

American Cast Iron Pipe Company and Jesse Blackmon. Case 10-CA-12619

March 3, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE

On October 18, 1977, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, American Cast Iron Pipe Company, Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

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

WE WILL NOT maintain or enforce Rules 27, 29, and 30 relating to the distribution of leaflets and the solicitation and distribution of oral and written statements.

WE WILL NOT maintain or enforce any no-distribution rule prohibiting distribution by our employees of any written or printed matter relating to employee wages, hours, or working conditions on our property if such written matter is distributed in nonwork places and on nonworktime.

WE WILL NOT prohibit our employees from soliciting among their coemployees for mutual aid

and protection provided that such solicitation occurs on nonworktime.

WE WILL NOT prohibit any of our employees from distributing leaflets relating to wages, hours, working conditions, or other terms and conditions of employment provided such distribution occurs on nonworktime and nonwork areas.

WE WILL NOT permit nonemployee groups and organizations to solicit among our employees or distribute materials to our employees on company property while prohibiting same to our employees.

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

AMERICAN CAST IRON
PIPE COMPANY

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: Upon a charge filed against American Cast Iron Pipe Company (herein called Respondent) by Jesse Blackmon, an individual, on February 25, 1977, a complaint and notice of hearing was issued by the General Counsel on April 18, 1977, alleging violation of Section 8(a)(1) of the National Labor Relations Act, as amended, by virtue of Respondent's maintaining certain rules concerning its employees, and because of their enforcement. Respondent filed its timely answer on April 27, 1977, and the hearing was held before me in Birmingham, Alabama, on May 24, 1977. Thereafter, the General Counsel and Respondent filed timely and helpful briefs.

Upon the entire record in the case, including my observation of the demeanor of the witnesses, and upon due consideration of the briefs, I make the following:

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that Respondent is a Georgia corporation, having an office and place of business in Birmingham, Alabama, where it has been and is engaged in the manufacture and sale of iron products, valves, tubes, and fittings. During the calendar year 1976, a representative period of Respondent's business, it sold and shipped finished products valued in excess of \$50,000 directly to customers located outside the State of Alabama. Respondent admits that it is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I so find.

II. THE ISSUES

1. Whether Respondent's Rules 27, 29, and 30 maintained and enforced¹ since on or about August 26, 1976, relating to and proscribing the distribution, writing, or verbalization of certain statements by Respondent's employees violate Section 8(a)(1) of the Act as constituting unlawful no-solicitation, no-distribution rules or otherwise constitute unlawful interference.

2. Whether Respondent, on or about February 7, 1977, by its supervisor, Assistant Works Manager Edward McCauley, in enforcing Respondent's plant rules, thus prohibiting Respondent's employees from distributing leaflets concerning conditions of employment in nonwork places during nonworktime, interfered with their Section 7 rights and violated Section 8(a)(1) of the Act.

3. Whether Respondent, since on or about February 7, 1977, by its assistant works manager, Edward McCauley, threatened its employees with discharge if they distributed leaflets concerning their working conditions, at any time, on or off company property, thereby violating Section 8(a)(1) of the Act.

4. Whether Respondent since on or about August 26, 1976, has permitted nonemployee groups and organizations to engage in solicitation and distribution of materials to employees, during employees' worktime, while prohibiting its employees from engaging in solicitation or distribution to other employees regarding wages, hours, and conditions of employment, thereby unlawfully and disparately enforcing its rules in violation of Section 8(a)(1) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

American Cast Iron Pipe Company's Birmingham, Alabama, plant employs approximately 3,200 employees, of which approximately 2,700 are production and maintenance employees, hourly paid. The balance are employed in the sales, staff, and engineering departments.

There is no collective-bargaining representative among Respondent's employees at its Birmingham, Alabama, plant. Rather, there are elected employee representatives of various departments organized into a "Board of Operatives" which, in an advisory capacity to Respondent, deals with problems of employees' working conditions, pay increases, and employee relations.² At the present time, and since the early 1970's, Respondent's work force in the

production and maintenance department consisted of about 35 to 40 percent black employees.

In 1964, certain of Respondent's black employees formed the "Committee For Equal Job Opportunity," known as CEJO. Neither the complaint nor Respondent alleges that CEJO is a labor organization within the meaning of the Act. There are about 30 CEJO committee members and about 1,000 of Respondent's black employees support the committee. These supporters pay no dues to it, financial support being gained at meetings that CEJO holds where employees are invited to give contributions. The evidence does not show whether the membership in CEJO is restricted to black employees.³ CEJO handles labor relations matters and employment discrimination complaints from its members. Another prime purpose is the continued support of certain lawsuits against Respondent under the Civil Rights Act of 1964, entitled *Pettway v. American Cast Iron Pipe Company*, 406 F.2d 399 (C.A. 5, 1969); and 411 F.2d 998, 1007 (C.A. 5, 1969), litigations in progress in the Federal court since 1966. CEJO supports those lawsuits by holding meetings, distributing leaflets, and contributing money to secure the continuation of the case. The evidence also shows that CEJO has been dissatisfied with the results of the litigation and the court decrees which have flowed therefrom. Respondent asserts that under the latest decree of the district court (not in evidence or otherwise cited) every facet of the employer-employee relationship, including grievance procedure, promotion, and seniority, is covered. This decree appears to have been a result of CEJO's litigation in which it alleged racial discrimination in Respondent's hiring, promotion, and other terms and conditions of employment. *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 98, 1000-01, fn. 4.

At least as early as October 1965, Respondent has maintained rules forbidding its employees (with penalties including reprimand, layoff, and discharge) from the distribution of written matter without the permission of Respondent; forbidding the posting or removal of any matter on bulletin boards unless specifically authorized by Respondent; and prohibiting the making of "false, vicious, or malicious statements concerning any employee, the company or its products." These rules were thereafter changed from time to time.

The evidence shows that between September 14, 1971, and August 17, 1976, at least 33 various newspapers and leaflets were found in Respondent's plant. These writings, including those authorized by or distributed by CEJO, were not distributed inside the plant but only outside the plant.⁴

¹ Respondent without pleading the affirmative defense seeks for the first time, in its Brief, to defend against the allegation of unlawful maintenance and enforcement of the no-distribution, no-solicitation rules (G.C. Exh. 1(c), par. 6, 11) by asserting that Sec. 10(b) of the Act forbids an attack on their "promulgation." Although Respondent's Rule 30 was substantially revised within the 10(b) period (G.C. Exh. 2, posted August 24 but "effective" August 26, 1976) and so may have been unlawfully "promulgated," it is unnecessary to reach the question whether the promulgation of any of the three interrelated rules is time-barred. The complaint does not attack the promulgation of the rules, but merely their maintenance and enforcement. Respondent's reliance, therefore, on *Inland Shoe Mfg. Co.*, 211 NLRB 843 (1974), is misplaced since that case found time-barred the promulgation, rather than, as here, maintenance and enforcement of the alleged unlawful

rules. Cf. *Boaz Spinning Company, Inc.*, 210 NLRB 1078 (1974); *Pepsi-Cola Bottling Co. of Los Angeles*, 211 NLRB 870 (1974). As hereafter described, there is little doubt that these rules have been enforced and maintained within the 6-month period.

² Neither General Counsel, Respondent, nor the Charging Party has alleged the board of operatives to be a "labor organization" within the meaning of Sec. 2(5) of the Act.

³ Up to at least 1969, Respondent's plant appears to have been operated, in terms of hiring, promotions, seniority, and other terms and conditions of employment, along segregated racial lines.

⁴ The schematic map of Respondent's premises (Jt. Exh. 1) indicates the existence of several parking lots within gates demarking Respondent's property, which gates boarder 32d Avenue and 16th Street in Birmingham

(Continued)

Respondent's Plant Rules Prior to August 26, 1976

As of August 25, 1976, Respondent's rules governing employees conduct, as pertinent herein and as admitted by Respondent, were:

Rule 27 prohibits: "Distributing on Company property written or printed matter of any description not in the performance of Company business without Company permission." The first offense is 1 week's layoff, the second offense is discharge.

Rule 29 prohibits: "Making false, vicious or malicious verbal statements concerning any employee, the Company or its products and methods of manufacture." The first offense is reprimand; the second offense is 1 week's layoff; the third is discharge.

Rule 30 prohibits: "Distributing false, vicious or malicious written statements about any employee, the Company, its products or methods of manufacture on Company property." The first offense is 2 weeks' layoff; the second offense is discharge.

The above rules, as amended on February 12, 1976, were posted on the bulletin board (effective February 18, 1976), and reflect the Company's policy through August 25, 1976.

Respondent's witnesses testified, without contradiction, that, in the period commencing 1971, it became increasingly concerned with three types of leaflets and publications, distributed near its plant, which publications found their way into the plant. Respondent received complaints from employees regarding Respondent's continued permission, or at least lack of strict response, to the various publications coming into Respondent's plant. Among the publications were (1) leaflets circulated by CEJO, (2) publications quoting CEJO members and officers, and (3) other publications. Respondent placed in evidence numerous publications of and about CEJO and those which it characterized, perhaps not without cause, as leftist, communist and Marxist publications.⁵ The Marxist publications include, "The Daily World," "Turning Point (Birmingham Area Workers Papers)," "World Magazine," and "The Worker for the Birmingham Area," and publications of similar stripe. These publications contain, *inter alia*, exhortations against employers in general and Respondent in particular; in favor of labor organizations' tactics; against racism; and against alleged unhealthy practices and conditions in Respondent's plant. These publications also refer to CEJO lawsuits, above mentioned, and to Respondent's alleged violation of rights of its black employees. Respondent asserts that it became more and more alarmed at the radical elements of these publications and became particularly concerned and incensed at false, malicious, and vicious attacks on Respondent and its production procedures. Respondent asserts that it has the right to suppress documents which are maliciously false and, in addition,

near the Louisville and Nashville Railroad tracks. Within these gates at Respondent's main service building, there is a guard station leading directly into the building. Respondent's witnesses placed the distance from some of the parking lots to the guard station at or about two blocks. There is, however, no evidence in this record which shows that any CEJO leaflets or any other leaflets or newspapers were distributed on Respondent's premises. Rather, the evidence shows that all these documents were distributed on public property outside Respondent's gate and were taken into Respondent's plant by employees.

leftwing documents which have the effect of disrupting plant discipline and production.

Samuel Carter, vice president and works manager of Respondent, testified, that for several years, Respondent's factory has been flooded with a large volume of literature. Neither he nor any other witness could suggest who brought the literature into the plant. Carter characterized the literature as falling into two groups, both of which caused tension among the employees (fights, disobedience to supervision, violation of plant rules): those leaflets containing false and misleading information against Respondent and those of the leftwing, communist orientation which might or might not refer to Respondent. With regard to the communist-type literature, Carter received complaints from employees and foremen over Respondent's leniency in permitting such literature in the plant. He also testified that, in 1972, there had been a knife fight concerning communism and other fights over these "sheets."⁶ Carter himself had never heard threats or witnessed disobedience, but it was his opinion that the increasing disciplinary problems were caused by the influx of this literature. In particular, he testified that leaflets relating to the court rulings in *Pettway v. American Cast Iron Pipe Co.* were confusing and disruptive because they related to changes in the seniority system and led to racial anger. No specific testimony was produced to show that any CEJO document caused any fight, confrontation, or disturbance attributable to it. No witnesses were produced who participated in any fight or confrontation relating to the sheets. Moreover, no witnesses were produced who witnessed any confrontation relating to the distribution or possession of these CEJO or other sheets. Indeed, Vice President Carter's testimony on the single incident regarding a knife fight, in 1972, was itself unclear and fragmentary. He was, of course, not a witness to any such fight. Surely, assuming the accuracy of his testimony and Respondent's disparately acute interest in things disruptive to production and discipline a substantial record of this event or other events relating to disruptions caused by distribution of leaflets would have been kept and offered. No such evidence was apparently accumulated; none was offered.

The CEJO Vinyl Chloride Leaflet

On or about August 17, 1976, CEJO distributed outside Respondent's gate a leaflet (Resp. Exh. 1) addressed to Respondent's employees concerning the alleged use by Respondent of a powder which, in the production process, produced vinyl chloride gas and which the CEJO leaflet alleged caused both liver cancer and silicosis. Respondent admits that steel drums, bearing labels showing the contents to contain vinyl chloride, were shipped into Respondent's plant. These identifying labels were the

⁵ I have examined the documents in evidence. I have found, contrary to Respondent's repeated assertions, that CEJO-produced literature concerns alleged racial discrimination and working conditions at Respondent's plant whatever the nature of the attacks and exhortations found in the communist press concerning Respondent.

⁶ Resp. Exh. 36 notes a "1972 threat with knife" resulting from "discussion of communism." No literature was cited. No other recorded incidents are contained in this voluminous record of Respondent's disciplining of employees relating to "communism" or the distribution of literature.

apparent result of Respondent's supplier negligently failing to remove them, the drums apparently containing substances not including anything which would cause the emission of vinyl chloride gas. Neither the Charging Party nor the General Counsel, however, concedes that vinyl chloride was not in the drums.

On August 20, 1976, Respondent posted on its bulletin board a response to the CEJO vinyl chloride leaflet entitled "False Statements in Throw Sheet" (Resp. Exh. 33) in which Respondent answered "the many obvious falsehoods in recent throw sheets by the Committee for Equal Job Opportunity and by various communist affiliated groups." This posted leaflet states that Respondent did not use and never did use vinyl chloride or any material that emits vinyl chloride. Vice President Carter testified credibly that Respondent received an apology from its supplier. If the finding were material, and I conclude that it is not material, I would credit Respondent and find that CEJO falsely stated that Respondent used vinyl chloride. In so finding, I would also conclude, however, that Respondent, having inadvertently induced CEJO into believing that vinyl chloride was used, cannot assert that, on this record, CEJO was acting maliciously in this false assertion, notwithstanding that CEJO did not first consult Respondent before distributing the vinyl chloride leaflet which made the assertion that vinyl chloride was used in Respondent's production process. Cf. *Roemer Industries, Inc.*, 205 NLRB 63, 65 (1973).

Respondent's Revised Rule 30

On August 25, 1976, in response to the CEJO vinyl chloride leaflet of August 17, 1976, Respondent posted the following notice (G.C. Exh. 2):

NOTICE FALSE WRITTEN STATEMENTS

Following rule revision is necessary to protect the Company against so much false, unfounded, and misleading information causing damage to customer confidence and unnecessary cost of correcting confusion.

In these times of low business with short time and lay-offs in our industry, we need every customer and order we can get. We don't need employees jeopardizing customer confidence and Company image with false, vicious throw sheets.

We do not intend to interfere with our employee's rights, but anyone who writes false, vicious, and destructive information must be held responsible for his action.

RULE REVISION

Plant Rule #30:

Writing or distributing false, vicious, or malicious written statements about any employee, the Company, its products, or methods of manufacture.

First offense — discharge

AMERICAN CAST IRON PIPE COMPANY

Approved by Board of Management
August 19, 1976, effective August 26, 1976
August 24, 1976

The limitation in old Rule 30 on the distribution "on Company property" was removed, thus broadening the geographic sweep of the new rule, the mere "writing" of any such statement was added as proscribed conduct within the rule along with distribution of the writing; and the penalty for first offense was upgraded to "discharge" from the prior "2-weeks layoff." Both the old and new rules related, *inter alia*, to false statements "about any employee" —not, therefore necessarily an employee of Respondent. Thus, strict construction of the rule would bring within its prohibition a false, though otherwise innocent, assertion, for instance, that employees of other employers were enjoying better (or worse) working conditions than Respondent's employees.

Nonbusiness Distribution and Solicitations on Respondent's Property

Paragraph 10 of the complaint alleges that Respondent, since on or about August 26, 1976, has permitted nonemployee groups and organizations, including political candidates, churches, and schools, to engage in solicitations and/or distribution during employee worktime while prohibiting its employees from such conduct with regard to wages, hours, and conditions of employment.

Respondent admits in its answer (par. 6, G.C. Exh. 1(e)) that it may have "on an infrequent basis allowed political candidates for public office to contact its employees, on an equal basis, on non-working time and in non-working areas."

Particularly around November 1976, Respondent permitted the distribution by nonemployees of political writings of a congressional candidate to its employees *inside* its property at the guard gate in front of the Service Building. CEJO distributed its literature only *outside* the gates and, as noted below, was not permitted distribution of a leaflet inside or outside Respondent's property. In April 1977, a supervisor solicited employees for money on behalf of an employee whose home was damaged by a tornado. A sheet of paper was circulated among 23 employees, on worktime, in a work area, seeking contributions.

The Meeting of February 8, 1977

On February 8, 1977, four members and officers of CEJO (James Baskerville, Alton Pugh, Henry Booker, and Harvey Henley) met with Respondent's assistant works

manager, Edward D. McCauley, in McCauley's office.⁷ Baskerville told McCauley that, in view of the permission requirement in Rule 27, CEJO was requesting Respondent's permission to distribute literature on February 11 and wanted Respondent to inspect the literature since the employees feared Respondent might construe that it was violative of Rule 30.⁸ Pugh and Booker testified that Baskerville asked McCauley for permission to distribute the leaflets because CEJO desired to make the distribution at the Company's gate, in the Company's parking lot, locker room, and the cafeteria and in nonwork areas on the lunch hour. The CEJO representatives gave McCauley a copy of the document (G.C. Exh. 3) which they intended to distribute and asked McCauley to determine if anything in the leaflet was prohibited. After McCauley read the document and consulted Respondent's rules, he told the CEJO representatives that (1) any material which was to be distributed to employees was to be distributed by the Company alone; (2) company permission was necessary for the distribution of literature anywhere on company property and that included the lobby, the restrooms, and the parking lot, anywhere on company property; (3) different people have different opinions as to what is false or malicious; and (4) he specifically noted that the document did contain the statement "Management purposely cut down on the number of blacks hired." McCauley described his actual statement to the four CEJO committeemen with regard to the alleged falsity of the CEJO assertion on the hiring of blacks as: ["You] will have difficulty in defending that." I conclude that such a reply is an assertion that the statement was "false."

In any event, the CEJO representatives asked McCauley whether he was going to give them permission to distribute the document (G.C. Exh. 3)⁹ and McCauley told them he could not give them permission to distribute the document and that his decision was final.

⁷ General Counsel's witnesses were confident that the meeting took place on Tuesday, February 8, 1977, since the purpose of the meeting was to obtain authorization from Respondent for a CEJO leaflet distribution on Friday, February 11, 1977. McCauley was equally confident that the meeting took place on February 15, 1977. I conclude on the basis of the consistency and circumstantiality, as well as the mutual corroboration, of General Counsel's witnesses that the meeting took place on February 8, mindful of Respondent's concession, at the hearing, that the date of the meeting did not otherwise appear material.

⁸ As above noted, both Rules 27 and 30 relate to distribution: Rule 27 permits distribution, with company permission, of writings on company property; Rule 30, on and after August 26, 1976, forbade, *inter alia*, any false writing or the distribution of any false writing concerning any employee, the Company, its products, or production methods. A first violation of Rule 30 calls for discharge.

⁹ G.C. Exh. 3 presented to Supervisor McCauley relates to Respondent's alleged discriminatory failure to hire and promote black employees and raises, in question form, issues relating to the Federal court's consent decree issued in the litigation against Respondent; suggests that the employees' "Board of Operatives" protects the rights of the employer rather than the employees; requests plantwide seniority and plantwide posting of jobs; and alleges various health and safety violations and lack of safe production practices.

Discussion and Conclusions

B. Respondent's Contention with Regard to the Plant Rules in Existence Commencing August 26, 1976

The complaint alleges that Respondent, by maintaining and enforcing the rules, above noted, and by prohibiting the distribution of the CEJO document (G.C. Exh. 3) on or about February 7, 1977, unlawfully prohibited its employees from engaging in concerted activities with other employees for the purposes of collective bargaining or other mutual aid and protection.

Respondent's principal defense¹⁰ is that, regardless of whether the above rules, read together, constitute an overbroad interference¹¹ with the rights of solicitation and distribution of its employees, thus presumptively being unlawful, any unlawfulness was overcome by Respondent's rights (a) to prohibit maliciously false statements against itself on the ground of disloyalty to Respondent and its products; and (b) to prohibit false, malicious, and vicious literature from entering the plant because of safety and discipline and the necessity of preventing interference with production.

In support of (a) above Respondent cites, *inter alia*, *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers, A.F.L.* [*Jefferson Standard Broadcasting Co.*], 346 U.S. 464 (1953), and *Maryland Dry Dock Company v. N.L.R.B.*, 183 F.2d 538 (C.A. 4, 1950). In support of (b) above, Respondent cites, *inter alia*, *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793 (1945), and *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962). Since Respondent's proscriptive rules, above, are divided into three sections, they will be treated separately.

1. Rule 27, which provides for a first offense 1-week layoff and for a second offense, discharge, if an employee distributes, on company property, written matter "of any discription" not in the performance of company business, *without company permission*, of course, is overbroad and presumptively unlawful by virtue of the very cases Respondent cites, *Peyton Packing Co.*, 49 NLRB 828, and

The full text of the paragraph in which the objectionable sentence appears is:

ACIPCO used to hire more Blacks than white. When the committee was formed back in 1964 management saw that the Black workers weren't going to put up with open discrimination any longer. Management purposely cut down on the numbers of Blacks hired. Out of 15 new men hired last week only one was Black.

¹⁰ Respondent's answer, in substance, admits the maintenance and enforcement of Rules 27, 29, and 30 since August 26, 1976, but denied that such maintenance and enforcement prohibited the employees from engaging in protected concerted activities in violation of the Act. Its brief admits the maintenance and enforcement of the rules.

¹¹ Respondent, in citing in its brief with apparent approval *Peyton Packing Company, Inc.*, 49 NLRB 828 (1943), and *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962), acknowledges that its rules inherently proscribing, on nonworktime and in nonwork areas, otherwise protected concerted activity, are presumptively invalid. It asserts that Rule 27, above, is necessary because of the existence of "special circumstances"; and that Rules 29 and 30, if enforced, are rights of proscription possessed by Respondent.

Stoddard-Quirk Manufacturing Co., supra. (a) As Respondent notes, in its citation of *Stoddard-Quirk*,¹² there, as here, the no-distribution rule maintained by Respondent was held presumptively invalid on its face as applied to employees who might wish to distribute union literature, since its reach was not limited to employees' working time or to the working areas of the plant. (b) In addition, as the Board recently held, Respondent cannot unlawfully require an employee to secure *permission* as a precondition to engage, without fear of management interference or retaliation, in protected concerted activities on the employer's property in nonwork areas on the employees' free time. *AMC Air Conditioning Co.*, 232 NLRB 283 (1977).

2. With regard to Rules 29 and 30, they are *per se* unlawful because they (a) reach beyond Respondent's property and (b) punish the merely false. As the Respondent's supervisor, Edward McCauley, admitted to employee Henry Booker, on the credited testimony of Henry Booker (McCauley, testifying after Booker, did not deny Booker's testimony), "people have different opinions as to what is false and malicious." This was in response to the CEJO committee's question to McCauley whether he could find anything in General Counsel's Exhibit 3 that was false and malicious.¹³

Whereas Rule 27 relates to the distribution of written material on company property, Rules 29 and 30, on their face, are not limited either to company property or to worktime with regard to the making of false, vicious, or malicious verbal or written statements concerning any employee, the Company, or its products.

It is readily observable that Rules 29 and 30, by their own enumeration, necessarily distinguish between the merely false utterance and utterances which are malicious or vicious. Thus, merely false utterances or writings are subject to inclusion within the rules. The Board rule, enforced by the courts, is that, within the area of concerted activities, false and inaccurate employee statements are *protected* so long as they are not malicious. See: *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006, fn. 19, (C.A. 5, 1969), wherein the court of appeals declared, *en banc*, this to be the Board rule, citing *Socony Mobil Oil Co. Inc.*, 357 F.2d 662 (C.A. 2, 1966); *N.L.R.B. v. Coca-Cola Bottling Co.*, 333 F.2d 181 (C.A. 7, 1964); and *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152 (C.A. 5, 1962). Here, Respondent's Rules 29 and 30, by prohibiting and punishing the merely false, as opposed to the malicious and vicious, are overbroad and in violation of Section 8(a)(1) of the Act. Rules 29 and 30 are not presumptively unlawful; they are unlawful *per se*. Thus, unlike the merely presumptively unlawful rules in *Peyton Packing* and *Stoddard-Quirk, supra*, and other cases in which an employer's property rights or rights to maintain production and discipline, or other vital interests, e.g., *McDonnell Douglas Corporation*, 204 NLRB 1110 (1973); *N.L.R.B. v. The Babcock & Wilcox Company*, 351 U.S. 105 (1965); *Scott Hudgens*, 230 NLRB 414 (1977), are balanced against

employee statutory rights of solicitation and distribution even on the employer's property, here, there is no competing employer property right. Respondent's rules reach beyond Respondent's property into its employees' private comings and goings. While it may be theoretically possible that an employee's false (but not vicious or malicious) statement, uttered in his own home, might conceivably interfere with employer discipline or production, the employer may not proscribe such conduct, by rule or otherwise, except insofar as the utterance was malicious or vicious, or designed to injure the employer's product regardless of its truthfulness, as in the *Jefferson Standard* case, cited by Respondent, 94 NLRB 1507 (1951), *enfd. sub nom. N.L.R.B. v. Local Union 1229, IBEW, supra*, or to insult and ridicule the employer's management,¹⁴ *Maryland Drydock Co. v. N.L.R.B., supra*. The product and personnel defamation cases are collected in *American Hospital Association*, 230 NLRB 54 (1977). An early statement of the rule that false, misleading, and inaccurate statements, made in the course of concerted activity, are protected is found in *El Mundo Broadcasting Corporation*, 108 NLRB 1270 (1954).

In short, rules which, on their face, as Rules 29 and 30, forbid false verbal and written utterances which may be made while employees, as here, engage in otherwise protected concerted activities *on or off* Respondent's property, would not merely be presumptively unlawful as in *Peyton Packing*, but would be, as here, *per se* unlawful since the reach of such overbroad rules would not have the benefit of any competing employer right which, in turn, would give rise to an inquiry as to whether the employer's property or production rights were being unduly invaded by the utterances or writings. To hold otherwise would allow the employer to unduly govern employee concerted conduct otherwise protected by the Act and to unlawfully interfere with protected rights. It is unnecessary to reach any constitutional question for, in a labor relations context, protection extends to false statements "short of a deliberate or reckless untruth." *William C. Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 62-63 (1966), cited in *United Parcel Service, Inc.*, 230 NLRB *supra* at fn. 4.

The particular statutory vice of Respondent's Rules 29 and 30, wholly apart from their enforcement, is that, as the Board recently said in the context of an employee's speech on employer property during nonworktime in a nonwork place, *AMC Air Conditioning Co.*, 232 NLRB, *supra* at fn. 6, as should be applied to the instant case, rules punishing a merely false statement, fail to define the area of permissible concerted activity in a manner clear to employees, thus tending to cause employees to refrain from engaging in protected activities in areas where, and at times when, they have a right to do so under the Act. Indeed, Supervisor McCauley's prohibition under Rule 30 of the lunchtime, nonwork area distribution of General Counsel's Exhibit 3 had the exact consequence.

¹² In *Stoddard-Quirk, supra*, 616, the employer's rule prohibited "unauthorized distribution of literature of any description on company premises" and was unlawful.

¹³ Witness Booker and McCauley agree that McCauley never did use the words "false" or "malicious" or "vicious"; only "difficulty in defending that."

¹⁴ Member Murphy would not limit the rule even to this extent and would leave the employer to his tort action. *United Parcel Service, Inc.*, 230 NLRB 1147 (1977). In addition, Member Murphy would similarly treat even "vitriolic" attacks on the employer's product. *Automobile Club of Michigan*, 231 NLRB 1179 (1977).

It might be noted in passing that the latest revision of Rule 30 makes the mere *writing* of a false statement about any employee punishable on first offense by discharge, and is now applicable *off* Respondent's property. The newly restrictive Rule 30 was *promulgated* in retaliation for CEJO engaging in protected concerted activity and would be unlawful in any event. Since no such allegation, regarding promulgation, appears in the complaint and since the case was not tried on that theory, I make no finding or conclusions based on unlawful promulgation of Rule 30. In any event, I conclude that, as alleged in paragraphs 6, 7, and 8, maintenance and enforcement of Rules 29 and 30 are unlawful within the meaning of Section 8(a)(1) and that McCauley's enforcement of the rules is also unlawful. See *infra*.

Respondent's Proof with Regard to Production,
Safety, and Discipline in the Plant; Malice and
Viciousness in the Leaflets

As above noted, Respondent asserted that, whatever the unlawfulness of the rules, the invalidity thereof had been overcome by proof that the breadth of the prohibitions was required by the peculiar factors present in the plant which required such prohibitions on the grounds of the necessity to maintain production safety and discipline, and, in addition, a privilege to independently suppress false, malicious, and vicious utterances and documents. Also as above noted, Respondent submitted in evidence many documents which it found in its plant, all of which were, on this record, distributed to its employees outside Respondent's property. Some of these documents are of a distinctly leftwing persuasion, some documents were authored and distributed by CEJO, others were authored by third persons and concerned CEJO, and still others have no bearing on either CEJO or Respondent, but merely advocate radical political and economic positions with regard to politics and employees and their rights against employers. Respondent testified that, over the years, these documents became more numerous and more vicious in their attacks of Respondent, upon free enterprise and in favor of communism.

In support of the necessity of suppressing the writing or distribution of these materials to its employees, and for the necessity of suppressing any verbal statement which it considered false, vicious, or malicious, regardless of whether the writing or utterance or distribution was by its employees or occurred away from Respondent's premises, Respondent submitted in evidence a summary of discipline cases and written reprimands involving Respondent's employees engaging in acts of threatening, abusive language, fighting, disobedience to proper authority, and malicious damage, all in the period 1965 through 1976. With regard to the penalties involved, the statistical summary is divided into two classes of cases: those relating to discharge and layoff on the one hand, and those relating to mere written reprimands entered into the employees' work records on the other. The documents show that the total number of instances, where discipline involving discharge or layoff occurred (threatening, fighting, abusive language) in 1965, consisted of two cases involving three people and involving no interracial incidents. By 1970,

there were 6 such cases involving a total of 7 employees, 2 of them interracial; in 1975, there were 9 such cases involving 10 employees with five instances being interracial.

Whereas in 1968 there were 3 cases involving written reprimands involving 3 employees, where 2 of them were interracial, by 1975, the number had grown to 14 cases of reprimand involving 14 employees, 11 of the instances being interracial. The cases involving reprimands, relating principally to disobedience to proper authority and abusive language, show the following: written reprimands in the period 1965 to 1969 were a maximum of three per year. In 1970 and 1971, there were 7 such cases each year; in 1972 and 1973, 12 such cases in each year; in 1974 there were 7 cases; in 1975, 14 cases; and in 1976, 3 cases.

With regard to the discipline cases involving layoff and discharge, in the period 1965 to 1969, there were a maximum of three incidents per year; in 1970, there were six incidents, of which two were interracial; in 1971, there were seven incidents, of which four were interracial; in 1972, there were four incidents, of which two were interracial; and by 1976, there were eight such incidents of which four were interracial.

Alleged Disparate Enforcement of the No-
Distribution, No-Solicitation Rules

Paragraph 10 of the complaint alleges that on or about August 26, 1976, Respondent permitted nonemployee groups and organizations, including political candidates, churches, and schools, to engage in solicitation and/or distribution of materials to employees during employees' worktime while prohibiting its employees from engaging in such conduct with regard to other employees regarding wages, hours, and conditions of employment. As above noted, Respondent's answer admits that it may have "on an infrequent basis, allowed political candidates for public office to contact its employees, on an equal basis, on a non-working time and in non-working areas."

In support of this allegation, General Counsel's witnesses testified, without contradiction, that, in the last year and in particular November 1976, candidates for local congressional office had their supporters distributing literature and soliciting votes inside Respondent's gate at the entrance to Respondent's building near the guard office, on Respondent's property. In particular, two or three persons passed out cards for the candidates and solicited votes. Respondent did not contradict this testimony.

Following an April 1977 tornado, employees and supervisors of Respondent solicited other employees on worktime to contribute in the plant in work areas, to the aid of employees whose property had been injured by the tornado. The solicitation on behalf of the coemployees whose property had been injured in the tornado amounted to about 23 employees being solicited on worktime inside the plant by a supervisor. The complaint further alleges, in paragraph 9 thereof, that on or about February 7, 1977, Supervisor McCauley threatened Respondent's employees with discharge if they distributed leaflets concerning their working conditions at any time, on or off company property.

In support of this allegation, General Counsel's witness, Henry Booker, chairman of CEJO since 1972, testified that, in his conversation with McCauley in the presence of Pugh, Baskerville, and Henry, he asked McCauley whether CEJO would be able to distribute union membership cards in various nonwork areas such as the bath house, cafeteria, and other places. Booker testified that McCauley responded that the company policy would not allow such activity on company property. McCauley testified that he was familiar with NLRB rules and requirements regarding the signing of the cards and that Baskerville asked him only whether the cards could be signed in the plant. McCauley testified that the cards could be signed in the plant but could not be signed so as to stop work in progress.

Further Discussion and Conclusions

1. False statements and the need to maintain production and discipline

Respondent's vice president and works manager, Sam Carter, testified that for several years there had been an influx of inflammatory literature from a number of leftwing, Marxist groups whose literature found its way into the plant. He said that such literature created tension among employees, caused disregard of supervisory orders, and increased the number of discipline cases. He also said that just as the Company had tightened up its rules (not submitted in evidence) relating to drugs and weapons, it tightened up its rules regarding literature because of its frustrating and disruptive nature.

I have read the documents submitted by Respondent in evidence and I would agree with Respondent some of the literature, at least, has a particular Marxist flavor and orientation and relates to political and economic problems of a "left-wing" aspect. Many of the documents are addressed to litigation against Respondent initiated by CEJO; and other literature reflects antagonistic positions by CEJO against Respondent and working conditions in Respondent's plant.

I believe the evidence fairly shows an increase in the cases of discipline in Respondent's plant resulting in layoff and discharge and in written reprimands. In addition, there is some concomitant increase in the number of interracial incidents leading both to reprimands and more serious discipline.

It may be therefore true, as Respondent asserts, that (a) there is over the years a flow into Respondent's plant of leftwing literature in which there appear statements which can be characterized, *arguendo*, at least in part, as false, as Respondent alleges. Other parts of such literature make derisive comments about Respondent; and (b) the evidence shows an increase in disciplinary cases in Respondent's plant both of a serious and minor character.

Respondent asserts that the increased flow of this literature has led to an increase in the number of disciplinary cases Respondent was faced with and, therefore, brought the new and strengthened rule. Thus, Respondent argues that, whether or not the rules are presumptively unlawful in being overbroad, they are necessary (1) to maintain discipline, production, and safety in the plant,

and (2) to eliminate false and malicious statements against Respondent.

With regard to (1) the basic problem with this first argument is that Respondent has not adduced any proof on this record to show that the increased number of disciplinary cases was caused by the influx of leftwing literature. Rather, Respondent appears to assume that there was a causal relationship. It is obvious that merely because there is an increase in the number of disciplinary cases and, *arguendo*, an increase in the amount of leftwing literature which is false coming into Respondent's plant—that does not establish a causal relationship.

At one point, Vice President Carter testified that he received reports from employees telling him that Respondent was too lax in keeping this literature out; but there is a complete failure of evidence submitted by Respondent to show that the literature itself was a causal factor in the increase in the number of discipline cases. For instance, there was no showing, except by Vice President Carter's conclusionary testimony, that fights or abusive language or an increase in tension was caused by the presence of these leaflets and newspapers in Respondent's plant. I do not regard the hearsay testimony of Vice President Carter regarding a 1972 knife fight over a communist sheet to be probative of this element. As above noted, the evidence, even here, shows the fight to have been over "Communism" and not over any leaflet or document.

I do not mean, by the above, that Respondent is under an obligation to await some catastrophic incident or riot before it can forbid a causal element of such conduct, such as malicious or otherwise disruptive literature. Thus, I agree with the Respondent that the law does not require Respondent to await a catastrophic event. *Southwestern Bell Telephone Company*, 200 NLRB 667, 671 (1972), and cases cited therein. There is here, however, no evidence that any such riot or similar conduct was building up, was imminent, or that Respondent even suspected that such conduct might occur.

In short, there is a failure of proof to overcome the presumption of invalidity of Rule 27 or to show that the rules were required to insure production, safety, or discipline. *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1965).

Here, as in *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 616 (1962), where the employer's rule prohibited "unauthorized distribution of literature of any description on company premises," the Board held that the presumption of invalidity was not overcome by the conclusionary testimony of the employer's vice president that the rule, adopted years before, as here, was for the purpose of preventing litter and resulting fire hazards in the plant.

With regard to Respondent's second argument—that it had the right to suppress malicious literature by preventing its distribution by employees under the *Jefferson Standard* rule, I have examined the CEJO distribution and the leftwing literature and particularly the February 8, 1977, CEJO leaflet (G.C. Exh. 3) of which Respondent prohibited distribution and I agree with Supervisor McCauley's evaluation that whether something is false or not may be a matter of opinion. In any event, the assertion in the February 8, 1977, CEJO leaflet that Respondent "purpose-

ly cut down the number of Blacks hired," while allegedly false, and *arguendo* false, is hardly malicious, given the background of Respondent's past hiring practices of which I take official notice from the opinions of the United States court of appeals, *supra*. Respondent's past conduct with regard to the hiring of blacks, assuming, *arguendo*, the falseness of CEJO's assertion with regard to Respondent "purposely" cutting down the number of blacks hired, cannot be reasonably described as "intemperate," "invidious," or a "lampoon" or "libelous and defamatory." *N.L.R.B. v. Aintree Corp.*, 135 F.2d 395, 397. Thus, even if false, it may not be suppressed. It is surely not a "deliberate or reckless untruth." *William C. Linn v. United Plant Guard Workers, supra*, as cited in *United Parcel Service, Inc.*, 230 NLRB 1147. Perhaps one method of limiting the false nature, if any, of this CEJO document would have been for Respondent to publish the contrary truthful facts as it did in rebutting the CEJO's allegedly false leaflet concerning the use of vinyl chloride in production processes. Since General Counsel's Exhibit 3, suppressed by Respondent, which included the allegation of Respondent's purposeful failure to hire black employees, was part of a document relating to other issues of concerted activity (whether the board of operatives was properly serving employees and also relating to plant health and safety conditions), its suppression was unlawful. I conclude that the enforcement of Respondent's invalid rule relating to the distribution of General Counsel's Exhibit 3 violated Section 8(a)(1) of the Act because, as alleged, it prohibited employees from engaging in concerted activity with other employees for the purpose of mutual aid and protection.

Moreover, I have found no literature submitted in evidence to be so malicious as to come within the *Jefferson Standard* rule. Nor did any documents, even those offered and rejected, cause or tend to cause a breakdown of production or discipline. Respondent's own disciplinary records fail to demonstrate this.

2. *Disparate enforcement*: I also conclude that Respondent unlawfully and disparately applied Rule 27 by giving permission to political and nonprofit groups for the distribution or solicitation on Respondent's property whereas it withheld permission to distribute CEJO material (relating to working conditions) in nonwork areas and in nonwork places. Although the political distribution and solicitation may have taken place on nonworktime in a nonwork area, such right of distribution was not accorded to CEJO. Moreover, the solicitation for the tornado victim took place *on worktime*. Thus, the disparate application of Rule 27, as alleged in paragraph 7 of the complaint, is a further violation of Section 8(a)(1).

3. Lastly, I conclude that there is insufficient evidence to prove that Respondent, on or about February 7, through Supervisor McCauley, threatened employees with discharge if they distributed leaflets on or off company property. This is the allegation of paragraph 9 of the complaint and I shall recommend that it be dismissed. In the first place, there is no testimony with regard to leaflets but only with regard to the hypothetical case put by employee Baskerville to Supervisor McCauley as to what would happen if CEJO distributed union membership cards on nonworktime in nonwork areas. Employee Book-

er recalls that Supervisor McCauley said that such distribution would be prohibited. McCauley denies that he said that. Employee Alton Pugh did not confirm Booker's recollection but said, rather, that, when Booker asked if there could be distribution in nonwork areas, McCauley answered only that the Company would decide if it was necessary. He did not corroborate that McCauley said that such distribution would be prohibited. However, even if Booker is credited and McCauley said that the distribution of union cards—or leaflets—will be "prohibited," it does not follow that such prohibition means that Respondent would discharge anyone. While a second violation of Rule 27 does lead to discharge, McCauley's statement is not an independent threat of discharge.

CONCLUSIONS OF LAW

1. American Cast Iron Pipe Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining and enforcing a no-distribution rule (Rule 27) prohibiting distribution by its employees of any written or printed matter on Respondent's property, including literature distributed in nonworkplaces and on nonworktime, Respondent having failed to prove the necessity therefore to maintain production, discipline, or safety or any other good and sufficient reason, Respondent has engaged in, and is engaged in, unfair labor practices in violation of Section 8(a)(1) of the Act, as amended.

3. By maintaining and enforcing rules (Rules 29 and 30) which prohibit its employees from making a false verbal statement and writing or distributing a false written statement about any employee, the Respondent, or its products and methods of manufacturing, without regard to whether such false verbal statement or writing is contained in, or part of, concerted activity among its employees protected by Section 7 of the Act, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, as amended.

4. By publishing and distributing leaflets relating to Respondent's hiring practices, safety and health standards, and the quality of representation afforded employees by Respondent's board of operatives, Respondent's employees are engaged in concerted activity protected by Section 7 of the Act.

5. By prohibiting its employees, on or about February 8, 1977, from distributing leaflets, as described in paragraph 4, hereinabove, in nonwork areas and on nonworktime on Respondent's property, and, in addition, by permitting nonemployee groups and organizations to distribute written materials to employees and to solicit employees on Respondent's property, Respondent violated Section 8(a)(1) of the Act.

6. Respondent has failed to establish that any leaflet, of which is prohibited distribution by its employees, lost its character as protected concerted activity, because of the nature of the leaflet or the language used therein.

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

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ¹⁵

The Respondent, American Cast Iron Pipe Company, Birmingham, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining, giving effect to, enforcing, or applying any rule prohibiting its employees, when they are on nonworking time, from distributing handbills, leaflets, or similar literature relating to concerted activities protected by Section 7 of the National Labor Relations Act, as amended, in nonwork areas of Respondent's property.

(b) Prohibiting its employees, during nonworking time, from soliciting their fellow employees to engage in activities protected by Section 7 of the National Labor Relations Act, as amended.

(c) Maintaining, enforcing, or giving effect to Rules 27, 29, and 30, as they existed on and after August 26, 1976, or any other rules or policies thereafter promulgated, maintained, or enforced, which prohibit its employees from engaging in the conduct hereinabove described in paragraphs (a) and (b).

(d) Disparately enforcing any rule, practice, or policy which prohibits its employees from soliciting or distributing leaflets or other literature where an effect thereof is interference with conduct described hereinabove in paragraphs (a) and (b).

¹⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Prohibiting its employees from distributing leaflets or other literature relating to their wages, hours, working conditions, or other terms and conditions of employment if performed off Respondent's property or, if on Respondent's property, if such distribution is on the employees' nonworktime and in nonwork areas.

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

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post at its facility in Birmingham, Alabama, copies of the attached notice marked "Appendix."¹⁶ Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the said Regional Director for Region 10, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁶ In the event that 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."