St. George Warehouse, Inc. *and* Merchandise Drivers Local 641, International Brotherhood of Teamsters. Cases 22–CA–23223, 22–CA–23259, 22–CA–23270, and 22–RC–11703

June 23, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On February 8, 2000, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.[4]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 6.

"6. By creating the impression that Respondent was engaging in surveillance of its employees, the Respondent violated Section 8(a)(1) of the Act."

ORDER

The National Labor Relations Board orders that the Respondent, St. George Warehouse, Inc., Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their membership in, or activities on behalf of, Merchandise Drivers Local 641, International Brotherhood of Teamsters, the Union.

(b) Promising increased benefits and improved terms and conditions of employment to its employees to induce them not to select the Union as their collective-bargaining representative.

(c) Soliciting grievances from its employees concerning wages, hours, and other terms and conditions of employment to induce them not to select the Union as their collective-bargaining representative.

(d) Creating the impression that its employees' union activities are under surveillance.

(e) Engaging in a program of issuing written warnings to its employees rather than its customary oral warnings, because of its employees' membership in, and activities on behalf of, the Union.

(f) Promulgating and distributing to its employees an unlawful no-solicitation, no-distribution clause because of its employees' membership in, and activities on behalf of, the Union.

(g) Issuing written warnings to its employees because of their membership in, and activities on behalf of, the Union.

(h) Discharging its employees because of their membership in, or activities on behalf of, the Union.

(i) 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 of this Order, offer to Leonard Sides and Jesse Tharp full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Leonard Sides and Jesse Tharp for any loss of earnings and other benefits resulting from their discharges less any net interim earnings, plus interest.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Leonard Sides and Jesse Tharp, and any reference to written warnings issued to Sides and Tharp from February 2, 1999, until their discharges and, within 3 days

[1] No exceptions were filed to the judge's dismissal of the allegation that the Respondent discriminated against Jesse Tharp by assigning him heavier workloads. Also, no exceptions were filed to the judge's conclusions that: the Respondent violated Sec. 8(a)(1) by unlawfully interrogating employees; the Respondent violated Sec. 8(a)(3) and (1) by increasing the volume of written discipline given to employees after it became aware of employees' union activities and by issuing written warnings to employees; the Respondent violated Sec. 8(a)(1) by remarks impliedly promising benefits; the Respondent's no-solicitation, no-distribution clause was ambiguous and overly broad, and the Respondent violated Sec. 8(a)(1) when it required employees to sign for receipt of a manual containing that clause.

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

The Respondent also has excepted to the judge's application of the "small shop theory" to establish the Respondent's knowledge of Jesse Tharp's union activities. We find it unnecessary to rely on that theory in concluding that the record supports the judge's determination that the Respondent had knowledge of Tharp's union activities.

In addition, Member Brame finds it unnecessary to rely on the judge's findings that the Respondent did not have to pay for employee Leonard Sides' miscounting mistakes, in order to find that the Respondent violated Sec. 8(a)(3) and (1) of the Act when it discharged Sides.

[3] The Respondent has excepted to the judge's conclusion that Paul Smith was a supervisor, and that Smith engaged in unlawful surveillance of employees' union activities. In his amended complaint, the General Counsel alleged that Smith created the impression of surveillance. See GC Exh. 26, par. 9. We conclude, based on Smith's agency status, and without regard to his supervisory status, that the record sufficiently demonstrates that Smith's attendance at the union meeting in his capacity as the Respondent's agent created the impression of surveillance. Accordingly, we find it unnecessary to pass on the judge's finding that Smith was a supervisor within the meaning of Sec. 2(11) of the Act. We shall modify the judge's Conclusion of Law 6 to conform to the violation found.

[4] We shall modify the judge's recommended Order to conform to the violations found, to correct inadvertent errors, and to conform to *Indian Hills Care Center*, 321 NLRB 144 (1996).

thereafter, notify them in writing that this has been done and that the discharges and warnings will not be used against them in any way.

(d) Rescind its unlawful no-solicitation, no-distribution rule, remove it from its employee manual, and notify the employees in writing that the rule is no longer being maintained.

(e) Preserve and, within 14 days of any 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) Within 14 days after service by the Region, post at its Kearny, New Jersey facility, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 1999.

(g) 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 Regional Director for Region 22 shall, within 14 days from the date of this Order, open and count the ballots of Leonard Sides and Jesse Tharp, and shall prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

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 coercively question you about your union support or activities.

WE WILL NOT promise increased benefits and improved terms and conditions of employment to employees to induce employees not to select the Union as their collective-bargaining representative.

WE WILL NOT solicit grievances from employees concerning wages, hours, and other terms and conditions of employment to induce them not to select the Union as their collective-bargaining representative.

WE WILL NOT create the impression that we are engaged in surveillance of our employees' union activities.

WE WILL NOT engage in a program of issuing written warnings to employees rather than our customary oral warnings because of employees' membership in, and activities on behalf of, the Union.

WE WILL NOT promulgate and distribute to employees an unlawful no-solicitation, no-distribution clause because of employees' membership in, and activities on behalf of, the Union.

WE WILL NOT issue written warnings to employees because of their membership in, and activities on behalf of, the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Merchandise Drivers Local 641, International Brotherhood of Teamsters, or any other labor organization.

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

WE WILL make Leonard Sides and Jesse Tharp whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Leonard Sides and Jesse Tharp, and any reference to written warnings issued to Sides and Tharp from February 2, 1999, until their discharges, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and warnings will not be used against them in any way.

WE WILL rescind our unlawful no-solicitation, no-distribution rule, and remove the rule from our employee

[5] 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."

manual, and WE WILL notify you in writing that the rule is no longer being maintained.

ST. GEORGE WAREHOUSE, INC.

Julie L. Kaufman, Esq., for the General Counsel.
Jedd Mendelson, Esq. (Grotta, Glassman & Hoffman), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on July 28 and August 4, 6, 10, and 11, 1999.

On various dates in 1999, Merchandise Drivers Local 641, International Brotherhood of Teamsters (the Union), filed unfair labor practice charges against St. George Warehouse, Inc. (Respondent).

On May 28, 1999, a complaint issued against Respondent alleging violations of Section 8(a)(1) and (3) of the Act. On June 10, 1999, a report on challenged ballots and an order consolidating cases was issued.[1]

On the entire record in this case, including my observation of the demeanor of the witnesses, and a consideration of briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New Jersey Corporation with an office and warehouse facility located in Kearney, New Jersey, where it is in the business of warehousing various commodities. Respondent annually performs warehousing services, valued at in excess of $50,000 in States, other than the State of New Jersey. It is admitted, and I find that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent warehouses customer's commodities at its South Kearny, New Jersey facility. Respondent employs approximately 40-day-shift and night-shift unit employees at its facility. Between 20 to 30 of these employees are employed on the day shift.

Anthony Fortunato is Respondent's owner. The operation is run day-to-day by Executive Vice President Linda Kuper. Steve Kuper is the terminal manager. He oversees the warehouse and supervises three departmental supervisors, Bob Chapman, Gabe Maldonado, and Jimmy Ciaramella. All of the above individuals are supervisors within the meaning of Section 2(11) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The First Discharge of Leonard Sides

Leonard Sides began working at Respondent's South Kearny facility around July 27, 1997, as a forklift operator on the export receiving side of Respondent's warehouse. At the time of his February 2, 1999 discharge, Sides worked on the day shift. Sides' immediate supervisor from about June 1998 until the day of his discharge was Gabriel Maldonado.

Sometime in January, Sides approached a group of outside drivers standing near one of Respondent's loading bays and asked them when someone from the Teamsters Union was going to organize Respondent's employees. Jan Katz, an outside driver and representative of Local 641 of the Teamsters, responded that he was the man to see about such organizing. Katz then handed Sides a number of union cards, explaining that Sides should distribute the cards to interested employees and, after the employees had signed the cards, return the signed cards to Katz. Sides subsequently distributed these cards to most Respondent's employees and returned the signed cards to Katz. Sides estimated that he distributed about 30 union authorization cards to his coworkers. Between about mid-January until the end of March, Sides had about four or five conversations with Katz at Respondent's export dock regarding organizing Respondent's employees. Sides signed a card for the Union in January 1999.

Sometime around mid-January 1999, Sides asked his coworker Jesse Tharp to sign a union authorization card. Tharp volunteered to distribute cards to the night-shift employees with whom he was familiar. Sides gave cards to Tharp approximately two or three times between mid-January and early February while both men were on the export dock. Tharp returned the signed cards to Sides. Respondent's own witness, employee Percell "Rob" Wallace Jr. credibly testified that "Lennie and Jessie, both, was giving out the cards." Wallace further testified that Respondent's employees were talking about the Union openly, and in Respondent's facility both before and after the cards were distributed by Sides and Tharp.

Around the time the cards were being distributed, in early February, Terminal Manager Steve Kuper was informed by Export Supervisor Maldonado that according to outside truckdrivers with whom he had spoken, the warehouse employees were organizing. Kuper also overheard employees talking about the Union while he was standing at the import-loading door in the middle of the warehouse. Maldonado testified that around the first or second week of February, the outside truckdrivers would tell him that Respondent's employees were "bringing in the Union."

On or about February 2, Respondent's owner, Anthony Fortunato, was approached by two of his long-time employees, Paul Smith and Jerry Hayes. Hayes and Smith each showed Fortunato a blank Local 641 authorization card and advised him that Leonard Sides was distributing the union cards to the warehouse employees. Fortunato admitted that he then asked Hayes and Smith "[w]ho's signing the cards and who's getting the cards."

I find Fortunato's questions clear and blatant unlawful interrogation in violation of Section 8(a)(1). *Greenfield Die & Mfg. Corp.,* 327 NLRB 237 (1998); *Americold Services,* 323 NLRB 1095 (1997); and *Rossmore House*, 269 NLRB 1176 (1984).

Fortunato admitted that after immediately learning that Sides was distributing union cards in the warehouse, he went directly out onto the dock where Sides was working, accompanied by Supervisor Steve Kuper, during the middle of the workday, and holding a blank union card up in his hand to get Sides' attention. He asked Sides angrily if he was the person who was passing out cards. Sides admitted he was distributing union cards. Fortunato, in the presence of Kuper, told Sides that Respondent was not a union shop, that he did not want it to be a

[1] The complaint allegations alleging the unlawful suspension and discharge of employee James Olbert were withdrawn during the course of this trial.

union shop, and though 2 to 3 hours remained in Sides' shift, Fortunato told Sides that he should punch out and go home. Kuper was present during the entire conversation.

Fortunato denied he fired Sides. He testified that he merely waved his hand and walked away.

Sides, accompanied by Kuper, went to the timeclock and punched out. Kuper continued to accompany Sides until he left Respondent's facility. As Sides was leaving, he told Kuper that he would see him in court.

Kuper then went back to the office and told Fortunato about Sides' "see him in Court" statement. Fortunato then called his attorney to speak to him about what had just taken place.

Sometime later that day, Sides called to get a reaffirmation from Fortunato that he was terminated. Fortunato told him he was not fired; that he would be paid for the hours missed, and could return to work.

Sides impressed me as a totally credible witness. I was impressed with his demeanor. His testimony was detailed and consistent during both direct and cross-examination. Moreover, and most importantly, he freely admitted his chronic lateness and mistakes when confronted with them during cross-examination.

Fortunato did not impress me favorably. His testimony that he merely waved his hands and walked away from Sides does not ring true. Why else would Sides punch out in the middle of the day and be accompanied by Kuper. Such conduct is simply consistent with a discharge. Further, why would Fortunato offer to pay Sides for the time he missed, if he had not initially terminated him. Fortunato's conduct is consistent with a man trying to mitigate damage already inflicted. In this regard, Fortunato's offer to Sides was made only after he contacted his attorney. For these reasons, I credit Fortunato's testimony only where he makes admissions against his own interest.

I discredit Kuper's testimony that he did not overhear Fortunato's conversation with Sides. Why else would he escort him to the timeclock if he did not overhear Fortunato terminating Sides. Fortunato probably instructed Kuper to escort Sides out. As set forth above, such conduct is consistent with a discharge. Moreover, Kuper, when questioned, was totally unable to explain why he escorted Sides to the timeclock, and then out of the plant. I thus find Kuper is not a credible witness, and credit him only when his testimony is to admissions against Respondent's interest.

Accordingly, I conclude based on the credible testimony set forth above, that Fortunato did discharge Sides.

As set forth above when Fortunato initially spoke with Sides, he asked him if he was the individual passing out union cards. Such conduct by Respondent owner when accompanied by an unlawful discharge, set forth and described below constitutes an unlawful interrogation in violation of Section 8(a)(1) of the Act. See *Greenfield Die,* supra*; Americold Services,* supra*;* and *Rossmore House,* supra.

It is well-established Board law that the General Counsel must show by a preponderance of the evidence that protected activity was a motivating factor in an employer's decision to discipline or discharge an employee. *Transportation Management Corp. v NLRB,* 462 U.S. 393 (1983); *Wright Line,* 251 NLRB 1082 (1980); See also *Dana Corp.*, 318 NLRB 312, 316 (1995). Such a showing establishes an 8(a)(3) violation unless the employer can show as an affirmative defense that it would have discharged the employee for legitimate reasons regardless of the protected activity.

Applying these principles to Sides' initial discharge, knowledge is established by employees Smith and Hayes telling Fortunato of Sides' union activities. His animus is established by Fortunato's unlawful interrogation of Smith, Hayes, and Sides. Fortunato's simultaneous interrogation of Hayes, Smith, and Sides coupled with his statement that he did not want a union shop followed by his discharge of Sides in the same breath, could not establish a stronger union motivating factor. It is virtually an irrebuttable admission. Fortunato essentially told Sides that he was aware of Sides union activities, wouldn't tolerate a union shop, and that he was being fired because of these activities on behalf of the Union. A clearer case for a discriminatory discharge cannot be made out.

Respondent's defense for this is that, "I didn't discharge Sides." This testimony that he merely waved at Sides is discredited as set forth and described above in detail.

Accordingly, I conclude that Respondent has failed to meet its *Wright Line* burden, and conclude that Sides was discharged on February 16, in violation of Section 8(a)(1) and (3) of the Act.

B. The Discharge of Tharp

At the time of his discharge on March 16, 1999, Jesse Tharp had been working at Respondent's South Kearny warehouse for approximately 6 years as a day-shift loader on the export side of the warehouse. Tharp's immediate supervisor from about August 1998 until the day of his discharge was Robert Chapman.

The evidence establishes that Respondent was aware of Sides' activities as of February 2. This is established by his testimony that Hayes and Smith told Fortunato about such activity. Moreover, during the February period Steve Kuper was informed by Supervisor Maldonado that he had been informed of the Union's attempt to organize the shop. Respondent's witness, employee Wallace, testified that the only employees distributing union cards were Sides and Tharp.

I conclude that knowledge of Tharp's activities could be inferred. Respondent undoubtedly acquired knowledge of such activity the same way it acquired knowledge of Sides' activity. Employees of Respondent told Fortunato and other supervisors about Tharp's union activities.

In this case, the small shop theory seems applicable. See *Wiess Plow Welding Co.,* 123 NLRB 617, 618 (1959); *Coral Gables Convalescent Homes,* 234 NLRB 1198, 1199 (1978); and *Permanent Label Corp.,* 248 NLRB 118, 134 (1980).

If more evidence need be established about Respondent's knowledge of Tharp's union activity, Tharp credibly testified that on various occasions while he was distributing union cards, he noticed Steve Kuper, and Chapman watching him. Tharp saw Steve Kuper on more than three occasions when he was distributing union cards at the breaktable. On a number of these occasions, Tharp credibly testified he saw Kuper standing approximately 80 feet away at the import door, staring at him. On different occasions, Tharp saw Kuper and Chapman walking about 5 feet from the breaktable and staring at him as he openly distributed union cards. Once when Tharp distributed union cards at the mechanics' room, he noticed Steve Kuper walk past and, from a distance of about 10 feet away, stopped and stared at him and the employee to whom he was speaking. On one of the occasions when Tharp noticed Supervisor Chapman watching him on the export dock, Chapman walked towards Tharp's Hilo until he was within 5 feet of where he and

another employee were exchanging cards. When the other employee left, Chapman walked away. Finally, on each occasion when Tharp handed signed union cards back to Sides, Tharp noticed Chapman staring at him and Sides from a distance of about 15 to 20 feet.

Towards the end of the day on March 16, 1999, Supervisor Chapman pulled Tharp aside while he was working and, according to both Tharp and Chapman, told Tharp that what he was about to say "was coming from the office." Chapman then told Tharp that he was being discharged because his work pace had slowed down. Tharp responded that he had kept the same production pace over the past 6 years and that Respondent had never had a problem with the speed of his work. When Chapman disagreed with Tharp's statement, Tharp asked if Chapman was calling him a liar. Chapman then raised the fact that Tharp was often late by 5 to 10 minutes. Tharp responded that this was a situation that had been ongoing for almost 6 years and had never been a problem before. Prior to his discharge, Tharp had never been disciplined for slow work. Until Tharp's discharge, neither Chapman nor any other of member Respondent's management had ever mentioned to Tharp that they perceived his production pace as having slowed down. Chapman then said that he was tired of speaking with Tharp and, after again telling Tharp that he was fired, walked away. Tharp did not receive a discharge notice. During his discussion with Chapman regarding his discharge, Tharp testified he was in no way insubordinate and did not raise his voice to Chapman when defending himself against Chapman's accusations.

A termination notice signed by Chapman and dated March 16, 1999, was included in Tharp's personnel file. Interestingly, Chapman checked off "substandard performance" and "attitude" on the notice, but did not check "lateness" as a basis for Tharp's discharge, though he wrote as the bases for discharge that Tharp's performance had slowed and that Tharp was constantly coming in late. However, there is no mention in the notice narrative of Tharp's alleged insubordination and poor attitude, the basis asserted by Chapman for his decision to terminate Tharp on the spot. Even Chapman admitted Tharp had never been disciplined for his attitude since Chapman had been supervising him.

C. The Second Discharge of Leonard Sides

On March 31 Supervisor Chapman asked Sides to write up a freight load. Writing up a freight load was not Sides' regular job and he only performed it on an as needed basis, perhaps once every couple of weeks.

At the end of the day, Supervisor Maldonado, without prior warning, called Sides into the office and told him that he was being discharged for making too many mistakes. Maldonado gave Sides a discharge notice and his pay after which Sides proceeded to punch out. The discharge notice, which was written and signed by Steve Kuper, stated the reason for Sides' discharge was due to the "number of warnings and mistakes" and specifically references three mistakes attributed to Sides on March 31. Of these three mistakes, two involved miscounts of freight. Sides candidly admitted that on March 31 he had in fact miscounted two different shipments of freight as described in the termination notice.[2]

[2] This is just one of a number of examples of Sides' candor. I was very impressed with Sides' credibility.

It is undisputed that when Supervisor Maldonado became aware of each of these miscounting mistakes, he brought them to Sides' attention and asked Sides to correct the mistakes. Sides did so. At no time prior to his actual discharge on March 31, was Sides informed by Maldonado or any other Respondent supervisor that he would be disciplined or discharged due to these mistakes. He was given neither oral or written warning. Sides had made miscounting mistakes in the past similar to the mistakes that he made on March 31, but had never been disciplined. Rather, in the past, once the mistake was caught, Sides would merely be asked to correct the mistake. It is admitted that the March 31 mistakes did not cost Respondent any money or customer complaints.

Sides credibly explained, without contradiction, that miscounting mistakes are frequently made by himself and by other employees and that he is unaware of another employee being disciplined, let alone discharged for such a mistake. Sides stated that miscounting mistakes occur when the freight writer is dealing with numerous pieces of loose freight such as the freight Sides miscounted on March 31.

The only other employee ever discharged for such a mistake was a probationary employee.

The third mistake noted on Sides' termination notice concerns Sides' alleged failure to properly record hazardous materials information on an arrival notice. Sides credibly denies making any mistake regarding the writing up of this hazardous freight. When Sides received the arrival notice for the hazardous materials, there were no markings on the arrival notice indicating the freight was hazardous.

Given Respondent's knowledge of Sides' and Tharp's union activities, the intense animus, the willingness to fire union adherents immediately on becoming aware of their union activity, discharging the only two active union organizers engaging in systemative interrogation and other 8(a)(1) activity described in detail below, the long length of employment of Sides and Tharp, and the timing of the discharges, I conclude the General Counsel has met its *Wright Line* burden and established a very strong prima facie case.

Respondent contends Sides was terminated because of being a slow worker, continued lateness, and the freight writing mistakes on March 31, the date he was discharged.

At first it should be noted that Respondent does not have a uniform policy as to what constitutes excessive lateness. Additionally, because Respondent does not keep a record of when verbal warnings are issued, there is no way to know whether any employee had received such discipline. In this regard, the "no previous warnings" boxes on Respondent's written discipline forms refer to the absence of prior written discipline only.

The day shift on which Sides was employed commences at 8 a.m. Sides' supervisor, Gabriel Maldonado, testified that he considers 5 to 10 minute lateness excessive, and warranting discipline. On February 10, after Sides' initial discriminatory discharge, Maldonado gave Sides a written warning for being late 3 days. Sides was late 12 minutes on Monday, February 1, 1 day before Respondent became aware of his union activity and discriminatorily discharged him. However, Maldonado was unable to identify which three February latenesses caused Sides to receive the February 10 warning. Therefore, I presume the warnings were for latenesses after his February 2 discharge.

Sides only prior written warning for lateness was signed by Maldonado on August 27, 1998, when Sides was 1 hour and 39 minutes late.

On March 19 Maldonado gave Sides a written final warning for lateness. The warning, which is actually signed by Steve Kuper, states that it is for repeated latenesses and that Sides had, at the time of the warning, 16 latenesses since January 1, 1999. The warning also states that Fridays are very busy. Sides admitted that he was about 1-1/2 hours late on Friday, March 19, but states that he called in to tell Respondent that he would be late.

However, during the period January 1, 1998, through March 31, 1999, Sides had been more than 1 hour late on eight different occasions, sometimes twice in 1 month (September 1998). Sides had never received any discipline for those latenesses. During the same period of time, Sides' coworkers, Paul Smith and Purcell Wallace, had each been more than 1 hour late to work on 9 and 14 different occasions, respectively. Kuper, who supervised Smith, and Chapman, who supervised Wallace, both testified that no written discipline for latenesses had been given to either employee since they had begun supervising them.

Maldonado and Kuper testified that because Thursdays and Fridays are the busiest days of the week for the receiving department, which Maldonado supervises, it is most important to be on time on those days. However, Sides had been over 1 hour late on Friday, August 14, October 15, and December 18, 1998, and on Friday, January 15, 1999, but had never been disciplined for these latenesses, all of which took place before Sides' union activity.

I conclude that Respondent condoned Sides' lateness, until Respondent became aware of his union activity. *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998).

On March 31, Export Supervisor Robert Chapman asked Sides to write up freight. Writing up freight was not Sides' regular job and he only performed it on an as-needed basis, perhaps once every few weeks.

At the end of the day on March 31, Maldonado called Sides into the office and told him that he was being discharged for making too many mistakes. Maldonado gave Sides a discharge notice and his pay after which Sides proceeded to punch out. The discharge notice, which is written and signed by Steve Kuper, states the reason for Sides' discharge was due to the "number of warnings (I assume lateness) and mistakes" and specifically references three mistakes attributed to Sides on a single day, March 31. Of these three mistakes, two involved miscounts of freight. Sides candidly admitted that on March 31, he had in fact miscounted two different shipments of freight as described in the termination notice. It is undisputed that when Maldonado became aware of each of these miscounting mistakes, he brought them to Sides' attention and asked Sides to correct the mistakes that Sides did. At no time prior to his actual discharge on March 31, was Sides informed by Maldonado or any other management that he would be disciplined or discharged due to these mistakes. Sides had made miscounting mistakes in the past, similar to the mistakes that he made on March 31 and had never been disciplined. Sides credibly testified that miscounting mistakes are frequently made by himself and by other employees and that he is unaware of another employee being disciplined, let alone discharged for such a mistake. Sides stated that miscounting mistakes occur when the freight writer is dealing with numerous pieces of loose freight such as the freight Sides miscounted on March 31. Rather, in the past, once the mistake was caught, Sides, in all other cases, except for March 31, would merely be told to correct the mistake. It is conceded that Respondent did not have to pay any claims because of Sides' two March 31 miscounting mistakes.

I conclude that Respondent condoned miscounting mistakes by Sides and other employees and only relied on such mistakes for discipline after becoming aware of Sides' union activity. *Mountaineer Steel, Inc.,* supra.

The third mistake noted on Sides' termination notice concerns Sides' alleged failure to properly record hazardous materials information on an arrival notice. Sides denies making any mistake regarding the writing up of this hazardous freight. When Sides received the arrival notice for the hazardous materials, he credibly testified that there were no markings on the arrival notice indicating that the freight was hazardous. Sides credibly testified that the "Hazardous" stamp that is now on the arrival sheet for the freight in issue, was not on the sheet when it was given to him. The arrival notice stated that the freight shipment contained four pieces and Sides counted four skids in front of him. Sides then measured the freight and entered the measurements on the arrival notice. He also examined all pieces of the freight for any markings and discovered a 3-by-5 inch white label, which stated "Thailand" on it. The white label also had typewritten on it Hazardous" and a "UN" or code number indicating the specific type of hazardous materials contained in the freight.

Sides recorded all of this information, including the hazardous information, in the "remarks" section of the arrival notice. While Sides explained that usually, a hazardous material's label would be red, he steadfastly maintained that there were no red or even green placards or labels on this freight indicating that it was hazardous and that the only label he saw indicating that the freight contained hazardous materials was the 3-by-5-inch white label described above. Respondent's supervisor, Robert Chapman, corroborated Sides' testimony when Chapman testified that he and Maldonado jointly examined the hazardous freight for markings, and that Chapman saw on the freight "***a***" UN number printed on ***white*** labels which also contained information that this freight was ***a liquid, class 3.2 hazardous freight.*** Sides was never asked to correct any mistake regarding the hazardous freight nor was he even informed that he had made any mistake regarding this freight until Maldonado discharged him later that day. While Maldonado claims that he gave Sides a verbal warning for the first miscounting mistake, Maldonado stated that he did not give Sides any warning for this second, hazardous mistake. Maldonado admitted that Respondent did not have to pay any claims regarding any alleged mistake in writing up the hazardous freight.

Sides has, in the past, made mistakes in writing up hazardous freight, including failing to mark "hazardous" on the arrival sheet or forgetting to note the marks in the "remarks" section of the arrival sheet, mistakes he did not make on March 31. Sides has not been disciplined for these past mistakes in writing up hazardous freight. Maldonado testified that Sides' alleged mistake about the hazardous freight was what made him consider discharging Sides and that if Sides had not made three mistakes in one day, he would not have been discharged. Sides, in unrebutted testimony, asserted that around the spring or summer, 1998, he made three freight writing mistakes in one day and, rather than being disciplined or discharged, was simply chided by Linda Kuper.

Steve Kuper and Maldonado asserted that although Sides' three mistakes in 1 day, and particularly the hazardous material mistake, caused them to decide to discharge Sides. Sides' en-

tire record was considered in deciding that he should be discharged. In this regard, Maldonado stated that in addition to the three March 31 mistakes, the basis for Sides' discharge were as follows: latenesses; attitude; slowness; carelessness; and the three alleged March 31 mistakes. The issue of Sides' latenesses has already been fully discussed above.

Again, the credible evidence, including Respondent's records and the credible testimony of Sides, establish that until the advent of union activity such conduct had always been condoned in the past. *Mountaineer Steel,* supra.

While Maldonado seemed to dwell on how slow Sides' performance was, he never issued Sides a single written warning regarding his slowness. Indeed, it appears from Maldonado's own testimony that prior to Sides' union activities, Sides' alleged "slowness" was condoned not only by Maldonado, but by Maldonado's predecessor.

Maldonado then testified, as an afterthought, that he and Kuper considered Sides' carelessness in running over a coworker's foot with a Hilo on December 8, 1998, and damaging freight on December 10, 1998, as an additional reason for his discharge. Based on Respondent's own records, it appears that Sides received first written warnings for each incident. However, former employees Gerard Murphy's and Andre Gladden's disciplinary records support a finding that Sides was disparately treated. Here, within a 2-month period (November 1997 through January 1998) Murphy received numerous verbal warnings, a written warning and a suspension for careless operation of a Hilo. In fact, according to November 10, 1997 suspension notice, his carelessness cost Respondent $8000 in *preliminary* claims for damage to customer freight. Despite this, Murphy was not terminated for carelessness, one of the alleged basis for Sides' discharge. Gladden too, was not discharged when, due to his negligence, he damaged a drum, causing its entire contents of lavender oil to spill and soak the remainder of the freight already loaded on a container.

I conclude that in this connection Respondent, assuming that such Hilo incident occurring in 1998 was actually considered as a reason for Sides' discharge, was disparately treated because of his union activities. *Woodlands Health Center,* 325 NLRB 351, 362 (1998); *Dlubak Corp.*, 307 NLRB 1138, 1155, 1156 (1992).

On February 10, 1999, Tharp was given a written warning regarding lateness. Interestingly, not only did Sides and Tharp both receive February 10, 1999, written warnings for lateness, but the narratives contained on the warnings themselves are identical. I conclude such identical warnings are additional evidence of Respondent's plan to set up both employees for discharge because of their union activities. Tharp's timecards show that while he was late 12 times in February 1999, he was also late 16 times in January 1998, 19 days in February, 15 days in March, 22 days in April, 19 days in May, 18 days in June, 9 days in July, 7 days in August, 21 days in September, 13 days in October, 5 days in November, and 18 times in December 1998, and late 16 times in January 1999, all before his union activity. Aside from his February 10 warning, Tharp never received any discipline for either his 1998 or his January 1999 latenesses. The only other written discipline that Tharp had received for lateness during his almost 6 years employment with Respondent was given to him in 1994. Tharp candidly testified that during his employment with Respondent, he received approximately six verbal warnings regarding lateness. Tharp's timecards for the period of time January 1, 1998, through March 16, 1999, support Tharp's assertion that he was very often 5 or 10 minutes late and that this had been an ongoing occurrence for almost 6 years.

Again it is crystal clear, and I conclude that Tharp's latenesses were always condoned by Respondent until he began distributing union cards. *Mountaineer Steel, Inc.,* supra.

Tharp's personnel file contains a March 8, 1999, written warning for carelessness. The warning was issued by Steve Kuper, and is unsigned by Tharp who denied ever seeing or being informed of it. I credit Tharp. Tharp candidly admitted that he accidentally damaged a drum while loading freight, and that Fortunato and Chapman were aware of this. Both Fortunato and Chapman testified that Tharp's damaging the drum was an accident.

I find that in view of such admission, any contention that such accident was considered to any extent in connection with Tharp's discharge would simply be additional evidence of Respondent's discriminatory motivation.

On March 16, 1999, near the end of the day, Chapman pulled Tharp aside while he was working, and according to both Tharp and Chapman, told Tharp that what he was about to say was "coming from the office." Chapman then told Tharp that he was being discharged because his work pace had slowed down. Tharp responded that he had kept the same production pace over the past 6 years and that Respondent had never had a problem with the speed of Tharp's work.

Indeed there is no record of any warnings for such alleged slow work throughout Tharp's 6-year employment tenure with Respondent. Moreover, I conclude that Chapman's use of the phrase "coming from the office" is further evidence of a discriminatory motivation.

Chapman then raised the fact the Tharp was often late by 5 to 10 minutes. Tharp credibly testified that this was a situation that had been ongoing for almost 6 years and had never been a problem before. Chapman then said that he was tired of speaking with Tharp and, after again telling Tharp that he was fired, walked away. Tharp did not receive a discharge notice. As set forth above, I have concluded that Respondent condoned Tharp's habitual latenesses until knowledge of Tharp's union activity.

To rebut Respondent's *Wright Line* defense, counsel for the General Counsel contends that Sides and Tharp were generally treated disparately with respect to other employees.

Sides, during his approximately 20-month tenure with Respondent, received three written disciplines prior to his February 10 and March 19 disciplines and March 31 discharge. During Tharp's almost 6-year employment with Respondent he received five written disciplines prior to his February 10 and March 8 disciplines and March 16 discharge. However, many of Respondent's current employees have received either the same or greater numbers of written discipline during shorter periods of time and, in some instances, for conduct which allegedly caused Sides and Tharp to be discharged, yet, these employees themselves have not been discharged. Interestingly, much of this discipline has been issued to current employees since February or early March—following Fortunato's February 2 interrogation of Sides. For example, Jesus Guzman received four written warnings during his first 8 months of employment, the first three of that were issued to him during his probationary period, in March 1999, for latenesses and walking off the job prior to completing his assignment. John Bevan also began receiving written discipline in March 1999 his 6th month of employment,

and received a total of five writeups between March 19 and June 25. Tony Kirkland who was hired on August 14, 1998, received five written disciplines between November 1998 and June 1999. Kirkland received his first of four written warnings for lateness on March 19, 1999. Franco Pericles received four written warnings for lateness between October 6, 1998, and April 28, 1999, and one warning for failing to call or show up for work. During the first month of his probationary period, Edwin Costillo received three written warnings, two of which were for being late 6 days. Seny Calcano received eight written warnings during the 7 months between November 1998 and June 1999. The first six of these warnings are for latenesses. During his probationary period in 1998, Melvin Ruiz received a written warning for being a no call/no show and a suspension for lateness. After he passed his probation, Ruiz received a suspension for a second no call/no show in 1998, and in 1999, a third lateness warning for incorrectly loading freight on the wrong containers, thereby causing Respondent to have to pay to retrieve the freight and send it to the correct destination. Hector Santiago, who was hired on July 1, 1998, received his first written warning on March 1, 1999, and between March through June, received a total of four warnings and one suspension. Ramone Solane was hired on February 18, 1998, and received his first written warning on March 10, 1999. During the 3-1/2-month period between March 10 and June 29, Solane received seven written warnings and one suspension. While most of Solane's discipline was for latenesses, Solane received one warning for damaging cargo, thereby causing a spill, which Respondent was then responsible for cleaning up, and one warning for walking off the job prior to the end of his shift. Richard Zapatier was hired on October 30, 1997, and did not receive written discipline until February 23, 1999, when he received the first of three written warnings given during a 5-month period, for walking off the job prior to completing his assignment. Zapatier's other two warnings were dated March 10 and July 19, 1999. To the extent that the above-named employees, especially, Guzman, Bevan, Santiago, Solane, and Zapatier began receiving discipline in February or March, some of which was similar to that discipline relied on by Respondent in discharging Tharp and Sides, I conclude that such discipline is bogus and would not have been issued to the employees, but for the union activity. I further conclude because of the specious nature of much of this discipline, particularly the fact that it was issued after the union organizing began, it cannot be relied on in evaluating whether Respondent regularly issues such discipline to its employees.

Additionally, assuming that all written discipline in Sides' and Tharp's personnel files were actually issued to those employees, Sides, during his approximately 20-month tenure with Respondent, received three written disciplines prior to his February 10 and March 19 disciplines and March 31 discharge. During Tharp's almost 6-year employment with Respondent, Respondent's records establish he received five written disciplines prior to his February 10 and March 8 disciplines and March 16 discharge. However, Respondent's records also establish many of Respondent's current employees have received either the same or greater numbers of written discipline during shorter periods of time and, in some instances, for conduct which allegedly caused Sides and Tharp to be discharges, yet none of these employees were discharged. I find this evidence of disparate treatment that further establishes a discriminatory motivation. See *Woodlands Health Center,* supra; and *Dlubak Corp.,* supra.

Moreover, Respondent's reliance on certain employee discharge records in support of its discharges of Sides and Tharp, is misplaced as the employees discharged were all probationary, and therefore, are distinguishable from Sides and Tharp. Respondent's reliance on the termination and discipline records of Gerard Murphy and Andre Gladden is similarly misplaced. Murphy and Gladden were both discharged for theft of customer property, an offense not raised in regard to Sides or Tharp.

I conclude Respondent's reliance on such records establishes further evidence of disparate treatment with respect to discharges. See *Woodlands Health Center,* supra; and *Dlubak Corp.,* supra.

Thus, I conclude that rather than establishing that the discharges of Sides and Tharp would have taken place notwithstanding these employees' union activities, Respondent's defense strongly reinforces the General Counsel's virtually insurmountable prima facie case.

In short, I conclude that the General Counsel has established with absolute certainty that by discharging Sides and Tharp, Respondent has violated Section 8(a)(1) and (3) of the Act.

Respondent's Written Warning System

In determining whether discipline issued to employees is unlawful within the meaning of Section 8(a)(3) and (1) of the Act, the Board relies on the same standard it uses in evaluating the lawfulness of an employer's reasons for discharge. *Wright Line, Wright Line,* 251 NLRB 1082 (1980); and *Dana Corp,* supra.

As set forth, and established above, there was a marked increase in the volume of written discipline issued by Respondent to its unit employees following Fortunato's February 2 interrogation of Sides and particularly following the March 8 service of the representation petition on Respondent and the March 19 Stipulated Election Agreement.

Additionally, a large portion of this written discipline is for conduct, such as lateness, which, relying on Tharp's, Sides' Wallace's, and Smith's records, Respondent previously condoned or at most gave verbal warnings.

Thus, based on the timing of the increased volume of written discipline in conjunction with Respondent's past, more lenient approach to issuance of discipline, I conclude that after learning of the union organizing, Respondent, in order to deter its employees from engaging in union activities, began issuing written, rather than verbal discipline. I conclude such conduct violates Section 8(a)(1) and (3) of the Act.

Assignment of More Difficult Loads

Tharp testified that since the end of February 1999 Respondent, by its supervisor began to assign him more difficult loads, which had the effect of slowing down his production time.

Chapman testified the loads he assigned Tharp were the same as those he assigned to other employees.

Respondent witness, Pursell, Wallace, a good friend of Tharp, testified that when Chapman became his supervisor in the summer of 1998, he and Tharp, who was also being supervised by Chapman, assigned them the more difficult loads and favored other employees with easier loads.

I conclude that the General Counsel did not establish through Tharp's conclusionary and opinionated testimony that such work assignments were in fact more difficult tasks. Respon-

dent's records[3] introduced to establish that Respondent did not discriminatorily assign Tharp more difficult loads are inconclusive. In any event, such records were not business records, recorded in the normal course of Respondent's business operations, but rather summaries, prepared exclusively for this trial. I give them no evidentiary weight.

Respondent argues that given the contradiction between Tharp and Wallace as to when they believed such discrimination with respect to assignment of loads took place reflects adversely, against Tharp's credibility. I do not agree. I have concluded that both Tharp and Wallace were credible witnesses. Either witness' testimony could be accurate. However, even if I were to find that Tharp's complaints began in the summer of 1998, rather then the end of February 1999, my impression of Tharp's overall credibility as to the rest of his testimony would be unaffected. *Americare Pine Lodge Nursing*, 325 NLRB 98 (1997).

I conclude there is insufficient evidence to establish the General Counsel's contention as to the discriminatory assignment of heavier workloads to Tharp.

The Union filed a representation petition on March 8, 1999. Following the filing of such petition, Respondent held three meetings with its warehouse employees concerning the Union's campaign. Fortunato conducted each meeting. Respondent supervisors were also present. Fortunato testified that at the first two meetings, the employees asked whether they could receive various new and improved benefits. Fortunato testified he told his employees he could not provide such benefits until after he had received the election results. Former employee Rigoberto Ubierra attended two of the three employee meetings. Ubierra credibly testified that Fortunato opened one of those meetings by asking the employees if any of them had already signed a union card. According to Ubierra, when no one responded, Fortunato then asked if any employees had complaints regarding the job, or if there was anything they wanted to discuss, or anything he could do for the employees.

I conclude that Fortunato's response to employees' questions concerning benefits, when taken into context with his unlawful conduct described above and below constitutes an implied promise of benefits and is in violation of Section 8(a)(1). *Selkirk Metalbestos,* 321 NLRB 44, 51 (1996), citing *Pincus Elevator & Electrical Co.,* 308 NLRB 684, 692 (1992), enfd. 998 F 2d 1004 (3d Cir. 1993). For the same reasons I find an implied promise of benefits in violation of Section 8(a)(1) when Fortunato asked his employees if they had any complaints regarding their job, or if there was anything they wanted to discuss.

I find Fortunato's questioning of his employees as to whether any of them had signed a union card to be a clear and unlawful interrogation in violation of Section 8(a)(1). *Greenfield Die & Mfg. Corp.,* 327 NLRB 237 (1998); *Americold Services,* 323 NLRB 1095 (1997); and *Rossmore House*, 269 NLRB 1176 (1984).

The No-Solicitation Clause

Respondent's current "Hourly Employees Manual" has been in effect since June 1994. The manual contains a no-solicitation and no-distribution rule, which states:

(V) SOLICITATIONS:

> There will be no solicitation or collection of funds, in the working areas or for any purpose during work hours on the St. George premises. Nor will the distribution of written or printed matter of any description for any purpose will be allowed. Absolutely no materials may be posted in the company bulletin boards or clock areas, except by management.

On Friday, March 19, 1999, Leonard Sides was informed by coworkers that the employees had to sign for their copy of the employee "Manual" in order to collect their paychecks from the accounting department. When Sides went to accounting at the end of the day and asked for his check, he was told that he should sign for receipt of the employee "Manual." Only after he signed the receipt, he was given his check. Sides and approximately 12 other employees were asked to sign for receipt of the employee "Manual" on March 19, 1999. None of these employees were new hires and many, like Sides, had been employed with Respondent for more than 1 year. However, these employees had never signed a receipt for the handbook upon their hire by Respondent.

Around March 19, Linda Kuper testified she reviewed one or two employee personnel files, and realized that signature pages for the receipt of employees' manual were missing from some files. In this regard, Linda Kuper initially testified that she had gone to the personnel files for "whatever reason," and that she had seen that there were one or two files missing signature pages, including Sides. When questioned as to what inspired Kuper to go through employee files, she testified she didn't know. Kuper then testified that during the union organizing drive she had noticed and been concerned by some employees like Tharp, who were exhibiting a "You can't touch me" attitude and testified further that an example of this attitude would be Sides' statement to Steve Kuper on February 2, the date of Sides initial discharge that Sides "would see Respondent in court." Kuper stated that this raised a concern with regard to Sides because he was essentially saying that Respondent could not discipline or discharge him. Kuper further testified that when it was discovered that Sides did not have a signed receipt for the employee manual that raised a concern because that meant there was nothing in Sides' file where he admitted that Respondent had the right to discipline him.

The testimony of Kuper establishes conclusively that she required Sides and the 12 other employees to sign these receipts of the hourly employees manual because of Tharp's and Sides' union activities, which consisted primarily of distributing union cards to Respondent's employees at Respondent's facility. Respondent's "Manual" prohibits employee solicitations and distribution of written matter in working areas during working hours. In this regard, "work hours" as opposed to "working time," connotes all hours of the workday including break and lunchtimes. Thus, the parameters of this rule are ambiguous and overly broad and, absent a showing that some legitimate purpose is served; the rule is facially invalid. *Control Services,* 314 NLRB 421 (1994), *Jay Metals,* 308 NLRB 167 (1992); *Southwest Gas Corp.,* 283 NLRB 543, 546 (1997); *Brigadier Industries Corp.,* 271 NLRB 656, 657 (1984). Respondent's rule is also invalid because it prohibits solicitation on the employees' own time. *Out Way, Inc.,* 268 NLRB 394 (1983).

Accordingly, I conclude that Respondent's no-solicitation clause is unlawful and that Respondent's distribution or requiring its employees to sign a receipt of the manual containing

[3] R. Exhs. 13 and 14.

such clause was motivated by the union activities of Sides and Tharp and is a violation of Section 8(a)(1).

Unlawful Surveillance

The General Counsel alleges that Respondent supervisor, Paul Smith, engaged in unlawful surveillance of employees, when he attended a union meeting. Respondent denies Smith was a supervisor within the meaning of Section 2(11) of the Act, but admits Smith was an agent within the meaning of Section 2(13) of the Act. There is no dispute that Smith told Fortunato of his intention to attend a union meeting, and that Fortunato told him it would be "okay," and that Smith attended such meeting in the presence of Respondent's employees. The meeting took place away from Respondent's facility.

It is undisputed that up and until the summer of 1998 Smith was a 2(11) supervisor, with a title of "export supervisor." Thereafter, he was reassigned to the title "import door checker," not a supervisory position. However, the credible evidence establishes that following such reassignment he continued to be paid at the same rate, and that he retained the authority to effectively recommend discharge and discipline. Moreover, Smith continued to assign Hilo drivers as he had prior to such reassignment.

To establish supervisory status, the party raising such allegations, must show that an individual exercises at least one of these types of authority with independent judgment on behalf of management and not in a routine or sporadic manner. *Feldkamp Enterprises, Inc.,* 323 NLRB 1193 (1997), citing *DST Industries,* 310 NLRB 957, 958 (1993); and *The Door,* 297 NLRB 601 (1990).

I conclude Smith was a supervisor within the meaning of the Act. I also conclude that by his attendance at a union meeting Respondent engaged in unlawful surveillance of Respondent's employees in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

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

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

3. Respondent interrogated its employees about their membership in, and activities on behalf of the Union in violation of Section 8(a)(1) of the Act.

4. Respondent promised its employees increased benefits and improved terms and conditions of employment if they did not select the Union as their collective-bargaining representative, in violation of Section 8(a)(1) of the Act.

5. Respondent solicited grievances from its employees concerning wages, hours, and other terms and conditions of employment in order to induce its employees not to select the Union as their collective-bargaining representative, in violation of Section 8(a)(1) of the Act.

6. Respondent unlawfully surveilled its employees union activities were under surveillance, in violation of Section 8(a)(1) of the Act.

7. Respondent commenced a program of issuing written warnings to its employees rather than its customary oral warnings because of their employees membership in, and activities on behalf of the Union.

8. Respondent promulgated and distributed to its employees an unlawful no-solicitation clause because of its employees, membership in, and activities on behalf of the Union, in violation of Section 8(a)(1) of the Act.

9. Respondent issued written warnings to its employees because of their membership in, and activities on behalf of the Union, in violation of Section 8(a)(1) and (3).

10. Respondent discharged its employees Leonard Sides and Jesse Tharp because of their membership in, and activities on behalf of the Union, in violation of Section 8(a)(1) and (3) of the Act.

The Election

Pursuant to a stipulated election agreement, an election was held on April 14, 1999 (Case 22–RC–23270), in a unit of Respondent's full-time and regular part-time warehouse employees. The tally of ballots showed:

Approximate number of eligible voters…..…….40
Void ballots……..…….1
Votes cast for Petitioner (Union)……16
Votes cast against Petitioner……...17
Valid votes counted……..…...33
Challenged ballots……..……...4

The challenges were sufficient to affect the results of the election.

On June 10, 1999, the Region issued its report on challenge ballots and order consolidating cases Respondent challenged Tharp and Sides and the Board agent challenged John Bevan and Tony Daniels on the ground that they arrived to vote after the poll had closed. Pursuant a stipulation, the challenges to Bevan and Daniels was sustained and approved by the Regional Director, and the challenges of Sides and Tharp consolidated with the instant trial.

In view of my finding that Sides and Tharp were discriminatorily discharged in violation of Section 8(a)(1) and (3), I recommend that their challenged ballots be opened, counted, and a revised tally of Ballots be prepared.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I recommend that Respondent be ordered to cease and desist, and to take certain affirmative action to effectuate the policies of the act.

Having found that the Respondent discriminatorily discharged Leonard Sides and Jesse Tharp, I shall recommend that the Respondent offer them immediate and full reinstatement to their former jobs or, a substantially equivalent position without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay provided shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Additionally, any written warnings to Sides and Tharp or reference to their discharge shall be expunged from their records and written notice given to them to this effect.[4]

[Recommended Order omitted from publication.]

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