

Winkle Bus Company, Inc. and United Food and Commercial Workers Union, Local 371, AFL-CIO, CLC. Cases 34-CA-10705 and 34-CA-10774

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
SCHAUMBER AND WALSH

On October 19, 2004, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief.¹ The General Counsel filed an answering brief.

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

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

In October 2003³ the Union began a campaign to organize the Respondent's Milford, Connecticut facility. We adopt the judge's findings that, in the course of opposing its employees' unionization, the Respondent violated Section 8(a)(1) by maintaining an unlawful no-solicitation policy, threatening union representatives with arrest,⁴ placing employees' union activity under surveillance, threatening employees with arrest, coercively in-

terrogating employee Zabala,⁵ threatening employees with loss of benefits,⁶ and threatening employees with stricter discipline and increased penalties.

A panel majority (Members Schaumber and Walsh) also adopts the judge's finding that the Respondent violated Section 8(a)(1) by asking employees to report union threats or coercion.⁷ A different majority (Chairman

⁵ In light of our finding that the questioning of Zabala was unlawful, we find it unnecessary to pass on the judge's finding that the Respondent also violated Sec. 8(a)(1) by coercively interrogating employee Joel Cohen. Any such finding would be cumulative and would not materially affect the remedy.

⁶ Member Schaumber agrees that the Respondent violated Section 8(a)(1) by threatening to stop giving paycheck advances if employees unionized. In his view, however, this violation is more properly characterized as threatening loss of "privileges."

⁷ Member Schaumber agrees that, under extant Board precedent, the Respondent violated Sec. 8(a)(1) in this case by distributing to its employees a letter that stated, in pertinent part: "If you are being threatened or coerced by employees or the Union, please contact the National Labor Relations Board's Hartford office at [telephone number] immediately or tell me." See *Tawas Industries*, 336 NLRB 318, 322-323 (2000); *CMI-Dearborn, Inc.*, 327 NLRB 771, 775-776 (1999). In his view, *Tawas* and *CMI-Dearborn* were wrongly decided, in part because a reasonable employee would not understand a request to report "threats or coercion" to extend to protected concerted activity. See *Palms Hotel and Casino*, 344 NLRB 1363 (2005) (employer lawfully maintained rule prohibiting "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons."). However, in the absence of a three-member majority of the Board willing to overrule *Tawas* and *CMI-Dearborn*, he applies that precedent for institutional reasons for the purpose of deciding this case.

In Member Walsh's view, *Tawas Industries* and *CMI-Dearborn* were correctly decided under the settled principle that requests to report union activity violate Sec. 8(a)(1) if they would reasonably be understood as referring to conduct that employees might find "subjectively offensive" yet which is nevertheless protected under the Act. E.g., *Ryder Transportation Services*, 341 NLRB 761, 762 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). As the Board stated in *Tawas Industries*, a request to report "coercion" is reasonably perceived by employees as encouraging reports of activities that are protected under the Act because "employees are unlikely to understand that [these requests] mean[] only such actions as those that have been held to be coercive under Section 8(b)(1)(A)." *Supra* at 322 (quoting *CMI-Dearborn, Inc.*, *supra* at 776). The Board has repeatedly held that such requests tend to chill lawful union organizing activity because they "have the dual effect of encouraging employees to report . . . the identity of card solicitors . . . and of correspondingly discouraging card solicitors in their protected organizational activities." *Ryder Transportation Services*, *supra* at 762. Furthermore, in Member Walsh's view, the Respondent's use of the term "harassed" in the letter also fostered the impression that it was asking employees to report protected activity. See, e.g., *Brandeis Machinery & Supply Co.*, 342 NLRB 530, 533 (2004); *Niblock Excavating, Inc.*, 337 NLRB 53, 61 (2001), enfd. 59 Fed. Appx. 882 (7th Cir. 2003). Although the sentence within the letter that expressly asked employees for reports referred only to coercion or threats, nevertheless, in the context of the letter's preceding statement that the Respondent had already received reports of employees being "harassed or coerced," employees would reasonably understand that the company considered

¹ There are no exceptions to the judge's recommended dismissal of complaint allegations that the Respondent violated Sec. 8(a)(1) by: prohibiting discussion of the Union; interrogating employee Terry Plona about her union activities on October 9 and December 10, 2003; creating the impression that Plona's union activities were under surveillance; threatening plant closure; engaging in surveillance of employees' union activities on October 23, 2003; threatening employee Xabier Zabala with unspecified reprisals during a conversation in October or November 2003; and violated Sec. 8(a)(3) and (1) by discontinuing the practice of permitting Plona to take the bus home on breaks and granting her additional work assignments.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ All dates refer to 2003, unless otherwise stated.

⁴ In adopting the judge's finding that the Respondent unlawfully threatened to have nonemployee union officials arrested for leafleting in front of its facility, Chairman Battista does not rely on *Wild Oats Markets, Inc.*, 336 NLRB 179, 180 (2001).

Battista and Member Schaumber) reverses the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees that unionization would be futile.

Asking Employees to Report Union Threats or Coercion

In November, the Respondent distributed a letter to employees with their paychecks. The letter, which is set forth in full in the judge's decision, included the following statement:

Some of you have come to me and expressed concerns that some employees are being harassed or coerced into signing authorization cards. The law supports your right to say no to the Union or to employees who try to pressure you into signing a card. It is illegal for the Union salespeople or employees to threaten or coerce you into signing a card. If you are being threatened or coerced by employees or the Union, please contact the National Labor Relations Board's Hartford office at [telephone number] immediately or tell me. If you have been pressured into signing a card and now want to change your mind, like some employees who have spoken with me, the attached page explains how to revoke one.

There is no record evidence, nor does the Respondent argue, that the Company had in fact received reports of union misconduct or that any such misconduct had taken place.

The judge found that this statement violated Section 8(a)(1) because it impermissibly called on employees to report on their coworkers' union activity. This finding comports with settled Board law, and we therefore adopt it. See *Tawas Industries*, supra, 336 NLRB at 322–323; *CMI-Dearborn*, supra, 327 NLRB at 775–776. The dissent argues that *Tawas Industries* is distinguishable because there, the employer asked employees to report “anyone expressing ‘views’ that others might ‘feel’ threatening or coercive” We disagree.

The notice at issue in *Tawas* stated:

It has been reported that employees feel they are being subjected to threats and coercion because they are expressing their views (either pro or con) regarding the [union] affiliation.

If you feel that you are being subjected to such actions, please report such incidents to the Company and we will take the appropriate action, or you may directly contact the Regional Office of the National Labor Relations Board.

“harassment” to fall within the range of activity it wished to be reported.

By its terms, the *Tawas* notice states that some employees felt they were subjected to threats and coercion *because they* had expressed a view on the union issue, and asks any employee who feels he was “subjected to such actions,” i.e., threats and coercion, to report it to the employer or to the Board (emphasis added). This request cannot meaningfully be distinguished from the request made by the Respondent in this case.⁸

The dissent also notes that, in *Tawas*,⁹ the employer followed its request for reports of coercion with the statement that it would “take the appropriate action,” supra at 322, whereas here, the Respondent did not state that it would do anything upon receiving the requested reports. However, the Board finds overbroad requests to report to be unlawful even where they are not accompanied by any statement that the employer would take adverse action. *Bloomington-Normal Seating Co.*, 339 NLRB 191 fn. 2 (2003), *enfd.* 357 F.3d 692 (7th Cir. 2004); *Eastern Maine Medical Center*, 277 NLRB 1374 (1985). Our finding that the November letter was unlawful is in accord with this settled principle.

The dissent's attempt to distinguish *CMI-Dearborn* is similarly unavailing. According to the dissent, the employer in that case requested reports of “scare tactics” as well as coercion, while here the request was only to report threats and coercion. However, the *CMI-Dearborn* Board adopted the judge's decision that found that the employer's request to employees referred to every contact that the employees might subjectively regard as “scare tactics” *or* “coercion,” and expressly rejected the employer's argument that employees are likely to understand “coercion” to mean only those forms of union coercion that the Act prohibits. 327 NLRB at 776. It could not be clearer that the judge considered the request to report “coercion” to be, in itself, unlawful.⁹

Alleged Statement of Futility

In December, the Respondent posted a copy of an article from the December 3 edition of the *New Haven Register* which stated that the Board would conduct a hearing

⁸ The dissent argues that the *Tawas* notice was subjective because it asked employees to report if they “felt” coerced. Again, we disagree. The *Tawas* Board viewed the notice in that case as impermissibly calling for the reporting of “subjectively offensive conduct” because its use of the term “coercion” “was likely to encourage employees to report protected conduct to management.” *Id.* at 322. The Board did not rely on the notice's use of the word “feel.”

⁹ The dissent also observes that the request in this case encourages employees to report either to the Respondent or to the Board, whereas the request in *CMI-Dearborn* only asked employees to report to their employer. The dissent does not explain why this distinction mitigates the tendency of the request to chill protected union activity. Extant Board law is clear that it does not. See *Tawas*, supra.

in February 2004 over allegations that an unrelated employer in the area, W. B. Mason, Inc., “refused to negotiate a contract for its newly unionized employees” after an “organizing vote” in August 2002.¹⁰ The article reported that “after the union vote, the company raised drivers’ salaries \$3 an hour” and quoted a union official’s characterization of the raise as “just a tactic to make the employees think they don’t need the union . . .”¹¹ Also according to the article, the employer attended “a few” initial bargaining sessions and then stopped negotiating in the summer of 2003 after receiving a petition signed by a majority of employees saying they no longer wished to be represented. A union representative accused the company of “dragging their feet” and stated that the union wanted the company to come to the bargaining table and sign off on “a fair contract.”

When employee Cohen saw the article and stopped to read it, the Respondent’s manager, Laurie Winkle, approached and, according to the credited testimony, asked him, “Do you want to wait for years for a raise like those people?”

The judge viewed this statement as a threat that it would be futile for employees to select the union as their collective-bargaining representative, and concluded that it therefore violated Section 8(a)(1). We disagree.

It is well settled that, absent threats or promise of benefit, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees in an effort to convince them that they would be better off without a union. *Langdale Forest Products Co.*, 335 NLRB 602 (2001). The Board normally treats such comments as statements of opinion protected by 8(c)’s free speech proviso. *Id.* An employer violates Section 8(a)(1), however, by threatening employees that attempts to secure union representation would be futile. *Wellstream Corp.*, 313 NLRB 698, 706 (1994). An unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means. *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002). On the other hand, it is well established that “words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section

8(a)(1).”¹² *Trailmobile Trailer, L.L.C.*, 343 NLRB 95 (2004) (quoting *Sears, Roebuck & Co.*, 305 NLRB 193 (1991)). Instead, such comments are protected by Section 8(c).¹²

Applying these principles, we find that Winkle’s off-hand comment did not unlawfully threaten that union representation would be futile. The comment did not follow from the text of the newspaper article the employee was reading. The article described a situation where employees *received* a wage increase “after the union vote.” By contrast, Winkle’s rhetorical question refers to a *delay* in getting a raise. The comment thus lawfully identified one of the possible consequences of unionization, i.e., that collective bargaining might have to run its course before employees received any raises. Winkle did not state or imply that the Respondent would ensure its nonunion status through unlawful means, or that it would withhold raises that employees would otherwise receive in retaliation for their decision to choose union representation. Accordingly, we find that Winkle’s remark was not a threat of futility.

In finding that Winkle’s remark was an unlawful threat, the judge relied on *Federated Logistics & Operations*, 340 NLRB 255 (2003), *enfd.* 400 F.3d 920 (D.C. Cir. 2005).¹³ The case is distinguishable. In *Federated Logistics*, the employer stated that if the union was selected negotiations “would start from zero and would

¹² Sec. 8(c) of the Act provides that “the expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c).

We do not agree with any implication in the dissenting opinion that an employer violates Sec. 8(a)(1) merely by telling its employees that it intends to oppose unionization by lawful means, or that bargaining may be delayed while it exercises its lawful right to contest a union’s certification in court. Such a statement is unlawful only if, in context, it discloses a “threat of reprisal or force or promise of benefit.” Sec. 8(c). While a threat to tie up the representation issue through *meritless* litigation may be unlawful, no such threat was made in this case. Indeed, unlike the cases cited by our dissenting colleague, the Respondent made no statement of any type concerning litigation or any other intended action on its part.

In light of the above, Member Schaumber does not pass on whether the Board correctly found unlawful the statements concerning possible delays in bargaining while litigation ran its course in *Intermountain Rural Electric Assn.*, 253 NLRB 1153, 1160–1161 (1981), and *Kent Bros. Transportation Co.*, 188 NLRB 53, 59 (1971), *enfd.* 458 F.2d 480 (9th Cir. 1972), cases cited by the dissent. Compare, *Histacount Corp.*, 278 NLRB 681, 689–690 (1986) (employer lawfully told employees that if the union won the election, it would file objections and it would be about 2 years before bargaining would begin). See also *W. E. Carlson Corp.*, 346 NLRB No. 43, slip op. at 1 fns. 2, 11, 14 (2006) (threat to intentionally delay negotiations violated Sec. 8(a)(1)).

¹³ Chairman Battista dissented in *Federated Logistics*.

¹⁰ In fact, the complaint alleged that the respondent failed to bargain in good faith by refusing to schedule timely negotiating sessions and by withdrawing recognition from the union. The administrative law judge found no merit to these allegations and dismissed the complaint. *W. B. Mason Co.*, JD 114-04 (Nov. 29, 2004). The Board subsequently adopted the judge’s decision in the absence of exceptions.

¹¹ The article does not say that the raises were alleged to be unlawful, and the judge’s decision in *W. B. Mason* makes clear that they were not.

negotiate from that.” The employer also stated that, contrary to its practice of granting annual merit increases, “[employees] wouldn’t get any raises.” On these facts, the Board found that the employer’s comments imparted the message to employees that their wages and benefits were endangered not because of the uncertainties of the collective bargaining process, but simply because they selected the union as their collective bargaining representative. None of those facts, however, are present in this case. Winkle did not tell Cohen that bargaining would start from zero. Nor did she imply that scheduled wage increases would be withheld. Indeed, there is no record evidence that the Respondent had any past practice of periodic wage increases. Unlike the statements found unlawful in *Federated Logistics*, Winkle’s comment simply and accurately indicated that wage increases could be delayed because of the uncertainties of the collective-bargaining process.¹⁴ For these reasons, we find that the statement was not unlawful.

Our dissenting colleague asserts that Winkle’s statement was unlawful because it threatened to draw out contract negotiations in the same allegedly unlawful manner used by the employer in the newspaper article, and that “if the employees selected the Union as their bargaining representative they would not receive a wage increase—generally a key goal of collective bargaining—for years.” We disagree. Winkle did not say that the Respondent would prolong contract negotiations. Moreover, the reality of collective bargaining is that negotiations can be prolonged for lawful reasons, and the prolongation may not be the fault of the employer.¹⁵ Our colleague thus reads far too much into this comment when he interprets it to say that any such delay would be due to unlawful acts on the Respondent’s part.¹⁶ Winkle’s reference to the newspaper article about another employer (Mason) does not require a different result.

¹⁴ See generally *General Electric Co.*, 332 NLRB 919 (2000) (employer’s handbill lawfully asked if employees were willing to face the possibility of “long, bitter negotiations” and a “long and ugly strike”); *Coleman Co.*, 203 NLRB 1056 (1970) (employer lawfully stated that a vote for the union would put the parties back at the bargaining table, a “long and expensive process,” and could result in a strike).

¹⁵ For example, in *W. B. Mason*, the judge found that the union—not the employer—was responsible for the lack of progress of negotiations and chastised the union for its dilatory tactics.

¹⁶ Contrary to each of the cases cited in the dissent, the Respondent did not forecast any intransigence in bargaining. The dissent draws an unwarranted inference in concluding that employees would reasonably understand Winkle’s reference to “those people,” i.e., the employees mentioned in the newspaper article, as suggesting that the Respondent was laying the blueprint by which the Respondent would behave in future negotiations.

According to the article, the Mason negotiations lasted for a year and ended only after a majority of unit employees indicated in a petition that they no longer wanted the union to represent them. And, as noted above, the article made clear that the Mason employees did not have to wait “years” for a raise but instead received one “after the union vote.” On balance, we find that the General Counsel has not proven that Winkle’s statement was a threat that unionization would be futile.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Winkle Bus Company, Inc., Milford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(i) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN BATTISTA, dissenting in part.

My colleagues find that the Respondent violated Section 8(a)(1) of the Act by distributing a letter to employees encouraging them to report, to the Board or management, fellow employees who threaten or coerce them. I disagree.

In November, the Respondent distributed a letter to all employees. The letter contained the following statement:

Some of you have come to me and expressed concerns that some employees are being harassed or coerced into signing authorization cards. The law supports your right to say no to the Union or to employees who try to pressure you into signing a card. It is illegal for the Union salespeople or employees to threaten or coerce you into signing a card. If you are being threatened or coerced by employees or the Union, please contact the National Labor Relations Board’s Hartford office at [telephone number] immediately or tell me. If you have been pressured into signing a card and now want to change your mind, like some employees who have spoken with me, the attached page explains how to revoke one.

I do not agree with the judge’s finding, adopted by my colleagues, that this statement violated Section 8(a)(1).

The letter asks employees to report on coercion. Of course, coercion is prohibited in Sections 8(a)(1) and 8(b)(1)(A) of the Act. The Act contemplates that each employee’s decision to support, or oppose, union representation is to be free from coercion from any source. Acts of coercion directed at employees are not protected

by Section 7. See generally *Staten Island University Hospital*, 339 NLRB 1059 (2003). Similarly, threats against an employee based on his Section 7 activity are also prohibited by Section 8(a)(1) and 8(b)(1)(A). See, e.g., *Ogihara America Corp.*, 347 NLRB No. 10, slip op. at 16 (2006); *August A. Busch & Co. of Massachusetts*, 334 NLRB 1190, 1205 (2006). Thus, an employer may lawfully assure employees that it will not allow them to be threatened or coerced, and it may ask them to report such conduct. *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979). Such requests are lawful because threats and coercion directed at employees are properly within the Respondent's "legitimate concerns." *Arcata Graphics*, 304 NLRB 541, 542 (1991).

The Respondent's letter asked only that employees report unprotected conduct either to the Board or to management. Such requests do not reasonably tend to chill employees in the exercise of their Section 7 rights. *First Student*, 341 NLRB 136 (2004) (request to report incidents where employees were forced or intimidated into supporting the union was lawful). On the contrary, they assist in assuring employees the free exercise of those rights.

Tawas Industries, 336 NLRB 318, 322–323 (2000), and *CMI-Dearborn, Inc.*, 327 NLRB 771, 775–776 (1999), cited by the judge in support of his finding that the request was unlawful, are not to the contrary. *Tawas* involved an employer's request that "if [employees] feel that [they] are being subjected to threats and coercion" because of the "express[ion of their views]," the respondent would "take appropriate action." *Tawas*, supra, 336 NLRB at 322. Thus, anyone expressing "views" that others might "feel" threatening or coercive would reasonably fear employer retaliation. By contrast, in the instant case, the Respondent did not ask employees to report conduct simply because they *felt* threatened or coerced. My colleagues argue that the *Tawas* notice was not subjective. I disagree. The trigger for employee reports in that case was that an employee expressed his view regarding the union, and "feels" that he/she is being subject to threats or coercion. The notice goes on to state that "if you feel" you are being subjected to the above, you are to report the incident.

Further, the employer in *Tawas* threatened to discipline anyone who had been reported. The Respondent here did not state what, if anything, it would do to employees who were so reported. Indeed, in the Respondent's letter, employees were asked to report such con-

duct to the Board's Hartford office, giving its telephone number, or to tell the Respondent.¹

In *CMI-Dearborn* the employer requested that employees report threats, coercion, or "scare tactics" to management, and offered its protection to employees. *CMI-Dearborn* considered "scare tactics" to be a broad term that might encompass "lawful campaign activities," 327 NLRB at 776. Indeed, the employer's request encompassed each and every "contact" that the employees might subjectively regard as either scare tactics or coercion. It should be noted that employees there were to report, in the disjunctive, "scare tactics or coercion." Thus, "scare tactics" alone would trigger a report. There is no such broad term as "scare tactics" used in the instant case. Finally, as *Tawas*, employees in *CMI-Dearborn* were given no option, as employees were given here, to report alleged misconduct to the Board.

In view of the above, I do not find that the Respondent's letter violated Section 8(a)(1).

MEMBER WALSH, dissenting in part.

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening that, if its employees selected union representation, it would be "years" before they received a pay increase. The majority reverses that finding. I dissent.

The credited evidence shows that, in December 2003, the Respondent's manager and co-owner, Laurie Winkle, approached employee Joel Cohen as he was reading a newspaper article that Winkle had posted at the facility and asked him, "Do you want to wait for years for a raise like those people?" The article, which was captioned, "W. B. Mason faces hearing on union," reported that the Board was conducting a hearing on allegations that a local firm had "refused to negotiate a contract for its newly unionized employees" since a union's victory in a Board-supervised election in August 2002. The article recounted allegations that the employer had failed "to negotiate in a timely manner" with the union and the employer's response that it had ceased negotiations after receiving an antiunion petition from its employees in the summer of 2003.

Contrary to my colleagues, I agree with the judge that Winkle's statement to Cohen was an unlawful statement of futility. The statement plainly implied that if the employees selected the Union as their bargaining representative they would not receive a wage increase—generally a key goal of collective bargaining—"for years." The

¹ I do not say that a threat of adverse action is a sine qua non of a violation. I simply note that this is a relevant factor to be weighed. It was present in *Tawas*, and it is absent here.

Board has repeatedly found that employer statements predicting excessive delay in bargaining are coercive, particularly where, as here, they are made by an employer who, by committing numerous other unfair labor practices, has amply demonstrated to her employees her propensity to violate their protected rights.¹

The context in which Winkle delivered her statement—Cohen’s scrutiny of the newspaper article that the Respondent had itself posted—exacerbated the coercive effect of her statement. The main theme of the article was that the Board was conducting a hearing on allegations that Mason had unlawfully delayed negotiations for an initial contract with a newly certified union.² Winkle’s reference to the article would reasonably be interpreted as implying that if the employees unionized, she would continue her already demonstrated pattern of unlawful opposition to union representation by delaying agreement on a contract, as the report alleged Mason to have done.

The majority claims that Winkle’s “offhand comment” “did not follow from the text of the newspaper article” and, analyzing the statement and the article in isolation from one another, proceeds to find the statement lawful. I disagree with the mode of analysis and the result. Indeed, in view of the Respondent’s contemporaneous unlawful conduct, the timing of the statement (when

¹ See, e.g., *Airtex*, 308 NLRB 1135, 1135 fn. 2 (1992) (finding unlawful statement of futility where employer found to have committed other unfair labor practices predicted that negotiations for an initial contract would last 1 year); *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1220 fn. 43, 1228 (1987), enf. denied on other grounds 851 F.2d 180, (8th Cir. 1988) (same, where employer stated it would fight the union if it took 3 to 10 years). In *Airtex*, supra at 1135 fn. 2, the Board further observed that the offending statement was addressed to an employee who was personally subjected to other unlawful threats and promises. Similarly, in the instant case, Winkle’s remark was addressed to an employee, Cohen, who was the object of other unlawful conduct.

Relying on Sec. 8(c), my colleagues imply that an employer’s statement of futility will not violate the Act unless the employer threatens to use unlawful means against the Union. But Board law holds otherwise. For example, an employer that demonstrates a propensity to act unlawfully by committing other unfair labor practices may violate Sec. 8(a)(1) by warning that it will exercise its lawful right to delay agreement to a contract by challenging the union’s certification through litigation. See, e.g., *Intermountain Rural Electric Assn.*, 253 NLRB 1153, 1160–1161 (1981); *Kent Bros. Transportation Co.*, 188 NLRB 53, 59 (1971), enf. 458 F.2d 480 (9th Cir. 1972). Compare, *Histacount Corp.*, 278 NLRB 681, 689–690 (1986). In any event, as explained above, Winkle’s remark is intelligible only as a threat to refuse to bargain in good faith, that is, to render her employees’ choice of union representation futile by unlawful means.

² Among other things, the article reported allegations that Mason had “refused to negotiate a contract,” was “dragging its feet” in negotiating, and had “fail[ed] to negotiate in a timely manner[,] indicat[ing] a failure to bargain in good faith.”

Cohen was reading the article), Winkle’s initiation of the conversation, and Winkle’s plain reference to the article and the alleged unfair labor practices to which the Mason employees had been subjected, Winkle must have intended to convey the message that the Respondent’s employees could expect similar treatment if they voted for the Union. But whatever Winkle intended, it defies belief to suggest that, after his boss asked, “Do you want to wait for years for a raise like those people,” Cohen would not have drawn a connection between the allegations of illegality discussed in the newspaper article and the prospect of the Respondent’s continuing its own anti-union efforts.

In sum, Winkle’s statement cannot reasonably, or even plausibly, be interpreted, as my colleagues do, as a mere reference to the “reality of collective bargaining,” that “negotiations can become prolonged for lawful reasons.” Rather, it was an obvious threat to use unlawful means to nullify the Respondent’s employees’ right to be represented by a union. Accordingly, I would find the violation.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain or distribute any policy that prohibits you from engaging in solicitation protected by Section 7 of the Act in nonwork areas of the Milford facility or during nonwork times such as breaks, lunch, waiting time, and before and after work.

WE WILL NOT threaten union representatives who engage in lawful union activity at, or near, the Milford facility with arrest.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT threaten to call the police in response to your protected union activity.

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

WE WILL NOT ask that you report to us about the union support or activities of other employees.

WE WILL NOT threaten that if you select the union as your representative we will discontinue the practice of giving cash advances to employees.

WE WILL NOT threaten you with stricter discipline or increased penalties because employees engage in protected union activities.

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

WE WILL rescind the rule entitled "Solicitation on Company Property/Time" and remove that rule from our employee handbook.

WE WILL distribute to you new copies of the employee handbook, with the unlawful solicitation rule removed.

WE WILL distribute to you a written notice explicitly advising that employees are permitted to engage in solicitation in nonwork areas of the Milford facility, and during nonwork times such as breaks, lunch, waiting time, and before and after work.

WINKLE BUS CO.

Quesiyah S. Ali, Esq. and William E. O'Connor, Esq., for the General Counsel.

Nick Grello, Esq., Hartford, Connecticut, and Christian Winkle, IV, Esq., Milford, Connecticut, for the Respondent.

DECISION

PAUL BOGAS, Administrative Law Judge. This case was tried in Hartford, Connecticut, on July 7 and 8, 2004. The United Food and Commercial Workers Union, Local 371, AFL-CIO, CLC (the Union), filed the initial charge on December 11, 2003, and amended that charge on January 21, 2004, March 4 and 29, 2004. The Union filed the second charge on February 20, 2004, and amended that charge on March 30, 2004. The Director for Region 34 of the National Labor Relations Board (the Board) issued the order consolidating cases and the consolidated complaint on March 31, 2004. The complaint alleges that Winkle Bus Company, Inc. (the Respondent) interfered with employees' union activities in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by engaging in a wide range of activities including threats, interrogation, surveillance, and the prohibition of lawful solicitation and discussion. The complaint also alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act by giving a union supporter additional work hours, and ceasing to allow that employee to drive one of the Respondent's buses to her home during breaks. The Respondent filed a timely answer in which it denied all the substantive allegations in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Milford, Connecticut (the facility), provides schoolbus and related transportation services. During the 12-month period ending the month before issuance of the complaint, the Respondent derived gross revenues in excess of \$250,000 from these activities, and received at its Connecticut facilities goods valued in excess of \$5000 directly from points outside the State of Connecticut. The Respondent admits, and I find, that it is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a bus company whose primary business is transporting students to and from schools in the State of Connecticut. It has about 180 employees at facilities in Milford, Orange, and West Haven, Connecticut. Laurie Winkle is the manager of the Respondent's Milford facility, and also an owner of the Company.¹ During the relevant time period, Flo D'Angelo was the dispatcher-secretary at the Milford facility.²

In October 2003, after receiving a request from one of the Respondent's employees, the Union began an effort to become the collective-bargaining representative for the approximately 75 employees who worked at the Milford location. The Union formed an organizing committee at the Respondent's facility, distributed authorization cards and literature to employees, and invited employees to attend meetings. For its part, the Respondent distributed materials to drivers encouraging them to oppose unionization, and also held a number of meetings at the Respondent's facility between late October and early December 2003. D'Angelo generally conducted these meetings, but Winkle also attended and spoke.

The record indicates that the Respondent's bus drivers typically had morning routes and afternoon routes and that in-between there was often a lengthy break period. Some of the drivers were assigned preschool routes or other extra work during that break period, but others used the time for their own purposes.

¹ The Respondent admits that Winkle is a supervisor within the meaning of Sec. 2(11) of the Act, and an agent of the Company.

² The Respondent denies that D'Angelo was a supervisor within the meaning of Sec. 2(11) or an agent of the Company. The record shows that D'Angelo, as a dispatcher, had the authority to use her independent judgment to assign work to employees, transfer drivers from one route to another, and resolve problems that drivers had with their routes. In its employee handbook, the Respondent identifies the dispatcher position as supervisory. General Counsel Exhibit (GC Exh.) 2 ("Our Company" sec.). In 2003, D'Angelo conducted multiple meetings on behalf of the Respondent, at which she articulated the Respondent's position regarding the Union. Winkle herself was present at these meetings. Company correspondence to employees listed D'Angelo as someone to contact with questions regarding the union campaign.

B. Respondent's Written Policy Prohibiting Solicitation

The record contains two different written statements of the Respondent's policy on solicitation. The earlier one is a memorandum from Laurie Winkle that is dated April 3, 1995. The Respondent posted this memorandum on its bulletin in 1995 and, apparently, has never taken it down.³ That memorandum states:

Due to some apparent confusion about Winkle Bus Company's policy regarding solicitation/distribution of literature and information, as well as the posting of nonwork items on the bulletin board, I want to take the opportunity to reaffirm the following:

SOLICITATION/DISTRIBUTION/POSTING

To prevent disruption in the operation of the facility, interference with work, and inconvenience to other employees, no solicitation or distribution of literature of any kind during *working time* is permitted. An employee who is *not* on working time (such as an employee who is on lunch or on break) may not solicit or distribute literature to an employee who is on working time. Whether on working time or not, no employee may distribute literature of any kind in any working areas of the facility. No solicitation or distribution of literature of any kind is permitted on company property by anyone not an employee of Winkle Bus Company.

Postings on the company bulletin board are to be limited to work-related items. All items to be posted must be approved in advance by me.

Thank you for your cooperation and if you have any questions (sic) please see me.

Respondent's Exhibit (R. Exh. 3) (emphasis in the original). The General Counsel has not alleged that the solicitation policy in the 1995 memorandum violates the Act.

The second statement of the Respondent's policy on solicitation is included in the employee handbook and sets forth a broader prohibition on solicitation. The Respondent distributes this handbook to all employees at the start of each school year, and to new employees when they began work. The version of the employee handbook that the Respondent issued during the time period covered by the complaint was one that had been revised in July 1999. The solicitation policy in that handbook reads:

³ I do not credit Winkle's testimony that the information posted on April 3, 1995, has subsequently been included in the packet of materials distributed to employees at the beginning of each school year. If this were the case, it would have been easy for the Respondent to introduce the packet into evidence; however, it did not do so. See *Galesburg Construction*, 267 NLRB 551, 552 (1983) (adverse inference drawn from respondent's failure to produce documents in its control that were vital to its defense). Moreover, Xabier Zabala, a current employee who I found very credible, stated that he did not believe the information in the April 3, 1995, posting was included in the packets he received.

Solicitation on Company Property/Time: Soliciting money or support for any cause from fellow workers, passengers or others on Company time or Company property is prohibited. This solicitation is also prohibited on one's own time, if the solicitation involves a fellow worker who is on duty.

General Counsel's Exhibit (GC Exh. 2) (employee handbook, revised 7/99) at page 5. This is the solicitation policy that the General Counsel alleges is unlawful. At trial, Winkle reaffirmed an element of the handbook policy, stating that the Respondent permitted solicitation only when employees were not "on Company time." (Transcript (Tr.) 192-193.)

C. October 9, 2003 Exchange Between Winkle and Plona

Terry Plona is a bus driver who contacted the Union about providing representation to employees at the Milford location. She also supported the union campaign by distributing authorization cards, informing employees about union meetings, and serving on the union organizing committee. Some of these activities had begun by early October 2003, but the record does not reveal the precise date they began, or when Winkle first found out about them.

On October 9, 2003, Winkle spoke with Plona and that conversation is the subject of a number of the allegations in the complaint. Winkle and Plona offered contradictory accounts of what transpired between them. Plona's testimony was that, after she completed her morning routes, Winkle came on the bus that Plona was operating, and asked what she was "doing." Plona responded, "What do you mean, what am I doing?" According to Plona, Winkle said, "Terry, you know what you're doing, we don't allow soliciting on the property, you know, we don't want to allow—we're not going to allow a union in here; if the Union came in here, we would move all the buses out of town." Winkle told Plona that the no-solicitation policy had been on the bulletin board for the past 8 years. According to Plona, Winkle then asked if Plona had any "issues" or "problems" that she "needed to discuss." The two went up to Winkle's office, where Winkle gave Plona assignments for charters, i.e., for extra, out-of-town, work. These assignments were voluntary and meant extra income for Plona. Prior to the start of the union campaign, Plona had sought such assignments, and Winkle had invited Plona to an August 27, 2003 meeting of employees at which Winkle announced that the Respondent would soon be offering charter assignments to interested employees. According to Plona, on October 9, Winkle also promised her certain pre-school assignments that were about to become available. As with the charters, these extra assignments would have meant increased earnings for Plona.

Winkle admits that she spoke to Plona in October, but denies the majority of Plona's account. According to Winkle, she never mentioned the Union, never threatened to move the buses out of town, and never told Plona that the company prohibited solicitation on the property.

In Winkle's account, Plona came to her office for a discussion of additional assignments. Winkle says she told Plona that a preschool route was becoming available, and that Plona could have the assignment. According to Winkle, she subsequently assigned the preschool route to Plona.

Unfortunately, I found neither Plona nor Winkle to be a very credible witness regarding disputed matters. Plona's testimony had significant contradictions and inconsistencies. See, e.g., Transcript 65–67 (inconsistency about whether Winkle first discussed additional work on bus “charters” during the August before the Union drive started, or only much later, on a date after the drive was underway) (Tr. 67–69). (Plona gives inconsistent, evasive, answers regarding whether she currently had a license to drive a bus.) After contradictions were exposed during cross-examination, Plona began to stonewall—repeatedly, and without pausing to think, responding that she did not recall relevant facts (see Tr. 78–80), even regarding matters about which she had previously testified with confidence. Winkle's testimony, likewise, had significant internal contradictions. For example, she said she did not recall having “any discussions” with the union representatives when she saw them at the Milford facility on October 15, 2003—a date she allegedly threatened them—but she then conceded that she spoke with them on that date. (Tr. 213, 247–248.) Winkle appeared unusually nervous during her examination—searching the hearing room with her eyes before, while, and after answering questions—and her testimony gave the impression of being more calculated than forthcoming. Moreover, Winkle's far-fetched assertion that the policy on solicitation, which the Respondent had distributed annually since July 1999, was somehow revoked by a memorandum that the Respondent posted on its bulletin board in April 1995, as well as her unwillingness to concede during cross-examination that the April 1995 memorandum did not state that it was revoking the July 1999 policy (Tr. 241–244), all reflect negatively on her reliability as a witness.

There were no other witnesses to the October 9 conversation between Winkle and Plona, and the record is devoid of additional evidence that provides meaningful corroboration for either witness' version. Given the evidence, and my assessment of the credibility of the witnesses, I find that the General Counsel has failed to show by a preponderance of the evidence that Winkle made any of the statements on October 9 that are alleged to constitute: oral promulgation of a rule prohibiting discussion of the Union at the facility; interrogation about union activities; the impression of surveillance; and, threats of plant closure. The record before me does not establish that these statements were *not* made, but it fails to establish that they *were*.

Winkle did not deny that she asked if Plona had any “issues” or “problems” that she “needed to discuss,” and so, in the absence of contradictory evidence, I credit Plona's facially plausible testimony that Winkle made this inquiry. I also find, as both Winkle and Plona agree, that on October 9 they discussed additional work for Plona, and that, shortly thereafter, Winkle did assign additional routes to Plona. I also find that Plona had previously made her interest in accepting additional assignments known to Winkle, and that on August 27, 2003—prior to the start of the Union campaign—Winkle informed Plona and other drivers that charter assignments would soon be made available to those who wanted them. The record also showed that Plona had been assigned additional work in the form of pre-school routes during two of the previous three school years, and that during the third year she chose to care for her infant

daughter rather than perform the additional work. Documentary evidence shows that one of the Respondent's customers placed an order for additional preschool bus routes near the time of the October 9 conversation.⁴

D. October 15, 2003 Encounter Between Winkle and Union Officials Outside the Facility

On October 15, 2003, three union officials came to the Respondent's Milford facility to distribute literature and authorization cards to the Respondent's busdrivers as they returned after completing their afternoon routes, and left for home in their private vehicles.⁵ Those union officials were Vincent Murolo (business representative and organizing director), Peter Sena (business representative and organizer), and Kerri Hoehne

⁴ During the trial, the Respondent agreed that, posttrial, it would provide the General Counsel with the documents that were used to create R. Exh. 1 so that the General Counsel could point out any inaccuracies in that exhibit. R. Exh. 1 summarizes Plona's work assignments and was relevant to the question of whether the Respondent had unlawfully assigned additional work to Plona. After the trial had closed, and prior to the submission of briefs, the General Counsel filed a motion to supplement the record with a new exhibit, GC Exh. 7 (the parties sometimes refer to this as GC Exh. 8) which is comprised of the underlying documents provided by the Respondent after trial. The Respondent opposed admission of the new exhibit, and moved to strike references to it in the General Counsel's Brief. In response, the General Counsel argued that the underlying records encompassed by the new exhibit show that R. Exh. 1 contained an inaccuracy. Since, I agree, that the GC Exh. 7 corrects or clarifies some of the information in R. Exh. 1, I receive GC Exh. 7 into evidence, and deny the Respondent's motion to strike references to that exhibit from the General Counsel's brief.

⁵ The three union officials testified that the events at-issue took place on October 15. Winkle testified that she saw the union officials at the facility on October 15, but also that some of the exchanges at-issue took place during a later visit by the organizers on October 23. I found the testimony of the three union officials, which was consistent regarding the date and was also corroborated to some extent by the accounts of bus drivers who were present, to be credible, and therefore find that the events all took place on October 15. I also credit the Union organizers' generally consistent account of Winkle's statements and behavior toward them, despite some inconsistencies that were demonstrated regarding less significant aspects of their respective testimonies about that day. The organizers' account of Winkle's behavior towards them was corroborated to some extent by the testimony of Joel Cohen, a driver who, while he could not hear Winkle's statements, did observe that she was gesturing at the organizers and was red in the face. I also gave some limited weight to the testimony of Plona, who, though not a very credible witness in general, gave an account of Winkle's statements and behavior that was plausible and generally consistent with that of the organizers. In its brief, the Respondent makes much of the fact that Hoehne testified that she did not recall seeing Plona at the incident on October 15, but that is not surprising since Hoehne did not know who Plona was at the time and, in any case, Plona was inside her bus and likely obscured to some extent. For the reasons discussed above, Winkle was a less than credible witness, and her milder account of what she said to the union organizers was not corroborated by any other evidence. I credit the generally consistent accounts of the three union organizers over Winkle's testimony about the disputed statements.

(organizer). The organizers situated themselves outside the two gates to the Respondent's bus yard. For much of the time the organizers stood in the driveways that led from the gates to the road, standing closer to the road than to the gates. At other times they traversed the space between the driveways. Apparently, the drivers tended to return from their routes at about the same time, and they lined up to pass through the Respondent's entrance gate, which was only wide enough to admit one vehicle at a time. It is reasonable to infer that when a bus driver whose turn it was to proceed through the gate stopped in the driveway to take materials from one of the organizers, this pause would cause some delay for the other drivers who were waiting to use the entrance. However, the record does not show how long a delay this was or whether it was significant. The road that runs in front of the Milford facility has only one lane in each direction, so any delay that kept the buses from turning off the road, would also tend to delay whatever other traffic existed along that road.

After the union organizers had engaged in these activities for a few minutes, Winkle approached and yelled that they had "no business being" there, and had to "[g]et out." Then she told them, "If you don't leave, I'm gonna call the cops and have you arrested." These statements were made in the presence of employees, and within the hearing of at least one employee—Plona. Sena responded that they had a right to give out the leaflets and invited Winkle to "go ahead" and contact the police. Subsequently, Winkle went to the other gate—generally used for exiting the yard—and closed or blocked it so that all the drivers were forced to enter and exit through a single, one-lane, entrance gate. Winkle later returned to the entrance gate where she lingered, picking up twigs. It was not unusual for Winkle to spend quite a bit of time out in the bus yard, but on this occasion she also stopped to tell drivers that they did not have to accept literature from, or talk with, the organizers, and that they should keep moving so as not to block traffic. Sena told Winkle not to engage in surveillance of the organizing activities, and Winkle responded that she was simply picking up sticks. Although many of the bus drivers had accepted the union literature prior to Winkle's appearance near the front gate, there was a marked decline in bus drivers' willingness to do so after Winkle arrived.

The record is unclear as to whether the organizers were on public property, as opposed to the Respondent's property, at the time of their October 15 confrontation with Winkle. The record does show that the organizers remained outside the Respondent's gates and that there was no sidewalk along the side of the road in front of the Respondent's property. All three union organizers testified that they were on public property, however, the record does not provide a basis for concluding that they were correct. Sena stated that he had not consulted "zoning," to determine where the Respondent's property ended, but explained that he generally judged where public property began by reference to the placement of telephone poles, which, he said, were on public property. He testified that it was his understanding that, even in the absence of a sidewalk, there is a "buffer zone" of public property between private property and a public street. Neither Hoehne nor Murolo explained why they believed they were on public property. Winkle testified that, in

her view, the area between the gate and the street was the Respondent's property. She stated that she believed this because there was 30 to 35 feet between the gate and the street. Neither side presented documentary evidence showing the location of the gate and the street relative to the Respondent's property line. This record provides an inadequate basis for determining whether the organizers were on private property at the time of the confrontation.

*E. Encounter Between Winkle and Plona on or about
October 19, 2004*

On or about October 19, 2004, Winkle had another encounter with Plona. Once again, Winkle and Plona provided contrary accounts of what occurred. Given my assessment of the credibility of these witnesses, I find that the record fails to establish the truth, by a preponderance of the evidence, of either witness' account of disputed matters, except to the extent that those accounts are corroborated by credible evidence. Fortunately, in this case a third witness—Joel Cohen—testified about a significant portion of the exchange. I found Cohen a very credible witness based on his demeanor and testimony. Cohen testified in a clear, certain, very forthcoming and measured way. He did not appear to strain to conform his account to any party's advantage. For example, while he was present during the October 15 incident discussed above, and testified about what he saw, he conceded that he was unable to hear what was being said. In discussing an incident on October 23, he willingly admitted that, although he did not know it at the time, he was running late when Winkle directed him to stop talking and begin his route. Cohen left the Respondent's employ when asked to appear for what Winkle described as a governmentally—mandated random drug test, but the record provides no basis for inferring that Cohen would hold the Respondent's compliance with this externally imposed requirement against the Respondent, or that Cohen was otherwise biased against his former employer. Cohen was not shown to have any personal stake in the outcome of this proceeding.

I find that the record establishes the following. On October 19, Plona was at the Milford location after completing her route. She and her daughter were waiting for Plona's husband to arrive and drive them home. Plona began approaching various bus drivers who had completed their work but still needed to put fuel in their buses before returning home. As the other drivers waited for turns at the fuel pump, Plona approached them shouting, "Meeting—big meeting—big meeting at Denny's." Cohen was one of the drivers waiting to put gas in his bus. He did not consider himself to be "on the clock," at this time because, like most of the Respondent's drivers, he was paid by the "run," not by the hour, and he had already completed his run. Plona came to the window of Cohen's bus and began to talk to him. Winkle heard Plona exhorting employees to attend the meeting, and called to her from the office window. Winkle shouted, "Terry, I told you not to talk to anybody." She also shouted, "Terry, that is enough." Plona responded that she was not talking about the Union. Winkle continued, "I'm going to get the police and throw you off the property." Plona answered that she could talk to whomever she wanted. There were several drivers nearby when this exchange took place.

Subsequently, Winkle approached Plona's daughter, who was sitting near the office, and said, "[Y]ou need to go with Mommy now. Mommy's leaving. You need to get up and go with Mommy." Plona and Winkle agree that Winkle touched Plona's daughter at this time, but Plona says that Winkle grabbed the girl by her shoulder or backpack and pulled her up, whereas Winkle says that she merely "tapped" her.

The record showed that Winkle was generally intolerant of employees having personal conversations during "working time"—regardless of whether the conversation was about unions or something else. The record does not, however, show that Winkle generally interfered with drivers who were talking when they had completed their routes, or who were waiting between routes or for a turn at the pump. Nor does the record show that Winkle considered drivers to be on "working time" during those hours, or whether she distinguished in that regard between drivers paid by the "run" and those paid by the hour. Moreover, even assuming that Winkle objected to personal conversations during employee "waiting time," the record did not show that her objections ever took a form as intimidating as a threat of arrest when those conversations involved matters unrelated to unions.

F. Encounters Between Winkle and Cohen on October 20 and October 23, 2003

On October 20, 2003, Winkle and Cohen met alone in Winkle's office. At this meeting Winkle stated, "[T]here are people here trying to organize the Union." Then Winkle added, "I don't know whether you're for that or not." Cohen responded that he was in favor of the Union and explained the reasons he supported it. Winkle did not respond to Cohen's statements regarding his union support or otherwise continue the conversation, and Cohen left.

Three days later, on the morning of October 23, 2003, Cohen was at the Milford location, talking to another driver, Don Johnson. Both drivers had finished certain preparatory work, but neither had begun their morning routes. Johnson was sitting in his bus, and Cohen went to talk to him. Winkle approached them and told Cohen that she was not paying him to talk on her time. Winkle did not mention the Union and the record does not show that Cohen was talking to Johnson about the Union, or that Winkle believed he was. Cohen conceded that he was late starting his route when Winkle spoke to him, but testified that he had not previously been told when to start the route and was preparing to leave at the same time he was accustomed to leaving.

G. Winkle Prohibits Plona From Taking Minibus Home During Break

The Respondent uses full-size schoolbuses for most of its work, but also has a number of minibuses that it employs primarily for transporting preschool children—aged 3 to 4 years. The Respondent permits drivers who operate the full-size schoolbuses to take those buses home during breaks, or overnight, as long as neighbors and the local authorities do not complain about where the buses are being parked. Many of the Respondent's drivers take advantage of the Respondent's policy and drive the full-size buses home in order to avoid unne-

cessary trips to the bus yard. With respect to the minibuses, the Respondent's policy is more restrictive because those vehicles are in short supply. The Respondent keeps many of its minibuses available in the yard, rather than permitting drivers to bring them home. However, the Respondent does permit a driver to take the minibus home if that driver has a specific minibus assigned to him or her and the driver uses that minibus to complete routes in both the morning and the afternoon.

Plona drove a full-size schoolbus during the months leading up to October 2003. In October Plona continued to use the full-size schoolbus for her regular morning and afternoon runs, but also began to use a minibus to perform the preschool route that she had been assigned that month and which she performed during the period between her morning and afternoon routes.⁶ She did not have a specific minibus assigned to her. Plona had long been permitted to take the full-size schoolbus home during a break between her morning routes. The Respondent never revoked Plona's authorization to do this, and Plona continued to return home in her full-size bus during the morning. When Plona started performing the preschool route using a minibus she asked Winkle for permission to take the minibus home in the afternoon. On November 3, 2003, Winkle denied that permission. Although her testimony on the subject lacked clarity, it appears that Plona claims that at a previous point in her employment, she had driven a minibus to her home during breaks. It is not clear whether she claims the Respondent had explicitly authorized this, or that it was done with the Respondent's knowledge. The record does not reveal whether Plona had a specific minibus assigned to her at the time she says she used a minibus to drive home. Plona conceded that not all drivers were permitted to drive the minibuses home, and the record does not show that the Respondent permitted any drivers to take a minibus home who did not have a specific minibus assigned to them for both morning and afternoon routes.

H. Encounter Between Winkle and Zabala

In October or November 2003, Winkle was in the yard giving direction to a busdriver named Xabier Zabala, who was sweeping buses. There were no other persons in immediate proximity to them. At some point, Winkle asked Zabala, "Are you in the Union." Zabala replied, "no." Winkle commented, "[T]hat's fine, because in your case the Union is not good for you."⁷

⁶ As discussed above, Plona had requested additional work, and took the preschool assignment voluntarily.

⁷ Winkle denied this conversation, but I credit Zabala's account. I found Zabala a credible witness based on his demeanor and testimony. He testified in a calm and certain matter, and showed no signs of attempting to embellish or exaggerate his account. The record provides no reasonable basis for believing that Zabala was biased against the Respondent or in favor of the Union. My credibility findings with respect to Zabala are made independently of his status as a current employee of the Respondent at the time of his testimony. I nevertheless note that these findings are consistent with the Board's view that the testimony of a current employee that is adverse to his employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason is not likely to be false." *Shop-Rite*

I. WINKLE'S NOVEMBER 2003 LETTER TO EMPLOYEES

In November 2003, the Respondent distributed a letter to employees. The letter reads as follows:

Dear Winkle Bus Company fellow employee:

We have heard that the Union sales people are continuing to work very hard to sell you on the Union, and in the process, are telling many of you things that are simply untrue. I feel it is important that you know the truth about some of these things so that you won't be misled.

The Union has said that Winkle Bus can make changes to your benefits and wages right now and that doing so would not be illegal. They are trying to make you believe that we are simply not willing to make changes. This is just not true. The Union salespeople know full well that when employees are actively trying to organize a union, a company can't legally make changes. The National Labor Relations Board, the federal agency that administers labor laws, says that this is the case.

The Union has said to some of you that it wants to have a debate with me about the Union. What the Union salespeople are not telling you is that they can make broad promises and statements about what they claim they can get for you. The law prohibits and forbids the Company from making *any* promises to you and drastically restricts what the Company can say. These restrictions place Winkle Bus in the position of violating the law if we discuss any plans or programs that might benefit you. This is why the Union is now talking about "debates" and why we simply cannot agree to one.

Some of you have come to me and expressed concerns that some employees are being harassed or coerced into signing authorization cards. The law supports your right to say no to the Union or to employees who try to pressure you into signing a card. It is illegal for the Union salespeople or employees to threaten or coerce you into signing a card. If you are being threatened or coerced by employees or the Union, please contact the National Labor Relations Board's Hartford office at 860-240-3522 immediately or tell me. If you have been pressured into signing a card and now want to change your mind, like some employees who have spoken with me, the attached page explains how to revoke one.

Finally, some employees tell me that the Union is saying that it is willing to waive initiation fees and dues for employees for some period of time. Don't be fooled by this "promise". The Union knows that if it can convince enough of you to sign up, it stands to make thousands and thousands of dollars from your dues money each year for a long, long time. The Union is a business and doesn't make these kinds of promises unless it thinks that it will stand to benefit from a bigger payout in the long run.

As always, if you have any questions, please feel free to come and talk with me or Flo.

Sincerely,
Laurie Winkle

The Respondent distributed this letter to employees with their paychecks.

J. Encounters Between Winkle and Cohen in November and December 2003

On three occasions in November and December 2003, Winkle made comments to Cohen about what unionization would mean to the Respondent's employees. On the first occasion, Winkle and Cohen were in the yard before Cohen began his afternoon run. Out of the presence of other employees, Winkle told Cohen, "[I]f the Union comes in, I'm not going to give anymore advances on paychecks." The record shows that Winkle had previously advanced funds to Cohen and other employees.

The Respondent's drivers are required to sound their buses' horns when backing up. In November, Cohen was backing up his bus in the Respondent's yard and failed to use the horn. Winkle approached Cohen and informed him of his mistake. Also present was an individual who is identified in the record as a "trainer" named Tony.⁸ Winkle told Cohen: "I'm going to start writing this down. If you have two write-ups, it'll be a day's suspension without pay. And if the Union comes in, I'm going to negotiate that into a contract." Cohen's experience was that, in the past, the Respondent had responded to such conduct by talking to the employee, without any written record being made of it.

The third occasion took place in December 2003. Winkle had posted a newspaper article that reported on conflicts the Union was having with a different employer whose employees had voted in favor of union representation the previous year. The article discussed allegations that the employer had failed to bargain in good faith, and had unilaterally granted employees a wage increase after the union was voted in. Cohen saw the article and stopped to read it. As he did so, Winkle approached and asked, "Do you want to wait for years for a raise like those people."⁹

⁸ The Respondent argues that I should draw an adverse inference from the General Counsel's failure to call Tony as a witness. However, the Respondent does not explain why it would not be just as proper to draw an adverse inference against the Respondent for also failing to call Tony as a witness. At any rate, the Board has held that since bystander employees are not presumed to be favorably disposed towards any party it is not proper to draw an adverse inference against a party for failing to call such a witness. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996), *affd.* on point 123 F.3d 899, 907 (6th Cir. 1997); see also *International Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987) (adverse inference is only proper if it can reasonably be assumed that the witness was favorably disposed to the party against whom the inference is drawn).

⁹ The Respondent argues that Cohen's account should not be credited because the comment Cohen reports Winkle making would have been "nonsensical" since the article dealt with an employer who granted employees a pay raise immediately after they chose union representation. I do not believe the statement is as nonsensical as Re-

Supermarket, 231 NLRB 500, 505 fn. 22 (1977); see also *Flexsteel Industries*, 316 NLRB 745 (1995), *enfd.* 83 F.3d 419 (5th Cir. 1996).

K. Plona's December 10, 2003 Conversation with Winkle and D'Angelo

On December 10, the Respondent had a meeting with employees. After the meeting, Plona decided to go to the Respondent's upstairs office in what she described as an effort to "break the ice." Present in the office were Winkle, D'Angelo, and a secretary. D'Angelo asked Plona if she had been paid by the Union for her organizing activities, and Plona responded that she had not been paid. Winkle then told Plona "[Y]ou can call the Union and let them know there's no contest."¹⁰

L. Complaint Allegations

The complaint alleges that the Respondent interfered with employees' Section 7 rights in violation of Section 8(a)(1): since about June 11, 2003, by maintaining a policy that prohibited solicitation on "Company time or Company property"; on or about October 9, 2003, by promulgating, and subsequently maintaining and enforcing a rule that prohibited employees from discussing the Union at the facility; on or about October 9, 2003, by interrogating employees about their union activities; on or about October 9, 2003, by creating the impression among employees that their union activities were under surveillance; on or about October 9, 2003, by threatening that it would close the plant if employees selected the Union as their collective-bargaining representative; on or about October 9, 2003, by soliciting employee complaints and grievances and impliedly promising that it would improve employees' working conditions; on or about October 15, 2003, by threatening union representatives with arrest and engaging in surveillance of employees' union activities; on or about October 19, 2003, by threatening employees with arrest for discussing the Union and their terms and conditions of employment; on or about October 20, 2003, by interrogating employees regarding their union activities; on or about October 23, 2003, by engaging in surveillance of employees' union activities;¹¹ in late October or early November 2003 by interrogating employees about their union sympathies and impliedly threatening employees with

unspecified reprisals if they selected the union as their collective-bargaining representative¹²; in or about November 2003, by distributing letters asking employees to inform the Respondent about the union activities of other employees; in or about November 2003, by threatening employees with loss of benefits, stricter enforcement of disciplinary rules, and increased penalties; in or about December 2003 by informing employees that it would be futile for them to select the Union as their collective-bargaining representative; and, on or about December 10, 2003, by interrogating employees about their union activities. The complaint further alleges that the Respondent discriminated against employee Terry Plona because of her union and concerted activities: on October 9, 2003, by granting her additional work hours; and, on November 3, 2003, by ceasing to allow her to take her bus home on breaks.

Analysis and Discussion

I. WRITTEN POLICY ON SOLICITATION

The complaint alleges that, since about July 11, 2003, the Respondent has violated Section 8(a)(1) of the Act by maintaining an unlawful prohibition on solicitation. As discussed above, the record shows that since at least that date, the Respondent has routinely distributed an employee handbook to its bus drivers that contains a rule prohibiting any solicitation on "Company time or Company property." Such a rule is presumptively invalid because "[t]he expression 'company time' does not clearly convey to employees that they may solicit on breaks, lunch, and before and after work. *Laidlaw Transit Inc.*, 315 NLRB 79, 82 (1994). Similarly, the use of the phrase "Company property," is invalid because its "overbread" and can be interpreted "to restrict solicitation and distribution in breakrooms or cafeterias, places where employees do not per-

spondent attempts to portray it, since the article involves laws under which an employer cannot freely grant wage increases to employees who have recently selected a union as their collective-bargaining representative, but will often have to bargain with the union before granting any such raises.

¹⁰ The findings regarding this December 10 encounter are based entirely on Plona's testimony. Although I did not find Plona a very credible witness, I note that her account of the December 10 meeting was uncontradicted. I recognize that D'Angelo died prior to the trial. However, Winkle was present during the exchange, and although she testified at length she never denied Plona's account of what D'Angelo said during the meeting. Since Plona's account is not disputed, and because it is not facially implausible, or contrary to record evidence, I credit her account.

¹¹ On its face, par. 9(b) of the complaint can be read to allege that the Respondent threatened union representatives with arrest on both October 15 and 23, 2003. A trial, counsel for the General Counsel indicated that the paragraph was inartfully drafted, and that the General Counsel was alleging that union officials had been threatened with arrest on October 15, but not on October 23. Tr. 157-159.

¹² Par. 9(e)(ii) of the complaint originally alleged that, in late October or early November 2003, the Respondent had "threatened its employees with loss of wages if they selected the union as their collective bargaining representative." During the presentation of its case-in-chief, the General Counsel moved to amend that paragraph to delete the allegation regarding "loss of wages" and substitute an allegation that the Respondent had "impliedly threatened its employees with unspecified reprisals." Tr. 88. I granted the motion to amend, over the Respondent's objection that it came "too late." Tr. 89. Pursuant to Section 102.17 of the Board's rules, "at the hearing and until the transfer of the case to the Board," the administrative law judge may grant a motion by the General Counsel to amend the complaint "upon such terms as may be deemed just." See also *Pincus Elevator & Electric Co.*, 308 NLRB 684, 684-685 (1992) ("Under Section 102.17 of the Board's Rules and Regulations, a judge has wide discretion to grant or deny motions to amend a complaint."), *enfd. mem.* 998 F.2d 1004 (3d Cir. 1993). In this case, the General Counsel made its motion to amend early in the presentation of its case-in-chief, during the testimony of the second of its six witnesses. This gave both parties the opportunity to fully litigate the new allegation, which they did. The new allegation was similar to the one for which it was substituted, and involved the time period and general type of allegation that much of the rest of the complaint concerned. Under these circumstances, it did not significantly, or unjustly, prejudice the Respondent to allow the General Counsel to amend the complaint.

form work activities but technically are ‘company property.’” *Id.*

The Respondent does not dispute that the solicitation policy it includes in its employee handbook is unlawful (R. Br. 43), but attempts to avoid a violation by arguing that the policy was no longer in effect during the relevant time period. Although it continued to distribute the handbook policy to employees in 2003, the Respondent argues that the policy was revoked by a memorandum that Winkle issued on April 3, 1995, and posted on the facility’s bulletin board. That memorandum, which has remained posted, sets forth specific, narrower, prohibitions on solicitation, but does not inform employees of any circumstances when solicitation is permitted. The 1995 memorandum does not state that it is revoking the handbook policy or even mention that policy.

The Respondent’s argument fails for a number of reasons. First, the Respondent did not revoke the unlawful handbook policy by issuing the 1995 memorandum. Four years after the Respondent claims it rescinded the unlawful policy, it still included that unlawful policy in a new version of its employee handbook. Moreover, the Respondent has continued to distribute that unlawful policy to all employees even after July 11, 2003. Indeed, at trial Winkle confirmed that the unlawful prohibition was still in effect, stating that solicitation was permitted when the employees were not “on Company time.” This unlawful formulation, which can be read to prohibit solicitation during breaks and other periods that are the employee’s own time, comes from the handbook, not the earlier memorandum. Second, even if the Respondent no longer intended to give effect to the overbroad policy in the handbook, it would not avoid a finding of violation since the Respondent continued to maintain and distribute the unlawful policy. The mere existence of an overbroad policy chills employees’ exercise of their Section 7 rights, even if the Respondent no longer intends to enforce the unlawful restriction. See *Alaska Pulp Corp.*, 300 NLRB 232, 234 (1990), *enfd.* 944 F.2d 909 (9th Cir. 1991); *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

Third, under applicable precedent, in order to avoid a finding of violation for its overly broad solicitation rule, the Respondent would have to demonstrate that it eliminated the impact of the unlawful rule by conveying to employees a clear intent to permit solicitation during break times and other nonwork periods, and in nonwork areas. *Laidlaw Transit Inc.*, 315 NLRB at 82–83; *Wellstream Corp.*, 313 NLRB 698, 703 (1994); *Ichikoh Mfg.*, 312 NLRB 1022 (1993), *enfd. mem.* 41 F.3d 1507 (6th Cir. 1994); see also *Teletech Holdings*, 333 NLRB 402, 403 (2001) (“a narrowed interpretation of an overly broad rule must be communicated effectively to the employer’s workers to eliminate the impact of a facially invalid rule”). This, the Respondent undoubtedly failed to do. The most obvious reason is, again, that the Respondent continued to routinely distribute the overbroad solicitation policy to employees long *after* it posted the April 3, 1995 memorandum. This timing would indicate to employees that, if anything, the policy in the 1999 version of the handbook superseded the policy in the April 1995 memorandum—not, as the Respondent now claims, the reverse. Moreover, the 1995 memorandum does not mention the employee handbook, much less state clearly that it is revoking,

narrowing, or modifying, the solicitation policy contained in it. More specifically, the 1995 memorandum does not state that, despite the contrary policy stated in the handbook, the Respondent will permit solicitation during breaktimes and other nonwork periods, and in nonwork areas. Indeed, the 1995 memorandum does not identify a single circumstance in which the Respondent would permit solicitation. Winkle conceded at trial that the Respondent did nothing to inform employees that the overbroad solicitation had been narrowed, other than to post the 1995 memorandum. Given these facts, it is an understatement to say that reasonable employees would not consistently assume that the policy the Respondent was distributing to them in 2003 had been revoked 8 years earlier by the April 1995 memorandum. Many employees would consider themselves bound by the unlawful no-solicitation policy in the handbook. At best, the Respondent’s two pronouncements regarding solicitation create confusion among employees about what is permitted, and such confusion itself has the effect of unlawfully discouraging employees from engaging in solicitation protected by Section 7 of the Act. See *Farr Co.*, 304 NLRB 203, 215 (1991) (An employer that maintained an unlawful no-solicitation policy in its handbook, did not escape liability by issuing a memorandum containing a lawful policy, since “legal confusion” would result even if all employees were aware of both pronouncements.); see also *Teletech Holdings*, 333 NLRB at 403 (When an employer communicates a narrowed interpretation of an overly broad rule, “[a]ny remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule.”). Indeed, as noted above, it seems that even Winkle had trouble keeping track of the Respondent’s supposed change in policy—reverting to the handbook language during her testimony and stating that the Respondent permitted solicitation when employees were not “on Company time.”

For the reasons discussed above, I conclude that, since July 11, 2003,¹³ the Respondent violated Section 8(a)(1) of the Act by its maintenance and distribution of the overly broad no-solicitation policy in its employee handbook.

II. ALLEGED 8(A)(1) VIOLATIONS ON OCTOBER 9

The General Counsel alleges that Winkle made a number of statements that violated Section 8(a)(1) of the Act during a conversation with Plona on October 9, 2003. As discussed above, the evidence failed to establish that Winkle made any of the statements during the October 9 conversation that are alleged to constitute: oral promulgation of a rule prohibiting discussion of the Union at the facility; interrogation about union activities; the impression of surveillance; or threats of plant closure. Therefore, I will recommend that the complaint allegations that Winkle violated Section 8(a)(1) by making such statements on October 9 be dismissed.

With respect to the October 9 conversation, this leaves only the allegation that Winkle unlawfully solicited employee com-

¹³ In reality, the Respondent maintained the unlawful solicitation rule since at least July 1999. The July 11, 2003, date is dictated by the 6-month charge filing period under Sec. 10(b). The original charge in this case was filed on December 11, 2003.

plaints and grievances, and impliedly promised to improve working conditions. The record shows that Winkle did make the statements that the General Counsel alleges constitute this violation. Specifically, on October 9, after Plona completed her morning routes, Winkle asked Plona if she had any “issues” or “problems” that she “needed to discuss,” and said that Plona would receive the additional work assignments that Plona had been seeking. An employer violates Section 8(a)(1) when it solicits, and promises to remedy, employee grievances as part of an effort to discourage union activity. *Hospital Shared Services*, 330 NLRB 317 (1999); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6th Cir. 1972). The promise to remedy grievances need not be explicit to constitute a violation. “There is a compelling inference that [the employer] is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.” *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), *enfd.* denied on other grounds 32 F.3d 588 (D.C. Cir. 1994), quoting *Reliance Electric*, 191 NLRB at 46.

In this case, I conclude that the record fails to establish that Winkle’s October 9 inquiry was part of an effort to discourage union activity. The evidence does not show that the Respondent was aware of the Union’s recently inaugurated campaign, or of Plona’s involvement in it, as of the time that Winkle made her inquiry. There is no evidence that, as of October 9, union literature or paraphernalia, or other indications of the Union’s campaign, were on view at the facility, or that anyone had contacted the Respondent about whatever efforts were being made.¹⁴ Moreover, the evidence did not show that it was unusual for Winkle to inquire whether employees had problems or issues they wished to discuss. Given these facts, as well as the facially innocent nature of Winkle’s inquiry, I conclude that the record fails to establish that Winkle was attempting to solicit, and promising to remedy, grievances, in an effort to discourage union activity.

For the reason stated above, I conclude that the Board should dismiss the complaint allegations that the Respondent violated Section 8(a)(1) on October 9, 2003, by: promulgating, and subsequently maintaining and enforcing a rule that prohibited employees from discussing the Union at the facility; interrogating employees about their union activities; creating the impression among employees that their union activities were under surveillance; threatening that it would close the plant if employees selected the Union as their collective-bargaining representative; and, soliciting employee complaints and grievances and impliedly promising that it would improve employees’ working conditions.

¹⁴ The first date when the record shows that Winkle was aware of the campaign was October 15—when union officials came to the Respondent’s facility to distribute union literature.

III. ALLEGATION THAT WINKLE GRANTED CONVERSATION IN VIOLATION OF SECTION 8(A)(3)

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) when, shortly after Winkle’s October 9 conversation with Plona, Winkle granted Plona additional work assignments in an attempt to cause Plona to lose interest in the Union. It is well settled that an employer violates Section 8(a)(3) and (1) of the Act when it grants benefits to an employee for the purpose of causing him or her to lose interest in unionization. *Insight Communications Co.*, 330 NLRB 431, 457 (2000); *Marriott Corp.*, 310 NLRB 1152, 1158 (1993).

I find that the record fails to establish that the Respondent granted Plona benefits in an effort to discourage her from supporting the Union. First, as discussed above, the record does not show that Winkle even knew about the union campaign either at the time of the October 9 conversation when she promised Plona additional work, or shortly thereafter when she actually assigned the work. Moreover, Plona had been seeking such assignments during the period leading up to October 9, and the extra work at issue here—preschool routes and charter routes—were of a type that Plona had done in the past. The record also shows that a preschool run was added to the Respondent’s schedule at about the time of the October 9 conversation, and that about 5 week earlier, prior to the start of the Union campaign, Winkle had assured Plona that additional charter assignments would soon be offered to drivers who wanted them. Given this record, I cannot conclude that the reason Winkle offered Plona the extra work was to try to cause Plona to lose interest in unionization.

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(3) and (1), by assigning additional work to Plona on October 9, or shortly thereafter, should be dismissed.

IV. ALLEGATION THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING AND SURVEILLING UNION REPRESENTATIVES ON OCTOBER 15

An employer violates Section 8(a)(1) Act when it threatens to have a nonemployee union official arrested for engaging in activity protected by Section 7 at its facility, unless the employer meets a threshold burden of proving that it had a property interest that entitled it to exclude the individuals. *Corporate Interiors, Inc.*, 340 NLRB 732, 744–745 (2003); *Swardson Painting Co.*, 340 NLRB 179 (2003); *A&E Food Co.*, 339 NLRB 860, 861–862 (2003); *Wild Oats Markets, Inc.*, 336 NLRB 179, 180 (2001); *Golden Stevedoring Co.*, 335 NLRB 410, 413–414 (2001); *Indio Grocery Outlet*, 323 NLRB 1138, 1141–1142 (1997), *enfd.* 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000); *Bristol Farms, Inc.*, 311 NLRB 437, 438–439 (1993). Applying this standard to the facts of this case, I conclude that the Respondent violated the Act on October 15, 2003, when Winkle attempted to expel the union organizers and threatened to have them arrested if they would not leave voluntarily.

The record shows that at the time Winkle attempted to expel Murolo, Sena, and Hoehne, they were distributing union literature to the Respondent’s drivers—an activity protected by Section 7. See *Bristol Farms*, *supra* (handbilling in front of em-

ployer's store is Sec. 7 activity). Thus, the Respondent has the burden of demonstrating that it had a property interest that entitled it to exclude the union officials. It is undisputed that the three nonemployee union organizers remained outside the Respondent's gates while they were engaged in the Section 7 activity. Winkle stated that she believed the Respondent's property extended beyond its gates and that the organizers were on the Respondent's private property, however no other evidence was presented to support Winkle's belief. In particular, the Respondent presented no documentary evidence showing where the Respondent's property lines were or indicating that its property extended to the locations outside the gates where the organizers were situated. For their parts, each of the three organizers stated that they were on public property. Sena explained that he based his belief on his position relative to telephone poles, which he understood to stand on public property. As discussed above, on the record in this case I am unable to make a finding about whether the organizers were on public property or the Respondent's private property. I conclude that the Respondent has failed to meet its initial burden of showing that it had a property right that entitled it to exclude the union officials.

The Respondent argues "if a union organizer stopped a bus on the way into the facility, it is inevitable that traffic would be backed up in both directions" on the road outside the facility and that Winkle therefore "had the right to bring [her] reasonable concern about public safety to the attention of the police." (R. Br. at 26–27.) The Respondent failed to show that the few moments it would take a driver to receive union literature from one of the organizers was significantly contributing to any traffic problems. At any rate, the claim that Winkle made the threat because she was concerned about traffic is belied by her decision to block one of the two driveways to the facility—thereby forcing all the buses to enter and exit through a single, one-lane, gate. Winkle must have known that this action would significantly slow the traffic coming to the facility from the road, and would exacerbate the traffic problem the Respondent claims she was concerned about alleviating when she threatened the union officials.

For these reasons, I conclude that the Respondent violated Section 8(a)(1) on October 15, 2003, by threatening to have the union representatives arrested.

The General Counsel also alleges that Winkle's actions on October 15 constituted unlawful surveillance of employees' union activities. The Board has held that "management officials may observe public union activity, particularly when such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1980), enfd. mem. 79 F.2d 875 (4th Cir. 1982); *Metal Industries*, 251 NLRB 1523 (1981) (same). The employer's actions are evaluated from the perspective of the employee and are unlawful if they would reasonably cause an employee to believe that his or her activities are under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 50–51 (1999).

I conclude that the observation at issue here constitutes more than ordinary observation of public union activity and amounts to unlawful surveillance. Although the record shows that it was

not unusual for Winkle to spend some of her workday outside at locations around the facility, her activities in this case were unusual. Most significantly, I note the fact that Winkle blocked one of the two gates to the facility, thereby ensuring that all the bus drivers had to pass by her position when they entered or exited the facility and could not receive literature or other information from the union representatives without her scrutiny. See *Flexsteel Industries*, 311 NLRB 257 (1993) (Under Sec. 8(a)(1), employees should be free to participate in union organizing campaigns without the fear that members of management are "peering over their shoulders."). There is no obvious explanation for Winkle's unusual decision to block the gate other than a desire to make intrusive surveillance of employees' union activities possible, and, indeed, the Respondent has not offered an innocent explanation for her action. Compare, *Fairfax Hospital*, 310 NLRB 299, 310 (1993), enfd. mem. 14 F.3d 594 (4th Cir. 1993), cert. denied 512 U.S. 1205 (1994) (Although "employer's mere observation of union activities that are conducted in public does not violate Section 8(a)(1) . . . , Board law does not authorize an employer to use patrolling cars, cameras, and videotapes to enhance its identification of those who are lawfully engaging in protected Section 7 conduct."), and *Sands Hotel & Casino*, 306 NLRB 172 (1992), enfd. mem. 993 F.2d 913 (D.C. Cir. 1993) (surveillance unlawful where guards made observation of union activity more intrusive by using binoculars). Winkle further magnified the coercive effect of her surveillance by attempting to expel the union organizers, see *Hoschton Garment Co.*, 279 NLRB 565, 566 (1986) (surveillance unlawful where employer did not merely observe union activity, but rather attempted to prohibit it), and by advising the drivers under her observation that they did not have to accept the union literature. Winkle's activities were out of the ordinary and had the tendency to unreasonably chill the exercise of employees' Section 7 rights. It is not surprising under the circumstances that bus drivers were much less willing to accept information from the union organizers as a result of Winkle's actions.

Those actions would cause employees to fear that their employer was attempting to specifically identify them in order to take action, such as discharge or other discipline. See *Fairfax Hospital*, 310 NLRB at 310.

I conclude that the Respondent violated Section 8(a)(1) of the Act by engaging in intrusive surveillance of employees' union activities on October 15, 2003.

V. ALLEGATION THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING EMPLOYEES WITH ARREST ON OCTOBER 19

On October 19, 2003, after completing her work, Plona repeatedly announced an upcoming union meeting to busdrivers, including Cohen, who were waiting for a turn to fuel their buses at the Respondent's pumps. Winkle, who could hear what Plona was saying, shouted to Plona from the office "Terry, I told you not to talk to anybody." When Plona persisted, Winkle shouted, "I'm going to get the police and throw you off the property." The Board has held that an employer violates Section 8(a)(1) when it responds to employees' protected union activity at or near its facility by threatening to call

the police. *Roadway Package System*, 302 NLRB 961 (1991); *the All American Gourmet*, 292 NLRB 1111 at fn. 2 (1989).

The Respondent argues that Winkle was generally intolerant of employees engaging in personal conversations during “working time”—regardless of whether the conversation was about unions or something else. While that is true, the evidence did not show that Winkle’s intolerance of conversation regarding nonunion matters extended to times when the drivers had completed their routes and were simply waiting for a turn at the gas pump before returning home. Even assuming that Winkle objected to conversations during an employee’s waiting time, the record did not show that her objections ever took a form as intimidating as a threat to contact the police when the conversations involved matters unrelated to unions. At any rate, the Board has indicated that employee “waiting time” is akin to “break time,” and that an employer violates the Act by prohibiting solicitation during such periods. See *Orbit Lightspeed Courier Systems, Inc.*, 323 NLRB 380, 389–390 (1997).

For these reasons, I conclude that the Respondent violated Section 8(a)(1) of the Act when Winkle threatened to call the police because Plona would not cease her protected union activities on October 19, 2003.

VI. ALLEGATION THAT RESPONDENT VIOLATED SECTION 8(A)(1)
BY INTERROGATING COHEN ON OCTOBER 20

The General Counsel alleges that, on October 20, 2003, Winkle interrogated Cohen about his union sympathies in violation of Section 8(a)(1). At the time of the encounter, Winkle and Cohen were alone in Winkle’s office. Winkle said, “[T]here are people here trying to organize the Union,” then added, “I don’t know whether you’re for that or not.” Cohen told Winkle that he was in favor of the Union and explained the reasons he supported it. Winkle did not continue the conversation and Cohen left. An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), *enfd.* in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292–293 (1990). Relevant factors include, whether the interrogated employee was an open or active union supporter, whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985). The Board has viewed the fact that an interrogator is a high-level supervisor as one factor supporting a conclusion that questioning was coercive. See, e.g., *Stoody*, *supra*.

Based on the factors articulated by the Board, I conclude that Winkle’s statements to Cohen constituted an unlawful interrogation. First, Winkle was a management official, an owner of the company, and the highest-ranking official of the Company at the facility. Second, prior to meeting with Winkle, Cohen was not shown to have publicly revealed his views regarding the union campaign, or to have assisted the Union in any open or active manner. Third, the meeting took place in Winkle’s

office, out of the presence of other employees, a factor that would tend to make the exchange more intimidating to a reasonable employee. Fourth, prior to the meeting, the Respondent had already committed multiple unfair labor practices. On two occasions, for example, Winkle threatened to call the police unless individuals ceased their union activities. Cohen heard Winkle make one of those threats, and in the other instance he observed Winkle confronting the union organizers. Moreover, the Respondent has not presented evidence showing an innocent purpose for the meeting or for Winkle’s comments. To the contrary, the evidence shows that Winkle effectively ended the conversation once Cohen revealed his views regarding the union campaign. Application of the factors discussed above, leads me to conclude that the interrogation of Cohen was coercive and violative of the Act.

The Respondent argues that Winkle’s statements to Cohen were not an interrogation because she did not ask him a question, but simply made declarative statements. This argument fails under applicable precedent. The Board has repeatedly held that the fact that an employer uses declarative statements, rather than questions, to elicit information from an employee about his or her union sympathies or activities does not mean that such activities are lawful. For example, in *Kuna Meat Co.*, 304 NLRB 1005, 1010 (1991), *enfd.* 966 F.2d 428 (8th Cir. 1992), an employer was found to have engaged in an unlawful interrogation, even though its inquiries were posed as “declarative statements” that its official “waited for [the employee] to either agree or disagree” with. In *Belcher Towing Co.*, 238 NLRB 446, 459 (1978), *enfd.* in relevant part 614 F.2d 88 (5th Cir. 1980), an employer violated the Act when its official made provocative statements to employees about union activity, which, while declarative in nature, were “designed to bring forth employee sentiments about union representation.” See also *Eddyleon Chocolate Co.*, 301 NLRB 887, 898 (1991) (“Although . . . statement was declarative in form rather than interrogative, it was clearly intended to elicit” information regarding employee’s participation in union activities.); *Wykle Research, Inc.*, 290 NLRB 1062, 1069 (1988) (“declarative statements” are unlawful interrogation where they are “interrogative in purport if not in form”); *Ebb Tide Processing, Inc.*, 264 NLRB 739, 744 (1982) (“declarative statement” made to employee was made “solely to confirm her participation in the grievance . . . was unlawful interrogation”). As discussed above, the evidence shows that Winkle’s purpose for meeting with Cohen in her office and making the declarative statements she did was to elicit information about Cohen’s sentiments regarding union representation.

For these reasons, I conclude that, on October 20, 2003, Winkle coercively interrogated Cohen in violation of Section 8(a)(1) of the Act.

VII. ALLEGATION THAT RESPONDENT VIOLATED SECTION 8(A)(1)
By Engaging in Unlawful Surveillance of Employees’ Union
Activities on October 23

The Respondent alleges that the Respondent engaged in surveillance of employees’ union activities on October 23, 2003, when Winkle interrupted a conversation between Cohen and

another driver, Johnson, and told them they were not being paid “to talk on her time.”

The record does not support the allegation that Winkle was engaging in surveillance of union activities in this instance. The evidence did not show that Cohen and Johnson were engaged in protected activity, or that Winkle had any reason to believe they were, when she told them to stop talking. The General Counsel does not claim that Winkle mentioned the Union at all during the exchange. More importantly, Cohen himself stated that he was late starting his bus route when Winkle interrupted his conversation, and he also testified that Winkle was generally intolerant of employees stopping for personal conversations when they had work to do. These facts simply do not support the unlawful explanation that the General Counsel attempts to attach to Winkle’s statement to Cohen and Johnson. The much more likely explanation is that Winkle was doing what she frequently did—making sure that the Respondent’s drivers did not spend time talking when they had work to do.

I conclude that the allegation that the Respondent violated Section 8(a)(1) by engaging in surveillance of employees’ union activities on October 23, 2003, should be dismissed.

VIII. ALLEGATION THAT RESPONDENT VIOLATED SECTION 8(A)(1)

By Interrogating and Threatening Zabala in October or November 2003

The General Counsel alleges that during a conversation in October or November 2003, Winkle approached employee Zabala and made statements that constituted unlawful interrogation and the implied threat of unspecified reprisals. On the occasion in question, Zabala was sweeping buses and Winkle was giving him directions. Then, while they were out of the presence of others, Winkle asked, “Are you in the Union?” Zabala said, “no,” and Winkle commented, “[T]hat’s fine, because in your case the Union is not good for you.”

Turning first to the allegation of unlawful interrogation, I find that the General Counsel has established a violation under the standards discussed above. See *Matthews Readymix*, supra; *Stoody Co.*, supra; *Emery Worldwide*, supra; *Liquitane Corp.*, supra; *Rossmore House*, supra. Winkle was the highest-ranking official at the facility and the questioning took place out of the presence of others, and against the backdrop of the Respondent’s multiple unfair labor practices. The Respondent does not claim that Zabala was openly prounion, and yet Winkle asked him directly whether he was in the Union. Winkle did not give Zabala any assurances to counter the coercive element in her questioning.

For the reasons discussed above, I conclude that in October or November 2003, Winkle coercively interrogated Zabala in violation of Section 8(a)(1) of the Act.

Turning to the allegation of an unlawful threat, I conclude that Winkle’s statement to Zabala that “in your case the Union is not good for you” was simply a general statement of Winkle’s opinion regarding the merits of union representation, not a threat. While Section 8(a)(1) prohibits certain speech and conduct deemed coercive, employers are free under Section 8(c) of the Act to express their views, arguments, and opinions regarding unions as long as such expressions are unaccompanied by

threats of reprisals, force or promise of benefit. *Eckert Fire Protection, Inc.*, 332 NLRB 198, 203 (2000); *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000), enfd. 282 F.3d 972 (7th Cir. 2002). In this instance, Winkle’s statement did not refer to any future action by the Respondent, much less contain a threat of retaliatory action by the Respondent or anyone else. See *Salvation Army Residence*, 293 NLRB 944, 965 (1989) (employer’s statement that it was going to be “tough” if the union was selected was too vague and ambiguous to constitute a threat and was not necessarily a reference to future action by the Respondent). Under the facts present here, Winkle’s statement that the Union would not be good for Zabala was an expression of opinion that falls within the protection of Section 8(c) of the Act, not a threat of retaliation by the Respondent.¹⁵

For the reasons discussed above, I conclude that the allegation that Winkle threatened Zabala with unspecified reprisals in violation of Section 8(a)(1) during a conversation in October or November 2003 should be dismissed.

IX. ALLEGATION THAT THE RESPONDENT VIOLATED SECTION 8(A)(3) AND (1)

On November 3 by Discontinuing the Practice of Permitting Plona to Take the Bus Home on Breaks

The General Counsel alleges that under the standards announced in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Respondent violated Section 8(a)(3) on November 3, 2003, by discriminatorily ceasing its practice of permitting Plona to take the bus she was using home during breaks. I reject this contention because the evidence fails to show either that the Respondent changed its practice with respect to Plona, or that it applied its policy disparately in her case. As found above, both before and after November 3, 2003, the Respondent permitted Plona to take home the full-size bus that she used for her morning and afternoon routes. It is true that the Respondent did not permit Plona to take a minibus home, but the evidence did not establish that the Respondent had given Plona permission to take a minibus home during the period leading up to November 3. Indeed, due to the shortage of minibuses, the Respondent’s policy was that only a driver who had a specific minibus assigned to him or her, and who used that bus in both the morning and the afternoon, would be permitted to take a minibus home. The record did not establish that Plona met either of those criteria. Nor did it show that any

¹⁵ If Winkle had made a prediction that specific consequences—e.g., plant closure, reduction in benefits—would flow from unionization, the inquiry would be different. Pursuant to the Supreme Court’s decision in *NLRB v. Gissel Packing Co.*, the analytical question posed would then have been whether Winkle’s statement constituted an unlawful threat of retaliation in response to protected activity, rather than a lawful, fact-based prediction of economic consequences beyond the employer’s control. 395 U.S. 575, 617–619 (1969). As noted above, on this occasion Winkle did not predict specific adverse consequences and did not indicate that the Respondent would take any action at all—retaliatory or otherwise—as a result of unionization.

other drivers who failed to meet the criteria were permitted to take minibuses home.

For the reasons discussed above, the allegation that the Respondent violated Section 8(a)(3) and (1) on November 3, 2003, by ceasing to allow Plona to take her bus home during breaks, should be dismissed.

X. ALLEGATION THAT WINKLE'S NOVEMBER 2003 LETTER ASKING EMPLOYEES TO REPORT UNION COERCION VIOLATED SECTION 8(A)(1)

The General Counsel alleges that Winkle's November 2003 letter to employees asking them to report any coercion or harassment by the Union to Winkle or the Board violated Section 8(a)(1) of the Act. The focus of this allegation is the portion of the letter which states: "Some of you have come to me and expressed concerns that some employees are being harassed or coerced into signing authorization cards If you are being threatened or coerced by employees or the Union, please contact the National Labor Relations Board's Hartford office at [telephone number] immediately or tell me." In *Tawas Industries*, 336 NLRB 318, 322 (2001), the Board considered very similar language and found it to be violative of Section 8(a)(1). The employer's notice in *Tawas* stated: "It has been reported that employees feel they are being subjected to threats and coercion because they are expressing their views (either pro or con) regarding [union representation]. If you feel that you are being subject to such actions, please report such incidents to the Company and we will take the appropriate action, or you may directly contact the [NLRB]." *Id.* In *Tawas*, the Board stated that such statements by an employer violate the Act "because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities." 336 NLRB at 322 (quoting *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988)). The language employed by the Respondent here, which requested that employees report prounion threats, coercion, and harassment, has the same "potential dual effect." Winkle's invitation is equivalent in all material respects to that found to be unlawful in *Tawas*, except that Winkle's is somewhat more offensive because it only asks employees to report prounion coercion, not, as in *Tawas*, coercion for or against unionization. The language Winkle used in the letter is also comparable to that held to be unlawful in *CMI-Dearborn, Inc.*, 327 NLRB 771 (1999). There an employer was found to have violated Section 8(a)(1) by stating: "[We] will protect you from any threats, coercion or scare tactics used by union pushers to get you to join the union. If anyone tries these tactics on you, we urge you to report it [to management] immediately." *Id.* at 775-776. Moreover, the Board has commented specifically on an employer's use of the term "harassment" to describe the union activity employees are being asked to report about. In *Fixtures Mfg. Corp.*, the Board explained that the problem with an employer using the term "harassment" is that it is ambiguous and "employees might reasonably think that they are being asked to report on such protected activities as repeated efforts by the Union to persuade them to sign cards." 332 NLRB 565 fn. 4 (2000); see also *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979)

(same). Similarly, in this case, Winkle's reference to harassment by union supporters could lead reasonable employees to think that they were being asked to report on protected activity. The Respondent, while arguing that Winkle's letter was not so vague as to invite employees to inform on fellow workers protected activities, does not cite a single case in which language similar to that used by Winkle's was held to be lawful.

For the reasons discussed above, I conclude that Winkle's November 2003 letter to employees asking them to report on union activity was a violation of Section 8(a)(1) of the Act.

XI. ALLEGATION THAT THE RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING LOSS OF BENEFITS IN NOVEMBER OR DECEMBER 2003

The evidence showed that prior to November 2003, Winkle had advanced funds to employees. In November or December, Winkle approached Cohen, and told him that if employees selected the Union as their representative "I'm not going to give anymore advances on paychecks." The General Counsel alleges that Winkle's statement constituted a threat of loss of benefits in violation of Section 8(a)(1). I agree. Pursuant to the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, supra, the question is whether Winkle was making a lawful, fact-based, prediction of economic consequences beyond the employer's control, or was simply threatening to retaliate in response to protected activity. 395 U.S. at 617-619; see also *Tawas Industries, Inc.*, 336 NLRB at 321. In this case, Winkle failed to present any objective, legitimate facts showing that the discontinuation of cash advances would result from factors beyond the employer's control. Instead the evidence indicates that Winkle was simply threatening to retaliate for a prounion vote by discontinuing an informal practice that was within her control and had been enjoyed by employees. Such a threat would reasonably tend to coerce employees in the exercise of their Section 7 rights.

I conclude that Respondent violated Section 8(a)(1) in November or December 2003 by threatening to discontinue giving cash advances to employees if the Union was selected by employees as their representative.

XII. ALLEGATION THAT THE RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING COHEN WITH STRICTER DISCIPLINE AND INCREASED PENALTIES

In November or December 2003, Cohen made a mistake by backing up his bus without sounding the bus' horn. Winkle observed the error and told Cohen: "I'm going to start writing this down. If you have two write-ups, it'll be a day's suspension without pay. And if the Union comes in, I'm going to negotiate that into the contract." In the past, Winkle had talked to employees when they made such mistakes, but had not made a written record. An employer violates Section 8(a)(1) of the Act by threatening that it will more strictly enforce rules or policy because of employees' protected activity. *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074 (2004); *Mid-Mountain Foods, Inc.*, 332 NLRB 229, 237-238 (2000), *enfd.* 269 F.3d 1075 (D.C. Cir. 2001). *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1030 (1996), citing *Long-Airdox Co.*, 277 NLRB 1157 (1985).

I conclude that Winkle coerced and restrained employees in the exercise of their Section 7 rights, and thereby violated Section 8(a)(1), when she threatened to begin giving employees some type of written discipline for conduct that had previously resulted only in verbal counseling. Winkle made this threat during the union campaign and explicitly linked the increase in severity to the possibility of employees choosing union representation. Moreover, she made the threat to Cohen, an employee who, in October, she had unlawfully interrogated and discovered to be prouion. The Respondent does not argue that the statements that Cohen attributed to Winkle are lawful, but rather argues that I should credit Winkle's denials that she made the statements. For the reasons discussed above, I found Cohen a more credible witness than Winkle.

I find that the Respondent violated Section 8(a)(1) in November or December 2003 by threatening stricter discipline and increased penalties because of employees' protected activity.

XIII. ALLEGATION THAT THE RESPONDENT VIOLATED SECTION 8(A)(1) IN DECEMBER 2003 BY INFORMING EMPLOYEES THAT IT WOULD BE FUTILE TO SELECT THE UNION

The General Counsel argues that Winkle violated Section 8(a)(1) by informing employees that it would be futile to select the union as their collective-bargaining representative.

This allegation refers to the incident in December 2003 when Cohen was reading a newspaper article that Winkle had posted at the facility and Winkle approached Cohen and asked, "Do you want to wait for years for a raise like those people?" The newspaper article concerned employees who had recently voted in favor of union representation and reported on allegations that the employer was delaying negotiations for a contract, and had unlawfully granted a wage increase without bargaining. In a similar case, *Federated Logistics & Operations*, the Board affirmed that an employer violated Section 8(a)(1) by communicating the "message . . . that the selection of the Union would be a futile act as the employees would receive no wage increases until the parties negotiated a contract which could take a long time." 340 NLRB 255, 266 (2003); see also *Woodview Rehabilitation Center*, 265 NLRB 838, 841 (1982) (employer statement that employees would not receive prompt pay raises if they selected the union held to be an unlawful threat of futility). In reaching its decision in *Federated Logistics*, the Board noted that the employer's statements were made in the context of numerous other unfair labor practices. 340 NLRB at 255–256.

I have considered Winkle's statement to Cohen in tandem with the newspaper article that Cohen posted and referenced. In essence, Winkle's message to Cohen was that if, like the employees in the article, the Respondent's drivers selected the union as their representative, then wage increases would have to be bargained over and it would take "years" before they received a pay raise. This is essentially the same message that was found to be an unlawful threat of futility in *Federated Logistics*, supra, and, as in that case, I find that the message here constituted an unlawful threat. Winkle did not blunt the threat by telling Cohen that the Respondent could or would continue to grant any increases that it had routinely given to drivers in the past. Nor did Winkle state any objective, lawful, basis for

her prediction that it would take "years" to negotiate a wage increase. It is also worth noting that, as in *Federated Logistics*, Winkle's threat was made in the context of the Respondent's numerous other unfair labor practices.¹⁶

I conclude that the Respondent violated Section 8(a)(1) in December 2003 by threatening Cohen that it would futile for employees to select the Union as their collective-bargaining representative.

XIV. ALLEGATION THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY INTERROGATING PLONA ON DECEMBER 10, 2003

The General Counsel alleges that on December 10, 2003, D'Angelo unlawfully interrogated Plona in violation of Section 8(a)(1). On that occasion, Plona decided to go to the Respondent's office to try to "break the ice." Once Plona arrived in the office, D'Angelo asked her, in the presence of Winkle, whether the Union had paid Plona for her organizing activities. Plona responded that she had not been paid.

As discussed above, the Board answers the question of whether an interrogation is unlawfully coercive by considering "the totality of the circumstances." *Matthews Readymix, Inc.*, supra; *Emery Worldwide*, supra; *Liquitane Corp.*, supra. In this case some of those circumstances favor the view that the questioning was coercive. In particular, I note that the questioning took place in the Respondent's office out of the presence of other bus drivers and against the backdrop of the Respondent's multiple unfair labor practices. However, I conclude that those circumstances are outweighed in this instance by other factors. Perhaps most important, I note that it was Plona herself who initiated the meeting and chose when, where, and with whom it took place. The record indicates that Plona sought out Winkle and D'Angelo in the office completely of her own accord as part of what she described as an effort to "break the ice" with the Respondent. By the time of the exchange, Plona had not only publicly espoused support for the union for over a month, but had engaged in organizing activity under Winkle's nose and, in at least one instance, in defiance of Winkle's demand that she stop. I believe that by approaching Winkle and D'Angelo in the office to "break the ice," Plona was, in effect, raising the issue of their disagreements over the union campaign. The evidence showed that once Plona got there D'Angelo asked a single question—whether Plona was being paid by the Union. The General Counsel does not claim, and the evidence does not show, that any other questions were posed or that D'Angelo's question was accompanied by any type of threatening behavior or comment. Under those circumstances, I conclude that D'Angelo's question was more in the nature of verbal jousting than of an attempt to coerce Plona in the exercise of her Section 7 rights. This type of question about an employees' openly declared union sympathy does not rise to the level of a violation given the facts present here. See *Keystone Lamp Mfg. Corp.*, 284 NLRB 626, 635–636 (1987), enf.

¹⁶ The Respondent argues that I should not credit Cohen's account, but provides no argument for finding Winkle's actions lawful in the event that Cohen is believed. For the reasons discussed earlier, I have credited Cohen's testimony over Winkle's denials.

mem. 849 F.2d 601 (3d 1988), cert. denied 486 U.S. 1041 (1989); see also *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001) (“Although an employer does not necessarily violate the Act when it questions open and active union adherents about their union sentiments, a violation does occur if the employer statements contain express or implied threats or promises.”)

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(2) by coercively interrogating Plona on December 10, 2003, should be dismissed.¹⁷

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. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent interfered with employees’ exercise of Section 7 rights in violation of Section 8(a)(1) of the Act: since July 11, 2003, by maintaining and distributing an overly broad no-solicitation policy; on October 15, 2003, by threatening union representatives who were engaged in protected activity in the vicinity of the Milford facility with arrest; on October 15, 2003, by engaging in intrusive surveillance of employees’ union activities; on October 19, 2003, by threatening to call the police in response to Plona’s lawful union activities; on October 20, 2003, by coercively interrogating Cohen about his union sympathies; in October or November 2003 by coercively interrogating Zabala about his union sympathies; in November 2003 by distributing a letter to employees that asked them to report on the union activity of other employees at the Milford facility; in November or December 2003, by threatening that if employees selected the Union as their representative the Respondent would discontinue its practice of giving cash advances to employees; in November or December 2003, by threatening Cohen with stricter discipline and increased penalties because of employees’ protected union activities; and in December 2003, by threatening that it would be futile for employees to select the Union as their representative.

4. The Respondent was not shown to have committed the other unfair labor practices alleged in the complaint.

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. In addition, I shall recommend that the Respondent be ordered to rescind the rule entitled “Solicitation on Company Property/Time,” remove the rule from its employee handbook, and distribute new copies of the handbook that do not contain the unlawful rule, to all employees at the Milford facility. I shall also recommend that the Respondent be ordered to distribute to all employees at the Milford

facility a notice explicitly advising that they are permitted to engage in solicitation in nonwork areas of the Milford facility, and during nonwork times such as breaks, lunch, waiting time, and before and after work. See *West Pac Electric*, 321 NLRB 1322 (1966) (“[i]t is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct); see also *Maramont Corp.*, 317 NLRB 1035, 1037 (1995) (the Board has broad discretion to fashion a “just remedy”).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, Winkle Bus Company, Inc., Milford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or distributing a policy that prohibits solicitation for purposes protected by Section 7 of the Act during nonworking time and in nonworking areas of the Milford facility.

(b) Threatening union representatives who engage in protected union activity in the vicinity of the Milford facility with arrest.

(c) Engaging in surveillance of employees’ union activities.

(d) Threatening to call the police in response to any employee’s protected union activity.

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

(f) Requesting that employees report to the Respondent about the protected union activities of other employees.

(g) Threatening to discontinue the practice of giving employees cash advances if the employees select a union as their representative.

(h) Threatening any employee with stricter discipline or increased penalties because employees engage in protected union activities.

(i) Threatening any employee that it would be futile to select a union as their representative.

(j) 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) Rescind the rule entitled “Solicitation on Company Property/Time” and remove that rule from the Respondent’s employee handbook.

(b) Distribute new copies of the employee handbook, with the unlawful solicitation rule removed, to all employees at the Milford facility.

(c) Distribute to all employees at the Milford facility a written notice explicitly advising them that employees are permit-

¹⁷ Because I conclude that D’Angelo’s did not coercively interrogate Plona, I need not reach the Respondent’s contention that D’Angelo was not a supervisor or agent of the Company.

¹⁸ 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.

ted to engage in solicitation in nonwork areas of the facility, and during nonwork times such as breaks, lunch, waiting time, and before and after work.

(d) Within 14 days after service by the Region, post at its facility in Milford, Connecticut, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 2003.

(e) 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.

¹⁹ 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."