

Econolite Division of Altec Corporation and Michael J. O'Hara. Case 21-CA-12018

May 20, 1974

DECISION AND ORDER

BY MEMBERS FANNING, KENNEDY, AND
PENELLO

On January 4, 1974, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering 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 briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge to the extent consistent herewith.

We do not agree with the Administrative Law Judge's conclusion that Respondent's discharge of Michael O'Hara was not violative of Section 8(a)(3) of the Act. We are satisfied that O'Hara was discharged because of his activities on behalf of Traffic Controllers Independent Union (hereinafter TCIU) and, later, Local 2125, International Brotherhood of Electrical Workers (hereinafter IBEW).

In the spring of 1973, TCIU engaged in an organizational drive to replace IBEW as the exclusive bargaining representative of the production and maintenance employees at Respondent's plant. O'Hara took an active role in this campaign on behalf of TCIU by soliciting signatures on authorization forms, writing and handing out anti-IBEW pamphlets, and holding an employee meeting on the plant premises during one lunch hour in early April. All of O'Hara's TCIU activities were well known to management. An election was held in May 1973, in which IBEW defeated TCIU. After the election, O'Hara continued his participation in union activities by campaigning for, and winning, a seat on the IBEW committee formed to negotiate a new collective-bargaining agreement.² However, at the first negotiation session on June 4, Respondent's representatives expressed their reluctance to negotiate with IBEW so long as O'Hara and Rex Hiscocks, another employee previously active on behalf of

TCIU, participated in the IBEW committee, because they felt that by negotiating with TCIU spokesmen Respondent might be committing an unfair labor practice. O'Hara and Hiscocks resigned from the negotiating committee the next day in order to expedite the negotiations.

Until the TCIU organizational campaign in the spring of 1973, O'Hara had never, in his almost 3 years of employment with Respondent, been reprimanded or otherwise disciplined. On April 18, however, O'Hara was informed by his immediate supervisor, Billie Lex, that he had been seen excessively talking with employees outside his work area.³ Although the gist of the conversation between O'Hara and the other employees was unknown to anyone in management, Lex requested O'Hara to confine his discussion regarding union activities to his lunch or break periods. O'Hara said he would comply. On two separate occasions in June and July, Lex again confronted O'Hara with the fact that both he and other management personnel had observed O'Hara spending too much time away from his work area idly talking with other employees, and repeated his request that O'Hara refrain from such activity. He also warned him that any further infractions would result in written disciplinary action. On the morning of July 18, while on his work shift, O'Hara, having received from a fellow employee a copy of the terms of the new collective-bargaining agreement tentatively agreed to by Respondent and IBEW negotiators, ran off 12 copies of the contract terms on a Respondent-owned duplicating machine. He then gave one copy to Lex who had been standing next to him while he used the machine. Lex read the document and put it in his desk. The rest of the copies were distributed to other unit employees during O'Hara's lunch break. Upon learning of this act, Dennis DeCicco, Lex's immediate supervisor, confronted O'Hara and warned him not to use the Respondent's copying machine any more and not to distribute this sort of information either on his own or on company time without permission of both the Respondent and IBEW, lest he be immediately discharged. O'Hara promised to refrain from using the machine again, but claimed he had the right to distribute whatever materials he wished on his own time. On the next day, July 19, DeCicco and Lex reported the copying machine incident to Pospichal, who then decided to discharge O'Hara because he had violated two plant rules: rule 1.3, which prohibits

examined the record and find no basis for reversing his findings

² The old contract was to expire on or about June 14, 1973.

³ Besides having seen O'Hara himself, Lex had also been informed of O'Hara's excessive talking by Respondent's director of administration, Joseph Pospichal.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully

theft of company property, and rule 2.1, which prohibits distribution of materials during worktime.⁴

The Administrative Law Judge found that while O'Hara's reproduction and advance distribution of the terms of the proposed collective-bargaining agreement to unit employees was protected activity, the fact that he performed such activities during time he should have spent working removed such activity from its protected status and made it a proper basis for discharge by Respondent. We do not agree. The record reveals an unmistakable pattern of antipathy and suspicion exhibited by Respondent towards O'Hara because of his TCIU activities. This, coupled with patently pretextual use of valid plant rules to effect his discharge, leads us to conclude that O'Hara was fired solely because of his union activities.

After the advent of TCIU's decertification campaign, in which O'Hara played such a conspicuous role, O'Hara's excessive worktime conversations with other employees became the basis for repeated warnings and reprimands by Respondent's supervisors. While Respondent, of course, had a legitimate interest in ensuring that worktime should be reserved exclusively for work, it appeared that in the case of O'Hara it was what he was suspected of discussing during worktime rather than the fact that he was talking on worktime at all that was uppermost on Respondent's mind. Thus, on April 18, even though Lex had no inkling of what O'Hara was talking about with his fellow employees, he assumed that the talks centered around the TCIU campaign and warned O'Hara not to discuss *union activities* during worktime. Respondent's special attention to O'Hara's worktime activities, motivated as it was by its concern over his role in the TCIU campaign, evidenced itself in June, when, upon O'Hara's complaint of harassment to Lex in that he was being singled out for reprimand while coworkers could remain idle during their worktime for long periods with impunity, Lex agreed with him and attributed such harassment to the fact that O'Hara's union activities gave him "high visibility."⁵ Consistent with Respondent's undue preoccupation with O'Hara's possible TCIU activities was the warning found by the Administrative Law Judge to violate Section 8(a)(1), that Respondent's production manager, Robert Withrow, in April gave to pro-TCIU employee Kathleen Pierce to stop TCIU activities lest she be

hurt and end up like employee Rex Hiscocks, the president of TCIU.⁶ All these incidents clearly reveal an animus borne by Respondent towards TCIU in general and O'Hara's activities on behalf of TCIU in particular. Furthermore, this animus carried over after the defeat of TCIU in the May representation election. Thus, when DeCicco, on June 18, reprimanded O'Hara for reproducing the proposed contract terms on the office copy machine, he did not tell O'Hara merely to observe the plant rules and refrain from distributing any personal materials on company time, but admonished him not to distribute this *type of information* on either Respondent's or his own time, without permission of both Respondent and IBEW.⁷

Pospichal's reliance on O'Hara's reproduction of the contract terms and distribution of one copy to Lex, who was standing nearby, as a basis for his decision to discharge O'Hara reflects the extent to which that decision was colored by Respondent's union animus. Up until July 18, Respondent had no grounds as set forth in the plant rules for firing O'Hara. To the extent O'Hara had in the past spent too much time away from his work area idly gossiping with other employees, he might be found guilty of one of the so-called "minor" offenses delineated in the plant rules,⁸ commission of which was punishable by only verbal or written warnings, or, at worst, indefinite suspension for aggravated or serious violations. However, O'Hara's use of the office copy machine afforded the Respondent such grounds in that the act of reproduction, with its attendant appropriation of 12 pieces of company paper, could be labeled "theft" and thus constitute a so-called "major" offense set forth in the plant rules, for which immediate dismissal was warranted.⁹

Respondent's characterization of such minor appropriation as "theft" leads us to conclude that Respondent's reliance thereon in firing O'Hara was purely pretextual. This is especially true in that the record shows that prior to O'Hara's discharge, Respondent's copying machine had been utilized openly and freely by both rank-and-file employees and management personnel for personal business without any disciplinary action ever being taken. Moreover, Respondent seems to have been lax in its prosecution of other offenses that had occurred on its premises. Thus, when an employee brought a rifle into the plant, an offense punishable by immediate

⁴ Prior to O'Hara's discharge, there was no posted rule prohibiting unauthorized use of the copy machine. Such a rule was posted, however, on all such copy machines following the firing of O'Hara.

⁵ This was one of those few instances where *de minimis curat Lex*.

⁶ Hiscocks had previously been disciplined for refusing to transfer from one shift to another.

⁷ Plant rule 2.1 prohibits the following "Posting of notices, printed material, and/or distribution of any written or printed literature or articles

or petitions during the scheduled work shift, exclusive of rest periods and lunch and/or dinner periods on Company premises, without prior approval of the Industrial Relations Department."

⁸ E.g., rule 2.8—leaving one's department without prior authorization, rule 2.1—failure to perform assigned work.

⁹ Rule 1.3, theft, is one of the five major offenses in the "1" series of plant rules which may be punishable by immediate dismissal.

dismissal, no disciplinary action at all was taken. The same holds true for employees who distributed football and baseball pools on company time. Even though such conduct violated the no-distribution rule, no action was taken by Respondent. Given this backdrop of general tolerance in the enforcement of plant rules, the unique dispatch with which O'Hara was discharged for at most a *de minimis* violation of the rule against theft, and, for that matter, the rule against worktime distribution,¹⁰ convinces us that the real basis for O'Hara's discharge was his preelection efforts on behalf of TCIU and his postelection effort to keep unit employees informed as to the status of negotiations between Respondent and IBEW. For the foregoing reasons we conclude that Respondent's discharge of O'Hara violated Section 8(a)(3) and (1) of the Act.¹¹

ADDITIONAL CONCLUSION OF LAW

5. By discharging Michael J. O'Hara on or about July 19, 1973, because of his union activities, the Respondent has discriminated in regard to the hire and tenure of his employment, in violation of Section 8(a)(3) and (1) of the Act.

THE REMEDY

As we have found that on or about July 19, 1973, the Respondent discriminatorily discharged Michael J. O'Hara, we shall order that the Respondent offer to him full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings suffered by reasons of the discrimination against him by payment of a sum of money equal to that which he would normally have earned as wages from on or about July 19, 1973, to the date of Respondent's offer of reinstatement, less his net earnings during said period, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, together with interest thereon at the rate of 6 percent per annum, as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

ORDER

Pursuant to Section 10(c) of the National Labor

¹⁰ Lex was the only person to whom O'Hara gave a copy of the contract terms during worktime

¹¹ After this case was transferred to the Board, counsel for General Counsel moved to reopen the hearing and remand proceedings to the Administrative Law Judge for the purpose of receiving into the record additional evidence. Specifically, counsel for General Counsel would introduce, as evidence of both the shifting nature of Respondent's rationale for O'Hara's discharge and the true antiumion basis therefor, a copy of an appeal by Respondent of a state award of unemployment insurance benefits to O'Hara in which Respondent states that O'Hara was discharged not for

Relations Act, as amended, the National Labor Relations Board thereby orders that the Respondent, Econolite Division of Altec Corporation, Anaheim, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with economic reprisals for supporting the Traffic Controllers Independent Union, or any other labor organization.

(b) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because of protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

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

(a) Offer Michael J. O'Hara immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay which he may have suffered as a result of the discrimination practiced against him, in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under terms of this Order.

(c) Post at its plant in Anaheim, California, copies of the attached notice marked "Appendix B."¹² Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be posted by the 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 the said notices are not altered, defaced, or covered by any other material.

theft but for distributing confidential negotiation material Respondent has opposed this motion alleging such evidence to be irrelevant and untimely proffered

In view of our decision as set forth herein, we deny this motion.

¹² 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."

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

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

WE WILL NOT threaten our employees with economic reprisals for supporting the Traffic Controllers Independent Union or any other labor organization.

WE WILL NOT discourage membership in Traffic Controllers Independent Union, or any other labor organization, by discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or in any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

WE WILL offer Michael J. O'Hara immediate and full reinstatement to his former position or, if the position no longer exists, to a substantially equivalent one, without prejudice to his seniority and other rights and privileges enjoyed by him, and make him whole for any loss of pay he may have suffered by reason of his discharge, with interest of 6 percent per annum.

Our employees are free either to support, or to refrain from supporting, any labor organization, without our interference, restraint, or coercion.

ECONOLITE DIVISION OF
ALTEC CORPORATION
(Employer)

Dated _____ By _____ (Title)
(Representative)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Eastern Columbia Building, 849 South Broadway, Los Angeles, California 90014, Telephone 213-688-5200.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On October 18 and 19, 1973,¹ I presided over a hearing at Anaheim, California, to try issues raised by a complaint issued on September 6.²

The complaint alleged that Econolite Division of Altec Corporation³ violated Section 8(a)(1) of the National Labor Relations Act, as amended (hereafter called the Act), by interrogating an employee regarding union activity, by threatening employees with economic reprisals for union activity, and by prohibiting an employee from distributing union literature during nonworking time. The complaint also alleged the Company violated Section 8(a)(1) and (3) of the Act by discharging O'Hara for union activities.

The Company denied it committed the alleged interrogation, threats, and prohibition, denied it discharged O'Hara for union activities, and denied that any violation of the Act occurred.

The issues are:

1. Whether the Company interrogated an employee regarding union activities.
2. Whether the Company threatened employees with economic reprisals for union activities.
3. Whether the Company prohibited an employee from distributing union literature during nonworking time.
4. Whether the Company discharged O'Hara for union activities.
5. Whether, by commission of any of the foregoing, the Company violated the Act.

The General Counsel and the Company appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs have been received from the General Counsel and the Company.

Based upon my review of the entire record,⁴ observation of the witnesses, perusal of the briefs, and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find that the Company at all times material was an employer engaged in commerce in a business affecting commerce and Traffic Controllers Independent Union (hereafter called TCIU) and Local 2125, International Brotherhood of Electrical Workers, AFL-CIO (hereafter called IBEW),

¹ Read 1973 after all subsequent date references omitting the year.

² As amended on October 5 by the addition of a new Section 5(d) and 5(e). The original charge was filed by O'Hara on August 7 and an amended charge was filed on August 29.

³ Hereafter called the Company.

⁴ The unopposed motion of the General Counsel to correct certain portions of the transcript is granted.

were labor organizations, as those terms are defined in Section 2(2), (5), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Preliminary

At all times material, the Company manufactured traffic control systems at a plant located at Anaheim, California. The production and maintenance employees at that plant at all times pertinent were represented by the IBEW and covered by a contract between the Company and the IBEW expiring June 17.

TCIU launched an organizational campaign to displace the IBEW as the representative of the Company's production and maintenance employees in March, which culminated in a Board-conducted election in May. The election was won by the IBEW. O'Hara, Gerald Rex Hiscocks, Kathleen Pierce, Linda Banuelos, and Shirley Tyner were TCIU leaders and were active in the campaign.⁵

B. *The Alleged Interrogation and One of the Alleged Threats*

Pierce⁶ testified without contradiction that in late March or early April, Production Manager Robert Withrow⁷ came to her work station at the plant and said he heard there was something going on with the union; that she replied that some of the employees were trying to get the IBEW out and another union in; that Withrow warned her to lay off, as he did not want her to end up as Hiscocks had, he would hate to see her get hurt.⁸

Pierce's testimony was forthright and direct, it was uncontradicted, and it is credited.

While Withrow's comments were not couched in interrogating language, his warning to desist from her activities on behalf of the TCIU or she might suffer some economic detriment, coming from a representative of management, certainly interfered with, restrained and coerced Pierce's exercise of her Section 7 right under the Act to support a labor organization of her choosing, and thereby violated Section 8(a)(1) of the Act.

C. *The Second Alleged Threat*

Employee Tyner⁹ testified that on July 18, the Company's production manager, Robert Burns,¹⁰ informed her management was disturbed over premature publication to the employees of terms for tentative settlement of a new contract;¹¹ he told Tyner she was entitled to her views

⁵ Hiscocks was acting president of TCIU, O'Hara was its organizer; Pierce, Banuelos, and Tyner were active supporters. Their activities were known to the Company, particularly in the cases of Hiscocks and O'Hara, who identified themselves as TCIU leaders at the hearing in the representation case (21-RC-13161).

⁶ The Kathleen Pierce mentioned above. She was employed at all pertinent times as a receiving inspector.

⁷ An admitted supervisor under the Act.

⁸ The Company previously disciplined Hiscocks for refusing to transfer from the first to the second shift.

⁹ Employed as an operator of a solder-flow machine. She was also the shop steward in her department.

concerning the settlement terms, but she was not supposed to disseminate the settlement terms to other employees.

Tyner testified that Burns also instructed her not to use the Company's copying machines and informed her she could tell her partner, O'Hara, that the Company was setting a trap for him and he was going to be discharged within the next day or two.

Burns confirmed the fact that he talked to Tyner on July 18. He testified he spoke to her after he noticed a copy of the proposed contract settlement taped to the wall adjacent to Tyner's work station and after he took it off the wall; that his remarks were confined to statements that it had been reported to him.¹² that Tyner and O'Hara were distributing the document in question on company time, questions as to whether this was so, and a warning, on receiving a denial, that Tyner had better not distribute the document during her working hours.

Burns' testimony is credited. Tyner was a very partisan witness who tended to overstate or skip important background facts until cross-examined, and then to confirm such facts reluctantly. Burns, on the other hand, gave concise, direct, and candid testimony.

It is undisputed that all times pertinent there was in effect a valid company rule prohibiting the distribution of private materials on company time. There were also bulletin boards provided in specific areas for the posting of communications for employee perusal under certain conditions.¹³

Burns sought verification or denial of the report he had received from McVicker that Tyner and O'Hara were violating the no-distribution rule and cautioned Tyner to comply with it. His remarks were neither unlawful interrogations nor unlawful threats interfering with Tyner's Section 7 rights under the Act.

D. *The Third Alleged Threat, the Alleged Prohibition, and the Alleged Discriminatory Discharge*

The third alleged threat, prohibition, and discriminatory discharge all revolve about the Charging Party, O'Hara.

O'Hara was hired by the Company in July of 1970 and worked for approximately a year as an assembler. He then transferred to the stockroom as a storekeeper. In December of 1972, he was promoted to the position of lead storekeeper. In February or March of 1973, he was demoted (at his own request) back to the position of storekeeper.¹⁴ During the period he worked for the Company prior to the spring of 1973, O'Hara did not receive any reprimands or discipline for his work performance. Rather, he was complimented several times over the

¹⁰ An admitted supervisor under the Act.

¹¹ On July 17, the Company and IBEW negotiators agreed on terms for a 3-year contract retroactive to the date of expiration of the previous Company-IBEW agreement, subject to employee ratification. They also agreed to refrain from any publication of the proposed settlement terms prior to the ratification vote. Burns was understandably agitated (he was one of the company negotiators) at seeing a copy of the proposed settlement terms posted on the wall next to Tyner's work place

¹² By Donald McVicker, the IBEW's chief steward

¹³ IBEW requests, Company approval.

¹⁴ He was dissatisfied with the rate of pay.

quality of his work by various supervisors, including his immediate supervisor in the stockroom, Billie Lex.¹⁵ During this period, he was entrusted with the performance of several special tasks; one relating to the regular stockroom inventory and a second concerning a special inventory of the receiving room.¹⁶

As noted heretofore, in the spring of 1973 O'Hara assumed a leading role in the TCIU campaign to displace the IBEW as the collective-bargaining representative of the Company's production and maintenance employees. The activities of O'Hara were well known to management almost from their outset, since O'Hara openly sought employee signatures in support of the TCIU election petition, held a meeting of TCIU supporters on company premises during a lunch hour in the spring, and, on April 16, testified on behalf of the TCIU at the NLRB hearing on the TCIU petition.

A few days after O'Hara's testimony at that hearing, the Company's personnel director, Joseph Pospichal,¹⁷ telephoned Lex and informed Lex that O'Hara was spending an excessive amount of working time talking to other employees.¹⁸

Lex had also observed O'Hara engaging in frequent conversations, both on the production floor and with employees who called him to the door of the stockroom.

Lex called O'Hara aside where other stockroom employees could not hear their conversation and instructed O'Hara to confine his contacts and discussions with other employees during working hours to matters relating to his job and to conduct any other discussions he wanted to engage in during his lunch or coffeekbreaks or before or after working hours, in accordance with the plant rule. O'Hara agreed to do so.¹⁹ Lex made a written record of this conversation and sent it to Pospichal.

While O'Hara testified that a supervisor in the production department, Les Cormany, informed him in May during a lunch break to be careful, the Company was out to get him, Cormany's denial that he made that statement is credited.²⁰

Following the May IBEW election victory, four of the TCIU activists won election to the IBEW negotiating committee (O'Hara, Hiscocks, Pierce, and Banuelos). Negotiations for a new contract were set to begin on June 4. At the outset of the meeting, company negotiators pointed out that Hiscocks and O'Hara had identified themselves at the representation hearing as top officials of the TCIU and questioned whether the Company was bargaining with the TCIU, and thereby exposing itself to unfair labor practice charges, or the IBEW. The IBEW spokesman explained that the TCIU representatives had been elected by the employees to represent them in the negotiations and therefore were entitled to be there. The meeting was recessed to give both sides an opportunity to

secure legal advice. That evening, O'Hara and Hiscocks resigned from the committee.

Later that month (June), Lex warned O'Hara for the second time against spending too much time during working hours in personal conversations outside the stockroom.²¹

Still later that month (June), O'Hara, Lex, Cormany, and their wives went on a camping trip. In the course of the trip, O'Hara complained that other storekeepers could be away from the stockroom for longer periods of time than he could be away, without complaints, but he seemed to receive a complaint every time he was gone from the stockroom for 10 or 15 minutes. Lex replied that O'Hara had to remember he was "highly visible" due to his position in and activities on behalf of the TCIU.²²

Near the end of the month (June), O'Hara was called aside by Lex for the third time over spending too much time during working hours engaging in conversations outside the stockroom. O'Hara replied that the complaints were unfair, he was going to file a grievance if this "harassment" continued.

On July 10, Dennis DeCicco, the Company's material inventory control manager,²³ saw O'Hara in the production area talking to an employee in the module subassembly area while on his way to a meeting at the Company's executive conference room. It was approximately 3:30 p.m. and the employees were working overtime. DeCicco's immediate superior, E. Henslick, the Company's material manager, was standing nearby and directed DeCicco's attention to O'Hara. O'Hara did not have any cart or tray with him, which he would have if he were on the production floor to deliver parts or kits from the storeroom, the normal reason for his presence on the production floor.²⁴ The meeting lasted 10 to 15 minutes. When DeCicco left the meeting, O'Hara was still standing at the same location conversing with the same employee. Catching DeCicco's stare, O'Hara broke off the conversation and went towards the stockroom.

The following morning, DeCicco advised Lex of his observation of O'Hara the preceding day.

Lex contacted O'Hara in the presence of the lead storekeeper, Russell Hurst, and told O'Hara he had been observed again engaging in a lengthy conversation with another employee outside the stockroom during working hours and repeated his instruction (for the fourth time) that O'Hara was to confine his contacts and conversations during working hours to those required to perform his job. Lex also reminded O'Hara he had been warned previously about this.

O'Hara retorted that Lex was harassing him and demanded the name of his accuser (which Lex refused to provide). A written report of the incident was filed by Lex and Hurst with Pospichal.

management had conducted previously at which all supervisors were instructed to avoid making any remarks to employees which might compromise the Company

²¹ O'Hara confirmed receipt of the warning, while protesting his conversations were not overlong.

²² O'Hara so testified without contradiction.

²³ An admitted supervisor under the Act and Lex's immediate superior

²⁴ Also, his normal conversational contact would be with supervisors to see if the parts or kits were satisfactory

¹⁵ An admitted supervisor under the Act

¹⁶ Two of the compliments came over his performance of those tasks

¹⁷ An admitted supervisor under the Act

¹⁸ Pospichal had received several complaints or reports both from rank-and-file production workers and from supervisors that O'Hara was spending a lot of time on the floor contacting and conversing with the employees

¹⁹ These findings are based on Lex's testimony, which is credited.

²⁰ Cormany was a convincing witness, and it seems improbable a supervisor would make such a statement in view of a meeting top

Later that day, O'Hara stopped DeCicco to complain about the incident and Lex's refusal to name his accuser. DeCicco summoned Lex, identified himself as O'Hara's accuser, and stated O'Hara must know he was, since they locked eyes before O'Hara broke off his conversation and started towards the stockroom.²⁵ O'Hara became upset, stated he only talked a few minutes, said he didn't want to participate in any more discussions, and requested that all future reprimands be in writing. He was assured they would be.

The next day (July 12) O'Hara filed a grievance over the incident. It was taken through the third step of the grievance procedure and denied by the Company at each step. The IBEW did not take the grievance to arbitration within the time period specified therefor.

As noted heretofore, on July 17 the negotiators reached tentative agreement on terms for a new contract, subject to ratification by the affected employees. The negotiators also agreed to refrain from any publication of the terms of the tentative settlement prior to the ratification meeting and vote.

Shortly after he commenced work on his shift the following morning (about 7:30 a.m.), O'Hara secured a document purporting to describe the terms of the settlement. Using a company machine and paper in the stockroom, O'Hara reproduced a dozen copies of the document. He gave one of the copies to Lex. Lex accepted and read the copy without comment.

At approximately 9 a.m., the IBEW chief steward (and a member of the IBEW negotiating team) came up to DeCicco in a state of excitement, gave DeCicco a copy of the document reproduced by O'Hara, and told DeCicco that O'Hara was distributing such copies.

DeCicco tried to contact Lex, was unsuccessful, became busy on other matters, and finally reached Lex after the lunch hour. Lex informed DeCicco that he received a copy of the document from O'Hara but did not see him reproduce it. DeCicco and Lex then approached O'Hara. O'Hara admitted he duplicated the document on company equipment and paper during working hours and first admitted, but then denied, that he had distributed the copies he made on company time, claiming he distributed them during the lunch hour.

DeCicco told O'Hara he risked discharge by distributing copies of the document in the plant either during working or nonworking time, without IBEW and company permission.²⁶

O'Hara retorted that he would not use the company copier and paper in the future for his own purposes, but that he had a right to distribute whatever he pleased on his own time.

The following morning (July 19), O'Hara sought out DeCicco and requested reconfirmation of DeCicco's position that he was prohibited from distributing copies of

the document on his own time. DeCicco confirmed his position.

The duplication and distribution incident involving O'Hara was reported to Pospichal by DeCicco and Lex later that morning (July 19).²⁷ Pospichal had them reduce their report to writing and decided to discharge O'Hara. Lex was instructed (about 11:30 a.m.) to bring O'Hara to Pospichal's office.

Lex contacted O'Hara and asked O'Hara to accompany him to Pospichal's office. O'Hara stated he would come after lunch.²⁸ Lex reported to Pospichal. Lex and Pospichal went out to O'Hara and escorted him to Pospichal's office. After securing two IBEW stewards as witnesses (DeCicco and Lex were also present) Pospichal informed O'Hara he was discharged for using the Company's copier and paper to reproduce a personal document and distributing same on company time. O'Hara informed Pospichal of DeCicco's statement that he was prohibited from distributing the document on his own time. DeCicco did not deny making the statement. Pospichal stated he was the responsible corporate officer, not DeCicco, DeCicco was wrong, and O'Hara was free to distribute whatever he wished on his own time.

Following O'Hara's discharge, notices were posted on all the Company's copying machines stating they were not to be used for reproducing personal documents without supervisory permission.²⁹

No employees other than O'Hara have ever been disciplined for violation of the no-distribution during working hours rule. Previous discharges for violation of the theft and conversion rule have involved the theft of company equipment or supplies valued far in excess of the value of the paper utilized by O'Hara.

A POW-MIA petition and baseball and football pools were previously circulated during working hours in the plant with management knowledge previous to O'Hara's discharge without disciplinary action.

An employee violated the company rule against bringing firearms on the premises prior to the O'Hara discharge. The presence of the firearm was reported to Pospichal's predecessor. He removed the firearm but took no disciplinary action against the employee.

On the other hand, two employees who violated the company rule prohibiting one employee from punching another's timecard were summarily discharged, as were others who violated the theft rule. The record also fails to disclose that any of the TCIU activists other than O'Hara were discharged or otherwise disciplined.³⁰

O'Hara filed a grievance dated July 20 over his discharge. It was processed through the third step of the grievance procedure and denied in each step by the Company. It was not referred to arbitration within the time period prescribed by the IBEW—Company contract.

to reach him

²⁸ His lunch hour was 11:30 a.m. to noon

²⁹ The machines and paper had been utilized previously by both rank-and-file and supervisory personnel during working hours to copy personal documents. No one had previously been disciplined for such use.

³⁰ Hiscocks resigned his employment prior to the hearing. The other activists named heretofore are still in the Company's employ.

²⁵ DeCicco's testimony to this effect is credited as it fits in with Lex-Hurst report and other corroborating evidence

²⁶ DeCicco's denial that he included nonworking time in his statement is not credited in view of his awareness of McVickers' agitation over such distribution and Pospichal's corroboration of O'Hara's testimony that Pospichal overruled DeCicco on this point the next day (see later discussion)

²⁷ Pospichal was out of the plant the previous day and they were unable

E. *The Alleged Threat and Prohibition*

Findings have been entered that DeCicco told O'Hara on July 18 that he risked discharge for distributing copies of the tentative contract settlement in the plant either on working or nonworking time without the permission of the Company and the Union and that on July 19 he repeated that statement.

Findings have also been entered that Pospichal informed O'Hara on the later date (July 19) that DeCicco was incorrect, that he, as an official higher in the corporate hierarchy than DeCicco, wanted O'Hara to know he was free to distribute whatever he pleased during nonworking time.

Based on the foregoing, I find and conclude that, while the Company, by DeCicco, did advise O'Hara on July 18 and 19 he was prohibited from distributing the proposed contract settlement on his own time and risked discharge if he did so, that implied threat and prohibition was neutralized by Pospichal's July 19 statement to the contrary.

F. *The Discharge*

There can be little doubt that O'Hara engaged in extensive electioneering activities during working hours previous to the election, anti-IBEW activities during working hours subsequent to the election, and that the Company was both aware of, and disturbed by, those activities.

O'Hara's role as the TCIU's organizer was formally announced when he appeared at the April representation proceeding on the TCIU petition; he held a TCIU meeting during a lunch break at the Company's lunch facilities; and he both signed and circulated TCIU propaganda. Both Lex and Pospichal were keenly aware that O'Hara was spending a disproportionate amount of time during working hours talking to employees whom he would not normally have to be in contact with prior to the election. Of course they were not cognizant with the tenor of O'Hara's conversations, but it did not take much imagination to conclude they involved the election campaign. Aware of the sensitivity of the problem and undoubtedly wishing to avoid creating an issue, the Company limited itself to addressing a mild remonstrance and reminder to O'Hara of the no-solicitation rule.

Undoubtedly the Company hoped that the May election and IBEW certification as the winner thereof would bring an end to the turmoil in the plant and restore the cohesiveness of the unit and thus was understandably disturbed at the subsequent realization that O'Hara and his cohorts not only continued their opposition to the IBEW leadership,³¹ but had succeeded in placing themselves in positions³² where they could continue their divisive tactics among the employees.

O'Hara continued to flaunt the no-solicitation rule following the election, but the Company was in a weak position to enforce it without knowledge of the content of the conversations between O'Hara and the employees with whom he spoke. It thus had to content itself with repeated

admonitions, through June and early July, advising O'Hara to limit his contacts and conversations during working hours to persons and matters relating to his job. Each time he was warned, O'Hara minimized the incident which gave rise to the warnings and remained defiant.

The Company then learned O'Hara not only had breached the agreement among the negotiators to refrain from disclosing the terms of their proposed contract settlement, he had utilized a company-owned copier and company-owned paper during working hours, to reproduce and distribute the settlement terms.

On securing proof that O'Hara had indeed copied the document in question on company equipment and paper and given Lex a copy thereof during working hours, it discharged him.

The question then is reduced to a single issue—was the O'Hara conduct just recited the Company's reason for discharging him, or was citation of that conduct a mere pretext to cloak another reason—O'Hara's union activities?

While employees have a right, protected by the Act, to support a minority union, however disruptive of production and harmony their activities on behalf of that union may be, their employer is equally entitled to require that they spend their working time, for which they are paid, performing productive work.

It is clear that O'Hara, in reproducing and distributing the settlement terms, was engaging in activities he conceived to be in the best interests of his followers among the employees and therefore was engaged in protected, concerted activities under the Act. It is equally clear, however, that he engaged in those activities on time for which he was being paid by the Company to perform his job duties.

While the Company's disciplinary record is not entirely consistent, there is no evidence of any waiver of its right to discipline its employees for failing to perform the work for which they were hired.

Undoubtedly the Company was not displeased over removal of a disruptive influence among its employees; I cannot find and conclude, however, that this was its motive for discharging O'Hara. Rather, I find and conclude that upon finally securing proof of what it had long suspected, i.e., that O'Hara was using time for which he was being paid to perform his job duties to, instead, continue his anti-IBEW activities, it discharged him for this abuse of his position and his function.

CONCLUSIONS OF LAW

1. At all times material, the Company was an employer engaged in commerce in a business affecting commerce and the IBEW and the TCIU were labor organizations, as those terms are defined in Section 2(2), (5), (6), and (7) of the Act.

2. By Production Manager Robert Withrow's statement to Kathleen Pierce in late March or early April, to lay off her efforts on behalf of TCIU to supplant the IBEW as the exclusive bargaining representative of the Company's production and maintenance employees, as he did not

was a steward in her department.

³¹ O'Hara so testified.

³² Four TCIU leaders secured election to the negotiating committee, one

want her to end up as Hiscocks had and did not want to see her get hurt, the Company violated Section 8(a)(1) of the Act.

3. The Company did not, otherwise, violate the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that the Company engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, I shall recommend that the Company be directed to cease and desist therefrom and to post appropriate notices.
[Recommended Order omitted from publication.]