Nations Rent, Inc. *and* International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL–CIO. Cases 25–CA–27257–1, 25–CA–27257–3, 25–CA–27608–1, 25–CA–27613–1, 25–CA–27686–1 amended, and 25–CA–27994–1

June 29, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On August 28, 2003, Administrative Law Judge Margaret M. Kern issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

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

The Board has considered the decision[1] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found, inter alia, that the Respondent discharged employee Jerry Bickel in violation of Section 8(a)(3) and (1) and instigated police interference with lawful picketing, in violation of Section 8(a)(1). Excepting, the Respondent contends that the record evidence does not establish that Bickel was discharged, and that the Respondent involved local police in speaking to pickets to allay legitimate concerns that the pickets were violating the law. We find merit in these exceptions and therefore reverse both of the judge's unfair labor practice findings.

I. THE ALLEGED DISCHARGE OF JERRY BICKEL

A. Facts

The Respondent, Nations Rent, Inc., is a corporation engaged in the sale, service, and rental of construction equipment and supplies. The events involved in this case transpired at the Respondent's Elkhart, Indiana facility. In late March 2000, Jerry Bickel, a member of the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL–CIO (the Union), sought employment at the Respondent's Elkhart facility with the objective of organizing the Elkhart employees. Bickel secured a position with the Respondent and began actively promoting the Union in the spring of 2000. As Bickel proceeded with his organizing efforts over the ensuing year, the Respondent took several measures to counteract those efforts. The Respondent does not except to the judge's finding that some of those measures constituted unfair labor practices.

On May 19, 2001,[3] Bickel approached Branch Manager Dan Olinger and, in the presence of Assistant Branch Manager Chad Green told Olinger that he was going on strike. Bickel simultaneously handed Olinger a letter specifying that the strike was "in protest of the [Respondent's] unfair labor practices" and stating that he looked forward to returning to work once the "dispute" was resolved. Bickel then said, "I'm gone," and Olinger replied, "Okay." As Bickel left, he shook hands with Green and told him it had been nice working with him.

Later that same day, May 19, Olinger drafted and mailed a letter to Bickel that accepted Bickel's "letter of resignation" and asked him to contact Olinger to arrange for the return of any company property he still had in his possession. Bickel received this letter the following week and replied, on June 4, with a certified letter stating that he had not resigned but was on an unfair labor practice strike. In his letter, Bickel reiterated his intention to return to work "upon the resolution of the unfair labor practices." Bickel eventually received a certified mail receipt verifying that Olinger had received his June 4 letter. The record discloses no action by the Respondent in response to Bickel's June 4 letter.

B. Discussion

The General Counsel has the burden of proving every element of a claimed violation of the Act. *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 fn. 5 (2003). Where an unlawful discharge is alleged, it is self-evident that the General Counsel must show, first and foremost, a discharge. The fact of a discharge does not depend on the use of formal words of firing. *Lance Investigation Service*, 338 NLRB 1109, 1110 (2003); *North American Dismantling Corp.*, 331 NLRB 1557 (2000), enfd. in relevant part and remanded 35 Fed.Appx. 132 (6th Cir. 2002). "It is sufficient if the words or action of the employer 'would logically lead a

[1] In *Nations Rent, Inc.*, 339 NLRB 830 (2003), the Board found that the Respondent had failed to adhere to certain terms of a settlement agreement, and that the judge had erred in reinstating that agreement and dismissing the complaint. Based on those findings, the Board ordered the complaint reinstated and remanded the case to the judge to adjudicate the merits of the unfair labor practice allegations. The judge has done so, and the case is before us again on the Respondent's exceptions to her supplemental decision.

Member Schaumber notes that he dissented in the earlier proceeding and would not have set aside the settlement agreement under the circumstances presented there.

[2] We have modified the judge's recommended Order in light of our findings herein, and we have substituted a new notice to comport with these modifications.

[3] All dates hereafter are in 2001, unless otherwise specified.

prudent person to believe his [or her] tenure has been terminated.'" *North American Dismantling Corp.*, supra (quoting *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964)).

In the instant case, the evidence offers no support at all for a finding of discharge. At most, the evidence supports a finding that Respondent perceived a resignation, and that Bickel corrected that perception. There is nothing to suggest that the Respondent disagreed with Bickel's correction.

More specifically, Bickel's message of May 19 was confusing. On the one hand, his letter said that he was going on strike. On the other hand, his oral statement was that "I'm gone" and that it had been nice working with the Respondent. Olinger interpreted Bickel's words as a severance of the employment relationship. Thus, Olinger wrote Bickel a letter which accepted Bickel's "letter of resignation."[4] Olinger sought the return of company property that Bickel had in his possession. Bickel then acted to correct the misperception. Bickel said that he was on strike and had not resigned. Most significantly, the Respondent did not quarrel with Bickel's "last word," and it has taken no steps to retrieve the company property that Bickel had in his possession.

In finding that the Respondent discharged Bickel, the judge relied solely on Olinger's May 19 letter. To determine what a prudent person in Bickel's situation would logically believe as to his employment status, however, it is necessary to consider the entire course of relevant events following Bickel's declaration of an unfair labor practice strike, and not merely the Respondent's May 19 letter. As noted above, Bickel responded to Olinger's May 19 letter accepting Bickel's resignation with a certified letter dated June 4 emphatically stating that he had not resigned. Bickel knew the Respondent had received his letter because the certified mail receipt was returned to him. There is no evidence that, after receiving Bickel's June 4 letter, the Respondent persisted in its position that Bickel had resigned. The Respondent did not reiterate that position. Neither did it communicate to Bickel in some other way that it still viewed him as having resigned, such as by renewing its May 19 request that Bickel return any company property in his possession, or by mailing him a final paycheck.

Viewing this course of events from the employee's perspective, as required under Board law, *Pink Supply Corp.*, 249 NLRB 674 (1980), we are not persuaded that a prudent person in Bickel's position logically would have concluded that his employment had been terminated. This is not a case in which the employer continued to insist that the employee had resigned even after receiving the employee's denial of any resignation. See *Emergency One, Inc.*, 306 NLRB 800 (1992). Here, the General Counsel did not present any evidence to suggest that the Respondent, after receiving Bickel's June 4 letter clearly and expressly denying that he had resigned, persisted in the view that Bickel's employment with the Respondent had ended. Under these circumstances, a prudent person would not conclude that he had been discharged.[5]

We agree with our colleague that the test is whether Bickel would reasonably believe that he had been discharged. Based on the Respondent's acquiescence in Bickel's last word, and on the Respondent's allowing Bickel to retain company property, Bickel could not reasonably conclude that he had been fired. Further, at the very least, the General Counsel (who bears the burden of proof) has not established the contrary.

Our colleague asserts that the Respondent's 8(a)(1) conduct would lead Bickel to believe that he had been discharged. We disagree. That conduct could arguably support a finding that a discharge would be discriminatorily motivated, but it does not support the proposition that Bickel was discharged or that he could reasonably perceive himself as such. As discussed above, this case involves an incorrect perception of resignation, which misperception has been corrected.

II. ALLEGED INSTIGATION OF POLICE INTERFERENCE WITH LAWFUL PICKETING

A. Facts

The Respondent's Elkhart facility is situated on the south side of Toledo Road, behind a fence that runs parallel with that thoroughfare. Early in the morning on May 21, members of the Union began picketing along the south edge of Toledo Road, in the vicinity of the Elkhart facility's east gate. About an hour later, Olinger contacted the local police department and requested that a police officer be dispatched to the Elkhart facility. Officer James Smith arrived at the facility in response to

[4] Although the Respondent referred to Bickel's "letter" of resignation, the reference cannot be read in isolation, but must be interpreted in the context of Bickel's contemporaneous comments that he was "gone" and that it had been nice working for the Respondent.

[5] The cases cited by the dissent are distinguishable, as each presents facts probative of a discharge that are absent here. In *Accurate Wire Harness*, 335 NLRB 1096 (2001), enfd. 86 Fed.Appx. 815 (6th Cir. 2003), the employer told the employees not once but twice that their walkout would be treated as a resignation and posted a "Now Hiring" sign at the front entrance to its building. In *Harvard Industries*, 294 NLRB 1102, 1110–1111 (1989), enfd. 921 F.2d 1275 (D.C. Cir. 1990), the employer's letter stated that the employer wished the employees success in their future endeavors and asked them to "notify us in writing by June 1st if you would like to be considered for employment in the future."

this request and spoke with Olinger, who wanted to know what the Respondent's rights were in relation to the picketing. Officer Smith replied that the pickets could lawfully picket within a 15-foot public easement bordering the road. They could not, however, block the entrances or exits to the Respondent's facility, nor could they stray outside the public easement onto the Respondent's property. After speaking with Olinger, Officer Smith approached the pickets and relayed the same information to them.

Over the next few days, the picketing continued. On May 23, Olinger again asked the police to come to the Elkhart facility. As before, Officer Smith was dispatched and spoke with Olinger. Olinger told Officer Smith that the pickets' cars had been parked outside the public easement and on the Respondent's property, and that the cars had been moved after he called the police. Olinger said he suspected that the pickets had a police scanner, which enabled them to remove their cars from the Respondent's property before the police arrived. Olinger also told Officer Smith that the pickets were following employees home at night. Officer Smith testified that Olinger wanted him to "look into that or ask [the pickets] about that."

Acting on Olinger's concerns, Officer Smith spoke to the pickets and questioned them regarding each of Olinger's allegations. Officer Smith warned them that each allegation, if true, could justify their arrest under state law. The pickets admitted following the Respondent's employees to jobsites, but denied following them home at night. The pickets also denied possessing a police scanner. One of the pickets admitted that he had moved his car onto the Respondent's property, but said that he did so only to accommodate the movement of the Respondent's equipment. The Respondent does not except to the judge's finding that it interfered with the pickets, in violation of Section 8(a)(1), by parking heavy machinery outside its fence and erecting scaffolding within the 15-foot margin identified by Officer Smith as a public easement.

B. Discussion

The judge found that the Respondent's conduct on May 23 (i.e., calling the police and asking the police to question the pickets) violated Section 8(a)(1) of the Act. The Respondent excepts. We find merit in the Respondent's exceptions and therefore reverse the judge's finding of an 8(a)(1) violation.

It is well established that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests. See *Great American*, 322 NLRB 17, 21 (1996). So long as the employer is acting on the basis of a reasonable concern, Section 8(a)(1) is not violated merely because the police decide that, under all the circumstances, taking action against the pickets is unwarranted.

Here, the Respondent involved the police based on a reasonable concern that the pickets were trespassing on its property, monitoring a police scanner, and following employees home. These concerns fully justified the Respondent's involvement of the police.[6] Concededly, the Respondent unlawfully parked machinery outside its fence and erected scaffolding on a public easement. However, these facts do not establish that, in contacting the police, the Respondent was motivated by a purpose to harass rather than by its reasonable concerns. There is no dispute that trespassory picketing occurred: one of the pickets admitted trespassing on the Respondent's property. Our colleague says that the Respondent caused this trespass by moving a piece of equipment. However, that does not negate the fact of trespass. Further, there is no showing that in making way for the Respondent's equipment, the picket's sole option was to trespass. He could have also driven away on Toledo Road and returned once the equipment had been moved. There is also no dispute that the trespass ended shortly after Olinger called the police, reasonably suggesting the possible use of a police scanner. The pickets also admitted following employees as they left the Elkhart facility. In light of that fact, Olinger reasonably could be concerned that the pickets might be following employees home. This concern privileges the minimal intrusion of asking Officer Smith merely to "look into" or "ask" the pickets whether they were doing so. Thus, for all of the foregoing reasons, we find that the Respondent's involvement of the police on May 23 did not violate Section 8(a)(1).

In asserting a contrary view, our colleague relies on the Respondent's unlawful effort to interfere with the pickets. However, that conduct does not preclude the Respondent from calling police authorities to report a reasonable concern that local laws were being violated. A contrary view would mean that a person who has violated the Act is precluded from calling local police to report local infractions. Our colleague denies that this is his view. However, that denial is premised on the asserted "spuriousness" of the Respondent's concern about the picketing. As set forth above, that concern was far from spurious.

[6] This case is distinguishable from *The Greenbrier*, 340 NLRB 819 (2003), in which the panel majority found that the respondent lacked any reasonable basis for seeking police assistance in response to lawful picketing. The Chairman adheres to his dissenting view in that case that the respondent had a reasonable concern sufficient to warrant the seeking of police assistance.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Nations Rent, Inc., Elkhart, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in effect, either orally or in writing, a no-solicitation/no-distribution rule that unlawfully prevents employees from engaging in solicitation or distribution during nonworktime.

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

(c) Threatening to close the business because employees engage in activities on behalf of or support the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL–CIO (the Union), or any other union.

(d) Telling employees that they would be kept apart, that they would not be allowed to speak with one another, that they would not be allowed to talk about a union, and that their activities would be monitored because of their activities on behalf of, or support for, the Union or any other union.

(e) Prohibiting employees from wearing union buttons, union hats, or any other type of union insignia while at work.

(f) Discharging, disciplining, or otherwise discriminating against any employee for supporting the Union or any other union.

(g) Interfering with the right of employees to engage in picketing by physically blocking the area where picketing is taking place.

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

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and September 26, 2000 discharge of Jerry Bickel, and within 3 days thereafter, notify Bickel in writing that this has been done and that the discipline and discharge will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its Elkhart, Indiana facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2000.

(c) 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.

[7] 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."

MEMBER WALSH, dissenting.

Contrary to my colleagues, I find no merit in the Respondent's exceptions in this case. The judge correctly determined that the Respondent unlawfully discharged Jerry Bickel for a second time on May 19, 2001, in violation of Section 8(a)(3) and (1) by treating Bickel's declaration of an unfair labor practice strike as a resignation. The judge also correctly found that the Respondent interfered with lawful picketing in violation of Section 8(a)(1) by instigating the questioning of pickets by local police.

I. THE DISCHARGE OF JERRY BICKEL

In determining whether an employee has been discharged, the relevant events must be viewed from the employee's perspective, not the employer's. *Flat Dog Productions*, 331 NLRB 1571 (2000) (citing *Brunswick Hospital Center, Inc.*, 265 NLRB 803, 810 (1982)). The test, in such cases, is whether the employer's statements would reasonably lead the employee to believe that he or she has been discharged. Id. It is also well established that an employer unlawfully discharges striking employees by erroneously treating them as if they had resigned.[1] In assessing whether Bickel would reasonably have considered himself discharged in this case, the entire course

[1] See, e.g., *Accurate Wire Harness*, 335 NLRB 1096 (2001) (employer unlawfully discharged employees engaged in a protected strike when it told them that it would treat the walkout as a resignation), enfd. 86 Fed.Appx. 815 (6th Cir. 2003); *Harvard Industries*, 294 NLRB 1102, 1110–1111 (1989) (employer unlawfully discharged employees honoring the union's picket line when it sent them letters stating that it regretted that the employees voluntarily resigned), enfd. 921 F.2d 1275 (D.C. Cir. 1990).

of relevant events through June 2001,[2] must be taken into account.

Just over 1 month after gaining employment at the Respondent's Elkhart facility, Bickel, a member of the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL–CIO (the Union), began actively seeking to organize the Respondent's employees. As Bickel's activities became apparent, the Respondent set out to silence Bickel and any other employee who shared his union sympathies. The Respondent forbade Bickel to talk about the Union or to speak with another prounion employee at work, and told Bickel that he was being monitored. Just a few months before the discharge at issue here, the Respondent fired Bickel for wearing a union hat to work. Although the Respondent reinstated Bickel, it did not renounce its campaign to stifle his organizing activities. The Respondent subsequently disciplined Bickel for displaying a sample collective-bargaining agreement in the Elkhart facility, even though displays of personal items were generally permitted. The Respondent does not except to the judge's finding that all of the foregoing conduct violated the Act. "These uncontested violations do not disappear altogether. '[T]hey remain, lending their aroma to the context in which the contested issues are considered.'" *Rock-Tenn Co. v. NLRB*, 69 F.3d 803, 808 (7th Cir. 1995) (quoting *NLRB v. Shelby Memorial Hospital Assn.*, 1 F.3d 550, 567 (7th Cir. 1993)).

Following these events, on May 19 Bickel declared a strike in protest of the Respondent's unfair labor practices. He gave Elkhart branch manager, Dan Olinger, a letter stating as much. Although Bickel's letter made no mention of resigning and, in fact, specifically stated Bickel's intent to return to work upon resolution of the "dispute" over the unfair labor practices, the Respondent immediately proceeded to act as if Bickel had resigned. On the very day that Bickel declared his unfair labor practice strike, the Respondent mailed Bickel a letter purporting to accept his "letter of resignation." On June 4, Bickel replied with a letter denying that he had resigned and reiterating his desire to return to work once the Respondent's unfair labor practices had ceased. This letter was greeted by complete silence.

These events would reasonably lead Bickel to believe that he had been discharged. By its conduct over the course of the preceding year, the Respondent had clearly conveyed to Bickel its willingness to threaten, discipline, and even discharge him in order to stifle his prounion activities. Thus, when Olinger falsely characterized Bickel's declaration of an unfair labor practice strike as a resignation, Bickel had every reason to believe that he had been discharged. Nevertheless, he gave Olinger an opportunity to change his position by sending the June 4 letter. Olinger did not reply. Divorcing Olinger's silence from the history of the Respondent's treatment of Bickel, my colleagues view it as suggesting Olinger's position might have changed. Before finding a discharge, they would require Olinger to expressly reiterate his May 19 position. But when the handwriting is already on the wall, reasonable people can read it without needing to have it reinscribed. Viewing Olinger's silence from Bickel's perspective, which was necessarily shaped by the Respondent's longstanding hostility toward his union activity, Bickel would have reasonably construed it to mean that there was no change of position on Olinger's part. His "resignation" was accepted. In other words, he was discharged for participating in a lawful strike.[3]

My colleagues maintain that the evidence in this case does not demonstrate a discharge, but merely a misperception on Olinger's part that Bickel created by saying "I'm gone" and that it had been nice working with the Respondent. These statements, according to my colleagues, were "confusing" and explain Olinger's May 19 letter to Bickel accepting his "letter of resignation." However, my colleagues do not dispute that Bickel's letter said nothing about resigning, and in fact contradicted any such notion by unambiguously stating Bickel's intent to return to work. Thus, this case is not, as the majority contends, one of misperception on Olinger's part, but rather one of mischaracterization.

More fundamentally, Olinger's perceptions, whatever they may have been, are irrelevant to the determination of whether Bickel was discharged. As the majority acknowledges, a discharge is determined by reference to the *employee's* perspective. Bickel knew that his letter to the Respondent contained no suggestion of resignation. Bickel also knew that the Respondent had repeatedly resorted to unlawful conduct in its attempts to squelch his protected activities.[4] Thus, against that background,

[2] All dates hereafter are in 2001, unless otherwise specified.

[3] *Accurate Wire Harness*, supra; *Harvard Industries*, supra.

[4] The majority contends that the Respondent's prior unlawful conduct toward Bickel does not support a finding that Bickel was discharged, but rather would only support a finding of discriminatory motivation once the fact of discharge were otherwise established. That is plainly incorrect. Again, under the applicable standard, the dispositive question is whether the Respondent's conduct would reasonably lead Bickel to believe he had been discharged. Because people have memories, Bickel would of course consider the history of his treatment by the Respondent as well as Olinger's mischaracterization of his letter in forming the reasonable belief that he had been discharged. At that point, the Respondent's prior 8(a)(1) conduct would again be relevant, as my colleagues acknowledge, to a finding that the discharge was discriminatorily motivated.

when Olinger mischaracterized his letter as a "letter of resignation," Bickel reasonably believed he had been discharged—and therefore, as a matter of law, he was.

II. INSTIGATION OF POLICE INTERFERENCE WITH LAWFUL PICKETING

My colleagues correctly state that an employer may lawfully seek police assistance in response to picketing so long as the employer is motivated by a reasonable concern relating to public safety or the employer's legally protected interests. See *Great American*, 322 NLRB 17, 21 (1996). In this case, however, the Respondent enlisted the help of police not out of any such reasonable concern, but for the purpose of interfering with lawful picketing. See *The Greenbrier*, 340 NLRB 819 (2003). Therefore, the judge correctly found the Respondent's conduct in this regard unlawful.

The majority accurately summarizes the events that precipitated the finding of police interference to which the Respondent now excepts. However, once again, the majority underplays the larger context of harassment and interference in which these events took place. During the 4-day period in which the Respondent twice contacted police, the Respondent carried out an escalating campaign of physical interference with the pickets. On May 22, it parked seven pieces of heavy machinery outside its fence and within the public easement. Picketing continued, so on May 23—the date of the alleged instigation of police interference—it parked nine pieces of equipment within this same easement area. That same day, just inside the fence, it ran a diesel-powered generator so loud that Officer Smith told Olinger he would be unable to talk to the pickets unless it were shut off. Once again, however, picketing continued. When the pickets arrived on May 24, they found the public easement in front of the Elkhart facility completely filled and blocked by scaffolding. The Respondent does not except to the judge's finding that all of this physical interference with picketing violated Section 8(a)(1) of the Act.

The Respondent's escalating attempts to physically obstruct picketing strongly undermine the majority's conclusion that the Respondent had no harassing purpose in instigating police interference with the pickets on May 23. In light of those contemporaneous attempts, it is evident that the Respondent sought police assistance on May 23 as part of a transparent and continuing effort to interfere with the picketing by any means available. When the police failed to get rid of the pickets, the very next day the Respondent abandoned any pretense of acting rationally and simply lined the edge of Toledo Road with useless scaffolding. In light of the Respondent's evident purpose to harass the pickets, Olinger's unsubstantiated suspicions and conjectures about police scanners and pickets stalking employees to their homes do not constitute "reasonable concerns" justifying the involvement of police.

My colleagues fault the preceding analysis. Because I view the Respondent's instigation of police interference with the pickets within the context of its contemporaneous unlawful physical interference, they imply that I would preclude violators of the Act from calling the police to report unlawful conduct. That is not my position, nor is it a fair inference from my analysis. My point is simply that the spuriousness of the Respondent's pretended concern over the legality of the pickets' behavior is all the more obvious when its conduct is viewed as a whole.

My colleagues also cite a trespass by one of the pickets as a reasonable basis for contacting the police. But the only reason the picket briefly moved his vehicle outside the public easement and onto the Respondent's property was to make way for the movement of one of the pieces of heavy equipment the Respondent had parked outside the fence to obstruct picketing. In other words, the Respondent caused the trespass. Under these circumstances, that trespass cannot justify contacting the police. In sum, the Respondent instigated police interference with lawful picketing in violation of Section 8(a)(1).

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain in effect, either orally or in writing, a rule that prohibits you from engaging in solicitation or distribution during nonworktime.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten to close our business because you support the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL–CIO (the Union), or any other union.

WE WILL NOT tell you that you will be kept apart at work, that you cannot speak with one another, that you cannot talk about a union, or that your activities will be monitored because you support the Union or any other union.

WE WILL NOT prohibit you from wearing union buttons, union hats, or any other type of union insignia while at work.

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

WE WILL NOT interfere with your right to engage in lawful picketing by physically blocking the area where picketing takes place.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline and discharge of Jerry Bickel, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline and discharge will not be used against him in any way.

NATIONS RENT, INC.

Steve Robles, for the General Counsel.
James M. Walters, (Fisher & Phillips LLP), for the Respondent.
Alexia Kulwiec, IUOE Local 150 Legal Department, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in South Bend, Indiana on June 3 and 4, 2002.[1] A consolidated complaint issued on December 21, 2000, based on unfair labor practice charges filed on September 29, 2000, by International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL–CIO (the Union) against Nations Rent, Inc. (Respondent). On April 3, 2001, the Regional Director for Region 25, approved a settlement agreement resolving the allegations in the December 2000 complaint. On September 20, 2001, an order partially revoking the settlement agreement and a consolidated complaint issued based on unfair labor practice charges filed on September 29, 2000, and May 21 and 24, July 2 and July 27, 2001. On November 14, 2001, the Regional Director approved a second settlement agreement resolving the allegations of the September 2001 complaint. On February 28, 2002, an order revoking the second settlement agreement and consolidated complaint issued based on charges filed on September 29, 2000, May 21, May 24, July 2 and July 27, 2001, and January 4, 2002.

On August 12, 2002, I issued a decision recommending dismissal of the February 28, 2002 complaint on the ground that Respondent had complied with the terms of the second settlement agreement. On July 29, 2003, the Board reversed and concluded that Respondent had failed to comply with material provisions of the second settlement agreement, and that the Regional Director had acted properly in setting that agreement aside. The Board reinstated the February 28, 2002, complaint and remanded the case to me to consider the presettlement unfair labor practice allegations and to make the necessary findings, analysis, and conclusions.

It is alleged in the February 28, 2002 complaint that since July 2000, Respondent has maintained an unlawful written no-solicitation/no-distribution rule in its employee handbook. It is further alleged that on August 8, 2000, Respondent interrogated an employee and threatened to close the Company if employees selected the Union as their collective-bargaining representative; that on August 8, 2000, Respondent orally promulgated and has since maintained a rule prohibiting employees from talking about the Union during working hours, and informed employees they were not to talk with one another and would be kept apart because of their union activities; that on September 6 and 26, 2000, Respondent instructed employees to remove their union buttons and union hats; and that commencing on May 21, 2001, Respondent interfered with the Union's ability to engage in lawful picketing. Finally, it is alleged Respondent discharged Jerry Bickel on September 26, 2000, reinstated him on September 27, 2000, issued a written warning to him on April 26, 2001, and discharged him a second time on May 19, 2001, because of his union activities and because he engaged in an unfair labor practice strike. Respondent denies that it engaged in the unfair labor practices alleged.

FINDINGS OF FACT

I. JURISDICTION

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

II. LABOR ORGANIZATION STATUS

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

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the sale, service, and rental of construction equipment and supplies, and maintains a facility at 1651 Toledo Road, Elkhart, Indiana, the facility involved in this case. Toledo Road runs in an east/west direction, and the facility is located along the south side of the roadway. A chain link fence that surrounds the facility is situated approximately 30 feet from Toledo Road. There are two gated entrances/exits along Toledo Road; the east gate is a 30-foot sliding gate, and

[1] At the close of the hearing, counsel for the General Counsel requested that the record remain open pending the investigation of a newly filed charge in Case 25–CA–28107–1. That application was denied, and I adhere to that ruling. The record was left open for the purpose of receiving three W-2 forms. Those forms are made a part of this record as ALJ Exh. 1(a) through (c).

the west gate is a 25-foot swing gate. The 30-foot distance between the fence and Toledo Road is surfaced with limestone-gravel paving.

Respondent employs approximately 10 drivers and service employees at the Elkhart facility. Tim Bontrager is a supervisor, Barry Boggs is a district manager, and Alan Stewart is a human resource manager. Respondent admits that these individuals are supervisors and agents of Respondent within the meaning of the Act. Respondent further admits that Dan Olinger was the branch manager and Chad Green was the assistant branch manager until the fall of 2001, and that they were, until that time, supervisors and agents within the meaning of the Act. Green was promoted to branch manager in September 2001.

On December 17, 2001, Respondent filed a petition for Chapter 11 relief in the Bankruptcy Court, Wilmington, Delaware. That application was still pending at the time of the hearing.

B. The Organizing Attempt

In late March 2000, organizer Philip Overmeyer, asked Bickel, a member of the Union, to seek employment at Respondent's facility and, if hired, to organize Respondent's employees. On March 24, 2000, Olinger interviewed and hired Bickel and Bickel began working on April 3, 2000, as a semi-truckdriver. From April 3, 2000, to mid-May 2000, Bickel remained covert in his support of the Union. On or about May 15, 2000, he began speaking with employees about the Union.

On July 7, 2000, Respondent conducted a meeting of employees in its showroom. Among those present were Olinger, Boggs, and Bontrager. The film, "Little Card, Big Trouble," was shown and there was a discussion about the need for a union at Respondent's facility. It was mentioned that there was an organizing drive going on at one of Respondent's facilities in Detroit and that management wanted to stop the Union before it came to Elkhart. Ryan Stoll, a mechanic who had been hired 2 weeks after Bickel, asked why employees couldn't have a retirement plan and an insurance plan like the Union's plan. He also asked a question about the pay scale.

On July 13, 2000, Overmeyer met with Bickel and Stoll and both signed authorization cards. After this meeting, Bickel continued to talk to employees about the Union. Bickel testified he spoke to employees during lulls in the workday, and he denied interfering with employees' work. On September 18, 2000, Overmeyer sent a letter to Respondent's employees requesting them to attend a meeting on September 25, 2000. The only employee who attended the meeting was Bickel.

C. The Employee Handbook No-Solicitation/No-Distribution Rule

1. Facts

Respondent publishes and distributes to employees an employee handbook. The most recent edition of the handbook, published in July 2000, contains the following provision at page 34:

> Employees may not solicit for organizations, sell goods or services, or distribute catalogs or literature of any kind during working hours, or any time in public areas on Company property. Employees are prohibited from distributing literature of any kind in work areas. Outside third parties are also prohibited from entering Company property to solicit or distribute goods, services, or literature, except as contracted by the Company.

2. Analysis

No solicitation/no distribution rules using the term "working hours" are presumptively invalid because that term connotes periods from the beginning to the end of work shifts, periods that include the employees' own time. *Our Way, Inc.*, 268 NLRB 394 (1983). In this case, the handbook rule prohibits employees from soliciting or distributing literature during working hours and it is presumptively invalid. Respondent has not offered any evidence that it communicated or applied the rule in such a way that it conveyed to employees a clear intent to permit solicitation or distribution of literature during nonworking time. *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001). I therefore find the rule violates Section 8(a)(1) of the Act.

D. Events of August 8, 2000

1. Facts

Bickel and Stoll testified that they frequently wore baseball-type caps to work bearing different corporate logos and they observed other employees wearing similar caps. Prior to the events of this case, neither Bickel nor Stoll had ever been told not to wear these types of caps to work. Both employees also testified that employees regularly engaged in casual, nonwork related discussions while they were working, covering such topics as their children, sports, movies and politics. To Bickel's knowledge, no employee was ever told they could not engage in nonwork related conversations during working time.

On the morning of August 8, 2000, Stoll was in the shop when he was approached by Bontrager and Olinger. They summoned him into Bontrager's office, and the door was closed. Stoll testified that Olinger said he heard Stoll was talking to other employees about the Union, and Stoll said yes. Olinger said that Stoll was not allowed to talk to employees during working time and that he was not allowed to talk during breaks or lunchtime. He also said if Stoll tried to bring the Union in, Respondent would close the doors and that all a union does is take employees' money.

Later that morning, Bickel and Stoll were speaking with one another in the parking lot when Bontrager approached them. Stoll testified that Bontrager said that they were to be kept separate, that they were not to talk with one another, and they were not to talk about the Union. Bickel recalled that Bontrager said he was supposed to keep he and Stoll apart, they were not to talk with one another, and that Olinger had told Bontrager to keep an eye on them. Bickel and Stoll both testified that when Bontrager thereafter saw them talking with one another, he frequently asked if they were having a union meeting. Neither Bontrager nor Olinger testified.

2. Analysis

The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality of the circumstances test adopted by the Board in

Rossmore House, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The task is to determine whether, under all the circumstances, the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Medcare Associates, Inc.*, 330 NLRB 935 (2000), and cases cited. Applying these principles, it is clear the conversation in Bontrager's office was coercive. Stoll testified credibly and without contradiction that he was summoned into the office where he met with two supervisors with the door closed. Olinger's comment that he heard Stoll had been talking about the Union was immediately followed by an unlawful prohibition against Stoll's right to speak to employees during nonworking time, and by a threat to close Respondent's business. Under these circumstances, I find that Olinger unlawfully interrogated Stoll in violation of Section 8(a)(1), unlawfully prohibited him from engaging in solicitation of other employees during nonworktime in violation of Section 8(a)(1), and threatened to close Respondent's business in violation of Section 8(a)(1). With respect to the conversation later that morning, I credit Stoll and Bickel[2] that Bontrager told them that they would be kept apart from one another, that they were not to talk with another, that they were not to talk about the Union, and that thereafter Bontrager would be monitoring their activities. These statements constituted unlawful threats in violation of Section 8(a)(1).

E. Events of September 6, 2000

1. Facts

On September 6, 2000, Stoll wore a union button to work that read, "Be Wise, Organize." Olinger told Stoll, in the presence of Bickel, that he had to remove the button because he was not allowed to advertise for the Union on company time.

2. Analysis

Employees have a protected right under Section 7 of the Act to wear union insignia while working. At the same time, employers possess an undisputed right to maintain discipline in their establishments. In adjusting these mutually limiting rights, the Board has long applied the rule that a ban on wearing union insignia violates the Act unless it is justified by special circumstances. *USF Red Star, Inc.*, 339 NLRB 389, 391 (2003). I credit Stoll's testimony that on September 6, 2000, he was told by Olinger that he was not allowed to wear a union button on company time. Respondent has not offered evidence of the existence of any special circumstance that would justify this prohibition. Olinger's conduct therefore violated Section 8(a)(1).

[2] Although I discredited a portion of Bickel's testimony in my first decision on the issue of his vacation pay, he was a generally credible witness when testifying to the underlying unfair labor practices. His testimony was in large measure uncontradicted by Respondent's witnesses. In addition, his testimony was in some instances corroborated by Stoll, also a credible witness.

F. Events of September 26, 2000: Bickel's First Discharge

1. Facts

On September 26, 2000, Bickel, accompanied by Stoll, wore a baseball cap to work with lettering that read, "IUOE, Local 150..[3] Olinger approached them and told Bickel he could not wear the hat. When Bickel asked why, Olinger said that Bickel was insubordinate and that he was in violation of page 34 of the employee handbook. Bickel said it was just a hat, but Olinger stated that it was grounds for termination and that in addition, Bickel was not supposed to speak to anyone or hand out literature during company hours. Bickel asked, "All this for a hat?" Olinger responded, "Not for any organizations, that was in the handbook." Green, who was present during this conversation, added that not even a Nike hat could be worn. Bickel asked if he was being fired, and Olinger said, "Terminated, by the handbook." Bickel left the premises. Green, the only witness called by Respondent to testify at the hearing, was not asked about this conversation.

On the evening of September 26, 2000, Bickel retrieved a phone message left by Barry Boggs. Bickel called Boggs the following morning and Boggs said that he was overriding Olinger's decision to terminate him and Boggs asked if he would be interested in coming back to work. Bickel said yes and he returned to his regular duties on September 28, 2000. He was fully repaid for the time he was not at work. After he returned to work he wore his union hat on a daily basis. For 6 months following his reinstatement, Bickel worked without incident.

2. Analysis

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

The evidence establishes that on September 26, 2000, Bickel was fired because he wore a union hat to work. Counsel for the General Counsel has satisfied his *Wright Line* burden that Bickel's union activity was the motivating reason for his discharge. Respondent has not put forward any evidence to demonstrate that it would have discharged Bickel on September 26, 2000, absent his union activity. I therefore find Bickel's discharge violated Section 8(a)(1) and (3) of the Act.

[3] Stoll had been suspended on September 23, 2000, 3 days before this incident. His suspension, and his subsequent discharge on September 28, 2000, were resolved in the first settlement agreement.

I credit Bickel's testimony that on September 26, 2000, he received a message from Boggs offering to reinstate him to work. Bickel accepted that offer and returned to his regular duties on September 28, 2000. It is not disputed that Bickel was made whole for the time he was not at work.

G. Events of April 26, 2001

1. Facts

Bickel testified that on occasion he observed nonwork related literature, including a sales catalog and a Chicago Bulls game book, on top of a table in the employee break area. He also observed employees displaying and selling personal items in work areas. One employee displayed a Notre Dame football helmet in the company showroom, and the helmet was purchased by a customer. Another employee was observed, in the presence of Olinger and Bontrager, offering his personal tools for sale in the front counter area of the shop. The same employee was later observed in the service area of the shop trying to sell the same tools. Neither employee was disciplined for engaging in these activities.

On April 25, 2001, Bickel left a copy of a collective-bargaining agreement beside another employee's toolbox. It is not clear from the record where the toolbox was located at the time, i.e., in a work area or a nonwork area. Bickel passed by the employee and told him he had left something by his toolbox and to take a look at it. Later that day, Bickel saw the employee and Olinger standing together looking at the agreement. The next day, April 26, 2001, Bickel was given a disciplinary action report by Olinger that read, "soliciting and distributing literature for an organization on company property during working hours. Jerry must stop this immediately." Later that day, Bickel asked Olinger, in the presence of Bontrager, whether the warning meant he could not talk to employees about the benefits of a union. Olinger said it was in the handbook that there could be no solicitation for an organization on company property or on company time, and that if Bickel was talking about an organization, that meant he was not working.

2. Analysis

Contrary to the assertion made in Respondent's brief, there is no evidence that Bickel interfered with any employee's work, or that he failed to perform his own work, when he left the collective-bargaining agreement by another employee's toolbox. While it is not clear where the toolbox was located, it is an issue that need not be resolved since even if Bickel left the agreement in a work area, Respondent had a past practice of allowing employees to display personal items in work areas. To have disciplined Bickel for leaving a union contract arguably in a work area, while not having disciplined other employees who left personal items in work areas, Respondent violated Section 8(a)(1) and (3) of the Act.

H. Events of May 19, 2001: Bickel's Second Discharge

1. Facts

On the morning of May 19, 2001, Bickel told Olinger that he was going out on strike and he handed Olinger a letter stating that the strike was to protest Respondent's unfair labor practices. The letter further stated that Bickel looked forward to returning to work once the dispute was resolved. Bickel testified that at no time did he tell Olinger, or anyone else, that he was quitting or that he intended to quit. The following week, Bickel received a certified letter from Olinger, dated May 19, 2001, which stated, in relevant part, "I acknowledge receipt and accept your letter of resignation effective May 19, 2001." By certified letter dated June 4, 2001, Bickel wrote Olinger that he had not resigned, that he had gone out on an unfair labor practice strike, and that he wished to return to work on resolution of the dispute.

2. Analysis

I credit Bickel's testimony that on May 19, 2001, he first orally advised Olinger that he was going out on strike, and then handed him a letter restating the same fact. Respondent argues in its brief that Olinger was "under the impression" that Bickel quit. The difficulty with that argument is that Olinger did not testify to his impressions, or to anything else, because he was not called by Respondent as a witness. Bickel's credible testimony is that he clearly conveyed to Olinger he was going out on strike. Olinger's letter to Bickel on May 19, 2001, stating that he was accepting Bickel's "resignation," conveyed the message that participating in a lawful strike was incompatible with continued employment with Respondent. I find Bickel was terminated on May 19, 2001, in violation of Section 8(a)(1) and (3) of the Act.

I. The Events of May 21–24, 2001

1. Facts

On May 21, 2001, at approximately 6:30 a.m., the Union commenced handbilling and picketing at the Elkhart facility with signs that read, "IUOE Local 150 AFL–CIO on strike against Nations Rent for unfair labor practices." Ambulatory picketing was also conducted by two full-time staff organizers who followed Respondent's trucks from the facility to jobsites. Overmeyer testified that he specifically advised the staff organizers conducting the ambulatory picketing not to follow anyone home and Overmeyer testified that no employee was followed home to his knowledge. According to Overmeyer, the reason for the strike was the disciplinary action that had been taken against Bickel.

Records of the Elkhart County Public Safety Communications Center reflect that at 7:47 a.m. on May 21, 2001, a call was received requesting that a police officer respond to the Elkhart facility. Officer James Smith, of the Elkhart County's Sheriff Office, arrived at the facility at 8:30 a.m. and he observed several pickets carrying signs and standing along the south edge of Toledo Road, in the vicinity of the east gate. Officer Smith proceeded to the office where he spoke to Olinger. Olinger wanted to know what the Company's rights were with respect to entrances and exits being blocked, and how close the pickets could be to the Company's property. Smith said the pickets were allowed to remain within a 15-foot public easement measured from the edge of Toledo Road toward the fence. He also said they were not allowed to block the entrances/exits to the Company's property. After speaking with Olinger, Smith went outside and spoke to two of the pickets, neither of whom Smith could identify. According to Smith, he

told them they could not block the entrances or exits to the facility, and that they had to remain within the public easement. Smith left the facility at 8:41 a.m.

Robert Barthel is an elderly gentleman who has been retired from the Union for 17 years, and he identified himself as one of the pickets to whom Smith spoke on May 21, 2001. Barthel recalled that Smith told him and another picketer that they had to stay within the public easement, and that they should stay at least four feet from the edge of the pavement for their own safety. Barthel recalled the tone of the conversation as congenial. On May 22, 2001, Overmeyer and Barthel arrived at the facility at about 6:30 a.m. Both testified they observed approximately seven large pieces of construction equipment parked along the outside of the fence and extending into the public easement. According to Barthel, the location of the equipment "made it a little difficult" for the pickets to park their cars, but he managed to park his car at least 6 feet from the roadway and within the easement. Barthel testified that notwithstanding the presence of the equipment, the pickets had 50 unobstructed square feet within which to picket. Overmeyer agreed that the equipment made parking a little more difficult, but did not in any way hinder picketing activities.

On May 23, 2001, Overmeyer and Barthel again arrived at about 6:30 a.m. and both observed even more pieces of equipment parked outside the fence than had been parked there the day before. Photographs taken that day reflect six large pieces of equipment parked between the west gate and the east gate, and three large pieces of equipment parked west of the west gate. Barthel acknowledged that the presence of the equipment did not prevent the pickets from parking their cars within the easement, nor did it impair their ability to engage in picketing. Overmeyer, on the other hand, testified, "that it was much more difficult for [the pickets] to remain four feet off of the edge of the roadway . . . it was just dangerous." According to Barthel, a large air compressor was running inside the fence and the noise from the compressor made it almost impossible to engage in conversation.

That same morning, the police communications center received a call at 7:12 a.m. requesting that a police officer respond to Respondent's facility. Officer Smith was again dispatched, and when he arrived at 8:05 a.m., he observed the equipment parked outside the fence. He also observed two pickets standing along the edge of Toledo Road, in the vicinity of the east gate, and one or two cars parked within the public easement. Smith passed through the gate and observed a large diesel-powered generator operating in the yard area of the facility, within several feet of the inside of the fence. Smith entered the office and spoke to Olinger.[4] Olinger told him that earlier that morning the pickets' cars had been parked between the easement and the fence, on company property, and that after he called the police the cars had been moved. Olinger said he suspected the pickets had a scanner set to monitor police communications, and that by using the scanner they were able to move their cars to an area within the easement before the police arrived. Smith testified that Olinger told him that pickets were following trucks to jobsites, and that they were following individuals home at night. According to Smith, Olinger "wanted [him] to look into that or ask [the pickets] about that." Smith told Olinger that the generator noise was so loud that he would not be able to talk to the pickets without shutting it off, and the generator was shut off.

Smith proceeded to talk to two pickets, neither of whom Smith was able to identify. Smith testified that he advised them that a claim was being made that they had moved their cars from where they had been earlier parked outside the easement, and he asked them if they had a police scanner. The pickets denied having a scanner and offered to allow Smith to search their vehicles, which offer Smith declined. Smith told them that it was a misdemeanor to possess a police scanner and a jailable offense. Smith then asked them if they had been following individuals to job sites and they said they had. He asked them if they had been following individuals to their homes at night and they said they had not. Smith left the facility at 8:22 a.m.

Barthel testified that he was one of the pickets to whom Smith spoke on May 23, 2001. Barthel recalled Smith saying that someone had made a call to the police claiming that the pickets had parked their cars on company property, and that after the call had been made, the cars had been moved. According to Barthel, Smith told him that if he parked his car outside the easement it would be considered trespassing and Barthel could be arrested. Smith also said that someone had suggested that the pickets might have police scanners and that if so, it was illegal under Indiana law and they could be arrested. Smith asked if the pickets were following anyone home, and Barthel said no. According to Barthel, Smith replied that if that happened, it would be considered stalking and they could be arrested. Barthel described the tone of the conversation as congenial. In his testimony, Barthel acknowledged that he had in fact moved his car about 30 minutes before Smith arrived that morning. He claimed to have parked his car within the easement, but when someone came out to get a piece of equipment, he moved his vehicle out of the way. After the equipment was moved he parked his car back in the same spot.

The pickets left Respondent's facility at 4:30 p.m. on May 23, 2001. Overmeyer stayed at the facility until 5:45 p.m., and shortly before he left, he observed several employees come out of the facility and move the equipment back inside the fence. He also observed a straight truck pulling into the facility loaded with scaffolding.

On May 24, 2001, Overmeyer arrived at the facility at 5:30 a.m. He observed that scaffolding had been erected across the entire length of the facility on Toledo Road, with the exception of the two gates. The scaffolding was approximately 7 feet high and 6 feet wide, and it was positioned 3 feet from the roadway. Yellow caution tape was strung along the edge of the scaffolding closest to Toledo Road. The distance from the fence to the scaffolding was wide enough for a car to drive through. Photographs taken that day show that the public easement was almost entirely blocked by the scaffolding. At first Overmeyer testified there was no place for the pickets to park, but he later admitted that there was a gas station 300 yards east of the facility which had available parking space. Regardless of parking space, however, Overview testified that in his view it would have been too

[4] Respondent acknowledged in its brief that it was Olinger to whom Officer Smith spoke on May 21 and 23, 2001.

dangerous for pickets to patrol the three feet of the public easement that remained unobstructed. He sent the pickets home, and no further picketing was conducted.

Following May 24, 2001, Overmeyer drove past the facility on a daily basis except Sundays. He observed that the scaffolding remained in place until June 13, 2001, when it was taken down. At no time did he observe anyone utilizing the scaffolding. Nor did he observe equipment parked outside the fence after May 24, 2001. Bickel similarly testified that from December 10, 2001, when he returned to work, up until several weeks before the hearing in this case, he never again observed large pieces of equipment parked outside the fence.

At the end of January 2002, the Union engaged in handbilling at Respondent's facility and erected a 20-foot tall inflatable rat. According to Green, the handbillers stood outside the 15-foot easement, "clearly" on company property. Despite the encroachment, the police were not called and there was no interference with the Union's activities.

2. Analysis

a. Respondent's physical interference with picketing

The evidence establishes that on May 22, 2001, Respondent parked seven pieces of heavy machinery outside the fence surrounding its facility, in the area where the Union had commenced picketing the day before. Respondent did not present any evidence to support a business justification for this action. The following day, May 23, 2001, Respondent parked nine pieces of equipment in the same area, again without business justification. By the morning of May 24, 2001, Respondent had erected scaffolding that almost completely blocked the 15-foot easement running in front of Respondent's property, and that scaffolding remained in place until June 13, 2001. Contrary to Respondent's assertion in its brief, no evidence was adduced that there was a business justification for erecting the scaffolding. Thus, in a series of incremental steps commencing on May 22, 2001, Respondent's interfered with and ultimately completely prevented the Union from picketing. The issue is whether Respondent's interest in that strip of property justified its actions.

In situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions will be found violative of Section 8(a)(1) of the Act. *Wild Oats Community Markets*, 336 NLRB 179 (2001), and cases cited. In determining the character of an employer's property interest, the Board examines relevant record evidence.

In this case, there is no evidence as to who actually owns the 15-foot easement. The only evidence as to who had the right to occupy the easement was Officer Smith's interpretation that the 15-foot strip was a public easement that the union representatives had a right to occupy. In the absence of evidence to the contrary, Respondent has failed to show that it possessed an exclusive property interest in the 15-foot strip. Respondent therefore had no right to interfere with or prevent the Union's picketing on that property. By placing pieces of heavy equipment within the 15-foot easement on May 22 and 23, and by erecting and maintaining scaffolding on the 15-foot easement from May 24 to June 13, 2001, Respondent interfered with the Section 7 rights of employees in violation of Section 8(a)(1) of the Act.

b. Police involvement

Police Officer Smith credibly testified that on the morning of May 23, 2001, Olinger reported to him that he believed the pickets were in possession of an illegal police scanner, and Smith in turn told the pickets they risked being arrested for such an offense. By failing to call Olinger as a witness, Respondent failed to establish an objective basis for Olinger's claim. By attempting to cause the arrest of the pickets, Respondent interfered with employees Section 7 rights in violation of Section 8(a)(1) of the Act.

Olinger next told Smith that the pickets had parked their cars outside the easement and had trespassed on company property. Again, Respondent offered no evidence to support this allegation. Barthel's uncontradicted testimony was that he had momentarily moved his car that morning from the easement onto Respondent's property in response to Respondent's moving one of the pieces of equipment it had parked outside the fence, an action that was itself unlawful. As soon as the piece of equipment was moved, Barthel moved his car back onto the easement. By attempting to have Police Officer Smith take action against the pickets for trespass when there is no evidence that a trespass had occurred, Respondent violated Section 8(a)(1) of the Act.

Finally, by asking Officer Smith to question the pickets about the ambulatory picketing they were conducting, and about allegedly following individuals home at night, Respondent further violated Section 8(a)(1) of the Act.

J. Affirmative Defense of Bankruptcy

In its answer, Respondent avers that these proceedings should be held in abeyance because Respondent filed a Chapter 11 petition on December 17, 2001. It is well settled that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. Board proceedings fall within 11 U.S.C. 362(b)(4) and (5), the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. *Isratex, Inc.*, 316 NLRB 135 (1995).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 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. Since July 2000, Respondent has violated Section 8(a)(1) of the Act by maintaining in effect an unlawful no-solicitation/no-distribution rule in the employee handbook.

4. On August 8, 2000, Respondent, by Olinger, violated Section 8(a)(1) of the Act by coercively interrogating an employee about his union activities.

5. On August 8, 2000, Respondent, by Olinger, violated Section 8(a)(1) of the Act by prohibiting an employee from engaging in solicitation of other employees during nonwortime.

6. On August 8, 2000, Respondent, by Olinger, violated Section 8(a)(1) of the Act by threatening to close the business if employees selected the Union as their collective-bargaining representative.

7. On August 8, 2000, Respondent, by Bontrager, violated Section 8(a)(1) of the Act by telling employees that they would be kept apart, that they were not allowed to speak with another, that they were not allowed to talk about the Union, and that their activities would be monitored.

8. On September 6, 2000, Respondent, by Olinger, violated Section 8(a)(1) of the Act by telling an employee he could not wear a union button while working.

9. On September 26, 2000, Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jerry Bickel because of his union activities.

10. On April 26, 2001, Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written discipline to Jerry Bickel because of his union activities.

11. On May 19, 2001, Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jerry Bickel because of his union activities and because he engaged in a lawful strike.

12. From May 22, 2001, to June 13, 2001, Respondent violated Section 8(a)(1) by interfering with the right of employees to engage in picketing by attempting to cause employees engaged in picketing to be arrested, by requesting the police to question employees about their picketing activities, and by physically blocking the area where picketing was taking place.

REMEDY

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

It is not disputed that Jerry Bickel was reinstated and made whole following his first discharge on September 26, 2000, and the Board, in its Decision and Order Remanding dated July 29, 2003, determined that Bickel was properly reinstated and properly made whole following his second discharge on May 19, 2001. I therefore do not include in the remedy an order to reinstate Bickel or to make him whole.

[Recommended Order omitted from publication.]