**Mercury Marine-Division of Brunswick Corp. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.** Case 16-CA-12543

22 January 1987

## DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND STEPHENS

On 23 September 1986 Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief;[1] the General Counsel filed cross-exceptions and a brief in support thereof and in reply to the Respondent's exceptions; and the Respondent filed a brief in answer to the General Counsel's cross-exceptions.

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,[2] findings,[3] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found, inter alia, that remarks made by the Respondent's supervisor, Turner, to employee Wiles in November 1985 did not violate Section 8(a)(1) of the Act. The General Counsel filed exceptions to that finding. We find merit in the General Counsel's exceptions.

The relevant facts, as more fully set forth in the judge's decision, are as follows. In the course of a union organizing campaign in the fall of 1985, Wiles signed an authorization card and became an active union supporter by distributing cards and soliciting on behalf of the Union. In November 1985 Turner said to Wiles in the presence of two other employees, "What would stop [the Company] from picking up and moving down to Mexico if the union did get in this plant here?" Turner also remarked to Wiles that, if the Union were voted in, Long, a group leader who sometimes helped Wiles by operating a second forklift, would no longer be able to assist Wiles.

The judge dismissed those paragraphs of the complaint relating to Turner's statements on the ground that the statements appeared to be discussions of possible campaign issues rather than threats of retaliation. Regarding Turner's statement about Long's no longer being able to assist Wiles, the judge noted that he had to infer that Turner was referring to certain restrictive work practices in some collective-bargaining agreements. Regarding Turner's rhetorical question about the Company's moving its plant to Mexico, the judge found *Tra-Mar Communications*, 265 NLRB 664 (1982), cited by the General Counsel, to be inapposite because it involved many unlawful acts by the owner, including an outright threat to move the plant.

Contrary to the judge, we find that Turner's statement regarding Long's assistance does not constitute a prediction of potential adverse consequences which could flow from a plant's unionization. Absent any reference to the collective-bargaining process, Turner's statement must be understood instead as a threat of unilateral action to be undertaken in retaliation for unionization. Compare, e.g., *Aero Tec Laboratories*, 269 NLRB 705, 706 (1984), and *Piggly Wiggly, Tuscaloosa Division*, 258 NLRB 1081, 1092–1093 (1981). Since no such context was shown here, we find that Turner's statement violated Section 8(a)(1).

We also disagree with the judge's finding that Turner's rhetorical question regarding the plant's relocation to Mexico was nothing more than a discussion of possible campaign issues. In *Stanford Seed Co.*, 245 NLRB 1064, 1067 (1979), the Board found that a similarly rhetorical question by a supervisor to an employee constituted an unlawful threat of plant closure. We find, accordingly, that this statement by Turner also violated Section 8(a)(1).

2. The judge found that the Respondent since 20 September 1985 has maintained an unlawfully broad no-solicitation/no-distribution rule in violation of Section 8(a)(1) of the Act. We agree with the judge's finding that the rule is unlawful on its face. The rule requires employees to obtain the Respondent's permission before engaging in the protected activity of union solicitation in work areas during nonworking time, and it requires the Respondent's authorization in order to solicit in the lunchroom and lounge areas during breaks and lunch periods. In *Enterprise Products Co.*, 265

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to the judge's failure to grant its motion to dismiss par. 7(a) of the complaint following the General Counsel's resting without adducing any evidence concerning the Respondent's no-solicitation/no-distribution rule. In the absence of a showing that the judge's allowing the General Counsel to reopen his case resulted in prejudice to the Respondent, we find no merit in this exception.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Additionally, the Respondent in a motion for rehearing asserts that the judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit and, accordingly, we deny the Respondent's motion.

NLRB 544, 554 (1982), citing *Peyton Packing Co.*, 49 NLRB 828 (1943), and *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962), the Board held that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful. Further, the Board held in *Schnadig Corp.*, 265 NLRB 147, 157 (1982), citing *Staco, Inc.*, 244 NLRB 461 (1979), that the mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if the rule is not enforced. We find, accordingly, that the Respondent's promulgation and maintenance of its no-solicitation/no-distribution rule constituted a per se violation of Section 8(a)(1).

3. Finally, the judge found that the Respondent's discharge of Wiles on 21 February 1986 violated Section 8(a)(3) and (1) of the Act. In agreeing with the judge, however, we find it unnecessary to rely on the judge's finding that Employee Relations Manager Papen had been told by Turner that Wiles occasionally took his breaks out by the trailers, where he was discovered on 19 February 1986.

## ORDER

The National Labor Relations Board orders that the Respondent, Mercury Marine-Division of Brunswick Corp., Stillwater, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure because of their interest in or activity on behalf of the Union.

(b) Threatening employees with more onerous working conditions in retaliation for unionization.

(c) Maintaining any rule which requires employees to request company permission to engage in solicitation in work areas during nonworking time, or which requires company authorization in order to solicit in nonworking areas of the plant on employees' own time.

(d) Discharging or otherwise discriminating against any employee for supporting the UAW or any other union.

(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) Notify its employees in writing, by memorandum or letter separate from the notice to employees, that the no-solicitation rule contained at pages 21–22 of the employee handbook is no longer in effect.

(b) Insert a written notice in the employee handbook where the no-solicitation rule appears, advising readers that the rule, as written, has been rescinded, or substitute a valid rule in the handbook for the one now appearing there.

(c) Offer Rick Wiles immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(d) Remove from its files any reference to the unlawful discharge and notify Rick Wiles in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, on 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.

(f) Post at its facility in Stillwater, Oklahoma, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, 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.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.[5]

[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."

[5] The judge included in his recommended Order a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Board's Order. In the circumstances of this case, we find it unnecessary to include such a clause

## APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with plant closure because of their interest in or activity on behalf of the Union.

WE WILL NOT threaten employees with more onerous working conditions in retaliation for unionization.

WE WILL NOT maintain any rule which requires employees to request company permission to engage in solicitation in work areas during nonworking time, or which requires company authorization in order to solicit in nonworking areas of the plant on employees' own time.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the UAW or any other union.

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 notify you in writing, by memorandum or letter separate from this document, that the no-solicitation rule contained at pages 21–22 of the employee handbook is no longer in effect.

WE WILL insert a written notice in the employee handbook where the no-solicitation rule appears, advising readers that the rule, as written, has been rescinded, or WE WILL substitute a valid rule in the handbook for the one now appearing there.

WE WILL offer Rick Wiles immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Rick Wiles that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

### MERCURY MARINE-DIVISION OF BRUNSWICK CORP.

*Eric V. Oliver, Esq.*, for the General Counsel.
*Richard L. Barnes, Esq.*, of Tulsa, Oklahoma, for the Respondent.
*Richard J. Beasley*, of Denver, Colorado, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. My principal finding is that Respondent unlawfully discharged Rick Wiles on 21 February 1986. I order Respondent to offer him reinstatement and to pay him backpay, with interest.

This case was tried before me in Stillwater, Oklahoma, on 18 June 1986 pursuant to the 29 April 1986 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board. The complaint is based on a charge filed 20 March 1986 by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO[1] (UAW, Union, or Charging Party) against Mercury Marine-Division of Brunswick Corp. (Respondent or Mercury Marine).[2]

In the complaint the General Counsel alleges that Respondent (1) violated Section 8(a)(1) of the Act by promulgating and maintaining since 20 September an unlawfully broad no-distribution and no-solicitation rule, by threatening in November to close its plant, and by threatening in November an employee with more onerous working conditions if the Union came in, and (2) violated Section 8(a)(3) of the Act on 20 February 1986 by discharging Rick Wiles.

By its answer Respondent admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel[3] and the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a Delaware corporation with its principal office in Stillwater, Oklahoma, the facility involved here, manufactures stern drive inboard motors and related products. During the past 12 months Respondent has

[1] I show the full name of the Union as listed in the official names of national unions, *NLRB Style Manual* at 55, 57 (1983).

[2] All dates are in 1985 unless otherwise indicated.

[3] Counsel for the General Counsel attached to his brief a proposed notice to employees

purchased and received at its Stillwater facility goods and materials valued in excess of $50,000 directly from points outside Oklahoma. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the UAW is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *Allegations of Interference, Restraint, or Coercion*

#### 1. Introduction

Hired in May 1983, Rick Wiles had worked at Respondent's Stillwater facility for some 2 years and 10 months when Respondent's employee relations manager, Harold Papen, fired him on 21 February 1986. At the time of his discharge, Wiles worked as a forklift driver in Department 501 under Supervisor Michael E. Turner.

The UAW, apparently in the late summer of 1985, began an organizing drive at Mercury Marine. Papen testified that he became aware of the campaign in September (1:76). Some employees opposing the UAW formed a "NO Way" committee. It appears that the different groups distributed campaign literature to the employees. Papen testified that Respondent, using three shifts, employs slightly over 1000 production and maintenance employees at the plant (1:78–79).[4]

In November Wiles signed a UAW authorization card and became active on behalf of the Union by distribution cards, soliciting on behalf of the UAW, and attending union meetings. From November until he was fired, Wiles openly displayed his support of the Union by wearing four "UAW Region 5" pins on his hat and carrying a union pen in his jacket pocket (1:17–19).

#### 2. Remarks by Supervisor Michael E. Turner

In November, Wiles testified, Supervisor Turner, in the presence of employees David Fultz (who wore a No Way pin) and Ted Allen, asked Wiles, "What would stop the union[5] from picking up and moving down to Mexico if the union did get in this plant here?"[6]

Turner added, Wiles testified, that if a union did get in, Troy Long could no longer assist Wiles.[7] As Wiles explained, Troy Long, a group leader in Department 501, assisted Wiles by operating a second forklift when the workload became too heavy for Wiles (1:20). Wiles testified that although he responded to Turner, he did not recall what he said. Whether group leaders are statutory supervisors is a point which was neither stipulated nor litigated at the hearing.

Turner denied that any such conversation occurred (1:160–161), Fultz testified that he never heard any such remarks by Turner (1:168), and Allen did not testify. I credit Wiles, who testified more believably on this point than did either Turner or Fultz. Although I credit Turner on other points rather than Wiles, Fultz testified in an entirely unreliable fashion and I do not credit him on any disputed issue.

In arguing that Turner's rhetorical question was unlawful, the General Counsel cites *Tra-Mar Communications*, 265 NLRB 664, 681 (1982). *Tra-Mar* involved many unlawful acts by the owner, including an outright threat to sell the business and move to Florida. *Tra-Mar* is inapposite.

I shall dismiss complaint paragraphs 7(b) and (c) because Turner's statements appear to have been nothing more than a discussion of possible campaign issues between an open supporter of the UAW and his supervisor rather than threats of retaliation.

It is true I must infer that in the statement concerning assistance by group leaders Turner was referring to certain restrictive work practices in some collective-bargaining agreements, and that he was not making a threat of what he personally would do in retaliation. In the context here I think that inference is warranted.

#### 3. The no-solicitation/no-distribution rule

Complaint paragraph 7(a) attacks as overly broad Respondent's no-solicitation/no-distribution rule. Appearing at pages 21–22 of the handbook Respondent distributes to its employees (1:65; G.C. Exh. 4 at 21–22), the rule reads:

> NO SOLICITATION RULE
>
> While it is the Company's policy to support worthwhile community-wide charitable activities, it is our experience that unlimited solicitations, collections, sales of merchandise or chances, distribution of literature, circulation of petitions and promotion of outside activities to our employees not only can be a burden upon our employees but can, and do, interfere with out [sic] production process. Therefore, the Company had adopted the following NO SOLICITATION RULE:
>
> None of the foregoing activities shall be permitted during work periods and in working areas of the Company's facilities without the express permission of the Company, which permission shall be granted only to selected community-wide charitable activities and to Company sponsored events. Distribution of literature anywhere on Company facilities shall be prohibited if it results in housekeeping problems or constitutes an interference with safe production activities on Company property. Nothing shall be posted on any Company property without the express written consent of the Company.
>
> Company authorized solicitations are permitted in lunchroom and lounge areas during breaks and lunch periods provided that these activities do

[4] Citations to the one volume transcript of testimony are by volume and page.

[5] Wiles obviously garbled this, and I find that the word Turner used was "company" rather than "union."

[6] Complaint par. 7(b) alleges this to be an unlawful threat to close the plant

[7] Complaint par. 7(c) alleges this to be an unlawful threat of more onerous working conditions.

not carry over into production areas or cause housekeeping problems. Under no circumstances are solicitations to be made on Company property by nonemployees.

The rule is unlawful on its face because it requires employees to obtain Respondent's permission before engaging in the protected activity of solicitation in work areas during nonworking time or even in the lunchroom and lounge areas during breaks and lunch periods.

It is immaterial that some distributions by employees of the contending groups did occur in the breakroom, for the mere existence of the rule interferes with rights granted by Congress in the statute.

Respondent contends (Br. 5) that a 19 September memo to all employees from the plant manager, R. E. Agner, neutralizes the issue because the memo expressly grants permission in the last sentences as follows (R. Exh. 1): "Discussions on this matter should be done on breaks, lunch periods or other non-work time."

First, what Congress grants, Mercury Marine cannot withhold or restrict. The employees do not need Respondent's permission to engage in protected activities. Second, the primary thrust of Agner's memo is to advise employees that they can oppose unionization, and neither the employee handbook nor the no-solicitation/no-distribution rule that handbook contains is mentioned by Agner.

Because Respondent's rule is overly broad it may not stand, as written, and I shall order Respondent to notify employees in writing that they may deem the rule as expunged from the handbook and that Respondent will not attempt to restrain their right to engage in protected activities.

### B. *Allegations of Discrimination*

#### 1. Introduction

The General Counsel alleges and argues that Respondent violated Section 8(a)(3) of the Act by discharging Rick Wiles.

In common language, Wiles was fired for sleeping on the job,[8] but that description is an oversimplification of the facts. For his afternoon break on Wednesday, 19 February 1986, Wiles drove his forklift away from his general work area and out to the area where semitrailers are parked diagonally and he parked between two of the semis.[9] He appeared to be sleeping when seen by Maintenance Superintendent Paul L. Hicks and Maintenance Supervisor Frank Schritter.

Although Wiles extended his break,[10] the length of the break is not one of the reasons Respondent fired Wiles. As both Papen (1:86) and Turner (1:155–156) testified, the determining factor in the decision to fire Wiles was the fact (as they purportedly perceived it) that Wiles had concealed himself. Two additional reasons were that he was sleeping (although this possibly gets into the extended break concept, as well as the safety aspect, because Turner's policy allows employees to sleep during their breaks) and endangering his safety.

A written statement dated 7 March 1986 which Employee Relations Manager Papen furnished Wiles concerning the "Reasons for Termination" reads (G.C. Exh. 2) "You were terminated for concealing yourself, sleeping and endangering your safety."

There is no dispute that Respondent had knowledge of Wiles' union sentiments. Contending the discharge was pretextual, the General Counsel argues that animus by Respondent is demonstrated by (1) shifting and contradicting reasons given by Respondent (Br. 9–13); (2) Turner's statements in November (which I already have found noncoercive); (3) reliance on multiple reasons (Br. 14); (4) Respondent's failure to cross-examine the General Counsel's witnesses who testified at the hearing (Br. 14); (5) falsity or condonation of the concealment and endangerment grounds (Br. 14); (6) disparity (Br. 15); (7) haste, by failing to give Wiles "an opportunity to clear himself" (Br. 16); and finally (8) "Papen's resolute stance and unwavering position regarding Wiles' discharge is proof of Respondent's eagerness to seize upon the February 19 incident as a pretext." (Br. 16.)

#### 2. Facts

From a guard shack near where the trailers and Wiles were parked behind the plant, Superintendent Hicks, a minute or two before 2 p.m., telephoned Turner about the sleeping forklift driver. Turner (who figured that the driver was Wiles) initially downplayed the matter, saying that the driver might be on break, but agreed to come when Hicks stated that the location was risky and the driver was concealed (1:135–151). Even when Hicks, driving an electric buggy, picked up Turner, Turner insisted they go to the nearby guard shack and wait until 2:10 p.m. when the break period would be over to give Wiles the opportunity to be up by the end of the break period (1:136, 151–152).

At 2:10 p.m. the party (Turner, Hicks, and possibly Schritter)[11] left the guard shack and walked to Wiles. As they approached Wiles a truck with a semitrailer drove up and stopped near them. Whether the noise of the semi awoke Wiles, or whether Wiles was simply resting and took the occasion to end his rest, there is no dispute that Wiles rose up and began stretching.

Approaching Wiles, Turner asked him why he was between the trailers sleeping. "Why not?" responded Wiles. This exchange was repeated a couple of times, and Wiles eventually added that it was his break. Turner said witnesses reported that he was sleeping. Wiles said the witnesses were lying. Turner said it was 2:13 p.m. when he (Turner) arrived. Wiles shrugged his shoulders. Turner suspended Wiles (1:138, 153–154).[12]

[8] Indeed, the payroll change form states it just that way (G.C. Exh. 5).

[9] There was a clearance of 2 to 3 feet on each side of his forklift (1.188).

[10] On this point, I do not believe Wiles, and I credit the testimony of Respondent's witnesses that Wiles was parked at least by 1:50 p.m., a time 10 minutes before the beginning of his 2 to 2:10 p.m break.

[11] Turner and Hicks testified, but Schritter did not. Gerald L. Sumpter, the guard stationed at the guard shack in that area, was called as a witness by Respondent. Sumpter did not accompany the others when they left the guard shack to approach Wiles.

[12] I have credited the account of Turner and Hicks rather than the somewhat different version given by Wiles. As to the time, Wiles conceded that he rose up at 2:13 p.m. (1·23)

By the time Turner was able to report the matter to Employee Relations Manager Papen it was about shift change time, and Papen suggested they investigate the matter the next day (1:81–82).

The following day, 20 February 1986, Papen and Wiles conversed by telephone, with Wiles giving his version (that he was on break and not asleep) and requesting a meeting with Papen and Turner so he could clear up the suspension. Papen said he would check with Turner and let him know. Later that day Papen interviewed Hicks and Schritter and spoke again with Turner.

On 20 February Papen and Turner conferred with Turner's superior, Joe Foss, as well as Papen's supervisor, Tom Hagen (1:103, 155). The decision, on Papen's recommendation, was to discharge Wiles, based on past practices, because of the concealment (1:103, 155–156).

The following day, Friday, 21 February, Papen conveyed the termination decision to Wiles by telephone. Papen listed the three grounds, (1) concealing himself, (2) sleeping on the job, and (3) endangering his safety (1:84, 181). Papen's notes on this matter at one point show that he mentioned only sleeping on the job (R. Exh. 9 at 2), while at another point he has a checklist of the three reasons to cover when he spoke to Wiles (R. Exh. 9 at 3; 1:100–101). The General Counsel argues that the absence of the concealment and endangerment grounds in the first portion of the notes show these were afterthoughts added as makeweights (Br. 11, 12). Wiles' own testimony shows that in the 21 February telephone conversation with Papen he kept explaining that he was not trying to conceal himself nor was he endangering his safety (1:26). Wiles would not have spoken thus unless, as Papen testified, Papen had given him all three reasons. I find that Papen did give the three reasons to Wiles.

The General Counsel argues (Br. 12) that Papen contradicted himself because he testified that the sleeping aspect was inconsequential, for it was Wiles' concealing of his whereabouts that was the determining factor (1:86). Arguably there is some inconsistency on the sleeping aspect. Turner's testimony is clear that he does not object to his employees sleeping during their breaks so long as they are up and ready to work when the breaks end (1:157). Turner also conceded that he was aware Wiles occasionally took breaks on the patio area near Department 501 and on the concrete pad where the trucks drive behind behind the building (1:157). And Wiles credibly testified that in the past he has informed Turner, when the latter asked, that the reason he sometimes took his breaks farther away in the area of the semitrailers was to be off alone, and that Turner did not instruct him to discontinue this practice (1:21–22).

The record reflects that Respondent, including Turner, usually does not strictly limit the breaks to 10 minutes, and that employees frequently add a couple of minutes on either side. Turner's acknowleged actions on 19 February indicate that, initially at least, he saw nothing unusual about Wiles' presence near the trailers.

That brings us to the issue of Respondent's past practice and the General Counsel's disparity argument. Respondent has discharged other employees in the past for sleeping on the job while concealed. The names established in the record regarding this are those of Freddie L. Shiplett Jr., Jeff Todish, Anthony Mitchell, and Kelly Wright.

Shiplett and Todish, furnance room employees, were fired the same day, about 19 March 1985, for concealing themselves and sleeping on the job (1:54; R. Exh. 3). As Papen conceded, both were completely hidden in the incidents giving rise to their discharges (1:86–87). Moreover, as Shiplett credibly testified, each had been caught doing the same thing four or five times previously by Supervisor David Rupp (1:52–55, 184–185).

Although the previous incidents of Shiplett and Todish apparently predate Papen's arrival at the plant on 28 February 1985, Papen's notes reflect that he had actual knowledge that Shiplett had been caught previously (R. Exh. 8 at 2).[13] Presumably Papen had actual knowledge that Todish had been caught previously and not fired because the Shiplett and Todish incidents occurred at the same time and each had been caught previously by the same supervisor.[14]

In the incidents giving rise to their discharges, Shiplett concealed himself behind a furnace in order to sleep beyond his break (R. Exh. 8), and Todish had concealed himself in an upstairs storage area of the furnace room (R Exh. 3). As Papen conceded, neither was visible (1:86–87).

Wiles' situation differs from that of Shiplett and Todish in several respects. First, Wiles had never been told he was not to park out by the trailers. Indeed, Turner was on notice that Wiles occasionally parked there on breaks and acquiesced in the practice. Second, not only were Shiplett and Todish completely hidden, they had used boards or buckets to block themselves from view. Todish was even in a kind of crow's nest off the floor (1:55). By contrast, Wiles was clearly visible from the front or end views, and only from a side view was he not fully visible. (Actually, I infer that he even was partially visible from a side view because his forklift presumably could be seen from under the trailers. As is generally known, the bottom of a semitrailer sits several feet above ground. That open space would leave at least the bottom half of a forklift truck visible on the other side of the trailer.) Third, while it might be said that Wiles used the trailers to block his presence to the limited extent the trailers could do so, Wiles did not rearrange any of Respondent's property in an affirmative effort to conceal himself from view. In short, I find the circumstances of the cases of Shiplett and Todish to be significantly different from those existing in the case of Wiles.

Anthony Mitchell's case, as the General Counsel argues (Br. 15), has "aggravated" circumstances substantially different from Wiles' situation. Thus, Mitchell was filed on 2 June 1985 because he used an unsafe method to enter a furnace on 26 May when he doubly concealed

[13] Papen testified unpersuasively that he understood the previous incidents involved only sleeping and not concealment (1:89). I find that he was fully informed of the concealment aspect. I further find that Papen's testimony on this point reflects adversely on his credibility.

[14] Todish had received a "verbal" warning at some earlier date for some reason not specified in the record (R Exh. 2). During his employment, Wiles received an oral warning, in July or August 1985, but that was for excessive absenteeism (1:28).

himself in or by a box. Moreover, Mitchell and others had been instructed they were not to enter the furnace unless specifically directed to do so (R. Exhs. 6 and 7). Mitchell's case is inapposite.

Respondent also fired maintenance employee Kelly Wright on 2 June. Wright was helping with weekend work on 26 May. Instead of working, Wright went to a locker room in an unoccupied area of the plant, stretched out on a bench, and went to sleep. He was found there 2-1/2 hours later and thereafter fired for his conduct (1:88; R. Exhs. 4 and 5).

In a real sense Wright concealed himself,[15] and in an area where he had no business. Moreover, he had been missing for 2-1/2 hours. I find Wright's case to be significantly different from that of Wiles'.

The General Counsel points to the case of Harold James, a maintenance employee who was suspended for 3 days in June 1985 when he was found sleeping on the job (G.C. Exh. 3). James was working the "graveyard" shift from 11:30 p.m. to 8 a.m. He had performed assigned work on a light system and had sat down after 5 a.m. at a desk in that area to rest. He fell asleep. A guard awoke him at 5:30 a.m. (1:90–92; G.C. Exh. 3).

Papen testified that no evidence was presented to him that, unlike James' supervisor, Turner knew where Wiles was (1:92). I disbelieve Papen. I find that Turner told Papen that on occasion Wiles took his breaks out by the trailers. As we have seen, on 19 February Turner insisted that he and Hicks wait at the guard shack until the break ended to see if Wiles would be up by the end of his break (1:151–152). If Turner had been surprised and concerned about the location Wiles had chosen to park for a break, then surely Turner would not have acted as he did on the occasion. His conduct reinforces Wiles' testimony that Turner had impliedly consented to Wiles' taking breaks there, and it further reassures me in my finding that Turner informed Papen that Wiles occasionally took his breaks out by the trailers.

Although Wiles repeatedly requested a meeting, Papen denied the request on the basis that there was nothing to be gained in the absence of any new information (1:85, 156). With most of the others, including Shiplett, Anthony Mitchell, and Jeff Todish, Papen apparently interviewed them in person, although there is no evidence there was a conference with the employee, Papen, and the supervisor as Wiles requested in his own case.

### 3. Analysis and conclusions

I find that the General Counsel presented a prima facie case regarding Wiles. This is shown by Respondent's proceeding to discharge Wiles even though, as I have found, Employee Relations Manager Papen knew that Turner had given his implied consent for Wiles occasionally to take his breaks on the concrete pad behind the plant where the semitrailers are parked. By so disregarding Wiles' implied permission to be where he was on a break, and by discharging Wiles without warning when Respondent knew that Freddie Shiplett and Jeff Todish had received warnings in the past before they were fired, I infer that there was another reason Respondent chose to fire Wiles, and that this other reason was the unlawful one of Wiles' open and active support of the Union. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Although neither Mitchell nor Kelly Wright was shown to have received a prior warning, Mitchell had been instructed not to go where he did. His case borders, and perhaps constitutes, insubordination. Wiles had Turner's implied permission to be where he was.[16] And Wright certainly had no permission to hide in a vacant area of the plant and sleep for 2-1/2 hours. Neither of these cases is apposite.

Having found that Respondent was unlawfully motivated in discharging Wiles, I turn to the question of whether Respondent demonstrated that it would have fired him in any event. I find that the answer is no.

As for Wiles' sleeping for 3 minutes past his break, Papen conceded that the sleeping aspect was immaterial (1:86) and, as Wiles credibly testified, on 21 February Papen repeatedly told Wiles that the time consumed for the break was not an issue (1:26).

Little attention is given in the record to the asserted ground of safety. While safety is always important, I find that Respondent would not have discharged Wiles on that ground alone if for no other reason than Supervisor Turner had given his implied permission for Wiles to park out by the trailers.

For these reasons I find that Respondent, absent its unlawful motivation, would not have discharged Rick Wiles. As Respondent therefore violated Section 8(a)(3) of the Act by discharging Rick Wiles, it must offer him reinstatement and make him whole, with interest.

## CONCLUSIONS OF LAW

1. Mercury Marine-Division of Brunswick Corp. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Respondent has violated Section 8(a)(1) of the Act by maintaining, since 20 September 1985 (a date 6 months prior to the filing and service of the charge in this case), an overly broad no-solicitation/no-distribution rule in its employee handbook.

4. Respondent did not violate Section 8(a)(1) of the Act by statements made by Supervisor Michael E. Turner in November 1985.

5. Respondent violated Section 8(a)(3) of the Act by discharging Rick Wiles on 21 February 1986.

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

[15] Although Wright was visible to anyone who entered the locker room, a searcher would first have to enter the locker room before he would be able to see Wright.

[16] A principal reason, I find, that Papen avoided any conference with both Turner and Wiles present is the opportunity that such presence would prompt Wiles to elicit an admission from Turner that Turner had given his implied consent for Wiles to take his breaks out by the trailers.

## THE REMEDY

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

Because the no-solicitation rule contained in Respondent's handbook for employees is overly broad in interrelated aspects, Respondent must notify its employees in writing that the rule, as written, is without effect and should be disregarded. For any handbooks Respondent distributes after the date of this decision, Respondent must insert a written notice to the same effect.

Respondent must offer Rick Wiles immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Respondent must also make Rick Wiles whole, with interest, for any loss of earnings and other benefits he may have sufferd as a result of Respondent unlawfully discharging him on 21 February 1986. Backpay shall be computed in the manner established in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest calculated as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Although Respondent suspended Wiles on 19 February 1986 pending further investigation, that suspension was not alleged to be unlawful, and the issue was not litigated.

Respondent must remove from its files any reference to its unlawful discharge of Rick Wiles, and it must notify Wiles in writing that this has been done and that evidence of the discharge will not be used as a basis for further personnel action against him.

[Recommended Order omitted from publication.]