Grumman Flxible Corporation[1] *and* **Elvis Mitchell Gilt.** Case 8-CA-13490

September 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On September 25, 1981, Administrative Law Judge Russell M. King, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel 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 briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent herewith,[3] and to adopt his recommended Order, as modified.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by discharging employee Elvis Mitchell Gilt "solely because he expressed an intention to file a workmen's compensation claim." Assuming, *arguendo*, that Gilt's request for workmen's compensation papers was protected activity, we disagree with the Administrative Law Judge's finding that Gilt's discharge was motivated by Respondent's desire to protect its workmen's compensation liability.[4] As the Administrative Law Judge found, Gilt was either tardy or absent a total of 11 days during his 31-day term of employment with Respondent. Prior to reporting any ear discomfort, Gilt had already been recorded tardy or partially absent on six occasions. During that time he had been cautioned by his supervisor, Mike Nussbaum, to improve his attendance record. Later, in a November 28, 1980, progress report, Nussbaum cited the need for improvement in Gilt's attendance and, in issuing the report, counseled Gilt personally on the matter. The report did approve Gilt's retention, but Nussbaum, who had never previously caused the termination of a probationary employee, consulted with Gilt's other supervisor, Robert Grennell, and both supervisors subsequently raised the issue of termination with the personnel department. As the Administrative Law Judge notes, several other probationary employees had been fired for poor attendance records that year. Consequently, the decision to terminate Gilt was consistent with Respondent's past practice of dealing with probationers with unsatisfactory attendance records. Under these circumstances, we conclude that Gilt's discharge was motivated not by his expressed intention to file a workmen's compensation claim but by his poor record of attendance.[5]

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, as modified below, and hereby orders that the Respondent, Grumman Flxible Corporation, Loudonville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(d).
2. Delete paragraphs 2(b) and (c).
3. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent's name has been misspelled throughout the Administrative Law Judge's Decision. The correct spelling is as indicated above.

[2] Respondent 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 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] We agree with the Administrative Law Judge that it is improper to consider the validity of Respondent's 1980 solicitation and distribution rules since their validity was not fully litigated. We therefore find it unnecessary to determine whether the rules are facially valid under the Board's standard in effect at the time of their issuance. In finding the 1978 rules violative, Chairman Van de Water does not rely on *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981). See his dissent in *Intermedics, Inc., and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc.*, 262 NLRB 1407 (1982).

[4] The Administrative Law Judge considers significant Gilt's credited testimony that nurse Lois McDaniel told him that to pursue his claim would be "wasting his time and [he] would never win." The Administrative Law Judge interprets this statement to convey a message of the futility of seeking benefits in the face of Respondent's strong interest in protecting its liability. However, the remark is open to another at least equally plausible interpretation—that based on her familiarity with Gilt's symptoms and work environment, she did not consider the condition to be work-related. Moreover, regardless of the import of McDaniel's statement, it is not entirely clear that she was as agent of, and thus speaking on behalf of, the Respondent.

[5] The General Counsel excepts to the Administrative Law Judge's finding that a question in Respondent's employment application concerning prior workmen's compensation claims did not violate Sec. 8(a)(1) of the Act. In *Ohio Brass Company*, 261 NLRB 137 (1982), the Board found no violation in a similar job application inquiry, deeming it "a pertinent question bearing upon the applicant's history of personal injury."

Member Zimmerman concurred in that decision on the ground that the mere inquiry into the filing of past claims cannot be found unlawful in the absence of evidence of unlawful motive. Here no such unlawful purpose is involved in the inquiry.

APPENDIX

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

WE WILL NOT maintain an invalid no-distribution rule which prohibits employees from distributing written or printed matter of any description on company premises at any time, with or without the specific authority of management.

WE WILL NOT maintain an invalid no-solicitation rule which prohibits unauthorized solicitation for any purpose whatsoever on company premises.

WE WILL NOT enter into any labor agreement with the United Steelworkers of America, AFL-CIO, CLC, which restricts the posting of notices or the distribution of any kind of literature on company property other than the posting of official union notices on union-installed and union-maintained bulletin boards.

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

GRUMMAN FLXIBLE CORPORATION

DECISION

RUSSELL M. KING, JR., Administrative Law Judge: This case[1] was heard by me in Mansfield, Ohio, on October 8 and 9, 1980. The charge was filed by the Elvis Mitchell Gilt, an individual against the Respondent Employer (herein called the Company) on January 14, 1980. A complaint was issued February 29, 1980, by the Regional Director of Region 8 of the National Labor Relations Board (herein called the Board), on behalf of the Board's General Counsel, and the complaint (as amended during the hearing) alleges, *inter alia*, the discriminatory discharge of Gilt on December 6, 1979,[2] because he had previously expressed an intent to file a workmen's compensation claim in violation of Section 8(a)(1) of the National Labor Relations Act (herein called the Act).[3] The complaint further alleges the improper maintenance of rules restricting the use of company bulletin boards, and the improper maintenance of an overly broad no-solicitation rule, in violation of Section 8(a)(1) of the Act. The complaint also alleges that the Company improperly "maintained," through contract provisions, overly restrictive use and posting rules in connection with bulletin boards installed on company premises by the United Steel Workers of America, AFL-CIO, CLC (herein called the Union), in violation of Section 8(a)(1) of the Act.[4] Lastly, the complaint alleges (by amendment during the hearing) that the Company improperly included a question regarding the receipt of "compensation or insurance for a work injury" in its employment application, in violation of Section 8(a)(1) of the Act. The Company generally denies the allegations and alleges that Gilt was discharged for good cause (tardiness and absenteeism).

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT[5]

I. JURISDICTION

The pleadings and admissions herein establish the following jurisdictional facts. The Respondent is and has been at all times material herein a corporation duly organized and existing under the laws of the State of Delaware, with a place of business or plant in Loudonville, Ohio, where it is engaged in the manufacture of transit buses. Annually, in the course and conduct of its business operations, the Respondent ships goods valued in excess of $50,000 directly to points outside the State of Ohio. Thus, and as admitted, I find and conclude that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

---

[1] Originally consolidated with this case for hearing was Case 8-CA-13769, involving the individual charging party, Isaac Sturgeon. The General Counsel's unopposed motion to sever that case was granted at the commencement of this proceeding.

[2] All dates hereafter are in 1979 unless otherwise mentioned.

[3] The pertinent parts of the Act involved in this case are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .
>
> * * * * *
>
> Sec. 8(a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. . . .

[4] The union represents the company's production employees and its contract with the company contained the alleged objectional provisions. No charge was filed against the union in this case.

[5] The facts found herein are based on the record as a whole and upon my observation of the witnesses. The findings herein are in part based on credibility resolutions which have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Summary of the Testimony and Evidence*[6]

1. Testimony of employee Elvis Gilt

Elvis Mitchell Gilt testified that he had been employed by the Company as sawer-trimmer (or grinder) from October 22, 1979, until December 6, 1979, the day he was discharged. He worked the second shift from 3:30 p.m. to midnight and reported to Supervisors Robert Grennell (supervisor of the second floor), or Mike Nussbaum (supervisor of the second floor) when Grennell was not there. Gilt described his duties as routing and grinding fiberglass bus parts, front enclosures, rear-end enclosures, and two different types of side panels. The routing and grinding room was described by Gilt as covered with fiberglass, dust, cold, and without a heater. During rain, water would drip in his work room. Due to the type of work Gilt was engaged in, a particular clothing was required. He wore insulated underwear, heavy flannel shirts, blue jeans, a pair of coveralls, and the Company gave him a self-contained air helmet to wear for protection. According to Gilt the helmet was made out of plastic material that had a clear face mask over it and it had a cloth that came down that could be tacked inside of his shirt. A belt was strapped to his waist on which an air-conditioning unit was strapped. The air-conditioning unit pumped air into the helmet. Gilt indicated that air also came in from outside (outdoors) during the months of October, November, and December. Gilt testified that prior to his employment with the Company he had never sought medical help for an ear condition, but that during his employment with the Company he visited the Company's nurse (McDaniel) on November 19 and left work early. On November 20 he did not work and saw his wife's doctor, Dr. John Jentes who gave him a work excuse for leaving work early the previous day.

Gilt testified that subsequent to seeing Dr. Jentes he continued to experience discomfort with his ears and began to have an erratic work attendance record. Gilt related that on November 21 he did not work but went by the plant and spoke with Supervisor Grennell who informed him to "do what the doctor told [him] to do," adding that "ears are an important part of your body and you have to be extremely careful of it, and that he understood [his] feelings about not reporting to work, and he said he would see [him] the following day." The following 2 days (November 22 and 23) were Thanksgiving holidays and the following week Gilt reported timely for work Monday through Thursday, but on Friday (November 20) he left early because his ear hurt. Before leaving that day Supervisor Nussbaum had changed his work area, but according to Gilt this change proved unsuccessful in alleviating his ear problems, and Nussbaum therefore told him to go home. Gilt also indicated that Nussbaum requested that he "get a medical slip from the doctor and . . . take [it] . . . to personnel the following Monday."

The following Monday (December 3) Gilt reported early to personnel and after waiting 40 minutes he spoke with one Judy Edwards in personnel about the conditions he worked under and about the possibility of a job transfer from the department he worked in.[7] Edwards told him that at the time there were no openings and he would "just have to bear it." Gilt then requested workmen's compensation from Edwards, who informed him that personnel did not handle such matters but the nurse did. Prior to departing for the nurse's office Edwards said, "Well we hate to have to see you quit." Gilt then went to nurse McDaniel's office, asked for the workmen's compensation papers, and also gave McDaniel "the doctor's slip."[8] Gilt testified that McDaniel then told him "that it is worthless for [him] to do such a thing because [he] couldn't prove that [he] was just wasting [his] time." Gilt indicated he persisted in his request for the papers, explaining "that it was [his] choice" and McDaniel again responded that he would be "wasting [his] time because there would be a lengthy hearing and everything and [he] would never win." Gilt left without obtaining the workmen's compensation papers from McDaniel. Gilt then reported for work and soon thereafter spoke with Supervisors Nussbaum and Grennell regarding his unsuccessful attempts to transfer to another department, and again requested workmen's compensation papers. According to Gilt this request was disregarded, and Nussbaum told him to go back to work.

On Thursday, December 6, Supervisor Nussbaum informed Gilt that personnel had decided to discharge him. Gilt asked why, and Nusbaum replied that he should talk to Personnel Officer Furman Manley. Gilt made an appointment with Manley December 10 and, at that time, according to Gilt, Manley stated that his dismissal was due to poor workmanship and grinding too many parts. In January 1980, with the help of the Union, Gilt filed a workmen's compensation claim and eventually did receive some money as a result of his claim. Gilt also filed a grievance on December 11 over his discharge. The grievance reached the third step of the grievance procedure and was again denied by the Company on January 29, 1980.[9] The reason given for Gilt's discharge was his tardiness and absenteeism.[10] On February 8, 1980, the Union withdrew the grievance.[11]

---

[6] The following includes a summary of the testimony of the witnesses appearing in the case. The testimony will appear normally in narrative from, although on occasion some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witness themselves stated or related, without credibility determinations unless indicated, and does not reflect my ultimate findings and conclusions in this case. Not all documentary evidence admitted in the case is included or mentioned in the summary, and references to such evidence will appear later herein.

[7] Gilt arrived earlier than normal and thus did not "punch-in" timely because of a company policy, set forth in the employee handbook, that employees may not punch in more than 30 minutes early. Gilt's attendance record reflects that he worked 7.7 hours on December 3.

[8] The work excuse slip that Dr. Jentes had given Gilt on November 20, pertaining to his early departure from work on November 19, was admitted into evidence. The record, however, is uncertain as to whether this "doctor's slip" was the same. The slip from Dr. Jentes was the only one admited in the case.

[9] The union contract with the Company provided for a four-step grievance procedure, with the fourth step being arbitration.

[10] Gilt's attendance records indicated he was discharged for "unsatisfactory probation period."

[11] The charge in this case had already been filed (on January 14, 1980).

Gilt testified that he was tardy six or seven times, and indicated one was due to his wife's prenatal examination, another for car repairs, and several others (3 or 4 minutes) were due to parking problems outside the plant.[12] During his testimony Gilt also identified his employment application which included the question "Have you ever applied for or received compensation or insurance for a work injury?"[13]

2. Testimony of employee Edward Safran

Edward Safran, who was president of the union local, had worked for the Company for 10 years. Safran testified that the normal termination period for probationary employees, such as Gilt, was their last week or 41st through 45th days.[14] According to Safran, Industrial Relations Representative Furman Manley justified Gilt's early dismissal by citing his poor work quality. Safran testified, however, that during the second and third steps of Gilt's grievance proceedings the Company held steadfast with its position that the reason for Gilt's termination was absenteeism.

Safran identified the union contract with the Company which commenced on August 27, 1977, and expired on August 10, 1980.[15] Safran testified regarding the Company's no-solicitation rule as set forth in the Company's rules of conduct.[16] According to Safran the rules of conduct had been and were currently in effect and he indicated that a point system was applied to nonprobationary employees, as opposed to probationary employees. Safran also indicated that the company had a policy which permitted a supervisor to allow an employee, for real and compelling reasons, time off not to exceed 5 days.

Regarding injury records, Safran testified that he at one time had free access to all such records. This policy was then changed to deny him access to any records, but later he was granted permission to see such records regarding employees that had requested his representation.

3. Testimony of Industrial Relations Manager Willhite

Joel Willhite testified as the Company's present manager of industrial relations, indicating that both Industrial Relations Representative Furman Manley and Supervisor Bob Grennell were no longer with the Company. According to Willhire Manley was terminated in January 1980 and Grennell resigned because of health reasons in April or May 1980, and now resides in Florida. Willhite testified that during Gilt's employment (October 22 to December 6) he was tardy on seven occasions, and absent 2 partial days and 2 full days due to illness, adding that only 1 partial day was "verified by a doctor." Willhite further testified that Gilt was tardy or absent 11 days out of the 31 days he was employed. Willhite maintained that the Company's position regarding Gilt was that his "attendance record was not acceptable, and therefore he was terminated."

4. Testimony of Supervisor Michael Nussbaum

Michael K. Nussbaum would, on occasion, supervise Gilt. According to Nussbaum he received only favorable comments about the type of hood Gilt used on the job, and no employee ever complained of any physical dis-

[12] Gilt's formal attendance record, although difficult to understand in some places, reflects that he was tardy six or seven times (four times by 6 minutes, once by 18 minutes, and once by approximately 90 minutes).

[13] The application was admitted into evidence, and Gilt answered the question "No."

[14] There was an exception in the electrical department.

[15] Art. XXIII is entitled "Bulletin Boards" and reads as follows:

SECTION 1

The Union may install nine (9) lockable bulletin boards, at the Loudonville facility and one (1) lockable bulletin board at the Millersburg facility, in mutually agreed upon locations, to be used by the Union for the posting of official Union notices. The Local Union President shall designate, by written notification to the Company's Industrial Relations Department, the name of the Union Officer who is authorized to post such notices at each facility. Prior to posting, the designated Union Officer shall present to the Industrial Relations Department a copy of the notice to be posted.

SECTION 2

The Union notices shall be used only for the purpose of notifying employees within the bargaining unit of official Union business, and shall not be used for, or directed to, employees outside the Bargaining Unit, nor shall such Union notices be used for organizational activities or Union membership solicitation. Further, there shall be no controversial matter contained in any notice the Union desires to post.

SECTION 3

There shall be no other posting of notices by employees, nor other general distributions of pamphlets, advertising, political matter, or any other kind of literature upon Company property other than that herein provided.

A new contract was entered into on August 29, 1980. Slight changes were made to secs. 1 and 2, and sec. 3 was excluded.

[16] These rules, entitled "Rules of Conduct," were dated January 1978 and were admitted into evidence. Under shop rules, group B, the following is prohibited: "Distributing, posting (or removal) of notices, signs, literature, petitions, written or printed matter of any description on bulletin boards or company premises at any time without the specific authority of management." Under shop rules, group C, the following is prohibited: "Distributing, posting (or removal) of notices, signs, literature, petitions, written or printed matter of any description on bullentin boards or company premises at any time without the specific authority of management." Under shop rules, group C, the following is prohibited: "Unauthorized soliciting or collecting contributions for any purpose whatsoever on Company premises." Under the group C rules, employees were "subject to discharge" on the first offense. Under group B rules the first offense carried a written warning, second offense a 5-day suspension, and third offense "subject to discharge." In June 1980 the Company issued new rules of conduct which contained the following regarding solicitation and distribution:

> Distribution of printed matter or solicitation for any purpose by non-employees on the Company premises is not permitted at any time. Any visitor engaged in solicitation or distribution will be required to leave Company premises immediately.
>
> Solicitation by employees or the collection of contributions for any purpose (civic, charitable, political, etc.) is not permitted during working time. Working time includes either the working time of the employee doing the soliciting or the employee being solicited.
>
> Distribution of literature, petitions or printed matter of any kind by employees is not permitted in working areas at any time.

Group B of new shop rules prohibits "Posting (or removal) of notices, signs, literature, petitions, written or printed matter of any description on bullentin boards or Company premises at any time without the specific authority of management." Group C of the new rules prohibits "Distribution of printed matter, solicitation or collecting contributions in violation of the Rules of Conduct."

comforts, physical injury, sickness, or ill health because of wearing the hoods. Nussbaum also denied that Gilt had ever asked him for any compensation forms.[17]

5. Testimony of Nurse Lois McDaniel

The Company's industrial nurse, Lois Marie McDaniel, testified that Gilt made a request to her to have his position changed, indicating that he was having problems with the hood and had ear problems. She then informed him of the requirement of written documentation from a doctor before she could make any recommendations. According to McDaniel, Gilt also stated he "wanted to file a workmen's compensation form" for payment of his medical bills regarding his ear infection. McDaniel indicated she then informed Gilt that she "would be happy to file a claim for him, but it would be unusual and therefore it would probably be the Company's position that it would be set for hearing." Gilt later filed a workmen's compensation claim and, according to McDaniel, she then contacted and talked with Carmen Hall, who subsequently forwarded a memo to her indicating that Gilt's ear problems had not been "industrial related."[18] McDaniel testified that the Company ultimately paid $12 on Gilt's claim and this was paid by computer error of their "actuary" Company.

On cross-examination McDaniel indicated that the Company was "self-insured" regarding workmen's compensation payments, but if a claim were deemed meritorious the Company would pay the claim directly. McDaniel added that, although the Company voluntarily paid some claims, she informed Gilt that the reason his claim would not be paid by the Company was due to its classification as an "occupational disease" and the Company's policy regarding these types of cases was to "set them for hearing." Regarding Gilt's ear problems, McDaniel did indicate that she suggested to Gilt that he wear a toboggan hat, and that Gilt disregard her suggestion.

B. *The Employment Application*

The Company's employment application contained a question as to whether the applicant had "ever applied for or received compensation or insurance for a work injury?"[19] The complaint, as amended, alleges that the inclusion or presence of the question is a violation of Section 8(a)(1) of the Act.[20] Besides the actual existence of the question, there is no evidence in the record as to the Company's reason or need for the question, other than the fact that the Company was self-insured. The Board has held that an employment application inquiry into employees' past concerted activities regarding union affiliation is violative of the Act.[21] The Board has also held that a claim for unemployment compensation is protected concerted activity,[22] as well as an expressed intent to file a workmen's compensation claim.[23] In its brief the General Counsel argues in this case that the question regarding claims both attempts to elicit information to be used as the basis of a hiring decision, and serves as a chilling effect to perspective employees not to file such claims should they be hired, thus having a reasonable tendency to coerce employees in the exercise of their rights. I disagree in this case. I am unwilling to draw such inferences or conclusions from the mere existence of the question on the application, without further evidence. In my opinion to do so would be an overly broad, blanket, and unwarranted extension of what the Board has considered as protected and concerted activities or acts. I thus find no violation of the Act regarding the existence of the "compensation or insurance" question on the employment application.

C. *The Discharge of Employee Gilt*

Paragraph 8 of the complaint alleges that Gilt was discharged in violation of Section 8(a)(1) of the Act because he "expressed an intention to file a claim with the Ohio Bureau of Worker's Compensation." As indicated earlier, the Board has held that such expressed intentions are protected concerted activity under the Act.[24] That Gilt expressed such intentions at least on Monday, December 3, is uncontested in this case. After two uneventful and full work days (December 4 and 5), Gilt was discharged on December 6.[25]

Gilt commenced his employment on October 22 as a probationary employee.[26] The Company maintains that Gilt was either tardy or absent some 11 out of 31 working days, which constituted the sole reason for his discharge.[27] The record and evidence does support these

[17] Nussbaum had completed a "Probationary Period Progress Report" on Gilt dated November 28, which was admitted into evidence. This progress report noted that Gilt showed interest in his job, noted "average" work performance (adding "improvement can be made"), and indicated Gilt was "cooperative." The report also noted under attendance "improvement expected (tardiness)," and recommended Gilt's retention "with improvement in attendance and performance."

[18] The memo was admitted into evidence. It was dated February 21, 1980, and is headed, "From the desk of . . . John P. Jentes, M.D. [and] Daniel R. Daugherty, M.D." It was signed by Carmen Hall, as insurance clerk.

[19] The application also inquired as to "chronic ailments," "physical disabilities," "operations," and "severe illnesses."

[20] This allegation was inserted into the complaint by amendment during the hearing.

[21] *Boatel Alaska, Inc.*, 236 NLRB 1458 (1978).

[22] *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75 (1978).

[23] *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), citing *Self Cycle, supra*. Enforcement was denied by the Fourth Circuit in *Krispy Kreme*, 635 F.2d 304 (1980). This fact and other related matters will be discussed later in this Decision regarding Gilt's discharge.

[24] *Krispy Kreme, supra*. The five-member Board (then Chairman Fanning and Members Jenkins, Penello, Murphy, and Truesdale) reasoned, as in *Self Cycle, supra*, that such benefits arise out of the employment relationship and are of common interest to other employees. The U.S. Fourth Circuit Court of Appeals felt differently and denied enforcement (635 F.2d 304), citing among other cases, *ARO, Inc.*, 596 F.2d 713 (6th Cir. 1979). The initial decision in *ARO, Inc.*, was authored by me, and on exceptions was reversed by the Board (227 NLRB 243). The Sixth Circuit denied enforcement. Notwithstanding the foregoing, it is my lot herein to consider *Krispy Kreme* as Board precedent, which I am bound to follow.

[25] Gilt filed a grievance over the discharge on December 11. On January 14, 1980, he filed the charge in this case. The grievance was denied at the third step of the grievance procedure, short of arbitration. On February 8, 1980, the grievance was withdrawn. The complaint issued in this case on February 29, 1980.

[26] The union contract specified that all new employees were probationary employees, without seniority, for "forty-five (45) consecutive work days." Gilt's probationary period would have been up approximately December 30 (considering holidays).

[27] Gilt testified that Personnel Officer Manley later told him he was discharged for poor workmanship. Union President (and employee)

Continued

contentions by the Company regarding Gilt's attendance record.[28] However, on November 28 Supervisor Nussbaum completed and signed Gilt's "Probationary Period Progress Report," recommending Gilt's retention "with improvement in attendance and performance."[29] At this point Gilt was 6 working days from his discharge, and some 19 days short of the end of his probationary period. During the 6-day period Gilt left early on November 30 at Supervisor Nussbaum's suggestion,[30] and on December 3 was some 15 minutes late actually checking in by virtue of having gone to the personnel office where he inquired about workmen's compensation forms.[31] Gilt worked full days December 4 and 5.

I find in this case that Gilt was discharged solely because he expressed an intention to file a workmen's compensation claim.[32] Gilt was given only 6 days out of approximately 19 days to further prove himself, after his retention had been recommended. His early departure on November 30 was condoned by his supervisor and his later reporting on December 3 was not his fault. The Company was self-insured for workmen's compensation and strongly protected its liability. As nurse McDaniel put it during Gilt's visit the early morning of December 3, Gilt would be "wasting [his] time . . . and would never win."[33]

Having found that Gilt's expressed intentions to file a workmen's compensation claim resulted in his discharge, I am constrained to further find and conclude that under the Board's present law,[34] Gilt was discriminatorily discharged in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 8 and 10 of the complaint.

Safran confirmed, in his testimony, Manley's stated reason for Gilt's discharge. Manley, no longer with the Company, did not testify. The Company's industrial relations manager, Joel Willhite, testified, without uncertainty, that the discharge was due solely to Gilt's attendance record. I take this to be the Company's position in this case.

[28] The record and exhibits reflect that Gilt was late some 5 to 10 minutes on October 25 and November 2, 5, and 7. Gilt was also late October 31 and December 3. On December 3 he arrived early to go to personnel. He was too early to clock in but reported to work after he finished with personnel. On November 19 he left 2 hours early after seeing the nurse, for which he later obtained a doctor's excuse. Gilt did not report for work on November 20 and 21, and on November 30 he left 4 hours early at Supervisor Nussbaum's suggestion.

[29] The evidence reflects that other probationary employees during the year had been both rejected (several for poor attendance records) and retained.

[30] Gilt's attendance records reflect Nussbaum's suggestion to Gilt on November 30.

[31] Later on December 3 Gilt also asked Supervisors Nussbaum and Grennell for workmen's compensation papers. He never received the papers or forms from the Company and, finally, aided by the Union, he filed a claim in January 1980.

[32] In its defense in this case, the Company never raised the issue of Gilt's ear problems, or the fact that this problem may have eventually rendered any employment with the Company impossible. To have taken this approach may well have enhanced adversely the Company's claim exposure. However, this is speculative and I make no such finding in this case.

[33] Nurse McDaniel, in her testimony, denied these remarks claimed by Gilt, but did concede that she told Gilt the Company "would probably . . . set [the matter] for hearing." I credit Gilt over McDaniel here, and credit Gilt's testimony throughout this case.

[34] See *Krispy Kreme Doughnut Corp., supra.*

D. *The Company's Distribution and Solicitation Rules*

In January 1978 the Company published its "Rules of Conduct" which contained, among other things, certain "Shop Rules" which carried penalties for their violation. Among these rules appeared the following violations regarding distribution and solicitation:

> Distributing, posting (or removal) of notices, signs, literature, petitions, written or printed matter of any description on bulletin boards on Company premises at any time without specific authority of management.
>
> Unauthorized soliciting or collecting contributions for any purpose whatsoever on Company premises.

In June 1980 the Company published new "Rules of Conduct" which changed the word "Distributing," above, to "Posting" and replaced the above "Unauthorized" solicitation clause with simply the following:

> Distribution of printed matter, solicitation or collecting contributions in violation of the Rules of Conduct.

This replacement clause referred to a newly inserted section in the general rules section (as opposed to the "Shop Rules") which reads as follows:

> SOLICITATION AND DISTRIBUTION
>
> Distribution of printed matter or solicitation for any purpose by non-employees on the Company premises is not permitted at any time. Any visitor engaged in solicitation or distribution will be required to leave Company premises immediately.
>
> Solicitation by employees or the collection of contributions for any purpose (civic, charitable, political, etc.) is not permitted during working time. Working time includes either the working time of the employee doing the soliciting or the employee being solicited.
>
> Distribution of literature, petitions or printed matter of any kind by employees is not permitted in working areas at any time.

There was no issue in this case regarding distribution and enforcement of the rules cited above and I thus find that they were duly distributed and enforced.[35]

Basic considerations regarding distribution and solicitation rules involve a proper adjustment between the un-

[35] The record is simply void of any evidence on the subject except Union President Safran's testimony that the new rules had not been submitted to the Union. Safran was apparently referring to art. XXIV, sec. 1, of the union contract with the Company which reads as follows:

> The Company shall have the right to promulgate, establish, alter, amend and enforce reasonable shop rules relating to the conduct and efficiency of employees and Company operations. Any additions or deletions will be provided to the Union Negotiating Committee for information purposes prior to the incorporation of such changes. The Union shall have the right to process a grievance on any rule changes or additions which they deem unfair.

There was also no evidence presented in the case as to whether the old or new rules were in any way clarified by the Company to the employees.

disputed right of self-organization assured employees under the Act and the equally undisputed right of employers to maintain discipline in their establishments.[36] A broad guideline has been that, so long as distribution was by employees to employees and in-plant solicitation was on "non-working" time, to prohibit the same in such cases might well be violative of the Act.[37] Until recently the Board distinguished between prohibitions during "working time" and during "working hours," holding that "working time" restrictions were valid on their face and "working hours" restrictions were invalid unless their impact on lunch and break time were clarified.[38] However, the Board recently held that both phrases ("working time" and "working hours"), without further clarification, were presumptively invalid.[39]

With the above basic guidelines in mind, I find that the January 1978 rules were in effect until 1980 and were violative of Section 8(a)(1) of the Act as alleged in paragraphs 5, 6, and 10 of the complaint. The rules were far from even ambiguous. They simply prohibited any and all distribution "at any time without specific authority of management," and any and all "unauthorized soliciting . . . for any purpose whatsoever on Company premises." I am not called upon in this case to make any findings regarding the 1980 rules of conduct, which were published after the issuance of the complaint but before the hearing in this case. The 1980 rules prohibited distribution and solicitation only by "non-employees" and restricted employee solicitation to "working time." These rules, on their face, conformed to what the Board's standard for validity was at the time.[40] Their validity was thus not seriously contested or litigated on the record. I thus feel that it would be improper at this time for me to attempt an analysis of the 1980 rules in light of the Board's recent alteration of its earlier standard,[41] or in light of any other authority. I do find, however, that the publication of the 1980 rules did not extinguish the earlier violations resulting from the 1978 rules, and as found herein.[42]

[36] *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793 (1945). The Court also added that the "dominant purpose" of the Act is the "right of employees to organize for mutual aid without employer interference."

[37] *N.L.R.B.* v. *Magnavox Company of Tennessee*, 414 U.S. 1109 (1974).

[38] *Essex International, Inc.*, 211 NLRB 749, (1974). In this case, Members Fanning and Jenkins dissented and would have found both phrases, standing alone, to be ambiguous and invalid.

[39] *T.R.W. Bearing Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981) (by a three-member Board comprised by then Chairman Fanning and Members Jenkins and Zimmerman).

[40] *Essex International, Inc., supra.*

[41] *T.R.W. Bearing Division, a Division of T.R.W., Inc., supra.*

[42] I recognize that the 1980 rule changes may well have been a good-faith effort on the part of the Company to remedy the earlier defects, and it would not be any intention herein to condemn any such efforts on the part of this or any other employer who may be so motivated. The General Counsel argues in his brief that, for various reasons, the 1980 rule is also violative of the Act, and urges a finding to that effect in this case. As indicated above, I conclude that to do so would be improper in this case, and I further feel that such a finding is not necessary to preserve the violations attributable to the earlier rules. By the testimony of Union President Safran and Industrial Relations Manager Willhite (himself), I find that the new rules had not been effectively distributed to the employees or sufficiently promulgated to effect a repudiation of the old rules.

E. *The Bulletin Board Provisions of the Union Contract*[43]

On August 22, 1977, the Union and the Company entered into their collective-bargaining agreement. Article XXIII contained three sections dealing with the use of some nine union bulletin boards at the plant. Section 1 restricted use of the bulletin boards to the Union "for the posting of official Union notices." One union officer was to be designated as the officer "authorized to post such notices." Section 2 restricted the bulletin boards use to notifying "bargaining unit" employees only of "official Union business," excluded their use for "organizational activities or Union membership solicitation," and further excluded the posting of "controversial matter" in any notice to be posted. Section 3 prohibited all other postings of notices and "other general distributions" of any kind. On August 29, 1980, a new collective-bargaining agreement became effective with two sections regarding union bulletin boards.[44] Section 1 remained essentially the same. Section 2 contains no "official Union business" restriction and substitutes "inflammatory matter" for "controversial matter."

The General Counsel argues in his brief that section 3 of the 1977 contract was the objectionable section in that contract, and I agree and so find that it was in violation of Section 8(a)(1) of the Act as alleged in the complaint. In contrast, I find that sections 1 and 2 of the 1977 contract, standing alone, were within the legal bounds.[45] Section 3 in the earlier contract served to be more restrictive than the Company's rules which I have earlier found herein to be violative of the Act. The section prohibited "other general distribution" by all employees except that permitted in sections 1 and 2.[46] The exclusion of section 3 from the 1980 contract did not of course abolish its prior existence and effects and, as in the case of the rules, the record lacks evidence that the employees were actually informed of the significant deletion, whether in connection with the 1980 rule changes or not.[47] The same 3-year existence of the no-distribution clause (sec. 3) in the 1977 contract in violation of Section 8(a)(1) of the Act in my opinion was in no way extinguished by its exclusion in the 1980 contract. In these findings I have taken into consideration the long period of the section's existence, its obvious illegality, and the Board's implicit and prompt requirements for renouncement.

[43] As indicated earlier, no charge was filed against the Union in this case, thus the complaint only alleges the Company violated the Act regarding the existance of these provisions.

[44] The complaint in the case was also not amended to allege any violations as a result of the new contract. Sec. 3 of the 1977 contract was excluded completely.

[45] See *N.L.R.B.* v. *Magnavox Company of Tennessee, supra; Ford Motor Company (Rouge Complex)*, 233 NLRB 698 (1977); and *General Motors Corporation, Delco Moraine Division*, 237 NLRB 1509 (1978). If I had been confronted in this case with the validity of secs. 1 and 2 in the 1980 contract, my conclusions would be the same.

[46] I deem it unimportant to discuss the question of preemption of the rules by the contract, as testified to by Union President Safran. In my opinion, they both, together or separately, served to restrict the rights of the employees.

[47] *Allis Chalmers Corporation*, 224 NLRB 1199, (1976); *General Thermodynamics, Inc.*, 253 NLRB 180 (1980).

Upon the foregoing findings of fact, and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By publishing and maintaining an invalid no-distribution rule which prohibited employees from distributing written or printed matter of any description on company premises at any time without the specific authority of management, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By publishing and maintaining an invalid no-solicitation rule which prohibited unauthorized soliciting for any purpose whatsoever on company premises, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By entering into a labor agreement with the United Steelworkers of America, AFL-CIO, CLC, restricting the posting of notices or the distribution of any kind of literature on company property other than the posting of official union notices on union-installed and union-maintained bulletin boards, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By unlawfully discharging employee Elvis Mitchell Gilt on December 6, 1979, because he earlier expressed an intention to file a workmen's compensation claim, the Respondent violated Section 8(a)(1) of the Act.

6. Except those violations concluded in paragraphs 2 through 5, above, the Respondent has not otherwise violated the Act.

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

THE REMEDY

In order to remedy the unfair labor practices found herein, my recommended Order will require the Respondent to cease and desist from further violations, to post an appropriate notice to employees, and to offer unconditional reinstatement to Elvis Mitchell Gilt and make him whole for all wages lost by him as a result of his unlawful discharge, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[48]

Upon the basis of 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[49]

The Respondent, Gruman Flexible Corporation, Loudonville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining or enforcing a broad no-distribution rule prohibiting employees from distributing written or printed matter of any description on company premises at any time, with or without the specific authority of management, so as to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

(b) Maintaining or enforcing a broad no-solicitation rule which prohibits the unauthorized solicitation by employees on company premises for any purpose, so as to interfere with, restrain, or coerce employees in the exercise of the rights under Section 7 of the Act.

(c) Maintaining, enforcing, or renewing any contractual provision with the United Steelworkers of America, AFL-CIO, CLC, restricting the posting of notices or the distribution of any kind of literature on company property except the posting of official union notices on union-installed and union-maintained bulletin boards, so as to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

(d) Discharging or otherwise discriminating against employees because they expressed an intention to file a workmen's compensation claim, thereby interfering with, restraining, or coercing employees in the exercising of their rights under Section 7 of the Act.

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

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

(a) Offer Elvis Mitchell Gilt immediate, full, and unconditional reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make the said Elvis Mitchell Gilt whole for any loss of pay suffered as a result of his unlawful discharge in the manner set forth in that portion of this Decision 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 the terms of this Order.

(c) Post at its Loudonville, Ohio, facility copies of the attached notice marked "Appendix."[50] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that

[48] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[49] 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.

[50] 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."

said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.