow employees, violated Section 8(a)(1) of the Act.

2. Threat of closure

The complaint alleges a threat of plant closure on May 23. On that day, immediately after work, employee Larry Pugh crossed the road from the Joist Plant and solicited a union authorization card from employee David Waller who, at that time, was a welder at the Rack Plant. Waller had locked his keys in his truck. After opening the door with a coat hanger, Waller handed Pugh a pistol that he was going to sell by raffling it off. While Pugh looked at the pistol, Waller placed the authorization card on the seat on the passenger side of his truck, leaned over, and filled out and signed the card. He then handed it to Pugh. The foregoing occurred in front of the window of Rack Plant office.

Pugh looked over the card to assure that Waller had properly completed it and placed it in his left rear pants pocket. As he was doing so, he realized that Chris Moore, the general manager of the Rack Division, had joined them. Waller confirms that, after he handed the card to Pugh, it was "just about a minute" before Moore arrived.

Pugh recalled taking the authorization card while continuing to hold the pistol, but I find that his recollection was mistaken. Waller recalls that Pugh handed him the pistol when he handed Pugh his completed authorization card, and Moore recalled that Waller handed him the pistol after he arrived. Moore denied seeing Pugh handle the pistol, but I do not credit this testimony. On May 24, Pugh was questioned by Vice President of Manufacturing Van Johnson regarding the pistol. Johnson stated to Pugh that "Chris Moore wasn't sure if it was yours or David Waller's gun." The foregoing statement was not denied by Johnson and belies Moore's denial that he had seen Pugh handle the pistol. The only time Pugh held the pistol was when Waller was filling out the authorization card. Thus, the only basis for Moore having any question as to whether it was Pugh's pistol was that he observed him holding it while Waller was leaning over and filling out the union authorization card.

When he joined the employees, Moore asked what Waller and Pugh were doing. Waller told him that he was raffling off a gun that had bought from another employee, that "I was taking chances on the pistol." Waller handed the pistol to Moore and asked him if he wanted to take a chance on it. Moore replied that he was not interested. Pugh left at this point. Moore stated to Waller that there were supposed to be union representatives passing out literature at the gates the following Monday and that "we did not need them there," that "if the Union was to come in that the shareholders would probably shut our side [the Rack Plant] down due to the fact that we've lost so much money for the past few years."

Although Moore denies making any comment regarding the Union, he did acknowledge discussing the profitability of the Rack Plant stating that he has "often done than with other people." I find Moore's demeanor and testimony unconvincing. I credit Waller. I find that Moore's raising the matter of the Union as soon as Pugh left confirms that he had observed Waller writing at the same time he observed Pugh with the pistol and suspected that Waller and Pugh had been discussing other matters in addition to the pistol. Rather than inform Waller that he suspected that he had been engaging in union activity, Moore prefaced his comments by referring to union representatives leafleting. His statement that "if the Union was to come in that the shareholders would probably shut our side [the Rack Plant] down," constituted a threat of plant closure. The reference of losing money "the past few years" did not alter the threat in any way. Indeed, it confirmed that the Union, not profitability, is what would determine whether the plant remained open. The foregoing threat of plant closure if employees selected the Union as their collective-bargaining representative violated Section 8(a)(1) of the Act.

3. Creation of impression of surveillance

The General Counsel, relying upon Moore's comment to Waller that there were supposed to be union representatives passing out literature at the gates the following Monday, alleges that Respondent created the impression that employees' union activities were under surveillance. Waller testified that he had already heard a comment similar to that made by Moore in remarks by Vice President Johnson to employees in the Rack Plant either on the morning of May 23 or the previous day, May 22. Johnson acknowledged that he addressed employees in the Rack Plant and that, in his remarks, he stated that he had "received information voluntarily that there was going to be representatives of the Union, United Steelworkers, at our gates that Monday morning. I asked them just to treat them like they would any other salesman, roll their windows up and drive on by." Johnson testified that he made those remarks on May 19, a Friday.

The General Counsel called employee Ray Preston Connor in rebuttal and elicited testimony that the Union never publicly stated that it intended to handbill at the plant. Notwithstanding this testimony, Connor acknowledged that management thought there was going to be handbilling, "it was floating around the plant," but "it never happened."

The only allegation in the complaint regarding the creation of an impression of surveillance is the comment of Moore on May 23. Thus, it is immaterial whether Johnson's remarks were

made on May 19 or May 22 or 23. When Moore spoke with Waller, the rumor of union handbilling was "floating around the plant." Regardless of the source or accuracy of that rumor, there is no evidence that Respondent "could only have learned of the rumor though surveillance." *Embassy Suites Resort*, 309 NLRB 1313, 1329 (1992); *G. C. Murphy Co.*, 217 NLRB 34, 36 (1975). I shall recommend that this allegation be dismissed.

4. Threat of discharge for engaging in union activity

The complaint alleges that Supervisor Roger Sloan, on June 6, threatened employees with termination for engaging in union activity. Employees Pugh and Akers were terminated on June 5. On June 6, employee Ray Preston Connor had a conversation with fellow employee David Wallace, brother of Plant Superintendent Paul Wallace. Employee David Wallace referred to Pugh and Akers being terminated and, when Connor asked why the employees had been terminated, Wallace responded that the "Company is trying to say trespassing, but . . . everybody in the shop knows that they fired them for union activity." Thereafter, Connor was approached by Loading Supervisor Roger Sloan who, as was his practice, began the conversation by teasing Connor about going fishing with David Wallace, whose nickname is "Iceman." Connor responded saying, " Roger, . . . Iceman [David Wallace] came out here and told me they let two guys go yesterday for trespassing. . . . I've been here for twenty-three (23) years and I ain't never knowed nobody to be fired for trespassing." Sloan answered, "[W]ell, I heard they let them go for handing out union cards to the nightshift."

Supervisor Sloan admitted regularly teasing Connor about fishing, but denied the foregoing conversation. He testified that he heard only that Pugh and Akers were "let go." I do not credit Sloan. In a pretrial affidavit, Sloan acknowledged hearing that Pugh and Akers were terminated for union activity. In the affidavit he states that, if he said anything, "it would only have been that some of the other employees may have been talking among themselves that their discharges were related to some union activities that they might have had." I credit Connor and find that Sloan responded to Connor's comment regarding never knowing of anyone being fired for trespassing by stating that he heard that "they let them go for handing out Union cards to the nightshift."

Respondent argues that the reference in Sloan's affidavit is to "shop talk" and that Sloan was not privy to information relating to the discharge. The talk among employees referred to in Sloan's affidavit was to union activity, but his response to Connor was far more specific, "I heard they let them go for handing out Union cards to the nightshift." A statement by a supervisor to an employee that another employee has been terminated because of that employee's union activity violates Section 8(a)(1) of the Act even if the Board ultimately finds that the termination was not for union activity. *Animal Humane Society*, 287 NLRB 50 (1987). Supervisor Sloan's statement threatened termination in retaliation for employees engaging in union activity and violated Section 8(a)(1) of the Act.

C. The No-Access Rule

The Company has an employee handbook containing rules of employee conduct. Each employee signs a document acknowledging receipt of the handbook upon being employed. The rules provide for discipline, up to and including discharge, for various infractions. Included among the rules is a presumptively valid no-solicitation and no-distribution rule that includes a provision prohibiting access that states:

An off-duty employee may enter or remain in plant buildings or other work areas a reasonable period of time (not to exceed 30 minutes) prior to or after scheduled work, but access to the interior of company buildings and to other work areas before or after working hours is not permitted for any reason.

The record is replete with testimony concerning enforcement and nonenforcement of the no-access rule.

Employee Connor worked on personal items after his shift had ended without seeking permission on various occasions. In March 1999, he returned to use the arbor press to place some bearings on a car axle. On another occasion, he worked on a trailer. Although not seeking permission to work on the trailer, Connor did seek permission before using a company forklift to assist him. Even though Supervisor Kelly testified that Connor obtained his permission to perform all of the foregoing work, I credit Connor. In June or July 1998, Connor returned and put a starter ring gear on a flywheel. He did not seek permission to do this work, and his supervisor at the time, Douglas Guilliams, observed him. Guilliams had no recollection of the occasion. Connor also has observed various employees performing personal work including employee Mark Phillips working on a trailer and employees Nally and Martin making chair holders for the Salem Civic Center. Vice President Johnson testified that he gave Phillips and Nally permission with regard to those projects.

Employee Ellis Paris, who has a prounion sign in his front yard, went to the plant on a Saturday to borrow a water cooler. He was permitted to do so and was not disciplined for entering the premises without permission. He recalled that, while working overtime one Saturday, he observed Mark Phillips welding a drive shaft on his lawnmower. Supervisor Clifford Pagans testified that Phillips approached him on a Saturday and stated that he needed to work on his lawnmower. He gave him permission to do so.

Employee Paul Akers, one of the two alleged discriminatees, removed a muffler from his girlfriend's Camero in September or October 1999 and carried it into the plant where he repaired it using a welding machine. He did not obtain permission to perform this personal work. Akers recalled Night Superintendent Jerry Bowles being in the area, but he was unaware whether Bowles observed him. Shortly before Thanksgiving of 1999, Akers again went to the plant to perform welding on the exhaust system of his Blazer. Human Resources Manager Reinholtz asked Akers what he was doing and Akers explained that his muffler was falling off and that he needed to replace it. Pagans testified that Akers came to him seeking permission to work in the garage but that he had no authority to grant such permission. Akers later reported that he had been unable to find anyone with a key to the garage and asked permission to work in the plant. Pagans responded that was "fine with me." Akers observed Kevin Morris, who had been moved to first shift, come into the plant on second shift and talk to his brother Brian Morris. He also observed employee Tommy Reed building a

pressure washer. No supervisor acknowledged seeing Kevin Morris enter the plant and talk to his brother or observing Reed building a pressure washer.

Employee Larry Pugh, the other alleged discriminatee, returned to the plant about 3:45 p.m. in the summer of 1998 in order to repair a snow blade that fits on his lawn mower. He did not receive specific permission to do so, and he testified that supervisor Guilliams saw him. Guilliams had no recollection of Pugh ever performing any personal work in the plant.

Pugh, who works first shift, is married to the former wife of employee Calvin Meyers, who works second shift. Meyers pays child support to his former wife every 2 weeks. For convenience, he gives the money to Pugh who then delivers it to his wife. Normally, Meyers gives the money to Pugh in the parking lot between 3 and 3:15 p.m., after first shift ends and before second shift begins. If Pugh and Meyer did not meet during this 15 minute period, it was Pugh's practice to return at mealtime for second shift, approximately 9 p.m. The mutually corroborative testimony of Pugh and Meyers confirms the foregoing arrangement. On three or four occasions, their arrangement did not work. On those occasions, Pugh entered the plant, went to where Meyers was working, received the child support payment and left. Although Pugh testified that he saw and exchanged greetings with Night Superintendent Jerry Bowles and Supervisor Gayther Cantrell on a couple of these occasions, he admitted that he never encountered a supervisor when he was actually in the area where Meyers worked.

The no-access rule prohibits the presence of an employee in a company building more than 30 minutes after the shift. Notwithstanding this prohibition, Supervisor Guilliams admitted that employee Eddie Charlton regularly remained for at least 45 minutes after his shift taking a shower. Vice President Van Johnson knew that "Mr. Charlton takes a pretty lengthy shower, yes, sir, he does," and admitted that he had seen him at the plant at 4 p.m., a full hour after his shift ended. Johnson acknowledged that Charlton has not asked permission to take a lengthy shower but explained that the Company did not "put a stopwatch on people."

Vice President Johnson is responsible for all plant operations and facilities. Johnson testified specifically that there is no company rule regarding the presence of employees in the plant parking lot. He stated that any supervisor can give permission for an employee to work on a personal item in that supervisor's work area. He acknowledged that this effectively changes the no-access rule which makes no provision for obtaining permission and, by its terms, prohibits access to plant buildings "for any reason."

Night Superintendent Bowles is apparently unaware that there is no rule relating to employees being in the parking lot since he initially stated that, if he observed employees in the parking lot 30 minutes after their shift, he would discipline them. He later modified this testimony, stating that he would simply ask them to leave. Contrary to Johnson, Bowles testified that, if an employee wanted to stay over and work on a personal item, that employee needed permission from Johnson or himself. He recalls being asked and granting permission on one occasion, when employee Tony Rakes asked to do some welding on a mower deck.

Supervisor Gayther Cantrell, who works on the second shift, testified that if he observed a first-shift employee working on a personal item, "I would probably assume he had permission." Supervisor John Webb, another second-shift supervisor, noted that, when he observed employees working on personal items, "most of the time they're already in there before I get in the shop."

The foregoing testimony reveals that Respondent, without altering its written rule to provide that employees could obtain permission to enter the facility for personal reasons, permitted them to do so. Notwithstanding the requirement that they obtain permission, employees did enter the facility and perform minor projects without permission. Supervisor Cantrell assumed that any employee he observed had permission. When off duty employees sought permission to perform personal work, they often did so at the time they wanted to perform the work. They came to the plant, found a supervisor, obtained permission, and did the work. Respondent's rule prohibits access to the plant "for any reason," which would include entering the plant to seek permission to perform personal work. There is no evidence that, prior to June 2, any employee had ever been denied permission to enter the plant. There is no evidence that, prior to June 5, any employee had been disciplined for coming to the plant and, thereafter, seeking permission to enter the facility for a personal reason.

D. The Discharges of Larry Pugh and Paul Akers

1. Facts

a. Events prior to June 5

Larry Pugh began working for the Company on August 3, 1995. At the time of his termination on June 5, he was a welder on the first shift. Pugh signed a union authorization card, attended union meetings, and solicited his fellow employees to sign cards, including employee Waller on May 23. He attended the meeting at the Salem Civic Center on May 21 where he handed out literature and solicited employees who attended to sign union authorization cards. Human Resources Manager Bill Reinholtz, on May 23, referred to this meeting being held "over the past weekend" when he stated that anybody asking employees to sign union authorization cards would be known as "the enemy within."

On Friday, June 2, Pugh had not received his wife's child support payment from employee Calvin Meyers at the time of the shift change. He returned to the plant about one half an hour before the end of the shift, about 11:15 p.m., in order to pay Meyers $25 that he owed him and to obtain the child support payment from him. As Pugh entered the plant, he turned left to go back towards Meyers in the cutting and welding area. He got about half way to his destination when he saw Supervisor John Webb who summoned him. Pugh went to him. Webb stated that he had been told that "no day shift employees were allowed in the building at night shift to talk to the employees. I'm going to have to ask you to leave the building." Pugh responded, "Okay, you're doing your job." He turned around and was making his way to the exit when he encountered Supervisor Gayther Cantrell. As Pugh approached Cantrell, he stated that Webb had already asked him to leave and that he was leaving. Cantrell said, "Okay." Pugh left. Thereafter, at 11:45 p.m. he returned to

the parking lot in his van. He met with Meyers and obtained the child support payment. He observed Webb and left.

Supervisor Webb's recollection of this encounter effectively corroborates Pugh. Webb recalls that he observed Pugh coming in by the timeclocks. He motioned for him to approach, and Pugh did so. Webb did not ask Pugh why he was there. He stated, "I'm going to have to ask you to leave." Pugh asked why, and Webb responded, "[T]here's really no need for you to be on nightshift at this hour." Pugh left. After the shift ended, Webb went to the parking lot. He observed Pugh's van and began to walk toward it to "see what he wanted. What was the problem." At this point the van departed.

Supervisor Cantrell confirms that he encountered Pugh coming out of the shop and that Pugh stated, "I already know, John [Webb] just told me." Even though Pugh made this statement, Cantrell claims that the told Pugh to "leave the property and come back when your shift starts." I credit Pugh and find that Cantrell said, "Okay." Even though saying "okay" to Pugh, Cantrell told Webb that he had seen Pugh as he was leaving and had told Pugh "to leave the premises and not return until his shift."

Respondent, in its brief, argues that Pugh knew he had been directed to leave the property because, when pursuing an unemployment insurance claim, he stated that, as he was talking with Meyers at 11:45 p.m. he saw Webb and told Meyers that he was going to leave "so there would be no trouble." Contrary to this argument, I do not infer that Pugh's departure establishes anything other than, as Pugh credibly testified, "I didn't want any confrontations with anybody." In making this finding, I note that Webb did not testify that he told Pugh to leave the "property;" he testified simply that he told Pugh "to leave."

Employee Paul Akers began working for the Company in September 1995. He was a welder, and worked as a welding leader on two occasions. He was terminated on June 5. Akers attended the second union meeting that was held at the local union hall and, thereafter attended almost every meeting held. He sought to get his fellow employees to sign union authorization cards.

In May, Akers had purchased a house, and during the last week of May he was working at the house after having completed his shift. The gas hot water heater at the house was defective. On Tuesday and Wednesday, May 30 and 31, and Thursday and Friday, June 1 and 2, Akers returned to the plant after working on his new house and showered in the employee locker room. About 10 p.m. on June 2, having completed his shower and dressed, Akers was preparing to get into his truck and leave when he observed a friend, employee Troy Dennis, in the shop. Akers entered the shop to speak with him. Dennis was having difficulty hooking up a barrel full of bridge clips because the chain was slipping, and Akers helped him by holding the chain on one side while Dennis hooked it on the other side. They then engaged in a short conversation. Akers recalled that, as they were talking, Supervisor Webb approached, took out a cigarette that he did not light, but said nothing. Shortly thereafter, Supervisor Cantrell approached. Akers recalls asking Cantrell how he was and that Cantrell returned the greeting. Shortly after Webb and Cantrell arrived, Akers told Dennis that he had to be going and left.

Webb recalled observing Akers and Dennis talking with one another and approaching them. Contrary to Akers, Webb testified that he did not observe their conversation for any time at all. Rather, when he approached them he heard Akers say, "[W]ell, I guess I'd better go," and that Akers then left. He recalls that, at the point that Cantrell arrived, Akers was already "out the doors." He did not say anything to Akers, and he did not try to stop him. When asked whether he had tried to stop him, Webb testified, "No, sir, no need to stop him, he was leaving and that's what I wanted." Cantrell corroborated the testimony of Webb that he had no interaction with Akers. When he saw Akers, "he was leaving, that's what I wanted him to do." I need not resolve the conflicting testimony regarding whether Akers and Cantrell spoke since it is undisputed that Akers was not directed to leave and that when he left he was doing what Webb and Cantrell wanted him to do.

On Saturday morning, June 3, Cantrell called Vice President Johnson and informed him of the events of June 2, stating that "I'd had two visitors on Friday night, . . . one about fifteen minutes behind the other." He explained that he made this call because "I just felt like he needed to know in case something was damaged or what have you." Cantrell made no recommendation or request that either employee be disciplined. Cantrell noted that it was a strange occurrence, "I've never had anybody come back at 10 or 11 o'clock at night."

Johnson confirmed that Cantrell informed him that "there were two first shift employees in the plant at 11 p.m. and that he had asked them to leave." Upon being asked to elaborate upon what Cantrell reported, Johnson recalled that Cantrell said he had observed Akers talking to Dennis, that Webb was approaching them, and that Akers left before he could get to him. After this, Cantrell saw Pugh. Cantrell said that he told Pugh to leave the property and not come back until the start of his shift Monday morning but that when the shift ended Webb had observed him in the parking lot and that, as Webb approached him, Pugh "took off and left."

Supervisor Webb admitted attending meetings regarding the Union at which supervisors were asked to pay closer attention to what was going on, "to be a little more vigilant." Webb acknowledged that Vice President Johnson did not want any union activity going on during worktime in the workplace. Thereafter, counsel for the General Counsel asked:

> MR. BROWN: But from the time that you had the meeting with Mr. Van Johnson, regarding being a little more vigilant, you and Mr. Cantrell were paying a little closer attention to what was going on there in the plant and in the parking lot, isn't that correct?
>
> MR. WEBB: I try to do that all the time, yes.
>
> Q. But especially so during that period?
>
> A. What I can, yes, sir.

b. Events of June 5

On June 5, Akers reported for first shift at 6:30 a.m. Shortly after arriving he was approached by a welder with whom he worked. The welder, referring to Pugh by his nickname, "Opie," asked Akers, "[W]hat the hell was you and Opie doing in here Friday passing out union cards?" Akers responded that he did not know what the employee was talking about, that he just came

down to take a shower. The welder replied, "W]ell, it's all over the shop that you and Opie was down here passing out union cards." Akers repeated that he came to take a shower and that he had spoken to Troy Dennis. Later, another employee asked Akers about being in the plant passing out union cards, stating that he heard about it from employee Kevin Morris.

When Vice President Johnson arrived at the plant, he met with Human Resources Manager Bill Reinholtz and Plant Superintendent Paul Wallace to talk about the incidents of June 2. They called Cantrell, but he was out of town. Johnson then called Webb. Webb told Johnson that he had seen Akers talking to Dennis, that as he approached them, Akers left. Shortly after this he observed Pugh. Webb told Johnson that he had informed Pugh that he was "not supposed to be in here outside of your shift." That when Pugh asked why, he had responded, "[W]ell, you're just not supposed be here. You're interrupting people." Webb noted that Pugh gave no reason for being there and left. Johnson testified that, after he talked with Webb, he, Reinholtz, and Wallace "decided to get Mr. Pugh over and let him explain why he was there and why he came back." In the meeting with Pugh, Johnson discharged him. Akers was then called in "to explain why he had been in the plant talking to Troy Dennis." Johnson's testimony does not reflect that he, Reinholtz, and Wallace discussed the rumor that Akers and Pugh had been passing out union cards or that either employee should be disciplined.

Pugh recalls that Superintendent Paul Wallace directed him to report to Johnson about 8 a.m. The meeting was held in the office of Human Resources Manager Reinholtz. Johnson, Reinholtz, Wallace, and Pugh were present. Pugh recalls that Johnson addressed him stating, "You were here Friday evening and was asked to leave the premises and you didn't." Pugh responded, "No, that's wrong, I did. I was asked to leave the building, I left the building, I went home and I come back at 11:45 p.m. when night shift was over. I parked in the parking lot and did not go back in the building." Johnson twice repeated that Pugh had been asked to leave the premises, and Pugh responded both times that he had been asked to leave the building. Johnson stated, "The building and the parking lot are the premises. You were asked to leave and you didn't." Pugh again stated that he did leave and that he was told "to leave the building." Johnson stated, "Well, I'm going to have to let you go." Pugh said, "Over something this minor?" Johnson replied, "It's a rule." Pugh requested to see the rule and Johnson told him to look it up when he got home. Pugh stated, "You mean to tell me that I've been working almost five years and you're going to fire me over something this minor." Johnson repeated, "It's a rule." Pugh then questioned Johnson asking, "All bull crap aside, what are you firing me for?" Johnson again replied, "It's a rule and that's what I've decided to do."

Johnson testified that he asked Pugh why he was in the plant without permission and that Pugh responded that he had come to collect some money from Calvin Myers. He then asked, "[W]ell, you know you're supposed to have permission don't you, to be inside the buildings?" Pugh responded that he did not and Johnson told him that it was in his handbook. Pugh stated that he did not know where his handbook was. Johnson testified that he asked Pugh whether Cantrell had told him "to leave the property and not come back till the start of your shift?" Pugh respond, "[N]o. He told me to leave the building." Johnson testified that he then stated that he had had been informed by two supervisors that "you [Pugh] were told to leave the premises or the property and not come back until the start of your shift . . . and then you came back." Pugh admitted that he came back, and Johnson says that he asked Pugh if he realized that was insubordinate. Pugh replied that he did not, and Johnson stated, "[W]ell, you defied what a supervisor told you, and . . . I'm going to terminate you for it."

Contrary to the assertion that he made to Pugh, Johnson had not been told by two supervisors that Pugh had been directed to "leave the premises or property." Johnson's own testimony reveals that Webb reported only that he had told Pugh that he was "not supposed be here." Pugh's testimony reflects a dispute regarding whether he was told to leave the building, which is what he recalls Webb said, and Johnson's assertion that he was told to leave the premises or property. Although Johnson testified that Cantrell reported to him that he told Pugh to leave the property, when Cantrell spoke with Webb he told Webb that he had told Pugh "to leave the premises." Pugh's separation of employment document signed by Reinholtz makes no mention of Pugh being told to leave either the property or premises. It states:

> Larry came into the shop on Friday night 6/2 @ approx 11:00 p.m., was asked to leave by John Webb. Larry was observed leaving but returned at 11:45 p.m. Larry was terminated for being on company property without permission and insubordination for returning.

Pugh did not testify to Johnson ever using the term "insubordination," and I am satisfied that, if Johnson had used that term, Pugh would have recalled it.

Following the termination of Pugh, Akers was taken to Reinholtz's office by Plant Superintendent Wallace. Johnson, Reinholtz, Wallace, and Akers were present. Akers recalled that there was an informal exchange of greetings and that Johnson then stated that Akers had been seen at the plant on Friday night. Akers admitted that he had been at the plant taking a shower. Johnson then stated that he was seen in the plant, and Akers confirmed that he had walked into the plant and talked to Dennis. Johnson told Akers that he was "not allowed on Company property after your work shift." Akers replied that he did not know that. Johnson asked whether Akers had read his employee handbook. Akers responded that he had, "almost five years ago." Johnson stated that the handbook stated that "you're not allowed . . . on Company property thirty (30) minutes prior to or after your shift." Akers repeated that he did not know that. Reinholtz then asked if Akers had gotten permission, and Akers replied that he did not. Johnson asked how long he had been taking a shower, and Akers told him almost all week. Johnson commented, "[Y]ou been coming down here all week?" Akers repeated that he had. Johnson asked if anyone had seen him other than on Friday night, and Akers said no, that he did not care if anyone had seen him, he just came down to take a shower. Johnson then asked, "[H]ow do we know that you weren't stealing?" Akers replied that Johnson had known him for 5 years and asked if he honestly thought he would try to steal something. Johnson replied, "No, . . . but we just can't have people down here wandering around." Johnson then

stated, "[W]ell, I don't know what to do with you. Whether to terminate you, or give you a final notice." Akers responded saying, "I know what this is about, Van, ...this is about me and Opie supposedly being in here passing out Union cards." At this point, Johnson "kind of leaned back a little bit" and said, "[A]ah, I don't know nothing about that." Akers stated that he should "because it's all over the shop. . . . [T]hree people has done asked me, . . . and one of them was asking me right at 6:30." Johnson repeated that he did not know anything about that and directed Akers to return to his work area.

Shortly thereafter, as the morning break was ending, Wallace told Akers that Johnson wanted to see him again. Johnson told Akers, that "due to the information that we have and the circumstances, . . . I'm going to have to let you go. Akers said, "Van, . . . you're losing a good welder over a stupid reason." Johnson stated that the rules are the rules. Akers replied, "Van, if you're going to enforce the rules once you need to enforce them all the time."

Johnson confirms that Akers admitted that he came to the plant to take a shower and that, as he was leaving to go home, he saw Troy Dennis and entered the plant to talk to him. He noted that Akers stated that he was unaware that he needed permission. Johnson recalled that Akers explained that his hot water heater was not working that "he had been up there every night that week taking showers." Johnson acknowledged that the possibility of theft was mentioned, that Akers had stated, "Van, you know I'm not a thief," and that he took him at his word. Johnson asserted that it was at this point that he asked Akers to return to work.

Johnson testified that "we had originally called Akers in to reprimand him for being up there," but his testimony does not reflect that there had been any prior discussion of discipline. Johnson contends that, after Akers returned to work, he, Reinholtz, and Wallace had additional discussion regarding the fact that an off duty employee had been inside the locker room and that there had been thefts from the locker room. Johnson testified that Reinholtz had commented that the Company had a responsibility to "give the employees, as much as we could, a safe place to keep their valuables." Johnson was then asked, "Were there any other comments made by Mr. Wallace or you or Mr. Reinholtz?" Johnson answered, "No, sir."

Akers returned. Johnson stated that he told him that he not only had broken the rule of no-access for being there one time, Friday night, but that "in his own admission he had broke it four to five times that week. That we were going to terminate him for it." Johnson testified that, after he told Akers that he was terminating him, Akers stated that "the only reason you're doing this is because of this Union thing." Johnson testified that he replied, "Paul, that's not the case." The Separation of Employment document signed by Reinholtz states: "Paul was terminated for using JWH [John W. Hancock] facilities multiple times in May 2000 without management permission." The document does not mention his entry into the plant to speak with Dennis.

Respondent did not present either Human Resources Director Reinholtz or Plant Superintendent Wallace both of whom are currently employed.[2] According to Johnson's uncorroborated testimony, the only matter of substance that was discussed after the first meeting with Akers was the concern about security. His testimony does not reveal that there had been any prior discussion of discipline. Despite this, he testified that "we originally called Akers in to reprimand him." If that indeed was why "we" called him in, there had obviously been some discussion regarding discipline. When he sent Akers back to work, Johnson stated to him, "[W]ell, I don't know what to do with you. Whether to terminate you, or give you a final notice." Despite Johnson's purported uncertainty regarding whether a reprimand continued to be appropriate, there was no discussion whatsoever of altering the level of discipline that had previously been decided upon. Johnson called Akers back in and discharged him supposedly for taking what he understood to be five showers. The absence of corroboration, Johnson's unimpressive demeanor, and the illogic of his testimony belie Johnson's assertion to Akers that he did not "know anything about" the rumor that he and Pugh had been passing out union cards and his testimony that he made the decision to terminate him after Akers acknowledged taking showers. I do not credit his testimony.

Johnson stated that it was his practice not to tell anyone other than a terminated employee's immediate supervisor that an employee had been terminated and that he did not give the specific reason for termination to even the immediate supervisor. Notwithstanding this testimony, Supervisor Cantrell, who supervised neither Pugh nor Akers, testified that Johnson informed him that Pugh and Akers "were terminated for insubordination." Employee Connor, who has worked at the Company for over 23 years, credibly testified that "when somebody is let go there it flies through the shop like wildfire."

2. Analysis and concluding findings

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). I find that Akers and Pugh did engage in union activity and that Respondent bore animus towards employees who engaged in union activity.

Respondent argues that there is insufficient direct or circumstantial evidence to support a finding that Respondent knew that Pugh and Akers were engaged in union activity. Although Pugh and Akers had not been engaged in union [activity] on the night of June 2, the evidence establishes that Respondent suspected that Pugh and Akers came to the plant to engage in union activity. Moore's threat to Waller of plant closure immediately after observing him in conversation with Pugh suggests that Respondent suspected Pugh of soliciting on behalf of the Union at the plant. This suspicion is confirmed by the action of Webb, who admitted paying closer attention to what employees were doing. Webb directed Pugh to leave as soon as he saw him on June 2 without inquiring why he was present. Cantrell characterized the presence of Pugh and Akers in the plant within 15 minutes of one another on June 2 as a "strange occurrence,"

[2] Reinholtz conducted the search of Respondent's files for documents sought by a subpoena served by the General Counsel in connection with this hearing. He was unable to find evidence of a termination that "Plant Superintendent Wallace said [he made] back in the late 80's."

explaining, "I've never had anybody come back at 10 or 11 o'clock at night." Prior to the termination of these employees there was a plantwide rumor that they had been passing out union cards. The day following their terminations, Supervisor Sloan advised Connor, "I heard they let them go for handing out Union cards to the nightshift."

Respondent's belief that these two employees were engaged in union activity on the evening of June 2 is further confirmed by the absence of testimony by Reinholtz and Wallace. Johnson's testimony of his discussions with Reinholtz and Wallace on the morning of June 5 makes no mention of any speculation regarding what the employees had been doing. I find it incredible that Johnson, Reinholtz, and Wallace would not have discussed the "strange occurrence" of two employees being at the plant at 11 p.m. I have not credited Johnson's assertion to Akers that he did not know about the rumor that was "all over the shop." Respondent's failure to call either Reinholtz or Wallace, neither of whom was shown to be unavailable and both of whom were present on June 5, supports an inference that suspected union activity by Pugh and Akers was discussed and that they would have testified adversely to Respondent's interests. *International Automated Machines*, 285 NLRB 1122 [1987]. The probative evidence establishes that Respondent believed that Pugh and Akers had been engaging in union activity. "[W]hen an employee is disciplined for concerted or union activities which his employer mistakenly believes he had participated in, the statute affords him relief." *Gulf-Wandes Corp.*, 233 NLRB 772 (1977). A respondent's belief that protected activity has occurred is controlling. *Henning and Cheadle*, 212 NLRB 776, 777 (1974).

The probative evidence establishes that Respondent believed that these employees had come to the plant to engage in union activity and decided to discharge them. Although Johnson did not testify discussing discipline with Reinholtz and Wallace prior to speaking with Pugh, his testimony that "we . . . called Akers in to reprimand him," reveals that discipline was discussed prior to speaking with the employees. The fact that Johnson summarily discharged Pugh without any consultation with Reinholtz or Wallace confirms that it had been previously agreed that Pugh was to be discharged. Likewise, Respondent had determined to discharge Akers. I have not credited Johnson's testimony that "we originally called Akers in to reprimand him for being up there." If that testimony were true, there would have been discussion regarding changing the decision to reprimand him to a decision to discharge him. Akers' admission that he had been taking showers raised an issue that Johnson had not discussed with Reinholtz and Wallace. In order to provide time to consult with them regarding that issue, he prepared to send Akers back to work stating, "I don't know what to do with you. Whether to terminate you, or give you a final notice." If, as Johnson told Akers, he did not know what he was going to do, that indecision would have been a topic of discussion among himself, Reinholtz, and Wallace. According to Johnson, the only matter discussed after Akers was sent back to work was security in the locker room. When asked if either he or Reinholtz or Wallace made any other comments, Johnson replied, "No."

Respondent's predetermination to discharge these employees is confirmed by Johnson's interviews with them. Johnson asserted that we "decided to get Mr. Pugh over and let him explain why he was there and why he came back," but he then ignored Pugh's explanation that he had only been told to leave the building. Pugh's explanation was consistent with Webb's statement to Johnson that he had told Pugh that "he wasn't supposed to be there."

Respondent, in its brief, argues that "Johnson reasonably determined that Pugh had been insubordinate to Cantrell." Although Cantrell simply said "okay" when Pugh explained that he had talked to Webb and was leaving, he told Johnson that he had told Pugh to leave the property. Cantrell was out of town on June 5. Johnson had not spoken with him since Saturday morning. Despite Johnson's purported reliance upon Cantrell's report that he told Pugh to leave the *property*, the Separation of Employment document signed by Reinholtz does not reflect such a directive. It states that Pugh "was asked to leave by John Webb" and was terminated "for being on company property without permission and insubordination for returning." Respondent's no-access rule, by its terms, applies only to buildings and work areas. Johnson testified that it did not apply to the parking lot. Respondent's employee handbook prohibits "insubordination or the failure or refusal by any employee to follow management's instructions concerning a job related matter." Pugh was off duty, thus Webb's directive that he leave was not job related. Pugh was not insubordinate. He obeyed the directive and left the plant. Webb did not believe that he was insubordinate. When Webb observed Pugh's van at 11:45 p.m., he began to approach the van not because he was concerned that Pugh had disobeyed his instruction to leave, but to check and "see what he wanted. What was the problem."

Assuming that Johnson's reliance upon Cantrell's purported directive that Pugh not enter Respondent's property, although at odds with what both Pugh and Webb told him, was reasonable, the propriety of that purported directive must be examined. As the General Counsel points out, the applicable test for valid no-access rules is set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976), which explains that a no-access rule concerning off-duty employees is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity, and that except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. If Cantrell did bar Pugh from Respondent's property, including the parking lot, he orally amended Respondent's valid no-access rule and created an unlawfully broad no-access rule. Respondent's no-access rule is a portion of its no-solicitation rule. The Board has long held that discipline for violating an unlawfully broad rule governing solicitation is unlawful. *Chesterfield Convalescent Home*, 287 NLRB 328 (1987); *Stoody Co.*, 320 NLRB 18, 28 (1995).

The record establishes that Respondent seized upon Pugh's alleged disobedience of Cantrell's purported instruction and, although not using the term when speaking with Pugh, charac-

terized the offense as insubordination on the Separation of Employment document. Respondent's reliance upon the purported offense of insubordination, an offense that was not committed, was pretextual. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Even if I were to accept Respondent's argument that Johnson was justified in relying upon Cantrell's assertion that he told Pugh to leave the property, I would find that the termination of Pugh pursuant to that invalid orally promulgated no-access rule violated the Act.

Regarding Akers, Respondent's brief argues, consistent with Johnson's testimony, that Respondent had intended only to reprimand Akers, but that when it learned that he "repeatedly engaged in conduct that violated the second part or Respondent's no-access rule, Johnson was no longer confident that the intended punishment was appropriate." This argument might have merit if Johnson's testimony had been credible. As I have found, Respondent had determined to discharge Akers prior to speaking with him. According to Johnson's own testimony, there was no discussion of changing the level of discipline to be imposed upon Akers. The absence of any discussion regarding changing the level of discipline confirms that the level of discipline did not change. The consultation simply changed the grounds for the discharge. Although Akers purportedly had been called in "to explain why he had been in the plant talking to Troy Dennis," the Separation of Employment document does not even mention this incident; it refers, erroneously, to "using JWH [John W. Hancock] facilities multiple times in May 2000 without management permission." Akers showered on May 30 and 31 and June 1 and 2.

Respondent's no-access rule permits employees to remain in plant buildings or other work areas "a reasonable period of time (not to exceed 30 minutes) prior to or after scheduled work." Employee Eddie Charlton regularly exceeded this 30-minute limit, and Vice President Johnson admitted that he did not obtain permission to do so. Although Reinholtz raised the issue of security in the locker room, Johnson had acknowledged that he took Akers at his word that he was not a thief. There is no evidence establishing that Respondent's security concerns should have been any greater with regard to the presence of Akers, who was not a thief, than with the presence of Charlton, who was also not suspected of stealing. Charlton regularly violated Respondent's rule by remaining in a plant building for more than 30 minutes taking a shower. Akers violated Respondent's rule by entering the building on four occasions to take a shower. At the time Akers was terminated, he stated, "if you're going to enforce the rules once you need to enforce them all the time." Respondent arbitrarily and selectively enforced its no-access rule against Akers. Respondent's purported reliance upon that rule was pretextual.

Respondent's discharge of these employees for conduct that had previously not even resulted in discipline was unprecedented. Prior to June 5, no employee had been disciplined for entering Respondent's property without permission. Prior to June 2, no off duty employee had been denied entry to the plant to conduct personal business. Neither Webb nor Cantrell mentioned discipline to either employee or to Johnson. Employee Connor, when speaking with Supervisor Sloan stated, "I've been here for twenty-three (23) years and I ain't never knowed nobody to be fired for trespassing." Respondent presented no evidence contradicting that statement. Neither Human Resources Director Reinholtz nor Plant Superintendent Wallace were called to testify despite their involvement in the discussions with Johnson on June 5.

I find that the General Counsel has carried his burden of proof. Respondent suspected that Akers and Pugh had been "handing out Union cards to the nightshift" and its animus towards that union activity was a substantial and motivating factor for their discharges. Indeed, it was the motivating factor behind the discharges. *Manno Electric*, 321 NLRB 278, 281 (1996). Respondent has not established that it would have taken the same action against these employees had it not believed that they had been engaging in union activity. Although Respondent argues that permitting prounion employee Paris to enter the property and borrow a water cooler shows that it was not motivated to discriminate against union supporters, Paris was not suspected of engaging in union activity at the plant. There is no evidence that any employee had ever been disciplined, and certainly not discharged, for unauthorized presence on Respondent's premises. I find that Larry Pugh and Paul Akers were discharged because Respondent believed that they were engaging in activity on behalf of the Union at its plant on June 2. In so doing, Respondent violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By interrogating employees concerning the union activities of their fellow employees, threatening plant closure if employees selected the United Steelworkers of America, AFL–CIO as their collective-bargaining representative, and threatening employees with termination for engaging in union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging employees because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and 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.

The Respondent having discriminatorily discharged Larry Pugh and Paul Akers, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] 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

ORDER

The Respondent, John W. Hancock, Inc., Salem, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning the union activities of their fellow employees.

(b) Threatening plant closure if employees selected the United Steelworkers of America, AFL–CIO, as their collective-bargaining representative.

(c) Threatening employees with termination for engaging in union activities.

(d) Discharging or otherwise discriminating against any employee for engaging in union activity.

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

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

(a) Within 14 days from the date of this Order, offer Larry Pugh and Paul Akers full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Larry Pugh and Paul Akers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Larry Pugh and Paul Akers and, within 3 days thereafter, notify them writing that this has been done and that the discharges will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facilities at Salem, Virginia, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 facilities 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 May 22, 2000.

(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

Board and all objections to them shall be deemed waived for all purposes.

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