U-Haul Company of California *and* Machinist District Lodge 190, Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 32–CA–20665–1

June 8, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 6, 2004, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Charging Party filed cross-exceptions and a supporting brief. The Respondent filed both an answering brief to the General Counsel's cross-exceptions and a brief in reply to the General Counsel's answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Michael Warren at an employee meeting. For the reasons stated below, we reverse the judge and dismiss this allegation.

Warren, an active union supporter at the Respondent's Fremont, California facility distributed union materials to the Respondent's employees in the parking lot before working time on June 3, 2003,[3] and again around June 10. These materials included an article about the Union's organizing campaign at a facility in Las Vegas, Nevada, and also included copies of a collective-bargaining agreement between the Union and Penske Truck Leasing, a competitor of the Respondent. On June 12, the Respondent's shop manager, Chip Thorn, held an employee meeting, at which approximately 30 employees were in attendance. Thorn began the meeting by asking Warren, "What do you know about the Union in Vegas, Warren?" Warren answered that the employees in Las Vegas had voted for the Union, and that the employees here were waiting to see what would happen. Thorn replied that the Union had not been voted in at Las Vegas and that the issue had not yet been resolved. Thorn then stated that it would cost the employees initiation fees and monthly dues to join the Union, that all employees would get was a green card, and that if it is what the employees wanted then they should go ahead. Thereafter, on June 16, Thorn discharged Warren, along with another union supporter, Andrew Johnson.[4]

The judge found that Thorn's questioning of Warren was coercive and thus violated Section 8(a)(1). The judge relied on the fact that the questioning took place in front of 30 employees, that in that meeting Thorn also expressed an opinion that employees would gain nothing by union representation, and that Thorn discharged Warren and Johnson shortly after the interrogation. We disagree.

Contrary to the judge, we find that neither the subject matter of Thorn's question, nor the circumstances in which it was asked, were coercive. Thorn posed the question to Warren, an open union supporter, in an open forum on the plant floor. It occurred at one of the Respondent's plant meetings, where employees and managers periodically meet to discuss and exchange information on a wide range of issues, such as quotas, safety, attendance, production, and efficiency. Thorn's question, about an event at a different location, was the subject of literature that Warren had openly distributed. The question was not, however, about Warren's union activity, and Warren was not asked to reveal his union sentiments or those of his fellow employees. Thus, even though the question was posed in front of 30 employees, this fact hardly makes the circumstances coercive.

Further, the question did not become coercive by Thorn's subsequent opinion that employees would gain nothing from union representation. The subsequent statement was nothing more than an opinion protected by Section 8(c). Thorn merely expressed his opinion by telling employees that all they would get is a green card to put in their wallets, and added that if that was what the employees wanted then they should "go right ahead."

[1] 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.

[2] We shall modify the judge's recommended Order to require the Respondent to rescind its unlawful arbitration policy at all its facilities where it is in effect, and to post a notice regarding the unlawful arbitration policy at all such facilities. See *Jack In The Box Distribution Center Systems*, 339 NLRB 40 (2003). We shall additionally modify the judge's recommended Order to include the Board's standard remedial language for the violations found. Finally, we shall substitute a new notice to employees at the Respondent's Fremont, California facility to conform to the language set forth in the Order.

[3] All dates hereafter are in 2003 unless otherwise indicated.

[4] We adopt, for the reasons set forth in his decision, the judge's finding that the discharges of Warren and Johnson violated Sec. 8(a)(3) of the Act.

Concededly, Warren was discharged shortly after this incident. However, that subsequent event, while unlawful, does not render unlawful the prior question concerning employees and events not involved here. For all these reasons, we find that Thorn's question was not coercive in these circumstances, and accordingly we shall dismiss this allegation.[5]

Our dissenting colleague conversely contends that Thorn's question was unlawful. In the dissent's view, Thorn singled out Warren and questioned him in a confrontational tone that demonstrated that those who supported the Union would be subjected to a public inquisition. This description of Thorn's questioning, however, is not supported by the record.

First, Thorn did not rebuke Warren for supporting the Union at any point in the meeting. Second, Warren was not asked about his union activities or sentiments, or about those of his fellow employees. Rather, he was asked about a union campaign in Las Vegas. Third, the dissent's characterization of Thorn's question fails to adequately account for the fact that it was posed in response to Warren's public distribution of union literature concerning the union campaign in Las Vegas. The Board has previously found questioning of this character to be lawful. *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985) (after receiving mailgram announcing employee's role in organizing campaign, manager lawfully asked employee "What is this about a union?" and told employee owners of business would not like it). Finally, the fact that Thorn voiced his opposition to the Union does not establish that the question was coercive. Thorn had a Section 8(c) right to express that view.

Our colleague further contends that the questioning served as an early warning against supporting the Union. However, nothing in Thorn's question either implicitly or explicitly conveyed such a warning. Indeed, the complaint alleges an interrogation, not a threat. To the extent that it could be inferred that Thorn's question, standing alone, suggests his dislike of unions, that expression of opinion did not include any statements constituting a warning not to support the Union.

Our colleague, like the judge, states that the subsequent termination of Warren renders Thorn's prior questioning coercive, and cites in support *Medcare Associates, Inc*., 330 NLRB 935, 940–942 (2000), and *Aldworth Co.*, 338 NLRB 137, 141–142 (2002), enfd. 363 F.3d 437 (D.C. Cir. 2004). Those cases are clearly distinguishable. In *Medcare Associates,* the employer subjected two union supporters to a series of specific questions concerning their union activity over a period of several months. In the course of these questions, one employee was told she could not stay neutral and the employer needed her on its side and both employees were told that two supervisors had been fired because they had supported the union in violation of the employer's orders.[6] Relying on all of these factors, a majority of the Board found that the numerous interrogations were coercive and violated Section 8(a)(1). Although the Board relied, in part, on subsequent events, there was a close nexus between those events and the questions. By contrast, there is no such nexus here. The question concerned Warren's knowledge of union activity in Las Vegas. No subsequent event involved that activity or Warren's knowledge of, or participation in, that activity.[7]

As pertinent here, *Aldworth Co.* involved an employer's statement, at an employee meeting concerning organizing activity, admonishing employees not to "grab onto somebody with one foot out the door for lateness and another for stealing company time and sleeping on the job." The Board found the statement unlawful because it directed employees not to follow the lead of employees who favored the union and implied that they and any employees who did follow their lead would lose their job. The Board also found that the accusation that the employees were guilty of lateness and sleeping on the job was unlawful because the accusation was false. It therefore disparaged the employees and served as a warning to other employees that they would be subjected to the same treatment if they supported the union. Thus, the Board relied on the false accusations coupled with the announcement of discipline, rather than the subsequent discipline based on the accusations, in finding that the statement was unlawful. Here, there is nothing about Warren's termination that can be linked to the earlier question asked of him by Thorn. Accordingly, his termination does not render Thorn's prior statement unlawful.

Our colleague also says that we are "rejecting as irrelevant Warren's ensuing unlawful discharge." We do nothing of the kind. We consider it—and all of the surrounding circumstances—relevant, but ultimately insufficient to convert Thorn's sole question, about union activity elsewhere, into a coercive interrogation.

Finally, our colleague says that Thorn revealed his awareness of the union campaign and of the literature that was distributed. Assuming that this is so, we note that no one contends that Thorn was thereby creating an

[5] Member Liebman separately dissents on this issue.

[6] The Board found that the discharges were lawful.

[7] Member Schaumber does not pass on whether *Medcare* was correctly decided insofar as it found coercive the questions at issue in that case. He agrees that the case is distinguishable for the reasons stated above.

impression of surveillance or otherwise violating the Act. Similarly, our colleague notes that Thorn disclosed his negative view of the Union. Of course, negative views are expressly protected by Section 8(c).

For all these reasons, we find, contrary to the judge, that Thorn's question was not coercive in these circumstances.

2. The judge found that the Respondent violated Section 8(a)(1) and (4) of the Act by maintaining a mandatory arbitration policy as a condition of employment with the Respondent. We agree.

On May 20, 2003, the Respondent distributed to its employees a policy entitled "U-Haul Arbitration Policy" and a document entitled "U-Haul Agreement to Arbitrate." The policy states that it:

> . . . applies to all UCC[8] employees, regardless of length of service or status and covers all disputes relating to or arising out of an employee's employment with UCC or the termination of that employment. Examples of the type of disputes or claims covered by the UAP include, but are not limited to, claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendment, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations.

The policy continues with the following statement:

> Your decision to accept employment or to continue employment with UCC constitutes your agreement to be bound by the UAP. (Emphasis in original.)

The judge found that the arbitration policy, as stated, violates the Act because it would reasonably tend to inhibit employees from filing charges with the Board. Specifically, the judge found that the phrase "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" reasonably includes the filing of unfair labor practice charges with the Board, and thus employees could reasonably believe that they are precluded from filing such charges with the Board. We agree that the arbitration policy is unlawful.

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board held that in determining whether a challenged rule is unlawful, the inquiry begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If so, then the Board will find that the rule is unlawful. If, however, the rule does not explicitly restrict activity protected by Section 7, the finding of a violation is dependent upon a showing of one of the following: (1) reasonable employees would construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. 343 NLRB 646, 647 (2004).[9]

Applying that standard here, we find the arbitration policy is unlawful. We recognize that the language in the arbitration policy does not explicitly restrict employees from resorting to the Board's remedial procedures. However, the breadth of the policy language, referencing the policy's applicability to causes of action recognized by "federal law or regulations," would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Plainly, the employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims recognized by Federal law that are covered by the policy. Thus, we find that the language of the policy is reasonably read to require employees to resort to the Respondent's arbitration procedures instead of filing charges with the Board.

In its exceptions, the Respondent argues, as does our dissenting colleague, that the above-arbitration policy is not unlawful because the memo announcing this policy included a phrase, in a section titled "What is Arbitration," stating that the "arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief. . . ." The Respondent and our colleague contend that this statement makes clear that the policy does not extend to the filing of charges with the Board. We find this argument unavailing. The reference to a "court of law" in this part of the memo does not by its terms specifically exclude an action governed by an administrative proceeding such as one conducted by the National Labor Relations Board. Indeed, there is nothing in this portion of the memo that reasonably suggests that its intent is to modify the policy language referencing the applicability of the policy to causes of action recognized by Federal laws or regulations. Further, inasmuch as decisions of the National Labor Relations Board can be appealed to a United States court of appeals, the reference to a "court of law" does nothing to clarify that the arbitration policy does not extend to the filing of unfair

[8] "UCC" refers to Respondent (U-Haul Company of California).

[9] While Member Liebman dissented in that case, she concurs in the finding of a violation herein. She finds that, under either the majority or dissenting views in *Lutheran Heritag*e, the policy is unlawful.

labor practice charges. While our dissenting colleague correctly states that it is the NLRB, and not the individual, who presents the case to the court, we believe that most nonlawyer employees would not be familiar with such intricacies of Federal court jurisdiction, and thus the language is insufficient to cure the defects in the policy.[10]

Accordingly, because the employees would reasonably construe the broad language to prohibit the filing of unfair labor practice charges with the Board, we find that the policy violates Section 8(a)(1) of the Act.[11]

3. The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining a statement in its employee handbook requiring employees to bring work-related complaints first to their supervisor and then to the Respondent's president and chairman of the board. For the reasons stated below, we find, contrary to the judge, that maintenance of the handbook statement is not unlawful.

The Respondent's employee handbook, distributed to all new employees, includes a section entitled "What about Unions?" This section states the Respondent's preference to be union-free, and asserts that employees do not need a union or outside third party to resolve workplace issues. The concluding paragraph of this section reads as follows:

We know that you want to express your problems, suggestions, and comments to us so that we can understand each other better. You have that opportunity here at U-Haul. This can be done without having a union involved in the communication between you and the company. Here you can speak up for yourself at all levels of management. We will listen, and we will do our best to give you a responsible reply. *Furthermore, you should understand that if your supervisor cannot resolve your problems, you are expected to see me.* [Emphasis in original.]

The section is signed by the Respondent's president and chairman of the board of directors, whose photograph appears on the facing page.

The judge found that the Respondent violated Section 8(a)(1) by including the following statement in its employee handbook: ". . . if your supervisors cannot resolve your problems, you are expected to see me." Because the statement is accompanied by certain language expressing the Respondent's preference that its employees not be represented by a union, the judge found that the statement would reasonably be interpreted by employees as requiring them to resolve their workplace problems through internal measures rather than by exercising rights guaranteed them by Section 7 of the Act. Contrary to the judge, we find that the handbook statement is not unlawful.

First, the judge erred in reading the disputed statement in isolation, rather than considering it in the context in which it appears. The statement appears in the same paragraph, and immediately follows, the Respondent's assertion that its employees "can speak up for yourself at all levels of management" and that it will "listen" and do its best to give them a "responsible reply." The statement that employees "can speak up for yourself" invites, but does not require, the presentation of workplace problems to management. Concededly, the Respondent was "expecting" that the employees would accept the invitation. But, that expectation is far short of a command that they do so.

Second, even if the disputed statement could be read as a direction to employees to present their workplace problems to the Respondent's managers, or at least an en-

[10] The dissent asserts that the policy is lawful even if it would reasonably be read to cover NLRB charges, because it does not "impose any sanction" for violations of its terms. We respectfully disagree. Employees were required to agree to the policy as a condition of continued employment. Having entered into the agreement under those circumstances, a reasonable employee would be deterred from violating it by filing a charge.

[11] Our dissenting colleague notes that mandatory arbitration provisions "are used increasingly in the employment context," and suggests that we have condemned such clauses as unlawful. Our decision, however, is limited to the specific clause at issue in this case, which we have determined would be reasonably read to restrict the filing of unfair labor practice charges with the Board, thereby interfering with employees' Sec. 7 rights. We do not pass on the lawfulness of mandatory arbitration provisions. We note, however, that even in the context of other employment statutes, the courts and other administrative agencies have consistently recognized that individuals possess a nonwaivable right to file charges with the EEOC, and that mandatory arbitration provisions that attempt to restrict such rights are void and invalid as a matter of public policy. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (1991) (individual who signed an agreement to submit an employment discrimination claim to arbitration remained free to file a charge with the EEOC); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (invalidating former employee's promise not to file a charge with EEOC because it could impede EEOC enforcement of the civil rights laws and is void as against public policy); *EEOC v. U.S. Steel Corp.*, 671 F. Supp. 351, 357–359 (W.D. Pa. 1987) (invalidating as contrary to public policy a retirement plan provision that conditioned higher benefits on a retiree's promise not to file charges with the EEOC); "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes," Vol. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997). Congress explicitly reaffirmed the public policy against interference with EEOC enforcement efforts, including the right to file a charge, in the waiver provisions of the Older Workers Benefit Protection Act of 1990 (OWBRA), amending the ADEA: "No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." 29 U.S.C. § 626(f)(4) (ADEA). Nothing in our decision is inconsistent with well-established legal principles applicable to arbitration agreements in the employment context.

couragement to do so, the handbook does not foreclose employees from also using other avenues (e.g., the union, fellow employees, the NLRB.) In addition, the handbook does not state that the employee must go to management before using other avenues. Further, there is no evidence that the statement has been applied to foreclose such access. Therefore, the handbook statement would not reasonably forestall employees from bringing their work-related complaints to persons or entities other than the Respondent.[12]

Finally, the fact that the handbook statement is accompanied by statements of the Respondent's preference that its employees not be represented by a union does not render the prior statement unlawful. Such statements are opinions about unions and are protected by Section 8(c), and as such, are insufficient to establish an unfair labor practice.

In agreeing with the judge that the sentence at issue violates Section 8(a)(1), our dissenting colleague essentially makes two arguments. First, our colleague contends that because the word "expected" is accompanied by the Respondent's expression of its preference not to have a union, the use of that word would tend to restrain employees from seeking resolution of their workplace through a union or other outside entity. However, the fact remains that the accompanying lawful statements discuss the opportunities available to employees to take their workplace concerns to officials other than their immediate supervisors, and that—in this context—the word "expected" specifically describes the availability of such opportunities. Thus, when read in context, employees would reasonably view the sentence as nothing more than an explanation of why the Respondent believes that a union is not necessary.

In addition, our colleague contends that a finding of a violation is warranted under *Kinder-Care Learning Center*, 299 NLRB 1171 (1990). However, that case is clearly distinguishable, on two fundamental bases. First, the rule there explicitly required employees to bring their complaints to the employer. Second, the rule there explicitly threatened discipline and/or discharge if the employees did not bring their complaints to the employer. Contrary to our colleague's contention, the Respondent's use of the word "expected" is in no way comparable to the explicit requirement and threat of discipline and discharge contained in the rule in *Kinder Care*. Moreover, there is no evidence in the record demonstrating that the Respondent ever enforced the rule in a manner suggesting that the word "expected" is tantamount to a warning of adverse consequences. In essence, our colleague does nothing more than surmise that the word "expected" could be read as a threat of adverse consequences. However, in the absence of evidence that it would reasonably be read that way, a finding of a violation is not warranted.

4. The General Counsel excepts to the judge's failure to find that the Respondent additionally violated Section 8(a)(1) by threatening to terminate employees if they talked about the Union. The General Counsel argues that the judge neglected to consider employee Andrew Johnson's testimony that, at the June 12 meeting, Thorn stated, "if [Thorn] hears anymore whispering about [the Union] in the shop [they] could face termination."[13] The General Counsel contends that consideration of this testimony warrants the finding of this additional 8(a)(1) violation.

We disagree with the General Counsel that this testimony warrants a finding of a violation. The record shows Johnson further testified on cross-examination that Thorn's statement made it clear that he was talking about situations where he (Thorn) "was walking up and down the aisles," and when the employees "were in the bays." In addition, the record shows that Thorn repeatedly emphasized to the employees that they were not permitted to talk while working. For instance, Warren testified that Thorn stated at other employee meetings that he did not want employees talking about nonwork topics on work time. In view of this additional evidence, we find that the testimony cited by the General Counsel, even if credited, would not be sufficient to establish that Thorn unlawfully threatened employees for engaging in nonwork time activity.

ORDER

The National Labor Relations Board orders that the Respondent, U-Haul Company of California, Fremont, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in union or other concerted activity protected by the Act.

(b) Requiring employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment, to the extent such waivers apply to the filing of Board charges.

[12] Cf. *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990).

[13] This conduct was not originally alleged in the complaint. At the hearing, the judge granted the General Counsel's motion to amend the complaint to include this allegation. However, the judge failed to make any specific finding regarding the testimony or the allegation.

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

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

(a) Within 14 days from the date of this Order, offer Michael Warren and Andrew Johnson full reinstatement to their former positions or, if those positions are unavailable, to substantially equivalent positions, without prejudice to their seniority and any other rights or privileges previously enjoyed.

(b) Make Michael Warren and Andrew Johnson whole for any loss of earnings, with interest, and other benefits suffered as a result of the Respondent's unlawful discharges of them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharges, and within 3 days thereafter, notify employees Michael Warren and Andrew Johnson in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files all unlawful waivers of the right to take legal action executed by its employees, and within 3 days thereafter, notify in writing each present or former employee who executed such waiver that this has been done and that the waiver will not be used in any way.

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

(f) Within 14 days after service by the Region, post at its Fremont, California facility copies of the attached notice marked "Appendix A" and, at each of its other facilities where its arbitration policy has been in effect, copies of the attached notice marked "Appendix B." [14] Copies of the notices, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 2003.

(g) 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.

CHAIRMAN BATTISTA, dissenting in part.

My colleagues find, in agreement with the judge, that employees would reasonably view the Respondent's arbitration policy as one prohibiting them from invoking the Board's processes. They find that, because the policy states that it covers claims recognized by "federal law or regulations," the policy is reasonably understood as a prohibition of the right to file unfair labor practice charges. Contrary to the judge and my colleagues, I find that the policy is not unlawful.

This is another in a series of cases in which the General Counsel attacks a policy as unlawful on its face.[1] That is, there is no evidence that the rule has been applied to the protected activity of invoking Board processes. Further, there is no evidence that it was intended to apply to such activity. Finally, the policy does not explicitly bar any Section 7 activity.

In *Lutheran Heritage*, the Board concluded that there is no violation in cases of this kind, unless the policy expressly interferes with Section 7 rights or it is reasonable to read it in that manner. The mere fact that the policy could possibly be read in that manner is not sufficient, absent evidence that it was actually applied in that manner or that it was intended to be applied in that manner.

Applying these principles here, I note that the policy does not expressly refer to Section 7 activity, i.e., employee access to the NLRB. In addition, there is no evidence that the policy was applied to such access or was intended to so apply. Thus, the issue is whether the policy would reasonably be read to so apply.

Concededly, the policy states generally that it covers "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations."

[14] 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."

[1] See, e.g., *Lutheran Heritage*, 343 NLRB 646 (2004); *Mediaone*, 340 NLRB 277 (2003).

In addition, the policy covers "employment discrimination." Although the NLRA is not among the list of covered statutes, the list is only an "example" of the kinds of disputes that are covered.

On the other hand, the memo accompanying the policy sheds considerable light on the issue. The memo says that the policy is "limited to" claims that "a court of law" would be authorized to entertain. The NLRB is not a court of law. Unlike the other listed statutes, a claim of an unfair labor practice is made exclusively to the NLRB**,** an administrative tribunal. Thus, in the absence of any evidence of application or intent, I would not presume that a reasonable employee would read the policy as foreclosing his right to come to the NLRB. I recognize that NLRB orders are enforceable by Federal courts of appeal. However, it is the individual who files the charge with the NLRB, and it is his access to the NLRB that is the Section 7 right. I simply do not believe that a reasonable employee would read a provision regarding access to courts as limiting his ability to come to the NLRB. To repeat, no one has even suggested that interpretation to employees. At the very least, the General Counsel has not borne his burden of persuasion in this case.[2]

Moreover, even if the policy were read to cover matters recognizable by the NLRA, that would not make the policy unlawful. The provision does not impose any sanction against an employee who files a charge with the Board. Further, even my colleagues suggest that an employee who filed such a charge may well have it processed because the Board would not be bound by the agreement. Concededly, there is a theoretical possibility that an employee might refrain from filing a charge in the first place. But I am unwilling to find a violation of Federal law [Section 8(a)(1)] simply because of that hypothetical possibility.

I note that agreements like that involved herein are used increasingly in the employment context. The issue of whether arbitration is better than litigation is not for us to decide. However, I am concerned that my colleagues have gone out of their way to find a violation. Their approach would seem to outlaw, as violations of the NLRA, policies which, like the instant one, do not even mention the NLRB.

Finally, as noted my colleagues cite cases which suggest that an employee, who signs such an agreement, nonetheless retains the right to file a claim outside of arbitration. Even if that is so, that does not support my colleagues conclusion that the clause is itself a violation of Federal law [i.e., Section 8(a)(1)].

[2] I therefore do not reach the issue of whether an employer violates the Act if he has a policy that requires employees to agree to pursue NLRA claims only through arbitration.

MEMBER LIEBMAN, dissenting in part.

My colleagues err in reversing the judge's findings that the Respondent violated Section 8(a)(1) by coercively interrogating employee Michael Warren and by maintaining a policy that reasonably would be interpreted as restricting employees from taking work-related complaints outside the company hierarchy. As I will explain, Warren was singled out for questioning about union activity, by the shop's highest-ranking manager, before 30 other employees in a mandatory meeting—and was unlawfully fired soon afterward. The Respondent's complaint policy, in turn, explicitly told employees, after describing unions as unnecessary, that they were "expected to see" the Respondent's top official if they could not first resolve problems with their supervisors. Contrary to my colleagues' view, a careful examination of the circumstances demonstrates that, in each instance, the Respondents' actions reasonably tended to coerce employees in the exercise of their Section 7 rights.[1]

I. THE INTERROGATION OF MICHAEL WARREN

The judge determined that the Respondent's shop manager, Chip Thorn, began a meeting with approximately 30 employees by interrogating leading union adherent Warren about his knowledge of a union organizing campaign in a neighboring state.[2] The majority reverses the judge's determination that this question was unlawful, finding neither the subject matter nor the circumstances of the exchange coercive, and rejecting as irrelevant Warren's ensuing unlawful discharge. Describing Thorn's meeting as an "open forum" and focusing on Warren's open support for and activities on behalf of the Union, my colleagues overlook classic elements of coercion during the meeting. And because Warren's interrogation served merely as the opening thrust in Respondent's effort to thwart employees' organizing activities, they compound their error by disregarding the probative value of related subsequent events.

A.

Warren initiated contact with the Union on May 26, 2003.[3] Within a few days, he began distributing union

[1] I join my colleagues in adopting the judge's finding that the Respondent unlawfully discharged Michael Warren and Andrew Johnson because they engaged in Union and protected activities in violation of Sec. 8(a)(3) and (1), and I agree with Member Schaumber that the Respondent maintained a mandatory arbitration policy that reasonably tends to inhibit employees from filing charges with the Board, in violation of Sec. 8(a)(4) and (1).

[2] The judge credited the testimony of Warren and Johnson over Thorn's version of the meeting.

[3] Dates refer to 2003.

materials to employees in the Respondent's parking lot before work. Among the materials he handed out was an article dealing with the Union's on-going organizing campaign at a Nevada U-Haul facility.[4] Fellow mechanic Andrew Johnson soon joined Warren in discussing the Union with other employees during lunch and break times. On June 11, Warren arranged for a union representative to meet with the Respondent's mechanics on June 16. On June 12, Warren informed a number of employees[5] about the upcoming meeting.

On the same day, shop manager Thorn called employees to a meeting in Building C, the mechanical maintenance area where both Warren and Johnson worked. Once all employees had assembled, Thorn opened the meeting by looking directly at Warren and, addressing him by name, asked, "What do you know about the Union in Las Vegas, Warren?" Warren answered that employees there had voted for the Union and were waiting to see what would happen. Thorn countered that the Union had not been voted in and that the issue was not resolved. He continued by saying that the Union would cost employees $250 in initiation fees and $50 in monthly dues and that all they would get in return was a card for their wallets. He also explained that even if the Nevada U-Haul operation unionized, it did not mean the Respondent's California facility would follow suit because the two were separate corporations. Thereafter, Thorn responded to several questions concerning working conditions and advised employees that if they had questions about unions, they could come to his office for information.

B.

In determining whether employers' questions about employees' union and protected activities violate the Act, the Board assesses the totality of circumstances in which the questioning takes place.[6] Among the factors weighed in this analysis are the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. The Board emphasizes that "these and other relevant factors are not to be mechanically applied . . . but rather represent some areas of inquiry that may be considered . . ." in evaluating whether the interrogation "reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."[7]

Thorn was the highest-ranking official at the facility, and the exchange with Warren occurred before an audience of 30 unit employees. By posing the question as he did, Thorn revealed for the first time not only that the Respondent was aware of employees' nascent organizational activities, but also that it knew the subject matter of certain union literature Warren distributed to them. As the meeting continued, Thorn disclosed his negative view of the Union. And just 4 days later, Warren was unlawfully discharged.

The judge concluded that under these circumstances, taken together, Thorn's interrogation of Warren would reasonably tend to interfere with and restrain employees' organizational activities. I agree with the judge's conclusion. Because his analysis is not extensive however, several aspects of the exchange that underscore its unlawful coercive character should be further emphasized.

First, the manner in which the question was posed—at the very outset of the meeting, without introductory remarks or explanation as to the purpose of the meeting—set a serious and confrontational tone. Staring directly Warren and calling him by name, Thorn pointedly asked what he knew about the Union's Las Vegas activities. By singling out the leading union activist before his coworkers and placing him squarely on the spot, Thorn demonstrated that those who supported the Union would be subject to a public inquisition. By then disputing Warren's version of the Nevada situation and dismissing its relevance to the Respondent and the merits of the Union generally, the Respondent made clear its strong opposition to the employees' organizing efforts. Being confronted, and challenged, by the highest representative of management before a gathering of coworkers would reasonably tend to intimidate even an open union supporter like Warren.

Moreover, because of the setting in which the exchange took place, the coerciveness of the interrogation was not limited in its effect to Warren alone. It extended to the many other employees at the meeting. The questioning itself simply served as an early warning against supporting the Union. Because Thorn's remarks were made at a shop meeting called by the Respondent, attended by about 30 employees, the predictable impact of his words would not—indeed could not—reasonably be limited to one individual. Regardless of how the violations was plead, we can and should take the wider coercive tendency of Thorn's questioning into account.

Finally, that warning was soon made emphatic by Thorn's unlawful firing of Warren (along with union supporter Johnson) just 4 days later. If the interrogation of Warren did not tend to coerce immediately, it certainly did considered retrospectively, in light of Warren's firing. See, e.g., *Medcare Associates, Inc.*, 330 NLRB 935,

[4] The Respondent is located in California.

[5] The judge states that "Warren told as many employees as he could" about the meeting.

[6] *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985).

[7] Id., at 1178 fn. 20.

940 fn. 17 (2000) (holding that subsequent events may be considered in determining coercive tendency of interrogation: "[A] question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone"). The Respondent's swift and severe manifestation of disapproval of employees' organizational activities ensured that the memory of Thorn's interrogation of Warren would linger and resound throughout the unit. See *Aldworth Co.,* 338 NLRB 137, 141–142 (2002), enfd. 363 F.3d 437 (D.C. Cir. 2004) (employer's remarks during employee meeting warning unnamed but identifiable union adherents of adverse consequences may reasonably be interpreted by other employees as a threat, where remarks are followed by unlawful, retaliatory action against those individuals).[8]

II. Restricting Protected Activity

The judge found that the Respondent unlawfully interfered with employees' right to seek redress of employment problems through protected concerted activities by maintaining a policy implicitly prohibiting resolution of employee complaints through entities other than the Respondent's supervisory hierarchy. The majority reverses the judge, faulting him for failing to consider the full context of the policy statement, and finding instead that the Respondent was merely "inviting" employees to discuss their problems with management. In reaching this result, the majority mistakenly criticizes the judge's analysis, but also fails to meaningfully address *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), aptly relied on by the judge.

The disputed policy is set forth in an employee handbook which the Respondent provides to all newly-hired employees. Page two of the handbook displays a photograph of the Chairman of the Board, E.J. (Joe) Shoen, and on the opposite page contains a six-paragraph message from Shoen entitled, "What About Unions?". The paragraph touts the Respondent's positive employment environment, expresses its preference for remaining union-free, emphasizes employees' individuality, and asserts that union representation would not be in the best interests of employees, the Respondent, or its customers. The full text of the last paragraph reads as follows:

> We know that you want to express your problems, suggestions, and comments to us so that we can understand each other better. You have that opportunity here at U-Haul. This can be done without having a union involved in the communication between you and the company. Here you can speak up for yourself at all levels of management. We will listen, and we will do our best to give you a responsible reply. *Furthermore, you should understand that if your supervisor cannot resolve your problems you are expected to see me*." [Emphasis in original.]

The judge found the statement's final line unlawful, so it was appropriately the focus of his analysis. But, contrary to the majority's assertion, he read this line in the context of the entire paragraph.

Up to the last line, the Respondent communicates that it is now, and wants to remain, a nonunion operation. The essential purpose of this portion of the paragraph is to persuade employees that a union is unnecessary. This message is lawful. But the final sentence—printed in italics—goes further. Employees would reasonably read the emphasized sentence to *require* them to first discuss their complaints with their supervisor and Shoen, before pursuing other, statutorily-protected ways of redressing workplace complaint.

Phrased as an *expectation* from the Respondent's highest-ranking management official, it is unlikely to be read as a mere "invitation;" rather, it would reasonably tend to restrain employees' from seeking resolution of workplace problems through the Union or other entities.

This conclusion is supported by the Board's decision in *Kinder Care*, supra. There, the Board found unlawful a rule requiring employees to report work-related complaints, concerns, or problems to the immediate attention of the Center Director or to use other company-prescribed problem solving procedures. The rule did not, on its face, preclude employees from approaching someone other than the respondent. But because it mandated, on threat of discipline, that they first turn to employer-controlled processes, the Board determined that the rule violated the Act. Here, similarly, while the Respondent's statement does not explicitly threaten disciplinary action, there is an implicit threat of adverse consequences if employees do not meet the Respondent's "expectation" that they first discuss complaints with their supervisor and Shoen.

APPENDIX A

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

[8] While focusing narrowly on the factual differences between the Thorn–Warren exchange and the events of *Medcare Associates* and *Aldworth*, my colleagues miss the fundamental principle for which those cases stand. That is, in evaluating whether conduct tends to interfere with Sec. 7 rights, all the surrounding circumstances are to be considered.

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 discharge or discriminate against you because you engage in union or concerted activity.

WE WILL NOT require you to execute waivers of your rights to take legal action with respect to your hire, tenure, and terms and conditions of employment, to the extent that it applies to filing charges to the National Labor Relations Board.

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

WE WILL, within 14 days from the date of the Board's Order, offer employees Michael Warren and Andrew Johnson full reinstatement to the positions from which they were discharged in June 2003 or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights or privileges previously enjoyed.

WE WILL make employees Michael Warren and Andrew Johnson whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful discharge and, WE WILL, within 3 days thereafter, notify employees Michael Warren and Andrew Johnson in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL rescind our arbitration provision requiring you to execute a waiver of your rights to take legal action with respect to your hire, tenure, and terms and conditions of employment, to the extent it applies to filing charges with the National Labor Relations Board.

U-HAUL OF CALIFORNIA

APPENDIX B

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 require you to execute waivers of your rights to take legal action with respect to your hire, tenure, and terms and conditions of employment, to the extent that it applies to filing charges with the National Labor Relations Board.

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 or the Act.

WE WILL rescind our arbitration provision requiring you to execute a waiver of your rights to take legal action with respect to your hire, tenure, and terms and conditions of employment, to the extent it applies to filing charges with the National Labor Relations Board.

U-HAUL OF CALIFORNIA

Michelle M. Smith, Atty., for the General Counsel.
Burton F. Boltuch, Atty., *of Oakland, California,* for the Respondent and Employee Willy Tandoc.
David A. Rosenfeld, Atty., of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on October 15–17 and 22–23, 2003. On June 18, 2003, Machinists District Local Lodge 1173, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) filed the original charge in Case 32–CA–20665–1 alleging that U-Haul Co. of California, (the Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On July 3, the Union filed an amended charge alleging that Respondent had violated Section 8(a)(1) and (3) of the Act. The Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent on August 27, 2003. The complaint alleges that Respondent unlawfully discharged employees Michael Warren and Andrew Johnson, for their union activities. Further, the General Counsel alleges that Respondent interrogated employees about their union activities and that Respondent maintains a provision in its employee handbook, which interferes with employee Section 7 rights. Finally, the complaint

alleges that Respondent maintains a mandatory arbitration provision in violation of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in Fremont, California, where it is engaged in the business of renting trucks and trailers. During the past 12 months, Respondent received gross revenues in excess of $500,000. During the same period of time, Respondent purchased and received goods and services valued in excess of $5000 from outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent operates a truck and trailer rental business in California. This case concerns Respondent's repair facility in Fremont, California.

Organizing at Respondent's Fremont facility began in late May 2003. On May 26, Michael Warren, a mechanic, contacted the Union. Thereafter, Warren downloaded materials from the Union's Internet website. On June 3, Warren distributed these union materials to approximately 10 employees in Respondent's parking lot, prior to reporting for work. Warren told the employees that the Union was interested in meeting with the employees and that he would try and set up a meeting with the Union. Warren asked the employees to read the union materials and he directed them to the Union's website. At that time, union organizing activities were taking place at the Las Vegas and Henderson, Nevada facilities of U-Haul of Nevada.

On June 10 or 11, Warren passed out union information to 10 employees in the parking lot, prior to beginning work. Warren passed out an article about the union organizing at U-Haul of Nevada's Las Vegas facility and copies of a collective-bargaining agreement between the Union and Penske Truck Leasing, Respondent's major competitor. In addition to distributing these materials, Warren spoke to employees about the Union, during lunch and breaks. One of the employees whom Warren spoke with was mechanic, Andrew Johnson. After receiving union materials from Warren, Johnson began speaking with other employees about his belief that the Union could help the employees improve their wages.

On June 11, Warren spoke with a union representative and they set up a meeting for Respondent's mechanics, for Monday, June 16, after work. On June 12, Warren told as many employees as he could about the scheduled June 16 union meeting. Among the employees that Warren approached about the union meeting were Willy and Donathan Tandoc. During the afternoon of June 12, Chip Thorn, Respondent's shop manager called an employee meeting in building C, the shop where Warren and Johnson worked.[2]

Thorn began the meeting by looking at Warren and asking, "What do you know about the Union in Vegas, Warren?" Warren answered that the employees in Las Vegas had voted for the Union and were waiting to see what would happen. Thorn denied that the Union had been voted in and said that the issue had not yet been resolved.[3] Thorn told the employees that it would cost them $250 in initiation fees and $50 in monthly dues to join the Union. He said all that the employees would get for their money was a green card to put in their wallets. He said that if that was what the employees wanted, they should "go right ahead." Thorn said that the Nevada operation was a separate corporation and that even if the Nevada operation became unionized, it did not mean that the California operation would be unionized. Thorn said that U-Haul had separate corporations and that Respondent had a "firewall" to protect it against the Union from Nevada.

Johnson asked Thorn several questions, including questions as to why Respondent's wages were so low and why Penske could afford to pay its mechanics $25 per hour. Thorn answered that the repair shop only charged Respondent $26 per hour making it unfeasible to pay a wage rate of $25 per hour. Thorn reminded Johnson that Thorn was already working on making Johnson a front-end specialist, which would result in a pay increase for Johnson. Thorn told the employees that he had a

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] The Fremont repair facility consists of three buildings: "Building A" houses sales and administrative offices, "Building B" contains the preventative maintenance bay where employees clean vehicles and perform minor mechanical work (such as changing oil and replacing fan belts), and "Building C" houses the maintenance bays where the mechanical work on trucks and trailers is performed.

[3] Machinists Local Lodge 845 filed a representation petition in Case 28–RC–6159 seeking to represent the maintenance employees at U-haul of Nevada's Las Vegas and Henderson, Nevada facilities. An election was held on May 7, 2003. The employees cast a majority of votes in favor of representation by Local Lodge 845. However, the Employer filed timely objections to the election. On June 10, a hearing was held on the Employer's objections to the election. As of June 12, 2003, there was no ruling on the objections to the election. The hearing officer's report on objections did not issue until July 18, 2003.

book in his office with questions and answers about unions. He told employees that if they had questions about the Union, they could come to his office for answers. Thorn told the employees that they could talk about the Union before and after work but not while they were on company time. He also told employees to ask questions while at the meeting and not to have "mini-discussions" after the meeting when they should be working. When Thorn ended the meeting, the employees took their afternoon break.

Thorn denied that he started the June 12 meeting by questioning Warren about the Union. Thorn claimed that the subject of the Union was raised by a question from employee Willy Tandoc. Thorn claimed that the purpose of the meeting was to dispel rumors that the facility would be closed or moved. Supervisors Pugh and Contreras testified that they did not hear Thorn discuss the Union. However, these supervisors were not present at the start of the meeting. Warren and Johnson credibly testified that Thorn began the meeting by questioning Warren about the Union in Las Vegas. Employee John Soper, still employed as a mechanic, corroborated this testimony. Willy Tandoc was clearly biased and prejudiced in favor of Respondent, his employer.

In July 2003, Tandoc gave the Board a pretrial affidavit in which he stated that Warren and Johnson asked many questions about the Union, unionization and wages at the June 12 meeting. He claimed that "The meeting became Johnson and Warren's meeting." At the trial, Tandoc following leading questions by Respondent's attorney, who was also Tandoc's attorney, attempted to testify that he questioned Thorn about Las Vegas and that Thorn only mentioned the Union in order to answer the question. Tandoc otherwise denied that the Union was discussed. After prompting by Respondent's attorney, Tandoc attempted to testify that Board agents exerted undue pressure in taking the affidavit. However, on cross-examination Tandoc testified that the Board agents only stressed the importance of telling the truth and that Tandoc should carefully read the affidavit before signing it. Tandoc was told to make corrections, if necessary and he did, in fact, make a correction on the fifth and final page of the affidavit.

I credit the testimony of Warren and Johnson over that of Thorn. Both Warren and Johnson testified in a straightforward manner. Thorn's testimony, on the other hand, changed frequently at the urging of Respondent's counsel. The demeanor of a witness may satisfy the trier of fact, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies. I find Thorn to be such a witness. See *Walton Mfg. Co. v. NLRB*, 369 U.S. 404, 408 (1962).

After the meeting, Warren and Johnson took their afternoon break at a picnic table with several other employees. Johnson suggested that Willy Tandoc had told Thorn about the employees' discussion of the Union. Two other employees said they had seen Willy Tandoc talking with Thorn. Warren stated that he did not believe that Tandoc would inform on the employees. Warren said that because Tandoc was Respondent's chief diagnostician, it was only natural that he be involved in frequent conversations with Thorn. Tandoc had another job and left work after the employee meeting. Neither Warren nor Johnson spoke to Tandoc after the employee meeting.

On Friday, June 13, Tandoc did not report to work. Respondent contends that Tandoc did not work because Warren and Johnson had threatened him on June 12. Tandoc gave various reasons for not reporting to work on Friday the 13th. The credible evidence leads me to believe that Tandoc did not want to work on Friday the 13th and because he "had other things to do." On Saturday June 14, Tandoc returned to work. Warren spoke to Tandoc to obtain the phone number of a mutual friend in Las Vegas. There was no indication that Tandoc was intimated or threatened by Warren. Johnson was not scheduled to work on Saturday.

On June 16, prior to clocking in for work, Tandoc told Warren that he had spoken with their friend in Las Vegas. Tandoc said that the Union had been voted in at two of U-Haul's facilities in Nevada but that the matter was pending in Washington, D.C. Later that same day, Warren approached Tandoc while he was eating with his nephew Donathan Tandoc and asked them to come to the union meeting scheduled for that evening. Tandoc was working his other job and said he would not be able to attend. Warren asked Donathan to remind other employees about the union meeting. Johnson also asked Tandoc and Donathan to attend the union meeting that evening. Donathan revealed that they would not be attending the meeting.

At approximately, 3:15 p.m. Thorn called Warren and Johnson outside of their building. Also present were Patrick Pugh, shop foreman and Thomas Contreras, dispatch manager. Thorn told the two employees that he had spent a whole lot of money having an employee meeting about not discussing the Union and they just violated the rule by talking to Willy Tandoc about the Union. Thorn claimed that Warren and Johnson had threatened Tandoc and that was the reason that Tandoc did not report to work on Friday, June 13. Johnson said that Tandoc was a liar and that he would tell that to Tandoc, "to his face." Thorn said that would not happen and that the two employees were fired. Thorn told the employees that they had an hour to pack up their tools and leave the facility. Finally, Thorn stated, the Union may come in, but the two employees would not be there to see it.

According to Thorn, he learned on the morning of June 16 that Warren and Johnson had told Tandoc to "stop talking to management" and that Tandoc was then too upset to go to work on Friday the 13th. According to Thorn, he corroborated this story by talking to two mechanics. These mechanics were not called to corroborate Thorn's testimony. Thorn then spoke with Tandoc who allegedly claimed that Warren and Johnson had told him not to speak to Thorn. I note that this testimony differs from that of Tandoc. As stated earlier, I do not credit any of Thorn's testimony. As seen below, I do not credit any of Tandoc's testimony.

As Johnson was packing his tools to leave, he told Patrick Pugh, shop foreman, that the alleged threats were completely fabricated. Pugh replied that he had told Thorn that he had never heard Johnson talking about the Union. Pugh then said, "What can I do?"

After terminating Johnson and Warren, Thorn wrote an e-mail to his superiors stating that Johnson and Warren had been discharged because they had "pulled an employee away from the group and harassed him." There was no mention of any alleged threat. The General Counsel presented evidence that Warren and Johnson were given harsher discipline than other employees actually guilty of harassment. In 2002, two mechanics were involved in a confrontation, which included name-calling and the suggestion of a fight. One of these employees was suspended for 1 day and the other employee was not disciplined at all. Also in 2002, two employees were involved in a shoving match. One employee was suspended and the other given an oral and written warning. None of the four employees involved in these incidents were terminated. Thorn did give examples of employees discharged for threatening coworkers but those incidents involved more serious conduct than that which Thorn falsely accused Warren and Johnson.

At the times material, Thorn possessed a U-Haul human resources policy manual from 1993. The manual included the following advice to avoid unionization and to discourage a union drive beforehand: "Develop some company-minded people who consider any danger to the company as a danger to themselves. They will warn you of union activity, so you will be aware of organization attempts before the union is in the saddle." Thorn testified that he did not read this portion of the policy manual and argued that it was an old manual just sitting in his desk. I need not, and do not credit this self-serving testimony. It appears to me that Willy Tandoc was such a company-minded employee and he certainly attempted to help Thorn justify the discharges of Warren and Johnson.

At the end of September, Warren stopped Tandoc on a street near Tandoc's home and told Tandoc that he still respected Tandoc and that they were still friends in spite of Tandoc's involvement with Warren's discharge. Tandoc told Warren that Respondent had provided him with an attorney and if anybody contacted him, Tandoc was supposed to contact the attorney. Tandoc told Warren that Respondent was paying for his attorney. In addition, Tandoc said that he had told Thorn that he was not going to lie for him. Tandoc admitted that Warren had not threatened or harassed him. With respect to missing work on Friday June 13, Tandoc said that he didn't work that day because it was Friday the 13th and he had other plans and not because of any threats.

Tandoc's testimony was self-contradictory, shifting, and evasive. In his pretrial affidavit Tandoc stated, "I did not tell Thorn that Warren and Johnson physically confronted me. I did not tell Thorn that Warren and Johnson approached me together. I did not tell Thorn that Warren and Johnson blocked my way. I did not tell Thorn that I feared for the safety of my family or myself." According to the affidavit, after Thorn approached him, Tandoc told Thorn that Warren said, "Someone ratted me out." Tandoc told Thorn that Johnson said, "What kind of trouble are you starting." After Respondent provided him with an attorney, he attempted to backtrack on his affidavit and falsely accused the Board agents of misconduct. At the trial Tandoc, attempting to bolster Respondent's case, testified that Johnson and Warren scared him. Based on Tandoc's testimony and the inconsistencies in his pretrial statements, I am convinced that Tandoc changed his testimony whenever he thought it would assist Respondent's case. It appeared that in testifying, Tandoc was attempting to please Respondent's attorney rather than trying to answer questions truthfully. Under these circumstances, I cannot credit any of his testimony.

B. Respondent's Employee Handbook

Respondent distributes an orientation packet to all new hires. The orientation packet includes an employee handbook and an acknowledgement form. The first text page of the employee handbook is entitled "What About Unions?" and states Respondent's preference to be union free. Respondent states that employees do not need a union or outside third party to resolve workplace issues. The section ends with the following statement: "*Furthermore, you should understand that if your supervisor cannot resolve your problems, you are expected to see me*." (Emphasis in original.) The statement is immediately followed by the name, "E. J. (Joe) Shoen, chairman of the board." Shoen is president and chairman of the board of U-Haul International, Respondent's parent corporation. A copy of this page of the handbook was also posted on a bulletin board at the repair facility. A week after he discharged Johnson and Warren, Thorn posted an updated "What About Unions?' page which contained the statement at issue herein.

C. Respondent's Arbitration Policy

On May 20, 2003, Thorn distributed Respondent's arbitration policy entitled "U-Haul Arbitration Policy" and a separate document entitled "U-Haul Agreement to Arbitrate," at an employee meeting. When Thorn handed out these documents he explained that the purpose was to cut litigation expenses. He told employees that they did not have to sign the arbitration agreement but that it would make him look bad if the employees didn't sign the agreement; he also stated that if employees didn't sign the agreement, they would probably not be able to work. The policy included the statement, "Your decision to accept employment or to continue employment with [Respondent] constitutes your agreement to be bound by the [arbitration policy]." Most but not all of Respondent's employees signed an agreement to arbitrate.

> The arbitration policy covers:
>
> All disputes relating to or arising out of an employee's employment with [Respondent] or the termination of that employment. Examples of the type of disputes or claims coved by the [U-Haul Arbitration Policy] include, but are not limited to, claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment act, Title VII of the Civil rights Act of 1964 and its amendments, the California Fair employment and Housing act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal laws or regulations.

There is no evidence that the arbitration policy has been enforced. There is also no evidence that any employee was disci-

plined for failing to sign an arbitration agreement. Respondent argues that the arbitration clause only applies to court proceedings. However, I find the language of the arbitration policy that it applies to any dispute or claim recognized by Federal laws or regulations is certainly broad enough to apply to NLRB proceedings.

D. Analysis and Conclusions

1. The "What About Unions?" page of the employee handbook

As stated above, Respondent's handbooks states Respondent's opinion that a union would not be in the best interests of either the employer or its employees. Respondent states that employees may express their problems without having a union involved. Respondent's opinion is then followed by the mandatory language, "*furthermore, you should understand that if your supervisor cannot resolve your problems, you are expected to see me."*

Respondent's policy unlawfully interferes with the statutory right of employees to communicate their employment-related complaints to persons and entities other than the Respondent, including fellow employees, a union or the Board. Although the policy does not on its face prohibit employees from approaching someone other than the Respondent concerning work-related complaints, it provides that employees first report such complaints to a supervisor and if the issue is not resolved, employees are "expected" to report the problems to Shoen. I find that the Respondent's rule does not merely state a preference that the employees follow its policy, but rather that compliance with the policy is required. I further find that this requirement reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990).

2. The mandatory arbitration policy

Employer attempts to limit or bar the exercise of statutory rights, particularly those of individual employees as distinguished from those of their agents, have been held unlawful. See *Athey Products Corp.*, 303 NLRB 92, 96 (1991); *Isla Verde Hotel Corp.*, 259 NLRB 496 (1981), enfd. 702 F.2d 268 (1st Cir. 1981); *Reichhold Chemicals*, 288 NLRB 69 (1988)). The Board has regularly held that an employer violates the Act when it insists that employees waive their statutory right to file charges with the Board or to invoke their contractual grievance-arbitration procedure. *Athey Products*, supra; *Kinder-Care Learning Centers*, supra; *Retlaw Broadcasting Co.*, 310 NLRB 984 (1993).

Respondent's mandatory arbitration provision covers all disputes relating to or arising out of an employee's employment with Respondent. Claims covered include wrongful termination, employment discrimination and claims recognized by Federal laws or regulations. I find that this policy reasonably tends to inhibit employees from filing charges with the Board, and, therefore, restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection.

3. The Discharges of Warren and Johnson

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 98 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983).

It has long been held that there are five principal elements that constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employee alleged to be unlawfully disciplined must have engaged in union or protected activities. The second is that the employer knew about those protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of such activities. Fourth, the employer must discriminate in terms of employment. Finally, the discipline must usually be connected to the protected activity in terms of timing. See, e.g*., Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993).

I find that General Counsel has made a very strong prima facie showing that Respondent was motivated by Warren and Johnson's union activities in discharging the employees. Warren contacted the Union and distributed union materials. Johnson asked questions about wages at the employee meeting. Thereafter, Warren and Johnson invited employees, including Tandoc to the union meeting of June 16. At the June 12 meeting, Thorn started the meeting by asking Warren two questions about the Union in Las Vegas. On June 16 at the exit interview, Thorn stated that the two employees had broken the rule about talking about the Union. After, discharging the employees for threatening Tandoc, conduct for which they were innocent, Thorn stated, the Union may come in, but the two employees would not be there to see it.

The General Counsel has also demonstrated Respondent's animus toward the Union. In addition to the Respondent's lawful statements indicating that it was opposed to the Union, Respondent directed its employees to bring work problems or issues to their supervisors and Shoen, implying that employees should not contact a union. The Respondent's animus was further demonstrated by Thorn's comments at the June 12 meeting and particularly Thorn's comments at the exit interview. Having shown knowledge, animus, and that the discharges occurred immediately after Respondent apparently gained knowledge of Warren's and Johnson's union support, the General Counsel has made out a very strong prima facie case that employees' union sympathies were the motivating factor in the discharge decision.

My finding that Thorn's reason for the discharges—threats to Tandoc—was false amounts to a finding that it was a pretext. The failure of his testimony in this respect to withstand scrutiny not only dooms Respondent's defense but it buttresses the General Counsel's affirmative evidence of discrimination. See

Limestone Apparel Corp., 255 NLRB 722 (1981). Respondent's patently false reason for the discharge supports an inference that it had an unlawful motive for the discharge. See, e.g., *Keller Mfg. Co.*., 237 NLRB 712, 716 (1978); *Party Cookies, Inc.*, 237 NLRB 612, 623 (1978); *Capital Bakers, Inc.*, 236 NLRB 1053, 1057 (1978). See also *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB.*, 362 F.2d 466, 470 (9th Cir. 1966). I draw the inference that the motive of the discharge is one Respondent desires to conceal—a discriminatory and unlawful motive.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' union and protected concerted activities. Under Wright Line, Respondent must show that it would have discharged these employees anyway, absent their union activities. Since I found the proffered reasons for the discharges incredible, I find that the Respondent has not met its Wright Line burden. Therefore, I find that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Michael Warren and Andrew Johnson because of their union activities.

4. The interrogation

Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Here, I find that the interrogation of Warren tended to interfere with and restrain employees in their organizing activities. First, the interrogation took place in the presence of approximately 30 of Respondent's employees by Thorn the highest-ranking official at the repair facility. This was the first indication that Respondent had knowledge of the fledgling organizing effort. The interrogation took place during a meeting at which Thorn expressed an opinion that employees would gain nothing by bringing in a union. Third, Thorn discriminatorily discharged Warren and Johnson shortly after this interrogation. Under these circumstances, employees would reasonably conclude that union activities would lead to adverse action by Thorn and Respondent. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 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. By discharging employees Michael Warren and Andrew Johnson because of their union and protected concerted activities, Respondent violated Section 8(a)(3) and(1) of the Act.

4. By unlawfully interrogating employees Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By requiring employees to execute waivers of their rights to take legal action with respect to their hire, tenure, and terms and conditions of employment, and thereby requiring a waiver of the right to file NLRB charges, Respondent violated Section 8(a)(1) and (4) of the Act.

6. By requiring employees to bring work-related complaints to their supervisors and then to Respondent's president and chairman of the board, and thereby implying that employees could not discuss such problems with other employees, unions or the NLRB, Respondent violated Section 8(a)(1) of the Act.

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

THE REMEDY

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

Respondent must offer Michael Warren and Andrew Johnson full and immediate reinstatement to the positions they would have held, but for the unlawful discrimination against them. Further, Respondent must make Warren and Johnson whole for any and all loss of earnings and other rights, benefits and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also *Florida Steel Corp.*, 231 NLRB 651 (1977) and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent must also expunge any and all references to its unlawful discharge of Warren and Johnson from its files and notify Warren and Johnson in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

In addition, Respondent must rescind the portion of its "What About Unions?" rule or policy in its employee handbook that that requires employees to report work-related complaints or problems to their supervisors and then to the president and chairman of the board of U-Haul International.

Respondent must remove from its files all unlawful waivers of the right to take legal action executed by employees of Respondent and notify, in writing, each present or former employee who executed such waiver that this has been done and that the waiver would not be used in any way.

[Recommended Order omitted from publication.]