Amcast Automotive of Indiana, Inc. *and* John Rowe.
Case 25–CA–29199

September 29, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 16, 2005, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply 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[2] only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employee John Rowe and Section 8(a)(1) by interrogating John Rowe, and by, in separate instances, telling Rowe and other employees that Rowe's union activity played a role in his discharge. For the reasons discussed below, we reverse the judge's findings that the Respondent unlawfully interrogated and discharged Rowe. However, for the reasons given by the judge, we adopt his finding that the Respondent violated Section 8(a)(1) by telling Rowe that union activity played a role in his discharge.[3]

I. FACTS

A. Background

The Respondent operates a manufacturing facility in Gas City, Indiana, where it manufactures aluminum wheels for the automotive industry. It employs over 200 employees at the facility. John Rowe was employed at the Gas City facility for approximately 12 years as a bench worker and a machinist. As part of his job, Rowe was assigned a computer, with access to the Internet, which he used to order new tooling from one of the Respondent's suppliers. At all material times, Rowe's immediate supervisor was John Stambaugh.

In 1999 and in 2002, Rowe was actively involved in two unsuccessful attempts by the United Auto Workers of America (UAW or the Union) to organize the employees at the facility. The Respondent was well aware of Rowe's union activity at the time. However, there is no claim or evidence that the Respondent interfered with Rowe's prounion activity. Similarly, after Rowe received a final written warning in September 2003 for leaving the facility without clocking out, neither he nor the UAW filed a charge alleging that the discipline was linked in any way to Rowe's union activity. Finally, there is no evidence that Rowe engaged in any further union activity after 2002, other than occasionally wearing a UAW T-shirt to work.

B. The Events Leading to Rowe's Discharge in 2004

On about May 11, 2004,[4] Rowe heard a rumor that a company called KPS was purchasing the Respondent's Gas City facility. Prompted by the rumor, Rowe searched the Internet for information about KPS on three separate occasions during working hours. At times, employee Gene Sage Jr. joined Rowe at his computer to view KPS-related websites. Also, on one of these occasions, Rowe printed documents related to KPS on a printer located in Stambaugh's office, gave the documents to Stambaugh to read, and then placed them on a table in the tool room for other employees to read.

On May 25, Rowe discussed the potential sale to KPS with Stambaugh and Manufacturing Manager Wilbur Kline in Stambaugh's office. Rowe asked Kline what he would suggest doing with company stock if the sale to KPS went through. After answering Rowe's question, Kline asked Rowe if there was any truth to "the rumors." Rowe asked if Kline meant union rumors, and Kline replied yes. Rowe said no and told Kline that no union organizing drive was taking place. The following day, the UAW distributed handbills outside the Gas City facility. Rowe was not involved.

Previously, Human Resources Manager Larry Henn was told that Rowe was accessing the Internet to get information on KPS, although the Respondent and KPS were engaged in due diligence negotiations that were intended to be confidential. The exact date that Henn learned this was not established. Concerned, Henn requested, on the morning of May 26, a report of every computer at the facility that had accessed 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] There are no exceptions to the judge's finding that the Respondent did not create the impression that employees' union activities were under surveillance.

[3] We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) when it told other employees that union activity played a role in Rowe's discharge because any finding of a violation would be cumulative and would not materially affect the remedy.

[4] All dates are 2004, unless otherwise indicated.

KPSfund.com website during the period from May 7–14. He learned that three computers had accessed the KPS site; two were assigned to managers and the third was used by Rowe. Henn then requested a report of all the websites that had been accessed on Rowe's computer. [5] The report revealed that Rowe had spent a total of approximately 29 minutes accessing nonwork-related websites during working hours between May 11 and 14.

The Respondent concluded that Rowe's Internet usage violated employee work rules against loitering on the job, misuse of company equipment, and wasting time. As a result, Henn, Kline, and Human Resources Representative Mark Barker decided that Rowe (who had received a final warning 8 months earlier) should be discharged. The decision was confirmed with Plant Manager Duane LaShamb. Stambaugh was informed of the decision. On May 27, Henn, Barker, and Stambaugh met with Rowe and told him he would be terminated.

Stambaugh did not take part in the decision to discharge Rowe. The day after Rowe was discharged, Stambaugh told an employee that Rowe's Internet use was "part of the reason" he was fired. Rowe's discharge also came up in a conversation Stambaugh had with employees that day. He said that Rowe's union activity "probably didn't help his cause any." During the second week of June, upon receiving a phone call from Rowe, Stambaugh told Rowe, "[I]f it hadn't been for the 'U' word," Rowe would probably still be employed. Stambaugh was not called to testify; he was never asked what bases he had for making these statements.[6]

II. ANALYSIS

A. The Alleged Unlawful Interrogation

As indicated, the judge found that the Respondent unlawfully interrogated Rowe about union activity when Kline asked Rowe whether there was any truth to "the rumors," referring to a possible union organizing drive. Contrary to the judge and our dissenting colleague, we find that Kline's single question to Rowe did not violate the Act.

The Act does not make it illegal per se for employers to question employees about union activity. To establish a violation, the General Counsel must prove that, under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees in the exercise of their Section 7 rights. See *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Relevant factors include the background of the relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. Id.; see also *Temp Masters*, *Inc.*, 344 NLRB 1188, 1188 (2005), affd. 160 F.3d 684 (6th Cir. 2006) (unpublished).

Considering these factors, we find that the General Counsel failed to carry his burden. As described, there is no history of the Respondent interfering with Rowe, or other employees, because of union activity. In particular, there is no evidence that Kline (the questioner) and Rowe had a troubled relationship. To the contrary, Rowe apparently felt comfortable talking with Kline about personal matters, as evidenced by Rowe's inquiry about his company stock.[7] Further, there was no evidence that Kline's general question about "the rumors" was designed, or reasonably perceived, as an effort to uncover the union activities or sympathies of any employee. Last, although the questioning occurred in Supervisor Stambaugh's office, we find that this factor warrants less weight in the present case. Rowe's actions, such as printing KPS-related documents and discussing the potential sale to KPS in Stambaugh's office, indicate that Rowe would not have regarded the office as an unfamiliar or threatening place.

We recognize that the Respondent committed an unfair labor practice 3 weeks after the alleged interrogation. On that occasion, Stambaugh remarked to Rowe that union activity likely played a role in his discharge. However, as in *Temp Masters*, supra, the later violation bore little, if any, relationship to the earlier interrogation. See id. at 1188 (citing *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1225 fn. 5 (2002) (where an unfair labor practice occurs subsequent to an interrogation, the Board looks at the relationship between the two events). The comments were made by different supervisors, at different times, and in different contexts. Further, Stambaugh's unlawful remark was obviously not tied to the question Kline posed to Rowe because Stambaugh played no part in Rowe's discharge.

[5] The dissent states that, prior to Henn's May 26 request, the Respondent had never previously asked its computer consultant to prepare such a report. However, the record shows that, prior to April, only about six of the Respondent's employees had access to the Internet. Soon thereafter, the Respondent made Internet access available on all of the approximately 40 computers at its facility. Thus, there is little, if any, significance to the fact that the Respondent had never asked for such a report before May 26.

[6] Although the judge drew an adverse inference based on Stambaugh's failure to testify, the judge did not explicitly rely upon it in concluding that the discharge of Rowe was unlawful. Contrary to the judge, Member Schaumber would not draw an adverse inference against the Respondent for the failure to call Stambaugh.

[7] On this point, our dissenting colleague points out that Kline "abruptly" raised the subject of unionization. In an informal conversation centering around the Respondent's then-current state of operations and whether Rowe should hold or sell his stock, we do not view Kline's lone question about "the rumors" as an abrupt change.

For these reasons, we find that the General Counsel failed to establish that Kline's question about "the rumors" reasonably tended to restrain, coerce, or interfere with Rowe's exercise of his Section 7 rights. Accordingly, we shall dismiss this allegation.

B. The Alleged Unlawful Discharge of John Rowe

We also find that the General Counsel failed to establish that the Respondent unlawfully discharged Rowe. As the judge recognized, we apply the Board's *Wright Line* test[8] to determine if the Respondent's discharge of Rowe was unlawful. Under this test, the General Counsel bears the burden of proving by a preponderance of the evidence that the employee's protected conduct was a motivating factor in the adverse employment action. If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer's knowledge of that activity, and animus against protected conduct,[9] then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected conduct. See *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961 (2004).

Contrary to the judge, we find that the General Counsel failed to carry his burden here. The judge found that two of Rowe's activities were protected: (1) his activity of surfing the Internet for information on KPS; and (2) his union activity in 1999 and 2002. In our view, neither of these is sufficient to support the General Counsel's case.

First, although Rowe's Internet activity may have been concerted, we disagree with the judge's finding that it was protected. For an employee's activities to be protected under Section 7 of the Act, the activity must bear some relation to "employees' interests as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978). Implicit in this requirement is the corollary that "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." Id. at 567–568. The Board has recognized that, absent some "direct impact" on employees' terms and conditions of employment, Section 7 typically does not extend to employees' activities regarding the ownership or control of an employer. See, e.g., *Co-Op City*, 341 NLRB 255, 257–258 (2004) (recognizing that employees do not have a protected right to influence the identity of the managerial hierarchy) and cases cited therein. Here, we find insufficient evidence of a link between Rowe's Internet activity and the employees' working conditions.

The judge observed that a change in ownership of the Respondent could affect the employees' terms and conditions of employment. Although Rowe claimed this was his concern, there is no evidence that Rowe gathered information on how a possible acquisition by KPS would affect employees' terms and conditions of employment. Rather, it appears that Rowe only gathered general information on KPS, as evidenced by the fact that he shared the information he gathered with his supervisor and coworkers alike. Although Rowe expressed concern about the possible sale, the concern had to do with whether he would continue to hold the stock that he earned in the company 401(k) plan.

In any event, whatever concern Rowe may have had over the effect that a possible sale of the Company could have on the employees' interests as employees, we find, contrary to our dissenting colleague, that the mere possibility of a future sale was too speculative and remote for his Internet activity to be protected under Section 7. Certainly, there is no evidence that KPS, at the time, had any control over the Respondent's employees' terms and conditions of employment. The most that can be said is that Rowe was acting on a rumor that a *future* sale to KPS might occur, and that if and when it actually occurred, it might ultimately affect the value of Rowe's stock and also could affect the employees' terms and conditions employment.[10] We find that these possibilities were simply too attenuated to bring Rowe's Internet activity within the scope of Section 7.

Second, although Rowe engaged in union activity at times during his employment with the Respondent, we find that the General Counsel failed to establish that union activity was a motivating factor in Rowe's discharge. In particular, we find that the gap in time between Rowe's prounion activity in 2002 and his discharge in 2004 is too great to support such a connection.[11] Further,

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] Regarding the *Wright Line* analysis, Member Schaumber notes that the Board and the circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formula.

[10] Our dissenting colleague's intimation that this theoretical sale might result in a layoff of employees has no basis in the record and merely further stretches his chain of speculation.

[11] *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1340–1341 (1988) (employee's participation on union negotiating team found "too remote in time to be linked to" his layoff 11 months later); *Thom Brown Shoes,*

there is little evidence that Rowe engaged in union activity after 2002. At most, the record shows that Rowe occasionally wore a union T-shirt to work in 2003 and 2004. And, as the judge found, Rowe did *not* participate in the UAW handbilling in May 2004.

Given Rowe's minimal prounion activity after 2002, we further disagree with the judge's assessment that the Respondent acted on a mistaken belief that Rowe was still involved in union activity in 2004. Even Kline's brief inquiry of Rowe about whether he was *aware* of "the rumors" does not establish that the Respondent believed Rowe was *involved* in any union activity. As far as the record shows, moreover, the Respondent accepted Rowe's apparently truthful response that he had no knowledge of any such activity. The General Counsel has the burden of proving that Rowe was engaged in protected activity, and that the Respondent was aware of the same. The General Counsel's case must rest on something more than speculation and conjecture.

Moreover, contrary to our dissenting colleague, we do not find that the timing of Rowe's discharge—occurring the day after the union handbilling—supports an inference that the Respondent discharged Rowe because it believed he was still involved in prounion activity. Most importantly, Rowe did not take part in that handbilling. Additionally, as noted above, Rowe, other than wearing a union T-shirt, had not engaged in any prounion activity since his involvement in an organizing campaign 2 years previously. Further, as discussed below with respect to animus, the timing of Rowe's discharge is explained by the tip that the Respondent received about unauthorized Internet use.

Separately, we find, in agreement with the Respondent, that the judge erred in finding that the General Counsel established antiunion animus. Initially, we agree with the Respondent that the judge erroneously found that the postdischarge conjecture of Stambaugh constitutes direct evidence of animus. The judge found that Stambaugh was "basically left out of the loop entirely" in regard to the Respondent's decision to discharge Rowe. Given Stambaugh's noninvolvement in the decision to discharge Rowe, we are hard pressed to see how Stambaugh's subsequent statements about Rowe's discharge constitute evidence, much less "direct evidence," of the Respondent's animus. See, e.g., *John J. Hudson, Inc.*, 275 NLRB 874, 874–875 (1985) (finding that supervisor's statement, "I think you guys are killing yourself [sic] over what you're trying to pull," did not establish animus by a preponderance of the evidence in employer's decision to layoff employees where the supervisor played no part in the decision).

Further, contrary to the judge and our dissenting colleague, we do not find sufficient circumstantial evidence to warrant an inference of animus. The judge found that such animus could be inferred from the timing of the Respondent's investigation and discharge of Rowe, pointing to the fact that Rowe's Internet usage occurred between May 11 and 14 but that the Respondent did not take any action against Rowe until the UAW handbilling on May 26. However, the judge's finding incorrectly assumes that Henn learned of Rowe's Internet usage immediately or shortly after May 14. The General Counsel did not establish when Henn received the tip about Rowe's Internet usage. Therefore, we cannot conclude that the Respondent had this information but chose not to act on it until the handbilling took place.

Finally, contrary to our dissenting colleague, we do not find that animus can be inferred solely from the Respondent's assertedly insufficient thoroughness in investigating Rowe's misconduct, including not consulting Stambaugh prior to the decision to discharge Rowe. See *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004) (unlawful motivation cannot be established by showing that an employer "does not pursue an investigation in some preferred manner").[12]

Our colleague says that the immediate supervisor is ordinarily involved in the decision to discipline. Concededly, if the misconduct involves an alleged deficiency in the performance of work, the record demonstrates that the immediate supervisor would ordinarily be involved in the decision. However, the fact of Rowe's Internet usage was apparent to the Respondent based on the report generated on May 26.[13] Under these circumstances, we do not infer animus because the Respondent did not involve Stambaugh.

Relatedly, the dissent says that if the Respondent consulted with Stambaugh prior to the decision, it would

Inc., 257 NLRB 264, 268 (1981) (insufficient showing of antiunion motivation where protected conduct occurred almost 6 months prior to discharge); *Rockland Bamberg Print Works*, *Inc.*, 231 NLRB 305, 306 (1977), enfd. mem. 566 F.2d 1173 (4th Cir. 1977) (employee's discharge was too remote in time from his support of union in election 5 months earlier).

[12] In *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458 (2004), enfd. 414 F.3d 158 (1st Cir. 2005), cited by the dissent, the employer's failure to conduct a full investigation was shown to be a departure from its own rule. Id. at 459 fn. 9. Unlike that case, however, in the present case there is no showing that the Respondent conducted a less thorough investigation that its own rules required.

[13] The report generated from Rowe's computer revealed that he accessed Internet sites related to KPS during working hours. Our dissenting colleague speculates that this "may have taken place during Rowe's breaks," but the General Counsel failed to establish by a preponderance of the evidence that Rowe was on a break for each instance detailed in the report.

have discovered that Stambaugh condoned Rowe's Internet usage. Assuming, arguendo, that this is so, the fact is that the Respondent did not consult with Stambaugh, and it thus concluded that Rowe had used the Internet without permission. As discussed above, the failure to consult with Stambaugh was not unusual in the circumstances.

For these reasons, we find that the General Counsel did not satisfy his *Wright Line* burden of establishing that Rowe's discharge was motivated by protected activity. Accordingly, we dismiss the complaint allegation that the Respondent's discharge of Rowe violated Section 8(a)(3) and (1) of the Act.[14] Consequently, it is not necessary to pass on the Respondent's affirmative defense that it would have discharged Rowe in any event.[15]

ORDER

The Respondent, Amcast Automotive of Indiana, Inc., Gas City, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that an employee was discharged for engaging in union activity.

(b) 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 after service by the Region, post at its facility in Gas City, Indiana, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 25, 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 June 14, 2004.

(b) 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 unfair labor practices not specifically found.

MEMBER WALSH, dissenting in part.

Upon hearing rumors of a union organizing campaign among its employees, the Respondent interrogated employee and known union sympathizer John Rowe about the rumors. The next day, the rumors were confirmed by union handbilling at the facility, and, acting on a "tip" from an unnamed employee, the Respondent investigated Rowe's Internet activity at work. The Respondent decided the same day to discharge Rowe, without even bothering to speak to him, allegedly because Rowe, acting in concert with a fellow employee, had spent a total of about 29 minutes viewing websites related to a company that was considering purchasing the Respondent's facility.

Reversing the judge, the majority concludes that the interrogation was not coercive, that Rowe's union activity played no role in the discharge decision, and that the Act afforded no protection to Rowe in his effort to obtain public information about the potential purchaser. Contrary to the majority, I would affirm the judge's findings that the Respondent's interrogation and discharge of Rowe violated the Act.[1]

I. BACKGROUND

The Respondent manufactures and sells aluminum wheels for the automotive industry at its Gas City, Indiana facility. The Gas City facility is nonunion, and the Respondent has made it clear that it intends to keep it that way. The Respondent maintains a "Union-Free Policy" in its employee handbook, and it has defeated three organizing campaigns at the facility since about 1999.

Rowe was employed at the Gas City facility for approximately 12 years. Most recently, he occupied a ma-

[14] Member Schaumber would also dismiss the 8(a)(3) allegation on the additional basis that Rowe's conduct violated the Respondent's policy regarding employees' use of computers—a policy which is not alleged to be unlawful or discriminatorily applied.

[15] Inasmuch as we are dismissing the complaint allegation that Rowe was unlawfully discharged, we need not address the Respondent's contention that the usual remedy of reinstatement with backpay is not appropriate in light of after-acquired evidence.

[16] 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."

[1] I join the majority in affirming the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act when, following Rowe's discharge, Supervisor Stambaugh told him that he would probably still be employed "if it hadn't been for the 'U' word." For reasons discussed herein, I would affirm the judge's additional finding that the Respondent violated Sec. 8(a)(1) when Stambaugh told other employees that Rowe's union activity "didn't help his cause any." The majority mistakenly finds it unnecessary to pass on the latter finding.

chinist position that required him to use a computer and to use the Internet to order new tooling. His immediate supervisor was Reed Stambaugh. Rowe was actively involved in two of the union organizing campaigns at the facility, one in about 1999 or 2000 and a second in 2002. His past and present union sympathies were well known to management. Two former managers, John Lilly and Jerry Rowland, testified that Rowe had been identified as prounion because of his consistent union support during the organizing drives, and Manufacturing Manager Wilbur Kline observed Rowe wearing union T-shirts to work in 2003 and 2004.

On about May 11, 2004,[2] Manager Dwayne Gotshall informed Rowe, employee Gene Sage Jr., and another employee that the Gas City facility was going to be sold to a company called KPS. Thereafter, on May 11, 13, and 14, Rowe, frequently accompanied by Sage, used the computer at his workstation to search the Internet for information about KPS. There is no dispute that Rowe sought information about KPS because he was concerned about the employees' futures.

There is also no dispute that Supervisor Stambaugh was aware of Rowe's Internet activity. Rowe printed KPS-related documents in Stambaugh's office and gave them to Stambaugh to read, which he did. Yet Stambaugh never told Rowe that he had violated any company rule or policy, or that he had engaged in any misconduct. Stambaugh never even suggested to Rowe that he should stop using his computer to learn about KPS. The Respondent's employee handbook expressly permits employees to use the Internet "to further gain knowledge of the Company's business and industry."

On May 25, Rowe, Supervisor Stambaugh, and Manufacturing Manager Kline had a conversation in Stambaugh's office during which the sale of the Company was discussed. Rowe asked Kline what employees should do with their company stock if the Company was sold. Kline advised Rowe that the stock could be rolled over into the acquiring company's 401(k) plan. Kline then asked Rowe if there was any truth to "the rumors." Rowe asked if Kline was referring to union rumors, and Kline said that he was. Rowe gave Kline his word that there was no union organizing drive taking place. In fact, there was, though it is unclear whether Rowe was aware of it.

The next morning, union organizers distributed handbills outside the Gas City facility. That same morning, Human Resources Manager Larry Henn asked Nathaniel Spencer, the Respondent's computer consultant, to generate a report of every computer that had requested a particular KPS-related website during the week of May 7–14. When Henn learned that Rowe's computer had accessed the website, Henn asked for a detailed report of Rowe's individual Internet usage. Spencer had never before been asked to provide such a report.

The report showed that Rowe had accessed KPS-related websites for an average of less than 10 minutes on 3 separate days, some of which may have taken place during Rowe's breaks. Based on this report, Henn, Kline, and Human Resources Representative Mark Barker decided to fire Rowe for "loitering," "misuse of company equipment," and "wasting time." Rowe was formally discharged during a termination interview the morning following the union handbilling. During the termination interview, Rowe attempted to discuss the union and the circumstances surrounding his Internet use, but Henn refused to listen. Henn told Rowe that the decision had already been made.

The next day, Supervisor Stambaugh told Sage that Rowe's Internet usage was only "part of the reason why [he] got [sic] fired." Although Stambaugh did not explicitly say what the other reason was, he admitted to a group of employees that same day that Rowe's union activity "probably didn't help his cause any." When Rowe called Stambaugh for a reference a couple of weeks later, Stambaugh told Rowe that "if it hadn't been for the 'U' word," Rowe would probably still be employed.

II. THE RESPONDENT UNLAWFULLY INTERROGATED ROWE

The judge correctly found that the Respondent violated Section 8(a)(1) of the Act when Manufacturing Manager Kline, accompanied by Supervisor Stambaugh, questioned Rowe about rumors of union activity at the Gas City facility. Contrary to the majority, I would find the question coercive, considering the totality of circumstances as required by *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *NLRB v. Hotel Employees Local 11*, 760 F.2d 1006 (9th Cir. 1985). Rowe found himself alone in his immediate supervisor's office, being directly asked by Kline, a high-ranking manager, to reveal whether union activity was taking place at the facility. Whether Rowe actually felt coerced by the question is beside the point, as the Board's test is an objective one. See *Trinity Memorial Hospital*, 238 NLRB 809, 811 (1978).

The majority's reasons for reversing the judge's finding are not persuasive. Rowe's apparently unremarkable history with Manufacturing Manager Kline does not alter the fact that Kline held substantial authority over Rowe's terms and conditions of employment. Even if one assumes that Kline and Rowe were friendly, the Board has recognized that a friendly relationship between a supervi-

[2] All subsequent dates are in 2004, unless otherwise indicated.

sor and an employee does not necessarily diminish the coerciveness of an interrogation. *Acme Bus Corp.*, 320 NLRB 458 (1995), enfd. mem. 198 F.3d 233 (2d Cir. 1999). The majority also erroneously cites Rowe's familiarity with Stambaugh's office as a factor diminishing the coerciveness of Kline's question. The relevant fact is that Kline and Stambaugh confronted Rowe in the boss's office, where Rowe was cut off from other employees and understandably would not have felt free to simply walk away. Further, this is not a situation in which the employee raised the subject of unionization, or where the subject was a natural outgrowth of the conversation. Kline abruptly raised the issue without any indication from Rowe that he wished to discuss his or his coworkers' union activity.

Finally, the coercive nature of Kline's interrogation of Rowe is confirmed by the events that immediately followed. The Board has recognized that "a question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone." *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000). Such is the case here. When union handbilling began at the Respondent's facility the morning after Rowe was questioned, Rowe was immediately investigated and discharged. The next day, Supervisor Stambaugh made unlawful statements tying Rowe's discharge to his union activity. These events clearly gave Kline's inquiry "a more ominous tone."

Considering these circumstances, I would affirm the judge's finding that Kline's interrogation of Rowe violated Section 8(a)(1) of the Act.

III. THE RESPONDENT UNLAWFULLY DISCHARGED ROWE

The judge also correctly found that the Respondent unlawfully discharged Rowe because of his actual or suspected union and other protected activity. The General Counsel established that Rowe engaged in union and other protected activity, that the Respondent knew of the activity and suspected that Rowe was still engaged in such activity, and that Rowe's protected activity was a motivating factor in the Respondent's decision to discharge him. Further, the judge correctly found that the Respondent failed to establish that it actually would have discharged Rowe even in the absence of such activity.

A. The Respondent Knew or Suspected that Rowe was Engaged in Union and Other Protected Activity

1. Union activity

There is no dispute that Rowe was actively involved in two union organizing campaigns at the Respondent's facility in 1999 and 2002. During these campaigns Rowe talked to employees about the union, attended union meetings, and distributed prounion T-shirts to employees. Rowe also served as a union observer in the 2002 election.

Rowe made no secret of these activities, and, in fact, the Respondent was well aware of his prounion sympathies. Former Managers Lilly and Rowland both admitted that Rowe had been identified as a prounion employee because of his consistent union support during the prior organizing drives at the facility. Further, Manager Kline acknowledged that he had observed Rowe wearing union T-shirts as late as 2004.

The Respondent claims that it believed that Rowe had disavowed his union sympathies by the time it discharged him in May 2004. This claim is substantially undermined by the Respondent's otherwise unexplained assumption, demonstrated by Kline's questioning, that Rowe would know whether there was any budding union activity at the facility. See *Southern Household Products*, 180 NLRB 369, 380 (1969), enfd. 449 F.2d 749 (5th Cir. 1971). The Respondent's claim is further undercut by the timing of Rowe's discharge, coming immediately after the union began handbilling at the facility. See *Kajima Engineering & Construction*, 331 NLRB 1604 (2000) (the timing of a discharge in relation to protected activity may support an inference of knowledge). These circumstances fully support the judge's finding that the Respondent believed that Rowe was still involved in union activity.[3]

2. Other protected activity

The record also fully supports the judge's finding that Rowe was engaged in other protected activity when he searched the Internet for information about KPS.[4] As the judge explained, the Board has consistently taken the view that "[e]mployees' activities are protected by Section 7 if they might reasonably be expected to affect terms and conditions of employment." *Georgia Farm Bureau Mutual Insurance Cos.*, 333 NLRB 850 (2001) (quoting *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981)). There is no dispute that Rowe and Sage were searching for information about KPS because they were concerned about how a sale of the Gas City facility might impact their employment. As Rowe put it, he wanted to determine "what the rest of our future would be." Rowe's concern for the employees' futures was further demonstrated by his question to Kline about what to do with his company stock, evidently held in the Re-

[3] It makes no difference whether the Respondent's suspicion was accurate. Even if the Respondent discharged Rowe on the mistaken belief that he was still involved in union activity, the discharge would be unlawful. See *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997).

[4] The majority does not disturb the judge's finding that Rowe's conduct was concerted in nature.

spondent's 401(k) plan,[5] if the sale was consummated. In these circumstances, the judge properly found that Rowe and Sage were acting together to address a situation that might reasonably be expected to affect terms and conditions of employment, meriting Section 7 protection.[6]

The majority's conclusion that the employees' concerns over the potential sale was too attenuated from their interests as employees is not convincing. As a factual matter, the Respondent's sale to KPS was more than a remote possibility—the parties were engaged in due diligence negotiations.

More broadly, the majority's conclusion is at odds with the Board's "responsibility to adapt the Act to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Corporate acquisitions, mergers, and takeovers have increased dramatically in recent years, and "layoffs are a routine fact of [these] activit[ies]." See *MV Transportation*, 337 NLRB 770, 776–777 (2002) (dissenting opinion) (collecting authorities). Obviously, "[l]aying off workers works a dramatic change in their working conditions (to say the least) . . . ." *NLRB v. Advertisers Mfg. Co*. 823 F.2d 1086, 1090 (7th Cir. 1987). Especially given the wave of corporate reshuffling that is sweeping through our economy, the National Labor Relations Act clearly protects concerted efforts by employees to obtain publicly available information about a potential new employer so that they may begin to prepare for the "dramatic change in their working conditions" that likely lies ahead. Denying employees this right serves only to exacerbate feelings of economic insecurity and hardly furthers the Act's overriding policy of "industrial peace." *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27, 38 (1987) (quoting *Brooks v. NLRB*, 348 U.S. 96, 103 (1954)).

B. The Respondent's Unlawful Motivation

The General Counsel also established that Rowe's protected activity was a motivating factor in his discharge. The timing of an employer's action in relation to protected activity can provide reliable evidence of unlawful motivation. *Davey Roofing, Inc*., 341 NLRB 222, 223 (2004). Two aspects of the timing of Rowe's discharge are particularly significant. First, the Respondent investigated and discharged Rowe immediately after union handbilling had started at its facility. Second, the discharge occurred "closely on the heels" of Kline's interrogation of Rowe, illustrating the Respondent's "desire to cut any budding union activity." *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002), enfd. mem. 71 Fed. Appx. 441 (5th Cir. 2003).

Along with the timing of Rowe's discharge, the Respondent's failure to adequately investigate Rowe's alleged misconduct also evinces its unlawful motivation. See *Sociedad Espanola de Auxilio Muto y Beneficencia de P.R*., 342 NLRB 458, 459–460 (2004), enfd. 414 F.3d 158 (1st Cir. 2005); see also *Embassy Vacation Resorts*, 340 NLRB 846 (2003). The Respondent decided to terminate Rowe without seeking any information regarding Rowe's alleged misconduct from Rowe or Stambaugh. Had the Respondent conducted a full and fair investigation, it would have discovered that Rowe's Internet usage was effectively condoned by Stambaugh. And when Rowe attempted to discuss the circumstances surrounding his discharge with the Respondent, he was told the decision had already been made. This apparent lack of interest in Rowe's version of the events further suggests that the Respondent's real concern was not in uncovering the truth, but in penalizing Rowe for his protected activity.

The Respondent's failure to consult with Stambaugh is important for another reason. Henn, Barker, and Kline all testified that ordinarily, the immediate supervisor is integrally involved in the disciplinary process. Kline testified that the supervisor's recommendation is accorded the greatest weight. The Respondent's unexplained departure from this established practice further supports an inference of animus. See *Sociedad Espanola de Auxilio Mutuo y Benefcenica de P.R*., supra at 459 fn. 9.

In addition to the strong circumstantial evidence of unlawful motivation, I would find, contrary to the majority, that Stambaugh's unlawful statement to employees that Rowe's union activity "didn't help his cause any" as well as Stambaugh's unlawful statement to Rowe that he would probably still be employed "if it hadn't been for the 'U' word" further reveal the Respondent's unlawful motivation.[7] The Respondent may have excluded Stambaugh from its decisionmaking process, but Barker ad-

[5] Kline suggested that the employees would be able to "rollover" the stock, an apparent reference to the procedure by which an individual may avoid immediate Federal taxation of distributions from 401(k) plan when changing employers.

[6] In this regard, *Co-Op City*, 341 NLRB 255 (2004), relied on by the majority, is inapposite. There is no evidence that Rowe and Sage were trying to influence management in its decision regarding a change of ownership or to interfere with the potential sale of the Company in any way.

[7] The majority finds it unnecessary to pass on the judge's finding that Stambaugh's statement to other employees violated Sec. 8(a)(1) of the Act. Finding the violation is necessary. Stambaugh's statement to the employees did not merely echo his statement to Rowe that *he* had been punished for engaging in union activity. It served as a not-too-subtle warning to the remaining employees that union activity would not help their "cause any" either. I would find the violation.

mitted that the decision was discussed with Stambaugh prior to Rowe's discharge. In these circumstances, it was not unreasonable for the judge to find that Stambaugh's statements provided more insight into the Respondent's true motivation than either the Respondent or the majority is willing to admit.

Taking everything together, including the timing of Rowe's discharge, the Respondent's failure to conduct a full investigation, the Respondent's departure from past practice, and Stambaugh's unlawful statements to Rowe and the remaining employees, I would affirm the judge's finding that Rowe's union and other protected activity was at least a motivating factor in his discharge.

C. The Respondent's Rebuttal

Finally, I agree with the judge that the Respondent failed to establish that it would have discharged Rowe in the absence of his protected activities. The Respondent's burden was not merely to prove that it could have discharged Rowe for some nondiscriminatory reason but, rather, to establish that it actually would have done so. *Yellow Ambulance Service*, 342 NLRB 804, 805 (2004). The Respondent failed to carry this burden.

The Respondent's claim that Rowe engaged in misconduct warranting his discharge is seriously undermined by the fact that Stambaugh effectively condoned Rowe's conduct. As described, Stambaugh was aware of Rowe's Internet activity, yet he never told Rowe that he had violated any company rule, that he had engaged in any misconduct, or that should stop using his computer to learn about KPS. Instead, Stambaugh read the documents that Rowe gave him and then returned the documents to Rowe to share with other employees.

The Respondent has not shown, moreover, that a single employee other than Rowe has ever been investigated, much less disciplined, for Internet usage. Further, there is no evidence that the Respondent disciplined Sage for "loitering," "misuse of company equipment," and "wasting time," even though he actively participated in Rowe's search for information about KPS. And finally, Rowe's Internet usage appears to be consistent with the Respondent's policy on computer usage, which explicitly permits employee use of the Internet "to further gain knowledge of the Company's business and industry."

In these circumstances, I fully concur with the judge's finding that the Respondent failed to establish that it actually would have discharged Rowe for spending less than one-half hour looking for information about a likely purchaser of the Gas City facility.

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 tell you that an employee has been discharged for engaging in union activity.

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.

AMCAST AUTOMOTIVE OF INDIANA, INC.

Frederic Roberson and *Raifael Williams, Esqs.,* for the General Counsel.

Mark Stubley and *Brandon Shelton, Esqs. (Olgetree, Deakins, Nash, Smoak & Stewart, P.C.),* of Greenville, South Carolina, for the Respondent.

DECISION

IRA SANDRON, Administrative Law Judge. The complaint alleges that Amcast Automotive of Indiana, Inc. (the Respondent or the Company) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by essentially forcing employee John Rowe to resign on May 27, 2004,[1] and committed three independent 8(a)(1) violations in connection therewith. Although the Respondent has labeled "voluntary" Rowe's acceptance of resignation in lieu of termination, I deem it involuntary and to have constituted an effective discharge.

Pursuant to notice, I conducted a trial in Marion, Indiana, on November 15 and 16, and in Fort Wayne, Indiana, on January 25 and 26, 2005, at which the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Issues

The primary issue is whether the Respondent had good cause to discharge Rowe because he violated company policy by "surfing" the Internet on worktime, in looking at websites pertaining to KPS, a prospective buyer of the Respondent's business; or whether the Respondent discriminated against him because of his union activities in years past, his suspected union

[1] All dates occurred in 2004, unless otherwise specified.

activity in May, and/or his protected concerted activity in seeking information about KPS.

I note at this point that the Respondent's issuance of a "final written warning" to Rowe in September 2003, for leaving the building without clocking out,[2] was not alleged as an unfair labor practice, and its legitimacy is not before me. Accordingly, I will not address its particulars. Its relevance relates to the Respondent's assertion that the Company's progressive discipline policy mandates discharge of an employee who receives any kind of disciplinary action within 12 months of having received a final written warning.

The independent 8(a)(1) allegations are:

> (1) Wilbur Kline, manufacturing manager/maintenance and tool room manager, interrogated Rowe on about May 25 concerning his and other employees' union memberships, activities, and sympathies, and created an impression that the Respondent was surveilling employees' union activities.
>
> (2) Rowe's immediate supervisor, Reed Stambaugh, tool room cell 7 department manager (supervisor), informed employees on about May 28 that Rowe had been discharged because he engaged in union and other protected concerted activity (as testified to by Gene Sage Jr.); and told Rowe on about June 15 that he had been discharged for engaging in union and other protected concerted activity.
>
> The Respondent did not call Stambaugh, whom it still employs, and I draw an adverse inference against the Respondent on any factual matters in the case about which Stambaugh likely would have knowledge. See *Daikichi Sushi,* 335 NLRB 622 (2001); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988); *Martin Luther King Sr. Nursing Center,* 231 NLRB 15 fn. 1 (1977).

Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following

FINDINGS OF FACT

The Respondent, a nationwide company, headquartered in Dayton, Ohio, operates a plant in Gas City, Indiana (the facility), where it is engaged in the manufacture and nonretail sale of aluminum wheels for the automotive industry. The facility has over 200 employees. Organizationally, the top position is plant manager.[3] Larry Henn has been the manager of the human resources department (HR) since November 2002. He and Mark Barker, HR representative since December 2001, are involved in the full gamut of personnel and labor relations functions.

As far as disciplinary steps, verbal counselings, or oral warnings are not considered discipline per se. The steps of discipline are written warning, final written warning, and termination. New hires are provided a copy of the employee handbook[4] (handbook) at their times of hire, and Rowe signed an acknowledgment of receipt of such. The handbook states, at page 28:

> In some circumstances, a written warning may be issued after a rule is violated. If another offense occurs within 12 months, a final written warning may be issued. On the *third violation in 12 months* of a Company rule, the Associate will be terminated. If a rule violation is considered serious enough the violation may result in suspension or termination. [Emphasis added.]

According to the Respondent's witnesses, the policy is that employees who receive a final written warning will be terminated if they receive another warning of any kind within the next 12 months. This has been followed in many cases. However, despite Henn's initial testimony that he knew of no exceptions to this policy, the Respondent's records reflect several instances in 2002, 2003, and 2004 in which an employee's final written warning was followed within the next 12 months by another final written warning or lesser form of discipline.[5] Henn and Barker attributed these instances to mistakes by supervisors, who failed to check with HR to review the employees' personnel files.

The handbook also sets out, at pages 24–29, various standards for behavior and prohibits, inter alia, loitering, wasting time, or misusing company equipment. About 40 employees use personal computers at the facility. No one other than Rowe has ever been disciplined for using the Internet for nonbusiness-related purposes.

United Autoworkers (UAW or the Union) Activities

Rowe was actively involved in two unsuccessful UAW organizing campaigns at the facility, the first in 1999 or 2000, and the second in 2002.[6] In 1999, he talked to other employees in favor of the Union, attended almost all union meetings, and passed out approximately six T-shirts with union insignia. In 2002, he engaged in the same activities but distributed several dozen T-shirts, as well as other union paraphernalia. In addition, prior to the NLRB election on October 3, 2002, Rowe went to a representation case hearing, where the issue was the supervisory status of group leaders, and he served as the Union's observer on the day of the election. On May 26, the day before Rowe was terminated, the UAW engaged in handbilling outside the facility during shift changes for all three shifts. Rowe had no actual involvement in this.

Rowe's union sympathies and activities were well known to management. Thus, John Lilly, who was employed in managerial positions for about 14 years until October 2003, testified that during the 2002 organizing drive Rowe was one of the employees identified at management meetings as being prounion because he had demonstrated consistent union support during both organizing drives. Jerry Rowland, a manager or supervisor for almost 4 years until July 17, 2003, also testified that Rowe was identified as prounion. Finally, Wilbur Kline, a manager from August 1999 until November 15, observed Rowe wearing union T-shirts at work in 2002 and, after Kline returned from active military service, again in 2003 and 2004.

[2] GC Exh. 5.

[3] See R. Exh. 25, organizational chart.

[4] GC Exh. 6.

[5] See GC Exhs. 8–13.

[6] There was also a similarly unsuccessful organizing campaign by the Glass, Molders, Pottery, Plastics, & Allied Workers (GMP) Union in approximately 2001.

Current and former managers testified about two kinds of management meetings, the first being "consistency" meetings that Henn instituted shortly after he became HR director in November 2002. These biweekly meetings were the result of what he saw as the need to have consistency in the application of the Respondent's practices in disciplining employees and to ensure conformity with the Respondent's policies. The second type consisted of management meetings held regarding union organizing efforts. From the testimony of various witnesses, neither the demarcation between the two kinds of meetings nor their exact dates are entirely clear.

Lilly testified that during both the 1999 or 2000 UAW and GMP organizing campaigns, the Company provided training to managers and supervisors, He had a general recollection that they discussed which employees were prounion and which were procompany. As noted, Lilly recalled that Rowe was one of those identified as prounion. Plant Manager Duane LaShamb stated that supervisors should apply or enforce all company policies and rules.

Lilly also testified about separate regular weekly consistency meetings held starting after the 2002 union drive. He recalled that LaShamb in June 2003 told supervisors that if they did not "weed the garden," their replacements would. LaShamb did not say anything about prounion employees, and Lilly's testimony reflects that LaShamb's comments related to employees who were not performing. Lilly equivocated on whether LaShamb stated that they needed to monitor Rowe's performance and, if necessary, build a case against him.

Rowland put the consistency meetings as starting earlier, since he stated that Henn in May 2002 required supervisors to talk to employees about the Union and report back to him. Rowland testified that when he reported that employee Craig Piper evinced unequivocal union support, LaShamb stood up and stated that Rowland needed to find a way to get rid of Piper; that Rowland "needed to weed the garden." Rowland replied that Piper was a long-tenured and good employee, to which LaShamb responded that Rowland should find a way to build a case against him, or his replacement would. As opposed to Lilly, Rowland testified that when LaShamb and Henn used the expression, "weed the garden," and talked about building a case against employees, they were referring both to poor performers and to union supporters. Further, the consistency meetings were originally that but, as the union campaign progressed, the tenor changed to that of targeting union employees.

Rowe's Employment

Rowe was employed for about 12 years. He started as a bench worker and, for about 9 years prior to his termination, held the dual jobs of bench worker and CNC machinist in the tool room (cell 7). For about 8 years, he had a computer in connection with his duties as CNC machinist, and he used the Internet to order new tooling (from mcmaster.com). During the last year or year-and-a-half, Stambaugh was his immediate supervisor.

At all times material, Rowe worked the first shift, 7 a.m. to 3 p.m. He had three breaks during the workday; one 20 minutes for lunch, and two for 10 minutes each. They were not at fixed times. Depending on work needs, he normally took the first break at 8:30 a.m., lunch at 11 a.m., and the third break at 1 p.m. He was not required to notify anyone when he went on break.

Events of May 2004

On about May 11, at a weekly technical support meeting, Dwayne Gotshall, support manager for the Respondent's Freemont, Indiana plant, told Rowe, Gene Sage Jr., and another employee that it had been announced at Fremont that KPS was purchasing both the Company's Freemont and Gas City facilities. He further stated that the announcement would not be made at Gas City for another 3 weeks.

Thereafter, on May 11, 13, and 14, Rowe, with Sage present on many occasions, accessed various websites pertaining to KPS, in an effort to learn more about that company.[7] Rowe started by looking at the Amcast.com company web page and next went to links connected with KPS. Often before accessing sites, he discussed with Sage what to search for. All of the sites he visited related to checking Amcast stock or to KPS. Rowe conceded that some of this activity may have been on his worktime and, as detailed below, he apparently engaged in the activity both on breaks and on worktime.

On one of those dates, Rowe printed several pages from a website to the printer located in Stambaugh's office.[8] Stambaugh and several other employees were there at the time. Rowe gave the documents to Sage and Stambaugh to read. Stambaugh looked at them for about 5 minutes and then returned them to Rowe. Stambaugh did not say anything. After this, Rowe placed them out in the tool room, on the table where paperwork was kept. This is apparently what generated the "tip" from an employee that Rowe was surfing the Internet.

Rowe testified that on May 25 he had a conversation with Stambaugh and Kline in the former's office. Rowe asked Kline what he would suggest doing with company stock if the Company was sold, to which Kline responded that he would hold on to it because if KPS purchased the Company, the stock could be rolled over. Kline then asked if there were any truth to "the rumors." Rowe asked if he meant union rumors, and Kline replied, "yes." Rowe said no and gave his word that no union drive was going on. As described above, handbilling in fact took place the following day.

Kline did recall such a conversation in the spring but was vague about what was said. He testified he could not remember the context but only that Rowe basically said he did not think there needed to be a union. Stambaugh did not testify at all. I credit Rowe's testimony on the conversation, which was precise, as opposed to Kline's vague account.

Henn testified that Rowe's "surfing" of the Internet for KPS came to his attention through an employee's tip, reported to him by the employee's supervisor at a meeting. Henn quizzed

[7] Consistent with this testimony, Rowe stated at the unemployment hearing on October 22 that Sage was "present almost every time" and that they wanted to determine how their employment might change. R. Exh. 19 at 27. Sage testified, not inconsistently, that he "glanced" at the KPS information Rowe had on his personal computer. Sage, who is still employed, appeared reticent to testify, and I believe he downplayed his involvement.

[8] Similar to the printouts contained in GC Exh. 19.

the supervisor for more information because, he first testified, his primary concern was that KPS was not a public situation inasmuch as the Respondent and KPS were engaged in due diligence negotiations. Barker testified to the same effect. Later, however, Henn unequivocally testified that it was the length of time Rowe spent surfing the Internet, and not the fact that he was accessing sites related to KPS, that resulted in the decision to terminate him. Thus, he would have been discharged regardless of the subject matter of the nonbusiness-related sites he accessed.

On the morning of May 26, Henn asked Nathaniel Spencer, the Company's computer consultant, to generate a record of every personal computer at the facility that had requested KPSfund.com. for the period from May 7–14. This was the first time Spencer had ever been asked to retrieve anyone's Internet usage.

Spencer produced such a report. It showed that three computers had accessed the above website. One of them was later traced to Rowe. Henn had Spencer prepare a printout of Rowe's Internet use.[9] Henn determined that Rowe had spent 20 or 25 minutes being on the Internet on nonwork-related sites on three separate dates (May 11, 13, and 14), including a time when he was being paid overtime.

The report reflects that on May 11, after being on the mcmaster.com website, Rowe accessed sites for KPS information from 9:35–9:48 a.m. At 10:04 a.m., he again accessed mcmaster.com, but there is nothing showing how long he remained at his computer between 9:48 and 10:04 a.m. This could have been on his morning break. On May 13, Rowe accessed sites for KPS from 6:25–6:32 p.m., before accessing mcmaster.com at 6:42 p.m. Again, there is nothing showing that he spent the time between 6:32 and 6:42 at his computer. He then returned to KPS-related sites between 6:42–6:43 p.m. This presumably would have been when he was on overtime, since he normally stopped work at 3 p.m., but it is possible that he was entitled to an additional break on overtime status. On May 14, at 6:59 a.m. and between 7:22–7:29 a.m., he again accessed such sites. He accessed mcmaster.com at 7:54 a.m. Again, nothing in the document shows how long he remained at his computer between 6:59 and 7:22 a.m. or between 7:29 and 7:54 a.m. Since his shift started at 7 a.m., this activity (save the first minute) would have occurred on his worktime, unless he took an early break. In sum, the report on its face establishes with certainty only that he accessed KPS sites for 13 minutes on May 11, 8 minutes on May 13, and 8 minutes on May 14, for a total of 29 minutes over 3 days.

Henn, Barker, and Kline all testified that a decision to discipline an employee is normally a collaborative or consensus effort between the employee's first-line supervisor (and, at times, department manager) and HR. According to Henn and Barker, HR's primary function is to ensure consistency in the imposition of discipline and conformity with the Respondent's progressive discipline system. Kline testified that the supervisor's recommendation carries the greatest weight. However, Steve Robinson, maintenance superintendent from September 2003 until August, testified that his recommended disciplines were frequently reduced by Henn or Kline.

According to Henn, after reviewing Spencer's report about Rowe's Internet usage, he, Barker, and Kline decided that since Rowe was on a final written warning, termination was the appropriate action for his offense. They confirmed this decision with Plant Manager LaShamb.

Kline's account differed from Henn's in an important respect. Thus, Kline testified that Henn or Barker brought to his attention that Rowe had been on the Internet in the tool room "numerous times," a few of which were excessive and on overtime, and recommended that he be terminated. Nothing in his employment record was brought up as a reason for the recommendation. Therefore, according to Kline's testimony, the previous final written warning was not raised as a consideration.

Kline was consistent with Henn and Barker with regard to Stambaugh's very limited, if any, role in the investigation or the decision to terminate Rowe. Stambaugh was essentially presented with Rowe's discharge only after the decision had already been made, and Barker testified that Stambaugh was only "briefly" involved in management's discussions.

The termination interview took place in Barker's office on May 27. Barker, Henn, Stambaugh, and Rowe were present. Barker did most of the speaking for management. He confronted Rowe with being on the Internet at times he should have been working and presented him with the documents showing the amount of time he had spent on the Internet. Barker stated that he had violated three company rules: loitering on the job, misuse of company equipment, and wasting time. Rowe at first denied having been on worktime but then did not. Barker offered him "voluntary" resignation in lieu of discharge, explaining its benefits, and Rowe accepted that alternative. At one point, Rowe brought up his union activity, but Henn basically replied it had nothing to do with the termination.

At no time prior to this meeting did Henn or anyone else interview Rowe. Barker recalled that during the meeting, when Stambaugh had stepped out of the room, Rowe attempted to talk about his use of the Internet. However, Henn told him they should not have any such discussion because the decision had already been made to terminate him.

The following morning the subject of Rowe's termination came up in a conversation in the tool room office (Stambaugh's office). Stambaugh, Sage, and most people on the first shift were there. Sage testified that someone commented to the effect that Rowe was probably fired for his union activity. Stambaugh replied, "Well, it probably didn't help his cause any."[10] Sometime that day, maybe at the meeting, Stambaugh told Sage that "part of the reason why [Rowe] got [sic] fired" was his use of the Internet.[11]

Statements Sage made in his NLRB affidavit differed in wording with his testimony but were not necessarily inconsistent. Thus, Sage attested in the former that Stambaugh said, "It sure didn't help John's cause that the Union showed up here the day before. . . . The official reason John was fired was because

[9] GC Exh. 7. It shows only the times when particular sites were accessed but not logging off times.

[10] Tr. 170, 174.

[11] Tr. 171–172.

of improper Internet access."[12] As I previously stated, Sage appeared reticent, and he seemed to say as little as possible when answering questions. Because of this, and because the affidavit was closer in time to the actual events, I am inclined to credit what he said in the affidavit. However, to avoid any evidentiary issues, and realizing that testimony is subject to cross-examination at the time it is given, as opposed to statements made in affidavits, I will find what he said in testimony to be the facts.

During the second week of June, Rowe called Stambaugh about getting a reference for another job. During their conversation, Rowe asked why he had been terminated. Stambaugh responded that someone had taken a paper up to Barker and said Rowe was surfing the Internet. Stambaugh then said, "[I]f it hadn't been for the 'U' word," Rowe probably still would have been employed.[13]

CONCLUSIONS OF LAW

Section 8(a)(1)

1. Manager Kline asked Rowe on May 25 if there was any truth to rumors of union activity. Questioning an employee about his or her knowledge of a union's organizing activities may, depending on the circumstances, violate Section 8(a)(1) of the Act. *Michigan Roads Maintenance Co.*, 344 NLRB 617, 618 (2005); *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 959 (2004). Here, when Rowe was the lone employee in the presence of a manager and his immediate supervisor, Kline, suddenly asked him such a question. This was not a situation where the question was casually asked during an informal discussion on the subject initiated by the employee. It matters not that Kline did not use the word "union" when he asked Rowe whether there was truth to the rumors, because he subsequently confirmed that he was indeed referring to union rumors. In these circumstances, I conclude that Kline's question was coercive and therefore violative of Section 8(a)(1).

Kline's question did not amount to what the General Counsel alleges was interrogation concerning Rowe's and other employees' union memberships, activities, and sympathies, or create an impression that the Respondent was surveilling employees' union activities. Rowe sua sponte volunteered that he was not involved, and Kline's comments about union rumors did not state or imply that the source of that information had anything to do with surveillance of employees.

2. Supervisor Stambaugh told Sage and other employees on May 28 that Rowe's union activity probably played a role in his discharge.

By using the word "probably," rather than "possibly" or "may have," Stambaugh went beyond saying that he was merely speculating. Rather, he conveyed to employees the message that Rowe was discharged in part for his union activity.

Stambaugh also stated to Sage, and possibly other employees, that part of the reason Rowe was discharged was his use of the Internet. This was too ambiguous to be coercive; I do not believe employees would have seen a connection between Rowe's discharge and his protected concerted activity. It did, however, reinforce the message that Rowe was discharged in part for other reasons, to wit, union activity.

Therefore, I conclude that Stambaugh violated Section 8(a)(1) by stating that Rowe was discharged in part for his union activity.

3. Stambaugh told Rowe on about June 15 that if it had not been for the "U" word, he probably would not have been terminated.

For the above reasons, this also amounted to a statement that Rowe was discharged in part for his union activity and constituted a violation of Section 8(a)(1).

Stambaugh's statement that Rowe was terminated because someone had taken to HR documents Rowe had printed from the Internet was too ambiguous to find it a statement that Rowe was terminated in part for his protected concerted activity.

Rowe's Termination

The framework for analysis is *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting,* 332 NLRB 1363, 1366 (2000); *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*." Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reason for its action was the actual one, rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

There are two facets to Rowe's protected activities. First was his earlier support of the UAW in 1999 or 2000 and in 2002. The second was his engaging in protected concerted activity in May 2004. That his union activities came under the protection of the Act cannot be disputed.

The Respondent in its brief raises the contention that his activity of surfing the Internet for information on KPS was not protected concerted activity. I credit Rowe's testimony that he shared information with other employees and that Sage was

[12] Tr. 204.
[13] Tr. 245.

with him during at least some of the times that he accessed KPS sites, thereby making his conduct concerted in nature.

As to whether the activity itself was protected, an employee's activities come under the penumbra of Section 7 if they might reasonably be expected to affect terms or conditions of employment. *Georgia Farm Bureau Mutual Insurance Cos.*, 333 NLRB 850 (2001), citing *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981). This follows from what the Seventh Circuit Court of Appeals has recognized as the intent of Congress that the protections of Section 7 be broadly construed. See *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 577 (7th Cir. 1983), citing *Eastex, Inc. v. NLRB,* 437 U.S. 556, 567 fn. 17 (1978).

Here, Rowe was seeking information on what he reasonably believed was the company that was purchasing his current employer. Such a change in ownership reasonably could have affected the terms and conditions of employment of the Respondent's employees, as well as the value of their company stock. I therefore conclude that Rowe's activity was presumptively protected under Section 7 of the Act. I note Rowe's unrebutted testimony that on May 25 he asked Kline what he would suggest doing with company stock if the Company was sold, to which Kline responded that he would hold on to it because if KPS purchased the Company, the stock could be rolled over. I further note Rowe's unrebutted testimony that he shared with Stambaugh at least some of the information he obtained about KPS on the Internet. Management, by its actions, implicitly supported the conclusion that Rowe was engaged in protected activity.

As to knowledge, there is no issue that the Respondent knew of Rowe's surfing the Internet for information on KPS; indeed, that was the activity that precipitated his termination. Regarding Rowe's activities on behalf of the UAW in previous years, this was clearly known to management, as reflected by the testimony of former Managers Kline, Lilly, and Rowland. Moreover, Kline questioned Rowe on May 25 regarding rumors of another union organizing campaign, leading to the conclusion that management considered him to be involved in any type of planning for such. When UAW handbilling did take place the next day, it takes no great leap of imagination to conclude that management believed Rowe was involved, even if he were not. A respondent violates the Act if it terminates an employee in the mistaken belief that he or she was involved in union activity. *NLRB v. Link-Belt Co.,* 311 U.S. 584, 589–590 (1941); *Dayton Hudson Department Store Co.,* 324 NLRB 33, 35 (1997); *Salisbury Hotel*, 283 NLRB 685 (1987).

The last element necessary to establish a prima facie case of unlawful termination is animus. Going back to the consistency or other management meetings in years past, I do not find the evidence presented about statements made by LaShamb or Henn sufficient to establish direct animus. Only one former manager, Rowland, testified that LaShamb made statements targeting Rowe for his union activity, but he then equivocated on whether LaShamb specifically named Rowe.

However, Sage testified without controversion that the day after Rowe's discharge, Stambaugh told employees that Rowe's union activities "probably" played a role in his termination and that his use of the Internet was either a pretext or only one of the reasons he was discharged. The clear message was that Rowe was terminated in part for his union or suspected union activities, particularly when he was a known UAW supporter and the termination occurred just 1 day after the UAW handbilled outside the facility. Further, Sage told Rowe on about June 15 that if not for the "U" word, he probably would not have been discharged. There is thus direct evidence of animus.

Animus also can be inferred from the timing of the investigation and the termination. Although Rowe's Internet activity took place between May 11 and 14, and the employee who tipped off management on the basis of the printout presumably saw it during that time period, Henn did not ask Spencer to generate any kind of report until May 26, the date of the UAW handbilling, and Rowe was terminated the following day. See *Howard's Sheet Metal, Inc.,* 333 NLRB 361 (2001); *Signature Flight Support*, 333 NLRB 1250 (2001); *Masland Industries,* 311 NLRB 184 (1993).

Related to what strikes me as the Respondent's haste to terminate Rowe, and also raising another inference of animus, was the Respondent's failure to conduct a fair and complete investigation. No one from management spoke to Rowe prior to his termination interview, and Stambaugh, Rowe's immediate supervisor, was basically left out of the loop entirely. See *Publishers Printing Co.*, 317 NLRB 933, 938 (1995); *Burger King Corp.,* 279 NLRB 227, 239 (1986); and *Syncro Corp.,* 234 NLRB 550, 551 (1978). Indeed, when Rowe, at his termination interview, tried to discuss the underlying events, Henn cut him off and stated the decision to terminate him had already been made.

In light of direct animus expressed by Stambaugh and inferred animus as reflected by the preceding, I find that the element of animus has been established and that the General Counsel has made out a prima facie case of unlawful discharge.

The Respondent's Defenses

The Respondent's position has two facets—first, that Rowe's surfing of the Internet on May 11, 13, and 14 violated company policies and warranted disciplinary action; second, that because he had received a final written warning within the prior 12 months, company policy mandated discharge.

The primary issue is whether he was properly subjected to discipline for his Internet activities. If not, then he would not have been terminated regardless of the earlier final written warning.

It is noteworthy that approximately 40 people have personal computers at the facility, yet no one other than Rowe has ever had his or her Internet access reviewed or been disciplined for using the Internet for nonbusiness reasons. I also note that Rowe was an employee with approximately 12 years of tenure.

Considerably weakening the Respondent's position is the way it conducted its investigation. Rowe was never interviewed at any time prior to his termination interview, at which Henn refused to let him speak about the circumstances surrounding his Internet activity. Even though the report management received from Spencer established with certainly only that Rowe spent 29 minutes over 3 days on KPS-related sites, management came to the conclusion that he spent over an hour thereon and never questioned Rowe whether he was on worktime or on breaks.

Moreover, crediting management's witnesses, Stambaugh, the first-line supervisor, had little or no participation in the discussions leading to Rowe's termination and no input in the decision. Yet, Henn, Barker, and Kline all testified that the practice is that the first-line supervisor is integrally involved in the disciplinary process. Kline even testified that the first-line supervisor's recommendation is usually accorded the greatest weight.

I must conclude that management either heard from Stambaugh but chose to ignore what he said, because it exculpated Rowe (see below), or simply did not want to hear what he had to say about Rowe's activities. Either way, management acted contrary to normal and reasonable practice, shedding doubt on its motives.

This failure of the Respondent to conduct a fair and complete investigation leads to the conclusion that it was not genuinely interested in knowing the underlying facts and circumstances of the events but, rather, was looking for a pretext to discharge Rowe. See *Publishers Printing Co.,* supra; *Burger King Corp*., supra; *Syncro Corp.,* supra.

The Respondent emphasizes that Rowe was surfing the Internet on worktime. However, on at least 1 of the 3 days he spent on KPS-related sites (representing 13 of the 29 minutes clearly shown in GC Exh. 7), he apparently was on breaktime, and he may have been on break at other times he accessed such sites.

Regardless of whether he was on worktime or breaks, Rowe's unrebutted and credited testimony was that Stambaugh, his immediate supervisor, was aware he was accessing KPS information on-line and sharing the information with other employees. More than that, Stambaugh was present when Rowe printed information from the Internet, read it himself, and gave it back to Rowe to show to other employees. At no point did Stambaugh direct Rowe to cease engaging in his Internet search of KPS. Clearly, Stambaugh tacitly approved Rowe's conduct and therefore effectively condoned it.

In a myriad of cases, usually in strike or walkout situations, the Board has held that an employer cannot take action against an employee whose conduct has gone beyond the bounds of protected activity if the employer has, either affirmatively or by nonaction, condoned such conduct. See, e.g., *Asbestos Removal,* 293 NLRB 352 (1989); *General Electric Co*., 292 NLRB 843 (1989). Thus, even if it were to be concluded that Rowe's conduct in surfing the Internet for KPS information on worktime otherwise would properly have subjected him to discipline, Stambaugh's conduct effectively estopped the Respondent from imposing such. To hold otherwise would fly in the face of fundamental fairness.

Based on the above factors, I conclude that the Respondent has failed to meet its burden of showing that but for Rowe's union activities (actual and suspected) and his engagement in protected concerted activity, he would have been discharged on May 27.

In light of this conclusion, it is not necessary to go into great detail regarding the Respondent's purported policy of terminating an individual who receives discipline within 12 months of a previous final written warning. Suffice to say, the record reflects there were a number of instances in 2002, 2003, and 2004 in which this was not the case, whether the result of supervisors' errors or otherwise. Further, the policy as stated in the handbook refers to termination when there is a third discipline in 12 months, not two. Finally, Former Manager Robinson testified that HR had the authority to lessen proposed discipline and, in fact, exercised such authority when it saw fit. I cannot conclude in light of this evidence that management was bound by policy to terminate Rowe, even if it is assumed that his conduct in May warranted discipline. The Respondent's reliance on this purported policy is undermined, in any event, by contradictory testimony between Henn and Kline as to whether the final written warning was raised as a reason for termination.

As I said at the outset, no matter how phrased by the Respondent, Rowe's separation was effectively a discharge, and I conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Rowe on May 27, 2004.

CONCLUSIONS OF LAW

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

2. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Interrogated employees about union organizational efforts.

(b) Told employees an employee was discharged for his union activity.

3. By discharging employee John Rowe, the Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a) (3) and (1) of the Act.

REMEDY

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

The Respondent, having discriminatorily discharged John Rowe, must offer him reinstatement and make him 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 should remove from its records any references to Rowe's discharge, no matter how it is termed.

[Recommended Order omitted from publication.]