JD–44–05
Gas City, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMCAST AUTOMOTIVE
OF INDIANA, INC.

and Case 25-CA-29199

JOHN ROWE,

an Individual

Frederic Roberson and Raifael Williams, Esqs.
for the General Counsel.
Mark Stubley and Brandon Shelton, Esqs.
(Olgetree, Deakins, Nash, Smoak & Stewart, P.C.),
of Greenville, South Carolina,
for the Respondent.

DECISION

IRA SANDRON, Administrative Law Judge. The complaint alleges that Amcast Automotive of Indiana, Inc. (the Respondent or Company) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by essentially forcing employee John Rowe to resign on May 27, 2004,[1] and committed three independent 8(a)(1) violations in connection therewith. Although the Respondent has labeled "voluntary" Rowe's acceptance of resignation in lieu of termination, I deem it involuntary and to have constituted an effective discharge.

Pursuant to notice, I conducted a trial in Marion, Indiana, on November 15 and 16, and in Fort Wayne, Indiana, on January 25 and 26, 2005, at which the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed helpful posthearing briefs that I have duly considered.

Issues

The primary issue is whether the Respondent had good cause to discharge Rowe because he violated company policy by "surfing" the Internet on worktime, in looking at websites pertaining to KPS, a prospective buyer of the Respondent's business; or whether the Respondent discriminated against him because of his union activities in years past, his suspected union activity in May, and/or his protected concerted activity in seeking information about KPS.

[1] All dates occurred in 2004, unless otherwise specified.

I note at this point that the Respondent's issuance of a "final written warning" to Rowe in September 2003, for leaving the building without clocking out,[2] was not alleged as an unfair labor practice, and its legitimacy is not before me. Accordingly, I will not address its particulars. Its relevance relates to the Respondent's assertion that the Company's progressive discipline policy mandates discharge of an employee who receives any kind of disciplinary action within 12 months of having received a final written warning.

The independent 8(a)(1) allegations are:

1) Wilbur Kline, manufacturing manager/maintenance & tool room manager, interrogated Rowe on about May 25 concerning his and other employees' union memberships, activities, and sympathies, and created an impression that the Respondent was surveilling employees' union activities.

2) Rowe's immediate supervisor, Reed Stambaugh, tool room cell 7 department manager (supervisor), informed employees on about May 28 that Rowe had been discharged because he engaged in union and other protected concerted activity (as testified to by Gene Sage Jr.); and told Rowe on about June 15 that he had been discharged for engaging in union and other protected concerted activity.

The Respondent did not call Stambaugh, whom it still employs, and I draw an adverse inference against the Respondent on any factual matters in the case about which Stambaugh likely would have knowledge. See *Daikichi Sushi*, 335 NLRB 622 (2001); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F. 2d 720 (6th Cir. 1988); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977).

Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following

Findings of Fact

The Respondent, a nationwide company headquartered in Dayton, Ohio, operates a plant in Gas City, Indiana (the facility), where it is engaged in the manufacture and nonretail sale of aluminum wheels for the automotive industry. The facility has over 200 employees. Organizationally, the top position is plant manager.[3] Larry Henn has been the manager of the Human Resources department (HR) since November 2002. He and Mark Barker, HR representative since December 2001, are involved in the full gamut of personnel and labor relations functions.

As far as disciplinary steps, verbal counselings or oral warnings are not considered discipline per se. The steps of discipline are written warning, final written warning, and termination. New hires are provided a copy of the employee handbook[4] (handbook) at their times of hire, and Rowe signed an acknowledgment of receipt of such. The handbook states, at page 28:

> In some circumstances, a written warning may be issued after a rule is violated. If another offense occurs within 12 months, a final written warning may be issued. On the **third violation in 12 months** of a Company rule, the Associate will be terminated. If a

[2] GC Exh. 5.

[3] See R. Exh. 25, organizational chart.

[4] GC Exh. 6.

rule violation is considered serious enough the violation may result in suspension or termination. [Emphasis added.]

According to the Respondent's witnesses, the policy is that employees who receive a final written warning will be terminated if they receive another warning of any kind within the next 12 months. This has been followed in many cases. However, despite Henn's initial testimony that he knew of no exceptions to this policy, the Respondent's records reflect several instances in 2002, 2003, and 2004 in which an employee's final written warning was followed within the next 12 months by another final written warning or lesser form of discipline.[5] Henn and Barker attributed these instances to mistakes by supervisors, who failed to check with HR to review the employees' personnel files.

The handbook also sets out, at pages 24–29, various standards for behavior and prohibits, inter alia, loitering, wasting time, or misusing company equipment. About 40 employees use personal computers at the facility. No one other than Rowe has ever been disciplined for using the Internet for nonbusiness-related purposes.

United Autoworkers (UAW or the Union) Activities

Rowe was actively involved in two unsuccessful UAW organizing campaigns at the facility, the first in 1999 or 2000, and the second in 2002.[6] In 1999, he talked to other employees in favor of the Union, attended almost all union meetings, and passed out approximately six T-shirts with union insignia. In 2002, he engaged in the same activities but distributed several dozen T-shirts, as well as other union paraphernalia. In addition, prior to the NLRB election on October 3, 2002, Rowe went to a representation case hearing, where the issue was the supervisory status of group leaders, and he served as the Union's observer on the day of the election. On May 26, the day before Rowe was terminated, the UAW engaged in handbilling outside the facility during shift changes for all three shifts. Rowe had no actual involvement in this.

Rowe's union sympathies and activities were well known to management. Thus, John Lilly, who was employed in managerial positions for about 14 years until October 2003, testified that during the 2002 organizing drive, Rowe was one of the employees identified at management meetings as being prounion because he had demonstrated consistent union support during both organizing drives. Jerry Rowland, a manager or supervisor for almost 4 years until July 17, 2003, also testified that Rowe was identified as prounion. Finally, Wilbur Kline, a manager from August 1999 until November 15, observed Rowe wearing union T-shirts at work in 2002 and, after Kline returned from active military service, again in 2003 and 2004.

[5] See GC Exhs. 8–13.

[6] There was also a similarly unsuccessful organizing campaign by the Glass, Molders, Pottery, Plastics, & Allied Workers (GMP) union in approximately 2001.

Current and former managers testified about two kinds of management meetings, the first being "consistency" meetings that Henn instituted shortly after he became HR director in November 2002. These biweekly meetings were the result of what he saw as the need to have consistency in the application of the Respondent's practices in disciplining employees and to ensure conformity with the Respondent's policies. The second type consisted of management meetings held regarding union organizing efforts. From the testimony of various witnesses, neither the demarcation between the two kinds of meetings nor their exact dates are entirely clear.

Lilly testified that during both the 1999 or 2000 UAW and GMP organizing campaigns, the Company provided training to managers and supervisors, He had a general recollection that they discussed which employees were prounion and which were procompany. As noted, Lilly recalled that Rowe was one of those identified as prounion. Plant Manager Duane LaShamb stated that supervisors should apply or enforce all company policies and rules.

Lilly also testified about separate regular weekly consistency meetings held starting after the 2002 union drive. He recalled that LaShamb in June 2003 told supervisors that if they did not "weed the garden," their replacements would. LaShamb did not say anything about prounion employees, and Lilly's testimony reflects that LaShamb's comments related to employees who were not performing. Lilly equivocated on whether LaShamb stated that they needed to monitor Rowe's performance and, if necessary, build a case against him.

Rowland put the consistency meetings as starting earlier, since he stated that Henn in May 2002 required supervisors to talk to employees about the Union and report back to him. Rowland testified that when he reported that employee Craig Piper evinced unequivocal union support, LaShamb stood up and stated that Rowland needed to find a way to get rid of Piper; that Rowland "needed to weed the garden." Rowland replied that Piper was a long-tenured and good employee, to which LaShamb responded that Rowland should find a way to build a case against him, or his replacement would. As opposed to Lilly, Rowland testified that when LaShamb and Henn used the expression, "weed the garden," and talked about building a case against employees, they were referring both to poor performers and to union supporters. Further, the consistency meetings were originally that but, as the union campaign progressed, the tenor changed to that of targeting union employees.

Rowe's Employment

Rowe was employed for about 12 years. He started as a bench worker and, for about 9 years prior to his termination, held the dual jobs of bench worker and CNC machinist in the tool room (Cell 7). For about 8 years, he had a computer in connection with his duties as CNC machinist, and he used the Internet to order new tooling (from mcmaster.com). During the last year or year-and-a-half, Stambaugh was his immediate supervisor.

At all times material, Rowe worked the first shift, 7 a.m. to 3 p.m. He had three breaks during the work day; one 20 minutes for lunch, and two for 10 minutes each. They were not at fixed times. Depending on work needs, he normally took the first break at 8:30 a.m., lunch at 11 a.m., and the third break at 1 p.m. He was not required to notify anyone when he went on break.

Events of May 2004

On about May 11, at a weekly technical support meeting, Dwayne Gotshall, support manager for the Respondent's Freemont, Indiana plant, told Rowe, Gene Sage Jr., and another

employee that it had been announced at Fremont that KPS was purchasing both the Company's Freemont and Gas City facilities. He further stated that the announcement would not be made at Gas City for another 3 weeks.

Thereafter, on May 11, 13, and 14, Rowe, with Sage present on many occasions, accessed various websites pertaining to KPS, in an effort to learn more about that company.[7] Rowe started by looking at the Amcast.com company web page and next went to links connected with KPS. Often before accessing sites, he discussed with Sage what to search for. All of the sites he visited related to checking Amcast stock or to KPS. Rowe conceded that some of this activity may have been on his worktime and, as detailed below, he apparently engaged in the activity both on breaks and on worktime.

On one of those dates, Rowe printed several pages from a website to the printer located in Stambaugh's office.[8] Stambaugh and several other employees were there at the time. Rowe gave the documents to Sage and Stambaugh to read. Stambaugh looked at them for about 5 minutes and then returned them to Rowe. Stambaugh did not say anything. After this, Rowe placed them out in the tool room, on the table where paperwork was kept. This is apparently what generated the "tip" from an employee that Rowe was surfing the Internet.

Rowe testified that on May 25, he had a conversation with Stambaugh and Kline in the former's office. Rowe asked Kline what he would suggest doing with company stock if the Company was sold, to which Kline responded that he would hold on to it because if KPS purchased the Company, the stock could be rolled over. Kline then asked if there were any truth to "the rumors." Rowe asked if he meant union rumors, and Kline replied yes. Rowe said no and gave his word that no union drive was going on. As described above, handbilling in fact took place the following day.

Kline did recall such a conversation in the spring but was vague about what was said. He testified he could not remember the context but only that Rowe basically said he did not think there needed to be a union. Stambaugh did not testify at all. I credit Rowe's testimony on the conversation, which was precise, as opposed to Kline's vague account.

Henn testified that Rowe's "surfing" of the Internet for KPS came to his attention through an employee's tip, reported to him by the employee's supervisor at a meeting. Henn quizzed the supervisor for more information because, he first testified, his primary concern was that KPS was not a public situation inasmuch as the Respondent and KPS were engaged in due diligence negotiations. Barker testified to the same effect. Later, however, Henn unequivocally testified that it was the length of time Rowe spent surfing the Internet, and not the fact that he was accessing sites related to KPS, that resulted in the decision to terminate him. Thus, he would have been discharged regardless of the subject matter of the nonbusiness-related sites he accessed.

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[7] Consistent with this testimony, Rowe stated at the unemployment hearing on October 22 that Sage was "present almost every time" and that they wanted to determine how their employment might change. R. Exh. 19 at 27. Sage testified, not inconsistently, that he "glanced" at the KPS information Rowe had on his personal computer. Sage, who is still employed, appeared reticent to testify, and I believe he downplayed his involvement.

[8] Similar to the printouts contained in GC Exh. 19.

On the morning of May 26, Henn asked Nathaniel Spencer, the Company's computer consultant, to generate a record of every personal computer at the facility that had requested KPSfund.com. for the period from May 7–14. This was the first time Spencer had ever been asked to retrieve anyone's Internet usage.

Spencer produced such a report. It showed that three computers had accessed the above website. One of them was later traced to Rowe. Henn had Spencer prepare a printout of Rowe's Internet use.[9] Henn determined that Rowe had spent 20 or 25 minutes being on the Internet on nonwork-related sites on three separate dates (May 11, 13, and 14), including a time when he was being paid overtime.

The report reflects that on May 11, after being on the mcmaster.com website, Rowe accessed sites for KPS information from 9:35–9:48 a.m. At 10:04 a.m., he again accessed mcmaster.com, but there is nothing showing how long he remained at his computer between 9:48 and 10:04 a.m. This could have been on his morning break. On May 13, Rowe accessed sites for KPS from 6:25–6:32 p.m., before accessing mcmaster.com at 6:42 p.m. Again, there is nothing showing that he spent the time between 6:32 and 6:42 at his computer. He then returned to KPS-related sites between 6:42–6:43 p.m. This presumably would have been when he was on overtime, since he normally stopped work at 3 p.m., but it is possible that he was entitled to an additional break on overtime status. On May 14, at 6:59 a.m. and between 7:22 – 7:29 a.m., he again accessed such sites. He accessed mcmaster.com at 7:54 a.m. Again, nothing in the document shows how long he remained at his computer between 6:59 and 7:22 a.m. or between 7:29 and 7:54 a.m. Since his shift started at 7 a.m., this activity (save the first minute) would have occurred on his worktime, unless he took an early break. In sum, the report on its face establishes with certainty only that he accessed KPS sites for 13 minutes on May 11, 8 minutes on May 13, and 8 minutes on May 14, for a total of 29 minutes over 3 days.

Henn, Barker, and Kline all testified that a decision to discipline an employee is normally a collaborative or consensus effort between the employee's first-line supervisor (and, at times, department manager) and HR. According to Henn and Barker, HR's primary function is to ensure consistency in the imposition of discipline and conformity with the Respondent's progressive discipline system. Kline testified that the supervisor's recommendation carries the greatest weight. However, Steve Robinson, maintenance superintendent from September 2003 until August, testified that his recommended disciplines were frequently reduced by Henn or Kline.

According to Henn, after reviewing Spencer's report about Rowe's Internet usage, he, Barker, and Kline decided that since Rowe was on a final written warning, termination was the appropriate action for his offense. They confirmed this decision with Plant Manager LaShamb.

Kline's account differed from Henn's in an important respect. Thus, Kline testified that Henn or Barker brought to his attention that Rowe had been on the Internet in the tool room "numerous times," a few of which were excessive and on overtime, and recommended that he be terminated. Nothing in his employment record was brought up as a reason for the recommendation. Therefore, according to Kline's testimony, the previous final written warning was not raised as a consideration.

[9] GC Exh. 7. It shows only the times when particular sites were accessed but not logging off times.

Kline was consistent with Henn and Barker with regard to Stambaugh's very limited, if any, role in the investigation or the decision to terminate Rowe. Stambaugh was essentially presented with Rowe's discharge only after the decision had already been made, and Barker testified that Stambaugh was only "briefly" involved in management's discussions.

The termination interview took place in Barker's office on May 27. Barker, Henn, Stambaugh, and Rowe were present. Barker did most of the speaking for management. He confronted Rowe with being on the Internet at times he should have been working and presented him with the documents showing the amount of time he had spent on the Internet. Barker stated that he had violated three company rules: loitering on the job, misuse of company equipment, and wasting time. Rowe at first denied having been on worktime but then did not. Barker offered him "voluntary" resignation in lieu of discharge, explaining its benefits, and Rowe accepted that alternative. At one point, Rowe brought up his union activity, but Henn basically replied it had nothing to do with the termination.

At no time prior to this meeting did Henn or anyone else interview Rowe. Barker recalled that during the meeting, when Stambaugh had stepped out of the room, Rowe attempted to talk about his use of the Internet. However, Henn told him they should not have any such discussion because the decision had already been made to terminate him.

The following morning, the subject of Rowe's termination came up in a conversation in the tool room office (Stambaugh's office). Stambaugh, Sage, and most people on the first shift were there. Sage testified that someone commented to the effect that Rowe was probably fired for his union activity. Stambaugh replied, "Well, it probably didn't help his cause any."[10] Sometime that day, maybe at the meeting, Stambaugh told Sage that "part of the reason why [Rowe] got [sic] fired" was his use of the Internet.[11]

Statements Sage made in his NLRB affidavit differed in wording with his testimony but were not necessarily inconsistent. Thus, Sage attested in the former that Stambaugh said, "It sure didn't help John's cause that the Union showed up here the day before . . . . The official reason John was fired was because of improper Internet access."[12] As I previously stated, Sage appeared reticent, and he seemed to say as little as possible when answering questions. Because of this, and because the affidavit was closer in time to the actual events, I am inclined to credit what he said in the affidavit. However, to avoid any evidentiary issues, and realizing that testimony is subject to cross-examination at the time it is given, as opposed to statements made in affidavits, I will find what he said in testimony to be the facts.

During the second week of June, Rowe called Stambaugh about getting a reference for another job. During their conversation, Rowe asked why he had been terminated. Stambaugh responded that someone had taken a paper up to Barker and said Rowe was surfing the Internet. Stambaugh then said, "[I]f it hadn't been for the 'U' word," Rowe probably still would have been employed.[13]

[10] Tr. 170, 174.
[11] Tr. 171–172.
[12] Tr. 204.
[13] Tr. 245.

Conclusions of law

8(a)(1) Allegations

1. Manager Kline asked Rowe on May 25 if there was any truth to rumors of union activity.

Questioning an employee about his or her knowledge of a union's organizing activities may, depending on the circumstances, violate Section 8(a)(1) of the Act. *Michigan Roads Maintenance Co.*, 344 NLRB No. 77 slip op. at 2 (2005); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB No. 124, slip op. at 2 (2004). Here, when Rowe was the lone employee in the presence of a manager and his immediate supervisor, Kline suddenly asked him such a question. This was not a situation where the question was casually asked during an informal discussion on the subject initiated by the employee. It matters not that Kline did not use the word "union" when he asked Rowe whether there was truth to the rumors, because he subsequently confirmed that he was indeed referring to union rumors. In these circumstances, I conclude that Kline's question was coercive and therefore violative of Section 8(a)(1).

Kline's question did not amount to what the General Counsel alleges was interrogation concerning Rowe's and other employees' union memberships, activities, and sympathies, or create an impression that the Respondent was surveilling employees' union activities. Rowe sua sponte volunteered that he was not involved, and Kline's comments about union rumors did not state or imply that the source of that information had anything to do with surveillance of employees.

2. Supervisor Stambaugh told Sage and other employees on May 28 that Rowe's union activity probably played a role in his discharge.

By using the word "probably," rather than "possibly" or "may have," Stambaugh went beyond saying that he was merely speculating. Rather, he conveyed to employees the message that Rowe was discharged in part for his union activity.

Stambaugh also stated to Sage, and possibly other employees, that part of the reason Rowe was discharged was his use of the Internet. This was too ambiguous to be coercive; I do not believe employees would have seen a connection between Rowe's discharge and his protected concerted activity. It did, however, reinforce the message that Rowe was discharged in part for other reasons, to wit, union activity.

Therefore, I conclude that Stambaugh violated Section 8(a)(1) by stating that Rowe was discharged in part for his union activity.

3. Stambaugh told Rowe on about June 15 that if it had not been for the "U" word, he probably would not have been terminated.

For the above reasons, this also amounted to a statement that Rowe was discharged in part for his union activity and constituted a violation of Section 8(a)(1).

Stambaugh's statement that Rowe was terminated because someone had taken to HR documents Rowe had printed from the Internet was too ambiguous to find it a statement that Rowe was terminated in part for his protected concerted activity.

Rowe's Termination

The framework for analysis is *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399−403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reason for its action was the actual one, rather than a pretext to disguise antiunion motivation. *Detroit Paneling Systems,* 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

There are two facets to Rowe's protected activities. First was his earlier support of the UAW in 1999 or 2000 and in 2002. The second was his engaging in protected concerted activity in May 2004. That his union activities came under the protection of the Act cannot be disputed.

The Respondent in its brief raises the contention that his activity of surfing the Internet for information on KPS was not protected concerted activity. I credit Rowe's testimony that he shared information with other employees and that Sage was with him during at least some of the times that he accessed KPS sites, thereby making his conduct concerted in nature.

As to whether the activity itself was protected, an employee's activities come under the penumbra of Section 7 if they might reasonably be expected to affect terms or conditions of employment. *Georgia Farm Bureau Mutual Insurance Companies*, 333 NLRB 850 (2001), citing *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981). This follows from what the Seventh Circuit Court of Appeals has recognized as the intent of Congress that the protections of Section 7 be broadly construed. See *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 577 (7th Cir. 1983), citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 fn. 17 (1978).

Here, Rowe was seeking information on what he reasonably believed was the company that was purchasing his current employer. Such a change in ownership reasonably could have affected the terms and conditions of employment of the Respondent's employees, as well as the value of their company stock. I therefore conclude that Rowe's activity was presumptively protected under Section 7 of the Act. I note Rowe's unrebutted testimony that on May 25, he

asked Kline what he would suggest doing with company stock if the Company was sold, to which Kline responded that he would hold on to it because if KPS purchased the Company, the stock could be rolled over. I further note Rowe's unrebutted testimony that he shared with Stambaugh at least some of the information he obtained about KPS on the Internet. Management, by its actions, implicitly supported the conclusion that Rowe was engaged in protected activity.

As to knowledge, there is no issue that the Respondent knew of Rowe's surfing the Internet for information on KPS; indeed, that was the activity that precipitated his termination. Regarding Rowe's activities on behalf of the UAW in previous years, this was clearly known to management, as reflected by the testimony of former managers Kline, Lilly, and Rowland. Moreover, Kline questioned Rowe on May 25 regarding rumors of another union organizing campaign, leading to the conclusion that management considered him to be involved in any type of planning for such. When UAW handbilling did take place the next day, it takes no great leap of imagination to conclude that management believed Rowe was involved, even if he were not. A respondent violates the Act if it terminates an employee in the mistaken belief that he or she was involved in union activity. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589–590 (1941); *Dayton Hudson Department Store Co.*, 324 NLRB 33, 35 (1997); *Salisbury Hotel*, 283 NLRB 685 (1987).

The last element necessary to establish a prima facie case of unlawful termination is animus. Going back to the consistency or other management meetings in years past, I do not find the evidence presented about statements made by LaShamb or Henn sufficient to establish direct animus. Only one former manager, Rowland, testified that LaShamb made statements targeting Rowe for his union activity, but he then equivocated on whether LaShamb specifically named Rowe.

However, Sage testified without controversion that the day after Rowe's discharge, Stambaugh told employees that Rowe's union activities "probably" played a role in his termination and that his use of the Internet was either a pretext or only one of the reasons he was discharged. The clear message was that Rowe was terminated in part for his union or suspected union activities, particularly when he was a known UAW supporter and the termination occurred just 1 day after the UAW handbilled outside the facility. Further, Sage told Rowe on about June 15 that if not for the "U" word, he probably would not have been discharged. There is thus direct evidence of animus.

Animus also can be inferred from the timing of the investigation and the termination. Although Rowe's Internet activity took place between May 11 and 14, and the employee who tipped off management on the basis of the printout presumably saw it during that time period, Henn did not ask Spencer to generate any kind of report until May 26, the date of the UAW handbilling, and Rowe was terminated the following day. See *Howard's Sheet Metal*, *Inc.*, 333 NLRB 361 (2001); *Signature Flight Support*, 333 NLRB 1250 (2001); *Masland Industries*, 311 NLRB 184 (1993).

Related to what strikes me as the Respondent's haste to terminate Rowe, and also raising another inference of animus, was the Respondent's failure to conduct a fair and complete investigation. No one from management spoke to Rowe prior to his termination interview, and Stambaugh, Rowe's immediate supervisor, was basically left out of the loop entirely. See *Publishers Printing Co.,* 317 NLRB 933, 938 (1995); *Burger King Corp.*, 279 NLRB 227, 239 (1986); *Syncro Corp.*, 234 NLRB 550, 551 (1978). Indeed, when Rowe, at his termination interview, tried to discuss the underlying events, Henn cut him off and stated the decision to terminate him had already been made.

In light of direct animus expressed by Stambaugh and inferred animus as reflected by the preceding, I find that the element of animus has been established and that the General Counsel has made out a prima facie case of unlawful discharge.

The Respondent's Defenses

The Respondent's position has two facets—first, that Rowe's surfing of the Internet on May 11, 13, and 14 violated company policies and warranted disciplinary action; second, that because he had received a final written warning within the prior 12 months, company policy mandated discharge.

The primary issue is whether he was properly subjected to discipline for his Internet activities. If not, then he would not have been terminated regardless of the earlier final written warning.

It is noteworthy that approximately 40 people have personal computers at the facility, yet no one other than Rowe has ever had his or her Internet access reviewed or been disciplined for using the Internet for nonbusiness reasons. I also note that Rowe was an employee with approximately 12 years of tenure.

Considerably weakening the Respondent's position is the way it conducted its investigation. Rowe was never interviewed at any time prior to his termination interview, at which Henn refused to let him speak about the circumstances surrounding his Internet activity. Even though the report management received from Spencer established with certainly only that Rowe spent 29 minutes over 3 days on KPS-related sites, management came to the conclusion that he spent over an hour thereon and never questioned Rowe whether he was on worktime or on breaks.

Moreover, crediting management's witnesses, Stambaugh, the first-line supervisor, had little or no participation in the discussions leading to Rowe's termination and no input in the decision. Yet, Henn, Barker, and Kline all testified that the practice is that the first-line supervisor is integrally involved in the disciplinary process. Kline even testified that the first-line supervisor's recommendation is usually accorded the greatest weight.

I must conclude that management either heard from Stambaugh but chose to ignore what he said, because it exculpated Rowe (see below), or simply did not want to hear what he had to say about Rowe's activities. Either way, management acted contrary to normal and reasonable practice, shedding doubt on its motives.

This failure of the Respondent to conduct a fair and complete investigation leads to the conclusion that it was not genuinely interested in knowing the underlying facts and circumstances of the events but, rather, was looking for a pretext to discharge Rowe. See *Publishers Printing Co.,* supra; *Burger King Corp.*, supra; *Syncro Corp.*, supra.

The Respondent emphasizes that Rowe was surfing the Internet on worktime. However, on at least one of the 3 days he spent on KPS-related sites (representing 13 of the 29 minutes clearly shown in GC's Exh. 7), he apparently was on breaktime, and he may have been on break at other times he accessed such sites.

Regardless of whether he was on worktime or breaks, Rowe's unrebutted and credited testimony was that Stambaugh, his immediate supervisor, was aware he was accessing KPS

information on-line and sharing the information with other employees. More than that, Stambaugh was present when Rowe printed information from the Internet, read it himself, and gave it back to Rowe to show to other employees. At no point did Stambaugh direct Rowe to cease engaging in his Internet search of KPS. Clearly, Stambaugh tacitly approved Rowe's conduct and therefore effectively condoned it.

In a myriad of cases, usually in strike or walkout situations, the Board has held that an employer cannot take action against an employee whose conduct has gone beyond the bounds of protected activity if the employer has, either affirmatively or by nonaction, condoned such conduct. See, e.g., *Asbestos Removal*, 293 NLRB 352 (1989); *General Electric Co.*, 292 NLRB 843 (1989). Thus, even if it were to be concluded that Rowe's conduct in surfing the Internet for KPS information on worktime otherwise would properly have subjected him to discipline, Stambaugh's conduct effectively estopped the Respondent from imposing such. To hold otherwise would fly in the face of fundamental fairness.

Based on the above factors, I conclude that the Respondent has failed to meet its burden of showing that but for Rowe's union activities (actual and suspected) and his engagement in protected concerted activity, he would have been discharged on May 27.

In light of this conclusion, it is not necessary to go into great detail regarding the Respondent's purported policy of terminating an individual who receives discipline within 12 months of a previous final written warning. Suffice to say, the record reflects there were a number of instances in 2002, 2003, and 2004 in which this was not the case, whether the result of supervisors' errors or otherwise. Further, the policy as stated in the handbook refers to termination when there is a third discipline in 12 months, not two. Finally, former manager Robinson testified that HR had the authority to lessen proposed discipline and, in fact, exercised such authority when it saw fit. I cannot conclude in light of this evidence that management was bound by policy to terminate Rowe, even if it is assumed that his conduct in May warranted discipline. The Respondent's reliance on this purported policy is undermined, in any event, by contradictory testimony between Henn and Kline as to whether the final written warning was raised as a reason for termination.

As I said at the outset, no matter how phrased by the Respondent, Rowe's separation was effectively a discharge, and I conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Rowe on May 27, 2004.

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 the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Interrogated employees about union organizational efforts.

(b) Told employees an employee was discharged for his union activity.

3. By discharging employee John Rowe, the Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a) (3) and (1) of the Act.

Remedy

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

The Respondent, having discriminatorily discharged John Rowe, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent should expunge from its records any references to Rowe's discharge, no matter how it is termed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Amcast Automotive of Indiana, Inc., Oil City, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about union organizational efforts.

(b) Telling employees an employee was discharged for his union activities.

(c) Discharging employees because of their union or other protected concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer John Rowe full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Rowe whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any

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

references to Rowe's discharge, no matter how it is termed, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used in any way against him.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Oil City, Indiana, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 25, 2004.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 16, 2005.

_____
Ira Sandron
Administrative Law Judge

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interrogate you about union organizational efforts.

WE WILL NOT tell you that an employee has been discharged because of his union activity.

WE WILL NOT discharge you because you engage in union or other protected concerted activities for your mutual benefit and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer John Rowe full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Rowe whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any references to John Rowe's discharge, no matter how termed, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used in any way against him.

AMCAST AUTOMOTIVE OF INDIANA, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Federal Building, Room 238
Indianapolis, Indiana 46204-1577
Hours: 8:30 a.m. to 5 p.m.
317-226-7382.

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 ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 317-226-7413.