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**Austal USA, LLC and Sheet Metal Workers International Association Union, Local 441.** Cases 15–CA–18547, 15–CA–18628, 15–CA–18676, 15–CA–18702, 15–CA–18739, 15–CA–18781, and 15–RC–18394

December 30, 2010

DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On September 30, 2009, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

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<sup>1</sup> and briefs and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions as discussed and clarified below, to modify his recommended remedy,<sup>3</sup> and to adopt the recommended Order as modified.<sup>4</sup>

We agree with the judge, for the reasons he states, that the Respondent committed numerous violations of Section 8(a)(1) of the Act in the context of a union organizing drive. We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) by discharging employee Carolyn Slay. Our reasons are discussed below. In addition, we agree with the judge that the April 9, 2008 election must be set aside and a new election held. We adopt the judge’s rationale, except as discussed below.

1. In concluding that the Respondent’s discharge of union supporter Carolyn Slay was unlawful, the judge

<sup>1</sup> No exceptions were filed to the judge’s recommended dismissal of complaint par. 12(c) alleging unlawful impression of surveillance, or to the judge’s recommendations that Objections 7, 9, 10, and 17 be overruled.

<sup>2</sup> 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.

<sup>3</sup> In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge’s recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

<sup>4</sup> We shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

determined that there was “no need to go through a mixed motive analysis” under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), because the evidence relied on by the Respondent in its attempt to justify Slay’s termination “was a fabrication from start to finish” and was therefore pretextual. Although we agree with the judge that the Respondent’s reasons for the discharge were pretextual, we disagree with his statement that a mixed motive analysis is unnecessary. The Board has specifically held that *Wright Line* is applicable in cases in which there is a finding that a respondent’s purported justification for its actions is pretextual. See, e.g., *Teamsters Local 657 (Texia Productions, Inc.)*, 342 NLRB 637, 637 fn. 1 (2004); *Taylor & Gaskin, Inc.*, 277 NLRB 563, 563 fn. 2 (1985). Applying that analysis here, we find that Slay’s discharge violated Section 8(a)(3) and (1).

To begin, we find that the General Counsel has established his initial burden under *Wright Line* to show that Slay’s protected conduct was a motivating factor in her discharge. The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. See, e.g., *Willamette Industries*, 341 NLRB 560, 562 (2004). The following sequence of events culminating in Slay’s discharge demonstrates that Slay was engaged in union activities, that the Respondent had knowledge of those activities, and that the Respondent harbored animus against those activities: Slay’s wearing union stickers on her hard hat, union T-shirts, and union pins beginning in September 2007; Human Resource Director Jeff O’Dell’s request to supervisors in November 2007 to immediately report any prounion employees who were discussing the Union; the incident in December 2007 when O’Dell told Supervisor Chad Steele to write Slay up if she was not at her workstation when the bell rang; O’Dell’s subsequent statement to Steele that he did not care about the write-ups and that he was going to move Slay from crew to crew to make it appear as if Slay had a problem with authority; then-Leadman (later Supervisor) Roderick Jackson’s December 2007 comment to Slay that management had been badmouthing her; O’Dell’s statement to Steele in January or February 2008 that Respondent did not want to fire everybody, just those who were pushing for the Union, and O’Dell’s naming of Slay as one of those employees; O’Dell’s February 1, 2008 interrogation of Slay and his termination threat concerning Slay’s union T-shirt distribution; and Jackson’s comments to Slay in March 2008 that management was after her and he was trying to save her. This evidence easily establishes that the Respondent was aware of Slay’s union activity, that the Respondent had animus against that activity, and that the Respondent was targeting Slay for adverse action because of that activity. The Respon-

dent's antiunion animus was also shown by the other 8(a)(1) violations found in this case, such as unlawful restrictions on discussion of the Union, solicitation, and distribution, as well as other unlawful threats and interrogations.

Because the General Counsel met his initial *Wright Line* burden, the burden then shifted to the Respondent to show that it would have discharged Slay even in the absence of her protected activity. The judge found, and we agree, that the Respondent's proffered explanation for its conduct—her alleged sleeping on the job—was pretextual.<sup>5</sup> Consequently, the Respondent necessarily failed to show that it would have taken the same action even absent Slay's protected conduct. See *Golden State Foods*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982)).

2. We agree with the judge that Objections 1, 2, 3, 4, 5, 8, 11, and 12 should be sustained, but we clarify the rationale concerning Objection 11. Objection 11 alleged that the Respondent engaged in objectionable conduct by granting a mail order prescription drug benefit on April 5, 2008. In its exceptions, the Respondent argues that the judge erred by citing *Sun Mart Foods*, 341 NLRB 161, 162 (2004), for the proposition that granting a new benefit during the critical period will be *presumed* objectionable. The Respondent asserts, instead, that *Sun Mart Foods* established an *inference* rather than a *presumption*.<sup>6</sup>

The Respondent is correct that in *Sun Mart* the Board used the word "inference" rather than "presumption." The decision stated:

The Board will *infer* that an announcement or grant of benefits during the critical period is objectionable; however, the employer may rebut the *inference* by establishing an explanation other than the pending election for the timing of the announcement or the bestowal of the benefit. *Star, Inc.*, 337 NLRB 962, 963 (2002). The employer may rebut the inference by showing that

there was a legitimate business reason for the timing of the announcement or for the grant of the benefit. [Emphasis added.]

The difference between "inference" and "presumption" is of no moment here, however, because the Respondent has failed to establish a legitimate business reason for the timing of the benefit grant, as required under *Sun Mart*. As the judge found, the timing of the Respondent's action supports a finding that it engaged in objectionable conduct. The Respondent's decision to consider the new benefit, as well as its later announcement and implementation of the new benefit, all fell within the critical period before the election.<sup>7</sup> In addition, at the time the Respondent decided to investigate the feasibility of a mail order prescription benefit, in November or December of 2007, the Union's campaign had already begun to heat up following the reinstatement of the *Austal I* discriminatees.<sup>8</sup> Thus, when the Respondent made the decision to move forward with the new benefit, the Respondent was aware of the increased union activity and the distinct possibility that another election would be scheduled. Furthermore, it is noteworthy that the effective date of the new benefit—February 1—did not coincide with the Respondent's usual December 1 effective date for Blue Cross changes, and the Respondent did not establish a legitimate business reason for that departure from past practice. Finally, the fact that the Respondent specifically made note of this new benefit in its April 2008 newsletter directed at convincing the employees to vote against the Union demonstrates a link between the grant of the benefit and the second election, held that month. For these reasons, we find that the Respondent did not establish a legitimate reason for the timing of the grant of benefit unrelated to the employees' union activity, and, thus, failed to rebut the inference that the grant of benefits during the critical period was objectionable.

3. The Respondent contends in its exceptions that the judge improperly set aside the election based on preelection unfair labor practices, specifically complaint paragraphs 8, 10, 16(b), and 20(a) and (b) that were not included in the Union's objections to the election. In support of this contention, the Respondent relies on *NLRB v. Reliance Steel Products Co.*, 322 F.2d 49, 54–55 (5th Cir. 1963), as well as *Super Operating Corp.*, 133 NLRB 240, 241 fn. 4 (1961), for the proposition that unfair labor practices not also alleged as election objections cannot be the basis for overturning an election. The Respondent acknowledges, however, that the Board has held to the contrary in some cases, including *Dawson Metal Products, Inc.*, 183 NLRB 191, 200–201 (1970), *enfd. denied* on other grounds 450 F.2d 47 (8th Cir. 1971),

<sup>5</sup> In finding that the Respondent's explanation was pretextual, the judge relied in part on what he believed was an intentional mischaracterization of the record in the Respondent's posthearing brief. The judge found that this intentional error supported a finding that Slay's termination was based on a fabrication and was pretextual. In its exceptions brief, the Respondent acknowledged that the judge was correct that counsel had "inaccurately cited the record regarding a posting" but stated that the error was not deliberate. The Respondent also filed with the Board a Motion to Correct Error regarding this issue, requesting that "the portion of the decision which states that the error was an intentional and material misrepresentation of the record be modified or stricken." Motion at p. 3. Because we find that the record supports a conclusion that the Respondent's explanation for Slay's discharge was pretextual independent of the Respondent's briefing error, we find it unnecessary to rely on the judge's characterization of the Respondent's briefing error as intentional. As a result, we need not reach the merits of the Respondent's Motion to Correct Error.

<sup>6</sup> The Respondent asserts that this distinction is material because a legal presumption is stronger than an inference.

<sup>7</sup> The critical period began on the date of the first election in 2002. *Star Kist Caribe, Inc.*, 325 NLRB 304 (1998).

<sup>8</sup> 349 NLRB 561 (2007), *enfd.* 343 Fed. Appx. 448 (11th Cir. 2009).

and *Monroe Tube Co.*, 220 NLRB 302, 305 (1975), enf. denied on other grounds 545 F.2d 1320 (2d Cir. 1976).

Both the General Counsel and the Union argue that the Respondent's contention has no merit because the judge set aside the election solely on the basis of the Union's election objections. In our view, however, the judge's decision is ambiguous in this regard.<sup>9</sup>

We find, however, that even if the judge did rely on the unobjected-to unfair labor practices in setting aside the election, it was not error for him to do so. The Board has recently held that in a consolidated hearing, "the interests of employee free choice require that the unfair labor practice allegations be considered as grounds for setting aside the election even though not specified in the election objections." *Community Medical Center*, 355 NLRB No. 128 (2010) (incorporating by reference *Community Medical Center*, 354 NLRB No. 26, slip op. at 1 fn. 3 (2009) (citing *White Plains Lincoln Mercury*, 288 NLRB 1133, 1137–1138 (1988)); see also *Fisher Island Holdings*, 343 NLRB 189, 189 fn. 2 (2004) (citing *White Plains Lincoln Mercury* as establishing that "in a combined unfair labor practice/representation proceeding, the Board has authority to set aside an election based on unfair labor practices that were not specifically alleged as objectionable conduct"), enf. denied on other grounds 140 Fed.Appx. 857 (11th Cir. 2005).

The cases relied on by the Respondent do not warrant a different result. *Super Operating Corp.*, supra, appears to be an anomaly. Although it has not been expressly overruled, it has never been cited for the proposition at issue here, and it is clearly contrary to the cases cited above. Accordingly, we note that, to the extent that *Super Operating Corp.* is inconsistent with later cases such as *Community Medical Center*, *Fisher Island Holdings*, *White Plains Lincoln Mercury*, *Dawson Metal Products*, and *Monroe Tube*, supra, it has been effectively overruled.

*NLRB v. Reliance Steel Products*, also relied on by the Respondent, is distinguishable. In that case, because no objections had been timely filed, the court found that the election was immune from attack under the objections procedure. In those circumstances, the court found that the Board could not use the unfair labor practices to achieve indirectly that which it could not achieve directly, through the objections procedure. Here, because objections had been timely filed, the election was not

<sup>9</sup> At one point in the decision, the judge stated that the timely filed objections "which have been sustained justify setting aside the second election." He then listed Objections 1, 2, 3, 4, 5, 8, 11, and 12. Later, however, the judge stated, "[b]y the foregoing violations of the Act that occurred during the critical period before the second election, and by the conduct cited by Petitioner in its Objections numbered 1, 2, 3, 4, 5, 8, 11, and 12, Respondent has prevented the holding of a fair election, and such conduct warrants setting aside the election." Thus, it is unclear whether the judge relied in part on unfair labor practices not specifically encompassed within the numbered objections in setting aside the election.

immune from attack. The Board cases cited above plainly hold that in a consolidated unfair labor practice/representation case, unfair labor practices not specifically included in the objections may be used to set aside an election.

Accordingly, we find that if the judge did rely on unobjected-to unfair labor practices in finding that the election should be set aside, it was not error for him to do so. In the alternative, we find that the conduct found to be objectionable in the eight numbered objections sustained by the judge is sufficient in itself to warrant setting aside the election.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Austal USA, LLC, Mobile, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Make Carolyn Slay whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010)."

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Mobile, Alabama facility copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 December 2007."

<sup>10</sup> 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."

IT IS FURTHER ORDERED that Case 15–RC–8394 is severed and remanded to the Regional Director for Region 15 for the purpose of conducting a third election as directed below.

#### DIRECTION OF THIRD ELECTION

A third election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board’s Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Third Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Sheet Metal Workers International Association Union, Local 441.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Third Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances.

Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. December 29, 2010

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Wilma B. Liebman, Chairman

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Craig Becker, Member

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Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Kevin McClue, Esq.* and *Karen D. Brooks, Esq.*, for the General Counsel.

*Terry W. Dawson, Esq.* and *Nathan A. Baker, Esq.* (*Barnes & Thornburg, L.L.P.*), of Indianapolis, Indiana, for the Respondent.

*Kimberly C. Walker, Esq.* and *David C. Tufts, Esq.* (*The Gardner Firm, P.C.*), of Mobile, Alabama, for the Petitioner.

#### DECISION

##### STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Mobile, Alabama, on April 20–23, 2009. Beginning February 4, 2008,<sup>1</sup> numerous charges and amended charges were filed by Sheet Metal Workers International Association Union, Local 441 (the Union) against Austal USA, LLC (Respondent). As here pertinent, a second order consolidating cases, second consolidated complaint and notice of hearing (the complaint) was issued on December 19, 2008. As amended at the trial herein, it alleges that Respondent engaged in unfair labor practices (a) within the meaning of Section 8(a)(1) of the National Labor Relations Act (the Act) in that assertedly it (1) told employees that they would not be promoted because of their support for the Union; (2) told employees they could not discuss the Union during working hours; (3) threatened employees with termination because of their activities and support of the Union; (4) interrogated employees about their union activities and the union activities of other employees; (5) gave employees the impression that their union activities were under surveillance; (6) selectively and disparately enforced a solicitation rule by prohibiting union solicitations and distributions, while permitting nonunion solicitations and distributions; (7) impliedly threatened its employees that it would not hire union supporters; (8) interrogated its employees about their support for or against the Union by soliciting employees to accept anti-union shirts; (9) told employees who were talking about the Union that they needed to pipe down on the union stuff; (10) told employees who were talking about the Union to other employees that they should quit; and (11) promulgated and maintained a rule that “[e]mployees have the right to speak their mind . . . [but they had to] make sure . . . [they were] doing so

<sup>1</sup> All dates are in 2008, unless otherwise stated.

during nonworking time rather than when . . . [they were] performing . . . [their] job duties,” and (b) within the meaning of Section 8(a)(1) and (3) of the Act, by terminating employee Carolyn Slay allegedly because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Respondent denies violating the Act as alleged.

By Report on Objections, Order Directing Hearing on Objections and Consolidated Cases entered January 8, 2009, Case 15–RC–8394 was consolidated with the other above-entitled proceedings. Case 15–RC–8394 involves objections filed by the Union regarding alleged conduct which assertedly affected the results of the rerun election held on April 9. According to the Report on Objections (a) certain of the objections raise substantial and material issues; (b) some of the alleged conduct centers around conduct that has already been alleged in the second consolidated complaint; and (c) the allegations in the objections can best be resolved after a consolidated hearing.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent on June 26, 2009, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, an Alabama corporation, has been engaged in the shipbuilding business at its facility in Mobile, Alabama, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Alabama. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

Regarding background, as pointed out in the January 8, 2009 Report on Objections (GC Exh. 1(aaa)), in 2002 a Board election was held with 18 of 66 eligible voters voting for the Union, and 45 of Austal’s employees voting against the Union. There were 8 challenged ballots. In May 2002, the Union filed objections to the election. They were consolidated with pending unfair labor practice charges for hearing before an administrative law judge who issued his decision in April 2003. By Decision and Order dated March 21, 2007 (GC Exh. 2), the Board set aside the election and remanded the case, Case 15–RC–8394, for a second election. As noted above, a rerun election was conducted on April 9, with 171 of 801 eligible voters voting for the Union, and 528 of Austal’s employees voting against the Union. There were 23 challenged ballots. On April 16, the Union filed Objections to the Conduct of the Election. Subsequently certain of the objections (Objections 6, 13, 16,

<sup>2</sup> At the outset of the trial, the General Counsel and the Respondent stipulated, as here pertinent, that Roderick Jackson was a supervisor from February 1 to April 9; that Steve Richerson was a supervisor from January 1 to April 9; and that Supervisor Tim Clements, Supervisor Yancy Allen, Supervisor Clinton Hayes, and Coordinator Claudel Mack have been supervisors within the meaning of Sec. 2(11) of the Act and agents of Respondent within the meaning of Sec. 2(13) of the Act as of March 2008 and through the National Labor Relations Board (the Board) election on April 9. (Tr. 24 and 25.)

and 18) were withdrawn with the approval of the Regional Director.<sup>3</sup>

Carolyn Slay was hired by Austal in November 2004. She testified that when she first started working for Austal she was given an orientation booklet (GC Exh. 17); that she was hired as a welder; and that Chad Steele was her supervisor when she transferred to the electrical crew.

General Counsel’s Exhibit 31 is Respondent’s 2006 “HOURLY EMPLOYEE ORIENTATION BOOKLET.”

Jeffrey O’Dell was hired by Austal in February 2007 to be its human resources (HR) director. He testified that among the tasks given to him by COO Dan Spiegel was to build an HR team, to build a senior management structure because he was the first director hired in the organization; that he put together an employee handbook for Austal since when he came to the organization there was no handbook in place, there were only a couple of sporadic policies and procedures; that General Counsel’s Exhibit 31, the “HOURLY EMPLOYEE ORIENTATION BOOKLET,” dated April 2006 was in place when he was hired by Austal and it was given to all new hires; and that when he started at Austal there were 1250 to 1300 people working for Austal in Mobile and there were three people in the human resources department.

Steele, who was a supervisor at Austal from October 2006 to February 28, 2008, when he was terminated,<sup>4</sup> testified that in February 2007 he was run over by a Mobile Department of Transportation truck when he was walking on the side of the road from Austal’s big parking lot to work; that the lot was not adequately lit, there was some gravel only where the vehicles drove and not where they parked, and there were mud holes and potholes; that to get to work from the parking lot employees crossed a road and walked down the side of the road; and that about 2 months after his accident Austal began constructing a 5-foot-wide cement walkway which was completed in July 2007.

Terri Lindley, who is presently a benefits coordinator in Austal’s HR department and was a HR associate and benefits administrator, testified that Respondent’s Exhibit 13 is a power point presentation that was given at an all employee meeting she attended on April 30, 2007; that such meetings were held periodically to keep employees informed about new developments at Austal; that page 7 of Respondent’s Exhibit 13 shows the planned expansion of Austal, showing the administrative building, the new sheds, and the modular manufacturing facility (MMF); and that a considerable amount of parking is shown around the MMF.

O’Dell testified that page 19 of Respondent’s Exhibit 13 announced that the new employee handbook would be available by June 1, 2007; that he did not finish the employee handbook by June 1, 2007; that the employee handbook, which is dated November 2007, was probably finished in late October 2007; and that the timing of the employee handbook had nothing to do with union activity in that he was tasked in February 2007 to do a handbook and he knew nothing about the union activity at that time.

<sup>3</sup> At the trial herein, the Union also withdrew Objection 14, Tr. 12, and Objection 15, T. 336.

<sup>4</sup> On direct Steele testified, “[y]es,” he was terminated on February 28, 2008 (Tr. 83). On cross-examination, Steele testified that he left the employ of Austal, he quit, before he was terminated for fighting with a coworker (Tr. 100).

General Counsel's Exhibit 6 is a copy of an e-mail, dated June 12, 2007, Austal's director of HR, O'Dell, sent to Debra Warner, the compliance officer in Region 15 of the Board. It includes a copy of a June 12, 2007 newspaper ad of the Sheet Metal Workers Local #441 which reads, in part, as follows:

SHEET METAL WORKERS LOCAL#441  
CONGRATULATES  
AUSTAL USA EMPLOYEES  
In Your Fight to Win Better Wages,  
Working Conditions, and Benefits  
For You and Your Families!!!

The National Labor Relations Board (NLRB)  
March 21, 2007 "DECISION AND ORDER"  
helps you in this fight by issuing remedies  
for unfair labor practices and ordering  
a second representation election.

The copy of the ad refers to the notice that Austal was required to post to employees, reiterates the prohibitions contained therein, and advises employees what Federal law gives them the right to do. Counsel for the General Counsel indicated that the ad was introduced to show, among other things, that Austal was aware that the Union had "kicked off their campaign . . . to organize the employees." (Tr. 31.) An original of the full-page ad which appeared in the June 12, 2007 issue of the Press-Register Mobile, Ala was sponsored by Swan Cleveland, who was an organizer for Local 441, and it was received as General Counsel's Exhibit 15. Cleveland testified that the Union took the ad out and June 12, 2007, was the start of the campaign leading up to the April 9 rerun election; and that at first four or five volunteers from the Union gave out union handouts to incoming and outgoing employees at Austal's gate about once a month.

General Counsel's Exhibit 37 is a June 20, 2007 memorandum on Austal letterhead to all employees. It reads as follows:

I am sure by now that many of you have seen the paid advertisements run in the local paper by the . . . Union, and some of you may have even been approached by salesmen from this union. These paid-for-ads and flyers are all designed towards getting you to pay dues to the union, and they come with all sorts of promises. The same promises they made over five years ago when they tried the same thing.

According to recent newspaper articles, the union claimed to have had over 70% of the employee's "signed up" on union cards. The actual vote was completely opposite. The truth is that a secret ballot election was held in May 2002 and the outcome was 70% of the employees voted NO to the union. . . .

After the election, instead of respecting the choice made by more than 70% of the employees, the union continued to press the issue by involving the Labor Board filing all sorts of complaints and charges. These claims have been tied up in legal proceedings for five years and are still ongoing.

You might wonder why a union would again try to get into the Austal yard and the answer is simple: money. The local chapter of the . . . [Union] only has about 800 members. With Austal nearing 1,000 employees, the union sees

this as an opportunity to double their membership thus doubling their income. Income for them, not you. They'll take your hard earned money by requiring you to pay monthly dues. All for empty promises and no guarantees.

What has Austal done in the past five years? We have grown our workforce from barely 100 employees to almost 1,000. We have improved our insurance benefits, disability insurance and cancer insurance. We now give all employees personal days. We have increased the number of Austal recognized holidays and switched to vacation accrual policy which allows you to take vacation before being here a year. We have introduced funeral leave, a referral policy putting \$100 in your pocket for referrals, and now provide a PPE allowance for yard workers paid directly to you. In addition we have a Christmas Party, various cook-outs and gatherings, and recently had a successful Austal Family Day . . . all of this happened without the involvement of a union.<sup>5</sup> [Emphasis in original]

John Wray, who was Austal's Mobile facility manager, its acting site service manager, and had responsibilities for maintenance, testified that when he came from Austal in Perth, Australia, to Austal in Mobile on November 4, 2006, there were design plans for a sidewalk from the employees' parking lot at Addsko Road and Dunlap Drive to the facility; that at the time Austal was seeking approval from the city to build a new workshop, there was a planned unit development plan created in November 2006, and the involved sidewalk is on that plan, Respondent's Exhibit 36 which is dated "11/07/2006"; that the installation of the one-half mile or more (approximately 1050-

<sup>5</sup> This message was repeated, with minor changes, 2 days later in GC Exh. 38. The General Counsel also introduced an undated memorandum on Austal letterhead, GC Exh. 34. It reads as follows:

Remember these facts:

1. Austal was created without a union, and the union didn't help you get your job.

2. Austal has made great progress in the last five years in the size of the workforce, in pay and in benefits offered to our employees. You are the reason for this success; you *are* the success. No union has been here and no union helped to bring about any of these gains.

3. You have not had to pay a penny in "initiation" fees or union dues for any of this. If the union gets in they *will* take money out of your pocket.

4. Did you know that it is against the law for a company to pay even a dime to a union? This means that all of their operating money (money used to pay the salaries of their sales people, money for all of their staff and the union leaders, money for conventions and even down to the money to print their flyers) comes straight out of the wages of the union members.

Our yard is young and has a bright future. We believe the way to keep it this way is to keep moving ahead and providing more and better jobs by continuing to work together as a team. We believe you shouldn't have to pay money out of your pocket for empty promises.

We believe in our employees and we believe in our future. Help protect what together we have built. If you have any questions, feel free to ask any of the management team. If we don't know the answer, we promise to find out and let you know.

Let's continue to make Austal the most preferred team to work with in Mobile and together exceed our customer's expectations

Sincerely,  
Daniel Spiegel  
Chief Operating Officer [emphasis in original]

feet long) sidewalk was a safety issue in that hundreds of Austal employees were walking down the middle of Dunlap Drive; that Respondent's Exhibit 30 is a capital expenditure request for the sidewalk, which exhibit indicates an estimated completion date of July 10, 2007, and includes June 2007 bids for the job; that, with respect to the employee parking lot itself, there was a problem in that as Austal's work force grew, the lot was becoming inadequate in size; that the lot had been maintained in that potholes in the driveway areas were filled in with gravel but the employees parked on sand and grass; that Respondent's Exhibit 34, which is titled "*AUSTAL USA EMPLOYEE CAR PARK, EXTENSION OF TEMPORARY CAR PARK AND MAINTENANCE OF EXISTING TEMPORARY PARKING,*" is a request for bids by July 25, 2007, to refurbish the existing lot and expand the approximately 675 vehicle parking lot to accommodate approximately 1000 vehicles; that Respondent's Exhibit 33 is a capital expenditure request for the involved employee parking lot, which exhibit indicates an estimated completion date of August 17, 2007, and includes the bids on the project; that Respondent's Exhibits 31 and 32 are purchase orders, both dated "8/3/2007," for the maintenance and expansion of the employee parking lot; that he believed that this project was completed later in August 2007; that the employee parking lot had been an ongoing maintenance problem which required refilling the driveways between the parking aisles with rock and filling potholes; that Austal, at the time of the trial herein, was building the first half of Austal's MMF facility which is 1067-feet long and 347-feet wide; that the MMF facility will have somewhere in the vicinity of 2300 marked hard surface (paved) parking bays with filtered drainage; that the plans for this were developed during 2007 and the project went out for bids in the beginning of the winter 2007; and that Respondent's Exhibit 94 is an August 27, 2007 e-mail he was carbon copied on which refers to some of the parking options related to the MMF.

On cross-examination, Wray testified that Respondent's Exhibit 33, the capital expenditure request for the existing employee parking lot, was signed by Spiegel on July 30, 2007; that he did not share Respondent's Exhibits 36 or 30 with any hourly employee; that the request for bids for the extension and maintenance of the temporary car park, Respondent's Exhibit 34, was not put out for public bids but rather competent contractors were contacted and provided with the plans; that Respondent's Exhibit 33, the capital expenditure request for the expansion and maintenance of the temporary car park, did not include paving the parking lot; that some maintenance on the temporary car park had been done by site service employees, i.e. ordering a truckload of gravel and hand-filling potholes throughout the car park; and that none of the physical construction work reflected in Respondent's Exhibit 94 was done prior to the union election on April 9, 2008.

General Counsel's Exhibit 28 is an "EMPLOYEE CHANGE OF STATUS FORM" for Slay, which is dated August 9, 2007, and which indicates that she changed departments from aluminum to electrical and changed supervisors from D. Herbert to Steele because "Employee wants a change."

Slay testified that in September 2007 she started wearing union stickers on her hardhat, union T-shirts, and union pins, i.e. (GC Exh. 18),<sup>6</sup> on her clothing and on her tool bag; that when-

ever anyone asked her about the Union she tried to explain what the benefits of being in the Union would be; and that she would see her immediate supervisor all day in that the supervisor was in and out all day, the whole 8 to 10 hours.

General Counsel's Exhibit 8 is a letter dated September 14, 2007, from the compliance officer of Region 15 of the Board, Warner, to Respondent's counsel, Terry Dawson, referring to Austal Case 15-CA-16552, et al. More specifically, the letter refers to enforcement being temporarily postponed to afford the opportunity to settle the matter, the need for Respondent to submit to the Board additional payroll records of welding employees, which employees seek reinstatement, and the Board's position on reinstatement.

General Counsel's Exhibit 9 is a letter dated September 20, 2007, from Dawson to Warner responding to her September 14, 2007 letter.

The following notice (R. Exh. 19) was posted, on Austal letterhead:

DATE:	September 25, 2007
TO:All	Austal Employees
FROM:	Jeff O'Dell, Human Resources Director
RE:	National Labor Relations Act

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It has come to my attention that a supervisor asked an employee to remove stickers or writing from their hard hat or they could be disciplined. I further understand that the hard hat contained a pro-union sticker. Please understand that Austal repudiates this action and wants you to know that the National Labor Relations Act gives all employees the right to self-organization, to form, join, or assist labor organizations, to bargain as a group of [sic] through a representative of your own choosing, and to engage in other protected concerted activities for collective bargaining or other mutual aid or protection. The National Labor Relations Act also gives you the right to refrain from such activities. Austal values free speech rights of all employees (whether for or against the union) and wants you to know that employees may wear stickers on their hats if they so choose (whether the message is for or against the union). Austal reaffirms its commitment to respecting employee rights under the National Labor Relations Act and will not interfere with those rights.

Hopefully, this will clear up any confusion and you are encouraged to speak to your supervisor if you have any questions.

O'Dell testified that the supervisor was Scott Pearson; that Pearson disagreed with the decision to let employees place stickers on their helmets; and that after a lengthy discussion with Pearson, he sent Pearson back to Australia.

On cross-examination, O'Dell testified that Beverly Thomas was the employee who Pearson told to take the union sticker off; and that right after the incident he personally told Thomas that she could wear a union sticker.

Cleveland testified that from June to November 2007 the employee parking lot at Austal was in pretty bad shape with potholes and mud holes when it rained. As noted below, Slay testified that she believed that the crosswalk and the walkway

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cated below, subsequently Slay testified that she started wearing the union pins and union T-shirt around January 2008.

<sup>6</sup> One of the pins reads "VOTE, VOTE, AFL CIO, SHEET METAL WORKERS, INTERNATIONAL ASSOCIATION, VOTE." As indi-

from the employee parking lot were finished in November 2007.

Steele supervised Slay up until November 11, 2007, according to General Counsel's Exhibit 3. Steele testified that technically he was Slay's supervisor until December 24, 2007. Slay testified that she worked for Steele up until November 11, 2007, she worked for William Ready from November 12 to December 9, 2007, she worked for Steele between December 9 and 23, 2007, she then worked for William Dille for about 3 weeks in the electrical department, and she was working for Roderick Jackson when she was terminated on March 25, 2008.

General Counsel's Exhibit 5 is Austal's employee handbook dated November 2007.

General Counsel's Exhibit 11 is a letter dated November 21, 2007, from one of Respondent's counsel, Nathan Baker, to Warner enclosing copies of nine reinstatement letters provided to the alleged discriminatees in Austal Cases 15-CA-16552, et al.

Steele testified that a little bit before Thanksgiving in 2007 during a workday he and others were called into the production room to watch a slide show and have O'Dell and Stephanie Pate, who at the time was O'Dell's assistant, introduce the employee handbook to them and give them a paper that they needed to get signed by each one of the employees who was given an employee handbook; that O'Dell told them "that he wanted to know if we would—if we heard of any of the people on the floors talking about the union . . . and that if we knew of anyone that was in favor of the union and they were talking about it, to let him know immediately." (Tr. 70.) Steele also testified that during this meeting the supervisors were told that if they helped Austal out as supervisors, they would get some incentives, namely an increase in pay and an additional personal day; that conversations regarding nonwork topics continued and he continued to participate in these conversations; and that his conversations were about anything and everything, except the Union.

With respect to the solicitation and distribution policy in the employee handbook, Steele testified that before this handbook he was injured, he had medical bills before his short-term disability kicked in, and employees took up a collection for him to help him pay his medical bills.

Slay testified that she received a 17-page employee handbook in November 2007; that Ready handed her employee handbook to her when she came into work; that before this employee handbook came out (a) if she had to leave early and had an excuse, it would not be an occurrence, and (b) if she came in late and had an excuse, it would not be an occurrence; that both before and after the employee handbook came out employees talked about whatever they wanted to during work hours as long as they were productive and doing their work; that some of the topics employees would talk about included football, their children's sporting events, or just their children in general; and that all of her supervisors participated in these conversations.

Steele testified that he met with O'Dell four or five times about the Union; that during one of these meetings O'Dell asked him to keep his eyes on two employees, namely Slay and Beverly Thomas; that O'Dell had asked him or told him to write up employees; and that subsequently O'Dell told him that they needed to worry about the union situation and he should leave Slay and Thomas alone but there were two other people O'Dell needed him to start watching a little bit.

During one of Steel's meetings with O'Dell Slay's name came up. Steele testified that O'Dell asked him if Slay was showing up for work on time and if he had any problems with Slay's attendance; that he told O'Dell that he did not have any problems with Slay showing up for work and if she was late, she had a good excuse; that O'Dell told him that he did not want any more excuses and if Slay was not at her jobsite when the bell rang, he wanted Slay written up, and it was just that simple; and that he told O'Dell, "[Y]es sir." (Tr. 76.)

O'Dell testified as follows regarding Steele:

Q. . . . Did you ever tell Chad Steel to watch any employee more carefully because they were involved in union activity?

A. No, sir, I'd have no reason to tell him that.

Q. Or any supervisor, to watch someone more closely because of their union activity?

A. No, sir, I'd have no reason to tell anybody that.

Q. Did you ever tell Chad Steele to treat Carolyn Slay differently than any other employee?

A. No, sir I didn't even know that Chad supervised Carolyn Slay.

Q. . . . Did you ever tell Chad Steele to set up Carolyn Slay in any way?

A. Absolutely not.

Q. Or that you had a plan to do so?

A. Absolutely not.

Q. Did you ever tell any supervisor to target any employee—

A. Absolutely not.

Q. —because of their union activity?

A. Absolutely not. It made no difference to me whether that union came in there or not. I've worked with unions for 20 years.

Q. Or did you tell Mr. Steele to watch *your* attendance more closely than some other employees.

A. I wasn't the attendance clerk so, no, sir. [Tr. 706 and 707, with emphasis added.]

The day following his conversation with O'Dell about Slay showing up for work on time, Steele waited for 15 minutes for Slay to show up at her jobsite after a break. Steele testified that he did not allow Slay to give him an excuse and he told her that she needed to be at her jobsite working when the bell rang; that Slay:

was all upset, well, not everybody else is at their job site; you ain't writing them up—which was true. And—but I wasn't—I couldn't tell her that my boss was making me do this, so I just left that alone and said, look, we need to go down to our production office and have a meeting because I can't have you arguing with me up here in front of bunch of people.

So I gave her a direct order to go down there to the production office and specifically told her, do not come into this office. And she followed me down there. She stayed outside because we were told by the other bosses that we don't want any more hands [employees] inside of our production office. There's too many people. It's too small, it's too crowded. Leave your hands outside. You come in, take care of your business to get your hands back up. . . .

So I went in there [the production office]. Well when I went to get my manager to come outside . . . she's [Slay]

inside the office. . . . So I write . . . her up for it, and I give the write up to Claudel Mack . . . [who] was one of the coordinators. [Tr. 77 and 78.]

Steele further testified that subsequently he went to HR and spoke with O'Dell who told him that

Claudel got rid of the writeup and that what he was doing was setting Ms. Carolyn up for—he didn't care about the writeups. What he was wanting to make it look like Ms. Carolyn was having a problem with was authority. And with him moving her from the welding division to the electrical division, to my crew, and then moving me from—moving her from my crew to another crew, it's making her look like she can't deal with authority.

And he was setting her up by getting her to move crews instead of having her written up for not showing up for something petty. He was just making it look like she couldn't get—she couldn't work with her management. [Tr. 79.]

Steele testified that after this conversation with O'Dell, Slay was immediately moved to Dilley's crew that day.

Slay testified that the day before she went from Steele's crew to Dilley's crew she stopped at the bathroom on the way back from her break at 9:15 a.m.; that since there is only one toilet in the bathroom for ladies she had to stand in line waiting to use the bathroom; that it was after 9:15 a.m. when she got back to her work area; that Steele was sitting on her welding machine waiting for her; that Steele asked why she was late coming back from break; that she told Steele that she went to the bathroom; that Steele told her that she was not supposed to go to the bathroom unless she was on her 9:15 a.m. break; that she told Steele that he was harassing her and she could go to the bathroom whenever she had to go; that Steele told her that she needed to go to the trailer to see the coordinator because he was going to write her up; that he told her to stay outside the trailer since only coordinators and supervisors were supposed to be inside the trailer; that she told Steele that employees go inside the trailer during the day; that Steele told her to stay outside and she said okay; that another supervisor told her to come into the trailer; that at that time Steele and Mack were coming out; that Steele wanted to write her up for being insubordinate and cursing at him; that she told Mack that the real reason Steele wanted to write her up was for going to the bathroom; that Mack told her to go back to work; and that at the end of the day Mack told her that she would not have to worry about Steele because she would be on another crew, Dilley's, the next day.

General Counsel's Exhibit 36 is an Austal organizational chart for "Fit HVAC SFP" dated "11/19/2007." As here pertinent, it lists Steve Jones and Gary Logan as coordinators, and James Thomas, Terry Crawley, and Terry Westmorland as supervisors.

Steele testified that sometime after the November 2007 meeting with O'Dell regarding the employee handbook he overheard Austal employee Anthony Simon and some other of Austal's employees discussing the pros and cons of the Union; that he told Simon, who was the oldest employee in the group, that "whatever you all do . . . during company hours, y'all cannot talk about the union" (Tr. 71); that Simon told him that the

employees talk about anything and everything else<sup>7</sup>; and that he then told Simon

look, for me, don't talk about the union no more, dude. During company time, during company hours, don't talk about the union, bro, and not around me. If anything, not around me. And he kept on, kept on. And I was like, look, I said, I'm telling you this time, I'm walking out. You got to stop talking about it. I don't care what y'all do on breaks. I don't care, just not during working hours. And I rolled out. I rolled out and went straight down to HR and went [and] told Jeff O'Dell. [Id. at 72.]

Steele further testified that he told O'Dell that Simon was talking about the Union and he told Simon to stop.

Warren Gatwood Jr. testified that in late November 2007 he returned to Austal from a 2002 layoff after the Union filed a charge over the layoff, a decision in that matter was rendered, and he was called back to work; that within a week of being reinstated an issue came up about his vacation time in that he took time off when his daughter had surgery and he had to speak with O'Dell in HR; that O'Dell told him that he would be made whole and he could take vacation time anytime he needed it; that O'Dell asked him if he wanted to enroll in Austal's insurance program and he told O'Dell no since he had insurance; that O'Dell then said, "that he bet I was getting subsidized, too, and that he knew what I was doing there, that he had had complaints about me talking to other employees about the union, and I needed to keep it on my time. His time was his time" (Tr. 292); that when he returned to Austal he talked to the employees about the Union; that he was wearing a union T-shirt when he spoke with O'Dell on this occasion; and that the union T-shirt indicated "America Works Best Union, Union Yes" and it had a logo on the back. On cross-examination, Gatwood testified that he did not know who complained about him.

Tracy Watkins, who works as a materials clerk in Respondent's warehouse, testified that in November/December 2007 Manager Jerrod Bradford<sup>8</sup> was selling Christmas gift boxes and wrapping paper for his daughter's school fundraiser; that she was working at the window in the warehouse and Bradford approached her and two other employees, Patrina Jones and Gloria Sullivan; that she told Bradford that she was busy with people at the window; and that Bradford left a brochure for them to look at.

Cleveland testified that union organizing efforts were stepped up in late November and early December 2007 after it was determined that people who were fired with respect to the first election were going back to work; and that the stepped up efforts involved seven to eight union representatives wearing union T-shirts handbilling incoming and outgoing employees at the Austal gate once or twice a week.

Lindley testified that in November or December 2007 she was asked by O'Dell to check on the availability of a mail-

<sup>7</sup> Steele testified that while he was a supervisor at Austal employees talked about nonwork-related matters while they were working, and the topics included NASCAR, football, and girls, "we talked about anything and everything." (Tr. 85); that he made it a point to talk with employees about their family and what was going on in their life so that if the employee took time off for a family matter he would know that the employee was not feeding him some line; and that he stopped and talked to all of his employees.

<sup>8</sup> GC Exh. 33 is an organizational chart for Austal's warehouse. It lists Bradford as warehouse coordinator.

order drug prescription program where the employees could receive their prescriptions at home; that she contacted a marketing representative at Blue Cross/Blue Shield (BC/BS) to ask about such a program; that Respondent's Exhibit 29 is an e-mail, dated December 19, 2007, she sent to the BC/BS representative which reads: "I spoke with Jeff [O'Dell] about the mail order drug option—can you put something together that I can give to him? This is something that they are pushing"; that O'Dell was pushing for this and "[i]t had come about from employee meetings. It was asked by an employee" (Tr. 600); and that a union election was not scheduled in December 2007.

On cross-examination, Lindley testified that employees asking about a mail-order drug prescription program would have occurred in a meeting similar to the April 30, 2007 meeting where the aforementioned power point presentation, Respondent's Exhibit 13, was shown; that one was generally held once a quarter in 2007 that the question of mail order came up in meetings with smaller groups of employees; that she could not say how many of these meeting there were; that O'Dell did not tell her how many employees asked about this program; that the meeting occurred in November 2007; that she did not recall an NLRB notice being posted on the bulletin boards at Austal in November 2007; that O'Dell or whoever he delegated the task to in HR would have been responsible for posting governmental notices; that in February 2008 and in 2007 Austal maintained a self-funded health plan; that a self-funded health program is different from a fully-insured program to the extent that with self-funded programs, the employer pays the cost of the plan and not the premiums; that with a self-funded program, in designing the policy, the employer, to some extent, gets to choose what benefits are included in the self-funded program; that Austal's self-funded health program used BC/BS as its claims administrator; that BC/BS was Austal's previous plan provider when Austal was fully insured; that December 1 of each year is when Austal renews with Blue Cross/Blue Shield the claims administrator contract and that is when, generally the benefits for the upcoming year become effective; that as indicated by Petitioner's Exhibit 4, Austal can add benefits at other times during the year if Austal decides to do that; that various cost changes are set on December 1 of each year; that Austal had its normal annual renewal where it set benefits and set the costs for the upcoming year on December 1, 2007; that Austal then made the change that is reflected in Petitioner's Exhibit 4 to be effective on February 1; that Petitioner's Exhibit 7 is a benefits comparison of Austal's three medical plans which would have gone into effect in December 2006, were in effect through the year 2007, and were not changed at the December 2007 renewal; that Petitioner's Exhibit 8 is the high option PPO plan through Blue Cross/Blue Shield in effect January 1, 2007<sup>9</sup>; and that Petitioner's Exhibit 9 is the information from Blue Cross/Blue Shield on the prescription drug card which was in effect until it changed on February 1.

General Counsel's Exhibit 20 is a document which Slay signed and gave to Pate. It reads as follows:

12/7/07

To Whom It May Concern;

<sup>9</sup> Petitioner indicated that this document was introduced to show that the mail-order prescription program, which became effective February 1, is not in P. Exh. 8.

I, Carolyn Slay am tired of people vandalizing my machine. I am currently working below B-9 (galley area), in B-1. The Welding supervisors working in that area, should make sure that their welders have everything that they need. Someone had some welders working in B-1. Parts were taken off my machine (feeder box). My gas bottle was emptied or taken from my machine. Why are these so called supervisors not keeping these guys from stealing off of other people's machine. Obviously they have got a lot of time on their hands, because they can't be working. Now I'm not working because I've got to get another bottle of gas. Wait on maintenance to come fix my machine. The killing part about all this is that they purposely took parts off my machine that they don't need. So whoever this person or persons is, they are purposely harassing *me*. This is an ongoing problem, and I think something needs to be done about it. Putting locks on the doors of the welding machines would be a good idea for the real working people out here.

Slay testified that she complained about what was being done to her welding machine to O'Dell, Pate, Harley Combs, her supervisors, and whoever she was working under, i.e., Gerald Ransom; and that sometimes the paperwork would disappear so she started making copies so she would have a copy when she made a complaint.

Slay became a member of Dilley's crew on December 24, 2007. Slay testified that Jackson, who was a leadman at the time, was in her crew; that Jackson gave her a welding test, telling her that she had been "badmouthed"; and that after the test, Jackson told her that "they lied on you" and he was going to keep her on the crew.

Steele testified that sometime after Christmas 2007 he overheard Austal employee Utsetsi Nyanga and another employee talking during the break; that when they continued to talk about the Union after the break he approached them and said, "Utsetsi, how many times I got to ask y'all not to talk about the union during working hours—I meant during work schedule. You cannot talk about them during your work schedule. When you're supposed to be at work, you cannot talk about the union. And I got a yes sir from him. He shut up and went right back to work." (Tr. 83.)

According to the testimony of Cleveland, after the first of the year 2008 the employee parking lot at Austal was regraded, lighting was installed, and he believed that Austal also paved a walkway from the parking lot to the gate. On cross-examination, Cleveland testified that someone brought rock into Austal's employee parking lot around the first of the year 2008; and that he did not have any personal knowledge of how often Austal brought in rock for the employee parking lot or how often Austal did maintenance work to the parking lot.

Jerome Pettibone testified that Austal's employee parking lot was gravel, it held water when it rained, and people's cars were broken into and stolen; and that improvements were made to parking lot in that the lot was regraded and blacktopped.

Slay testified that she started wearing union pins and the union T-shirt around January 2008.

Petitioner's (Union's) Exhibit 4 is a BC/BS of Alabama Self Funded Health Change Agreement signed by the benefits coordinator of Respondent on January 16, with an effective date of February 1. The document indicates: "Please add Mail Order Prescription Drug Benefits." It goes on to indicate what this benefit entails. Petitioner's Exhibit 5 is the prescription drug

benefit insert summary plan description for Austal effective February 1.

Lindley testified that she signed Petitioner's Exhibit 4 on January 16; and that employees were notified of this change by a posting in January or early February 2008 on the bulletin boards, out in the sheds, and Austal also included it in the newsletter that was circulated in April 2008.

In January and February 2008, the fact that Austal employees were lining up at the timeclock before the end of the day became an issue. Steele testified that all of the supervisors were called into a morning meeting and told that they needed to stop employees, no matter who they worked for, from leaving the jobsite early and getting to the timeclock early; that if the employees did not follow the Austal handbook they were to be written up; that he wrote up 16 employees who did not work for him for being at the timeclock early and refusing to go back to their jobsite; that subsequently he was called to the HR office; that O'Dell told him

Chad we don't want to fire everybody at Austal; we [are] really only trying to get the people who's pushing for the union. I said, well, y'all do what y'all want to do with them writeups. I did them. I did what y'all asked me to do. Y'all can do what y'all want with the writeups.

And that's when they was like, look Chad, it's the union situation we're after. You know, whoever helps us out—he was talking about guys helping us out and stuff like that, but he said, we don't want to fire everybody. We don't want to write everybody up. We just want to attack the ones that are going for the union. . . .

He named about five people. He named Ms. Carolyn Slay. He named Ms. Betty Thompson. He named this girl named Jill. He named Anthony Simon. I think he named four. I'm not quite sure. . . . [Tr. 81 and 82.]

Slay testified that when she came to work on February 1, 2008, she had some union T-shirts in a backpack; that she picked up her tools and went to her jobsite; that she put the backpack down on the floor next to her toolbag while she was working by herself; that different people would come to her work area and ask her for a union T-shirt and she would tell them to get it out of the backpack; that during her 9 a.m. break she passed out the union T-shirts out at the gate to people who asked for the union T-shirt; that employees were at the gate because they were buying breakfast at the breakfast trucks outside the Austal gate; that at the time she had on a union T-shirt over her regular clothes; that at the end of the break "someone hollered over the radio" (Tr. 137) for her to come to HR; that she went to HR and saw Watkins, another unidentified man, and O'Dell; and that she and O'Dell had the following conversation:

. . . he said were you passing out union T-shirts? I said, yes, at nine o'clock.

He said, well, I got ten witnesses say you was [sic] passing them out during working hours. I said, well, they lying. I wasn't passing them out during working hours. I was passing them out during my break. He said, well, how did they get them? I said, they came in my work area and asked for them, and I told them to reach down in that bag and get them, and that's what they did. I didn't pass them anything. And he said, well, I believe you're lying.

And he said, well, did you tell Tracy Watkins to pass out union shirts? I said, no. He said, well, how many did you give her? I said, I don't know. She said a couple of guys came through, asked for shirts, and I gave her a couple shirts and told her to give them to them when they come back. And—but I didn't tell her to pass out union shirts. He said, well, I believe you're lying.

So he kept on trying to make me say what he wanted me to say, and I wouldn't. So he said, well, were not paying you to pass out union shirts, and if you're going to pass them out, you better keep them locked up and pass them out on your break. I said, well, that's what I was doing, passing them out on my break. Again, he said, I believe you're lying.

He said, but you know I could fire you for that. And I just looked at him. He said, that what you want? I looked at him, I said, well, no. He said, well, I just tell you about it. We're on the same page. And that's when I walked out. [Tr. 137 and 138.]

On cross-examination, Slay testified that the backpack in which she had the T-shirts was made out of cloth; that she had the backpack at her workstation; that she has to wear protection when she is welding to avoid getting burned; that she has seen a spark from a weld catch something on fire; that to her knowledge the backpack was not fireproof; that she placed the backpack next to her toolbag in her work area; that the toolbag is made of a material that can catch on fire; that the day before employees had asked her to bring in union T-shirts and they came to her area to get a union T-shirt; that when they came to her workstation she was on her worktime and she told them to reach in the bag and get a T-shirt; that to access the hold that she was working in that day she had to use a ladder; that even though she received an employee handbook in November 2007 she was not really aware that the Company had a no-solicitation, no-distribution policy because she had not read all of the book and she did not know what all was in the book; that she was given the employee handbook to keep in her possession; that the paper she signed regarding this incident indicated that she would not solicit during work hours; that she did not receive a disciplinary action over this incident; and that after this incident she still made shirts available to employees and she did it in compliance with the instructions she received from O'Dell.

On redirect, Slay testified that the employees who came to her to get a union T-shirt on the day in question were not on break; that there is no requirement that the shirts employees wear to work be fire retardant; that she saw employees wearing the Austal Union Free Proud to Be T-shirt at work; and that the label on that shirt does not indicate that it is fire retardant.

General Counsel's Exhibit 39 is a print out of e-mails exchanged between O'Dell and Bob Browning, who is Austal's chief executive officer, on February 1. The first is from O'Dell to Browning. It indicates as follows:

Not sure if you have heard, but I had an employee that was handing out t-shirts (about 50) to employees on their time today on our time. I have since then delt with the situation and want to post this message. [The one-page message to employees refers to the distribution of shirts and Respondent's solicitation and distribution guidelines, and advises employees to let their supervisor know if anyone tries to intimidate or

threaten them.] Now the postings are down from the NLRB I guess that we will start seeing some activity from Local 441.

Let me know your thoughts about the posting.

Browning replied, "I'm fine with the general message. Have you had our attorney look at it? We need to be squeaky clean in dealing with these things." O'Dell replied, "I will run it past Terry before I post."

O'Dell testified that when it came to his attention that Slay was passing out T-shirts on worktime, he called the supervisor over that area and asked him what was going on; that the supervisor told him that Slay was down in the hull of the ship, she had two large garbage bags of T-shirts, and Slay was handing them out; that the supervisor told him that he saw Slay holding shirts up sizing them up on people; that he met with Slay and told her that she was passing out T-shirts, which she did not deny, and the rules are she could hand the shirts out on her lunch or breaks, before or after work, off of property but she could not store them down in the working area; that he told Slay that she could leave the shirts in the break rooms or put them in her lock box; that he did not discipline Slay; that when he set the ground rules of what Slay could or could not do Slay said, "whatever" two or three times (Tr. 686); that he read General Counsel's Exhibit 19 to Slay, he signed it, and he gave it to Slay<sup>10</sup>; that after his discussion with Slay he had a similar document to all employees posted<sup>11</sup>; and that there was a no-solicitation, no-distribution policy in Austal's handbook.

<sup>10</sup> The memorandum is on Austal letterhead. It reads as follows:

DATE: 3 February 2008  
TO: Carolyn Slay  
SUBJ: Solicitation

Carolyn,

This note will remind you about our discussion today. As mentioned, Austal does not allow employees to solicit each other while on working time (yours and the employee you're trying to solicit). Neither do we allow employees to distribute materials in working areas. I reminded you of this today and fully expect that you will comply in the future. Failure to do so will cause disciplinary action.

I also want to remind you that you are free to solicit during nonworking time (your breaks, lunch, etc.) so long as the person whom you are soliciting is also not on working time. Austal has no problem with employees speaking their mind, no matter whether they are for or against a union. Austal does, however, expect its employees to be working when on the clock rather than soliciting for any cause or distributing materials of any kind.

Jeff O'Dell

Human Resources Director

<sup>11</sup> R. Exh. 4, which is on Austal letterhead and undated, reads as follows:

To all employees:

You have undoubtedly become aware that some employees began handing out shirts during work time and in working areas. We want to remind you that distribution is not allowed in working areas. Additionally, employees may not solicit during working time (theirs and the employee they are trying to solicit). This is true no matter the subject (girl scout cookies, little league candy, union issues, raffle tickets, etc.). Employees are free to solicit others during nonworking time. Please observe these guidelines so we can avoid taking disciplinary action.

Some of you have told us that you don't want to [be] bothered by the latest effort to divide the company and employees. Be aware that all employees—no matter your viewpoint—have the right to speak your mind. If you're being bothered by those who want to force their views on you, simply tell them to leave you

On cross-examination, O'Dell testified that he did not remember which supervisor told him that Slay had two garbage bags where she was welding and she was fitting employees; that he called the manager over the group, Harley Combs; that Combs subsequently called him and told him that Slay was passing out shirts; that other employees were passing out T-shirts, and buttons but he did not send Browning e-mails about them; that as far as he knew, Slay was the only one doing it on company time; that someone was disciplined for distributing antiunion shirts and he did not send an e-mail to Browning regarding that person; that "the first concern in any yard is safety" (Tr. 727) and he told the manager who looked into the situation to make sure the area was safe; and that when he called Slay down to talk to her about the shirts he already had the document he gave her typed up.

According to Slay's testimony, the morning after her discussion with O'Dell her coordinator called her to his office and told her that he had something for her to sign and he guessed it was a paper they forgot to have her sign at the meeting in O'Dell's office the day before.<sup>12</sup>

Petitioner's (Union's) Exhibit 3 is a February 25 e-mail from Elizabeth Garl to David Tomlin which indicates as follows:

Subject: MMF paragraph for the Austal newsletter per Bob B Hi David!

We're putting together the HR submission for the Austal newsletter and Bob wanted to address the parking situation he hears so much about. He wanted some information in the newsletter reviewing the MMF plans and how this will relieve some of the parking problems.

Could you send me a paragraph about the plans as they currently stand please? Michelle's trying to work on the newsletter right now so as soon as you can get me the information I can turn it over to her.

Carl Hudson, who was hired by Respondent in July 2007 as a sheet metal mechanic and later became a surveyor/inspector, testified that he wore union shirts and he talked to employees about the Union encouraging them to vote the Union in; that in March 2008 before the Board election his supervisor, James Thomas, told him that if he wanted to be a supervisor he had to shave, tuck his shirt in, don't be a rebel, and quit wearing union shirts and union paraphernalia; that he was wearing a union shirt when Thomas told him this; that he was going to apply for a supervisor's position and Thomas found out about it; and that this conversation occurred after a notice was posted on a bulletin board at work regarding employees' rights under the Act. On cross-examination, Hudson testified that no one other than him and Thomas was present during this conversation.

alone or tell them what you think about their efforts to create an "us versus them" atmosphere here.

You can expect more of this activity in the future. As you've learned before, the union desperately needs new dues-paying members. They're hoping you'll be willing to give them a cut from your paycheck every month and they'll say or do pretty much anything to get it.

In the meantime, let your supervisor know if anyone tries to intimidate or threaten you. We won't allow such behavior, no matter who it's from.

Jeff O'Dell

Human Resources Director

<sup>12</sup> GC Exh. 19, which is dated "3 February 2008" and is signed by O'Dell, is set forth above.

James Thomas testified that he worked at Austal for 6 or 8 months, he did not know “the dates exactly.” (Tr. 785.) One of the Respondent’s attorneys then elicited the following testimony:

Q. If it were to be suggested that you worked—your work ended at Austal in February of 2008, does that sound right?

A. That’s exactly right.

Q. So you would have started some time in the summer of 2007?

A. About that. [Ibid.]

James Thomas further testified that he started out at Austal working with his tools; that he was advanced to supervisor; that he did not recall when he became supervisor; that he was a supervisor when he left Austal in February 2008; that he has worked in a union environment before; that the sheet metal local telephoned him and asked him if he would take a job at Austal and salt for the union; that he has worked with Hudson on numerous jobs prior to Austal and Hudson worked for him for a short period of time at Austal; and that he did not tell employees that they would not be promoted if they supported the union. One of Respondent’s attorneys then elicited the following testimony:

Q. Did you ever tell Mr. Hudson that he couldn’t become a supervisor unless he stopped wearing union shirts?

A. No, I never made that allegation. It was a supervisor’s job to not talk about the union in any way, shape or form during—as a part of the—what we were told not to do, and I didn’t do it. So I didn’t much bring up anything pertaining to the union during working hours.

Q. So you never threatened any employees that they wouldn’t be promoted if they supported the union?

A. No.

Q. In fact, you—Mr. Thomas, you resigned well over a month before the union election:

A. Yes. [Tr. 787.]

In early March 2008, according to the testimony of Hudson, Gary Logan, who was his coordinator over Supervisors James Thomas, T.C., and Clinton Hayes, pulled him aside during his toolbox talk and told him two or three times that he needed to pipe down because the higher ups were saying that he was causing chaos; and that Logan told him he could not say who was saying this. On cross-examination, Hudson testified that no one other than him and Logan was present during this conversation.

Logan testified that Hudson was in his group; that he was at Austal from March 2006 to June 2008; that when he was at Austal he conducted morning meetings for about 15 minutes every morning to go over the daily tasks and safety issues; that several times Hudson raised an issue about the Union and one morning he told Hudson, “[h]ey, this is— we [are] on the clock, this is a start up meeting, let’s continue on with our start-up meeting” (Tr. 776); that he did this because Hudson wanted to talk about a nonwork-related topic and it did not matter what the nonwork-related topic was, they were on company time; that he did not tell employees to pipe down on the union stuff; and that he did not tell Hudson that the higher ups at Austal said that he needed to be quiet because he was causing trouble with the union issues.

On or about March 10, 2008, according to the testimony of Slay she got sick and she had to leave work early to go to the doctor. Slay testified that Supervisor Jackson told her that if she left early she was to make sure that she brought an excuse back because they were after her and he was just trying to save her; and that she had to leave early 1 day to pick her little girl up from school and Jackson said the same thing, namely make sure you bring me an excuse because they are after you and I’m just trying to save you.

General Counsel’s Exhibit 13 is a March 12 letter from Region 15 to the law firms representing the Union and Respondent, which letter (a) sets forth the specifics of the April 9 rerun election, (b) describes the involved unit, and (c) specifies a date by which the *Excelsior* list should be received by Region 15.

Steele testified that supervisors wore white hats and employees were expected to follow supervisor’s directions whether or not the individual was their supervisor, unless it involved doing something that was unsafe.

Pettibone, who worked as a welder for Austal from January 9, 2006, until April 20, 2009, testified that supervisors wore white hard hats until some time in 2009; and that if a person with a white hardhat gave him directions, he would follow the directions because that person was his senior boss.

Slay testified that supervisors wore white hardhats; and that if someone with a white hardhat gave her directions, she would do what the supervisor told her to do.

Hudson testified that at the time material herein the supervisors and coordinators wore white hardhats.

General Counsel’s Exhibit 35 is an Austal organizational chart for the “Outfit,” dated March 17, 2008. It lists, as here pertinent, Logan as a foreman, Terry Crawley as a supervisor, Steve Jones as a foreman, and Terry Westmorland as a supervisor.

On March 18 Hudson attended an Austal meeting at the convention center in Mobile. Hudson testified that he spoke with Jeff O’Dell who agreed to meet with him at work the next day; and that he was not wearing a union shirt when he spoke with O’Dell.

On March 19, according to his testimony, Hudson met with O’Dell just after lunch. Hudson testified that he did not wear any union clothing when he met with O’Dell on March 19; that at the outset of the meeting O’Dell asked him did he think Austal needed a union; that he responded, “Not really” (Tr. 245); that after indicating that Austal was a great Company, O’Dell said, “I see you’ve got seven occurrences here. A few more and you’re out of here” (Id. at 246); that they discussed the fact that employees have to use vacation days to go to the hospital, the fact that Ingalls (apparently another shipyard in Mobile) did not do it that way, and apparently how many sick days Austal employees should get; that O’Dell then said, “[t]he answer that you gave me before, . . . to be honest with you, I wouldn’t hire you” (Tr. 246); that O’Dell asked him why he came to see him, and he told O’Dell that he hurt his leg, he was put on prescription medication, his supervisor would not let him work while he was on the medication, Lortabs, and consequently he lost 10 hours of pay which he wanted Austal to give him; and that his Supervisor Crawley was at this meeting. On cross-examination, Hudson testified that the subject of his becoming a supervisor never came up in his discussion with O’Dell, and he has never discussed this matter with O’Dell.

O’Dell gave the following testimony regarding Hudson:

Q. Was there ever a time during your employment when you asked him—you thought Austal ever needed a union?

A. No, I did not ask him that.

Q. Did you ever tell Mr. Hudson that you wouldn't hire him based on his answer about how he felt about a union?

A. Mr. Hudson was already an employee.

...

A. So, no, I didn't tell him that. [Tr. 701.]

Crawley testified that in March 2008 he was a HVAC supervisor at Austal and he reported to coordinator Logan; that he left Austal in September 2008; that he had 7 to 10 employees in his crew; that he worked on the *Littoral* (along the shore) *Combat Ship (LCS)* and the *Hawaii Super Ferry (HSF)* and in March 2008 leading up to the election he was working on the *LCS*; that employee Hudson worked for him; that “[n]o, sir” he has never “heard Jeff O’Dell say . . . something like he would not hire Hudson if he gave the wrong answer about the union” (Tr. 765); that he was in a meeting with O’Dell and Hudson; that he did not remember if O’Dell mentioned the word union during that meeting; that “[t]he only thing I remember of that meeting was that you cannot be a supervisor if you’ve been written up” (Id. at 766); and that with respect to applying for a supervisor job, this is on the postings themselves for the jobs when they go up. On cross-examination, Crawley testified that the O’Dell/Hudson meeting lasted for 15 to 20 minutes.

General Counsel’s Exhibits 44 through 65 are Austal organizational charts, all of which are dated March 17, 2008.

Antiunion T-shirts were passed out to Austal employees on March 19.

Pettibone testified that he received an antiunion T-shirt distributed at Austal during the union campaign (P. (Union’s) Exh. 2); that the shirt was blue and it had “AUSTAL UNION FREE & PROUD TO BE” on it; that he received his T-shirt from Supervisor David Herbert; that he knew that Herbert was a supervisor because Herbert was one of his former supervisors; that when Herbert gave him the T-shirt Herbert was not wearing a hardhat; that he received the antiunion T-shirt at one of the two turnstiles employees had to go through on their way out of work; that there was more than one supervisor distributing the antiunion T-shirts on this occasion and he thought the supervisors had their hardhats off at the time; and that he observed individuals passing out the “AUSTAL UNION FREE & PROUD TO BE” T-shirts only once, and on that day he worked overtime and went through the turnstile about 4:30 p.m.

Slay testified that she recalled a situation where individuals were standing outside the gate passing out shirts that said “Austal Union—Free and Proud to be”; that Petitioner’s Exhibit 2 is the T-shirt that was passed out as employees were leaving work one evening; and that

one morning I came in, and all the supervisors and coordinators had those shirts on with their white hats. And at the end of the day, they was [sic] standing outside the gate. They had some supervisors standing inside the gate, passing out papers, hand-billing, antiunion. And they were standing on the outside of the gate passing out T-shirts. [Tr. 144.]

Slay testified further that she knew the individuals were supervisors because she worked with some of them and they all had on white hats; that when she left work that day the individuals were wearing white hats and they were passing out T-shirts;

that she saw Coordinator Tim Clements passing out the shirts; that she used to work for Clements when he was a supervisor before becoming a coordinator; that she saw the T-shirts being passed out about 2:30 p.m. that day; that about 80 percent of the entire shift was leaving at this time because everybody did not work overtime; and that employees could not enter or exit the shipyard without passing through a gate where the antiunion T-shirts were being distributed. On cross-examination, Slay testified that while an administrative employee or a visitor might wear a white hardhat, they would be plain white hats and they would not have supervisor or their names on the hardhat. And on redirect Slay testified that the day the antiunion T-shirts were passed out as employees went through the gate she knew that supervisors were passing out the antiunion T-shirts because she worked with them before and they all had on white hats; that their name and supervisor or coordinator was on the hardhat; and that some of the individuals she saw that day wore hard hats with supervisor on them.

Watkins testified that she wears an orange hardhat; that her supervisor and her supervisor’s manager wear white hardhats; that around March 2008 individuals were passing out antiunion T-shirts to employees as they were leaving work and going through the turnstile; that the T-shirts said Austal Union Free & Proud To Be; that the first time was about 2:30 p.m. and there were about five individuals wearing white hardhats, including some supervisors and some employees from HR; and that one of the individuals wearing a white hardhat was Lindley, who is over the insurance department, and another was Robert Hall, who is a fabrication supervisor.

Hudson testified that when he left work one day T-shirts were being passed out near the turnstiles; that supervisors were passing out the T-shirts and he knew this because they were wearing white hardhats and all the supervisors and higher ups wore white hardhats; that one of the supervisors who was passing out T-shirts that day was Terry Westmorland; that the shirts were blue with white lettering saying, “Union Free & Proud To Be” (P. Exh. 2); that he took a shirt<sup>13</sup>; that T-shirts were offered to all employees as they were leaving or coming to work; that employees had to go through the turnstiles to get out or get in; that most of the individuals passing out T-shirts had hardhats with their names and position on them; and that he knew that they were supervisors or “higher-ups” (Tr. 314) because they wore white hats.

Gatwood testified that supervisors wore white hardhats; that about 2 or 3 weeks before the April 9 Board election individuals were passing out T-shirts to employees as they came in and left work at the turnstiles; that “there were supervision [sic] on both sides of the turnstiles with an armload of tee shirts, passing out tee shirts and stickers” (Tr. 295); that the T-shirts indicated “Austal Union Free, Proud to Be” (Ibid.); that the individuals who were handing out the T-shirts wore white hardhats and khaki welding shirts with the Austal insignia embroidered on the front; that he is not aware of anyone who is not a supervisor wearing that khaki shirt; that he could not recall any su-

<sup>13</sup> Hudson testified as follows about what he did with the company T-shirt:

Threw it in my car, used it for a grease rag sometimes. And then they—and they was [sic] passing them two or three times. And so I just started grabbing them, just say, hey, I just keep them to wear around in, because I knew they was [sic] condemning me for wearing shirts. And sometimes I’d put my Union Free shirts on, that way to keep the peace with everybody. [Tr. 257 and 258.]

pervisor in particular that he saw handing out the shirts; that this happened on two occasions and on both occasions the individuals handing out shirts had white hardhats and khaki shirts on; that at the time he was leaving the shipyard at the end of his shift, at 2:30 p.m., on both occasions; and that he did not recall on either occasion if employees were coming into the shipyard at the same time that he was leaving. On redirect, Gatwood testified that it was common for supervisors to have their name and position on their white hardhats; that the individuals who he saw who he thought were supervisors had their positions on their white hat; that he believed that those positions were supervisory positions; and that those individuals had their names on their hats.

Jeffrey Garl, who has worked for Respondent for 2 years as a senior supply buyer, testified that he does not supervise any employees: that he passed out T-shirts which indicated "Austal Union Free"; that Carolyn Buckley who is with Respondent's HR department, asked him to pass out the T-shirts only to Austal employees,<sup>14</sup> and she told him that he needed to make sure that there were no supervisors in the area where the T-shirts were passed out; that he started passing out the T-shirts at the commercial (HFS) gate at 2 or 2:30 p.m. or at the end of the first shift; that about 1 hour later he went to the *LCS* gate to pass out T-shirts; that he was stationed inside the gate; that he asked the individuals what size they needed and told them to be sure to vote; that there were hundreds of people coming through the gate; that he did not, and he was not asked to, keep track of who took the shirt and who did not take the shirt, and he did not report such information; that he did not see any supervisors passing out T-shirts; and that he was not wearing a hardhat when he passed out the T-shirts, and he did not believe that others who were passing out the T-shirts were wearing hardhats.

On cross-examination, Jeffrey Garl testified that he did not recall whether he was instructed with respect to talking to employees when he passed out the T-shirts; that either Buckley or Bria Connolly told him to go to the *LCS* gate; that he believed that Buckley at the time was the administrative assistant for operations and not with HR; that he and about five other individuals were passing out T-shirts on the *HSF* side; that he did not remember who they were but most were employees from fabrication or the different trades; that there were no supervisors on the *HFS* side while he was there; that he was on the *HFS* side for 1 to 1-1/2 hours; that the employees wear their badges around their neck; that he was at the *HFS* gate for two or three waves of clock outs; that he could not remember how long he was at the *LCS* gate but it was not as long as he was at the *HFS* gate; that he thought he finished at the *LCS* gate close to 5 p.m.; that he passed out T-shirts only on this occasion, and he did not know what occurred when the T-shirts were passed out on another occasion; that he did not recall whether there were any employees coming into work during the time he handed out T-shirts; and that these two gates are generally how employees come into or go out of the shipyard.

On redirect, Jeffrey Garl testified that he had a white hardhat in March 2008; and that the people in administrative roles and supervisors wear white hardhats. On recross, Garl testified that

<sup>14</sup> Jeffrey Garl explained that one could tell that the individual was an Austal employee by their badge. Employees of contractors and anyone with Bath Iron Works were not allowed to receive T-shirts.

in March 2008 his white hardhat had his name and his position on it.

Rena Epperson, who has worked at Austal for a little over 1-1/2 years at the time of the trial herein, testified that in March 2008 she was a site administrative assistant, and she did not supervise any employees; that she volunteered to pass out union free T-shirts; that Buckley and O'Dell asked her if she would volunteer to pass out the shirts; that she was told not to pass out the shirts to supervisors, contractors, or managers; that neither supervisors nor managers could pass out the shirts; that she passed the shirts out on the *LCS* side at the gate at 2:30, 3 or 3:30, and at 4:30 p.m.; that she was at the gate for the entire timeframe; that employees get off at staggered times; that none of the people who passed out shirts with her at the *LCS* gate were supervisors; that the T-shirts said "Union Free" (Tr. 366); that she told the employees to make sure to vote; that regarding which employees took shirts and which did not, she did not keep track of this, she was not asked to keep track of this, and she was not asked to report this; that she did not see any supervisors passing out T-shirts; that she was at the *LCS* gate both times Austal passed out T-shirts; and that she has a white hardhat.

On cross-examination, Epperson testified that Jeff Garl was one of the individuals who passed out T-shirts the first day at the *LCS* gate; that she believed that he was there the whole time she passed out shirts but he was not there both days; that Tracy Hughen was there the first day passing out shirts; that Buckley told them what to do; that she took it upon herself to tell the employees to vote; that the T-shirt indicated to vote no in that it stated, "Union Free Proud to Be" (Tr. 372); that on the date she passed out the shirts, she owned a white hardhat at the time; that the hardhat had her name on it and Austal; that when supervisors were leaving through the *LCS* gate they would be shuffled on through; and that twice a day she would attend meetings where supervisors and at least one other nonsupervisor was present.

Subsequently, Epperson testified that she probably was not wearing her white hardhat in that while she was supposed to wear a hardhat inside the gate, her work location—the site service trailer—was 10 steps from the gate, and if she had to go out the gate, she never wore her hardhat; that if she had her hard hat when she was passing out shirts in compliance with the rule to have a hardhat on inside the gate, it was laying on the table because it would fall off her head when she bent over to get shirts out of the boxes; that she would have taken it off when she distributed shirts on both occasions; that some of the men who handed out shirts with her were wearing their hardhats but she did not remember the colors; that there were no supervisor hardhats among those handing out shirts; and that she did not recall Garl wearing a hardhat when he handed out shirts.

Hughen testified that she was hired by Austal in February 2008 (at the time her last name was Mathis) and was a senior supply agent in March 2008; that as a senior supply agent she did not supervise any employees; that she passed out Austal Union Free T-shirts at the gate at the behest of her boss, Kirsten Marks (now Bradford) who told her that supervisors could not pass out the shirts; that supervisors could not be in the area where the shirts were being handed out; that she passed out the shirts at the *LCS* gate with Epperson, who told her just to ask the employees if they wanted a free T-shirt; that she was at the *LCS* gate from 2:30 to 5 p.m.; that several other people passed

out the shirts with her and Epperson; that she was only supposed to give the shirts to Austal employees; and that she did not keep track of, she was not asked to, and she did not report, who took the shirts.

On cross-examination, Hughen testified that she handed out shirts on one occasion; that Jeff Garl handed out T-shirts at a different gate; that she never saw him at the gate where she was handing out shirts; that she is a salaried employee; that she is a purchasing agent and for purchases under \$100,000 she can use her best judgment to decide which vendor to use; that in March 2008 she was making the smaller buys; that there were about eight laborers passing out shirts when she was at the gate; and that “they had on hard hats at—or just work clothes. They weren’t office staff.” (Tr. 408.)

Subsequently, Hughen testified that her office is outside the gate and every time she goes inside the gate she has her hardhat; that she did not believe that when she passed out the shirts inside the gate that everybody that was passing out the shirts had their hardhat on; that the rule is as soon as the individual comes inside the gate they are supposed to have their hardhat on; and that there was a picnic table at the gate and those who were handing out shirts may have put their hardhats on the table.

James McNair Jr. testified that he has worked at Austal for about 3 years; that he is a ship fitter; that he went to HR, O’Dell told him about the Austal T-shirts, and he volunteered to pass out the shirts; that he passed out the shirts at the *LCS* gate at 2:30 and 3:30 p.m. after he was done with his shift; that there were about 10 to 15 guys passing out the shirts at the gate; that he did not see any supervisors passing out the shirts; that he did not keep track of who took a shirt and who did not; and that he was finished passing out shirts about 3:45 p.m.

On cross-examination, McNair testified that he got the shirts from HR, which is outside the gate, at 2:30 p.m. before he had clocked out; that he clocked out when he left at 3:45 p.m.; that he passed the shirts out on company time; that after he brought the shirts to the gate at 2:30 p.m. he went back to his work area for 30 minutes to get his tools and clean up; that he saw supervisors leaving work the same time as the employees; that he did not give a shirt to any supervisor; that his supervisor left work that day at 3:30 p.m. and he went through the turnstiles while the shirts were being passed out; that he and Tom Godwin went to HR to see about getting some T-shirts done up to respond to the T-shirts handed out by the Union; that O’Dell told them, “Just see what we can do” (Tr. 429); that the shirt he passed out indicated “Union Free, Proud to Be”; that he passed out the shirts 1 day; and that he did not pass out the gray T-shirts.

Subsequently, McNair testified that he did not have to put his hard hat on until he entered the shed where the boat is being built; that when he distributed the T-shirts the 10 to 15 other guys who were distributing T-shirts with him may have had their hardhats on; that he puts his hardhat on at his locker; that some people take their hardhats home; and that the day they passed out gray T-shirts he left work too late to get one.

Godwin testified that at the time of the trial herein he had worked for Austal for 2-1/2 years and was a welder fitter; that in March 2008 he was a fitter trades assistant; that he has only worked on the *LCS*; that in March 2008 he did not supervise employees; that in March 2008 he volunteered to and did pass out Austal Union Free T-shirts; that he went to HR with McNair to find out about getting some antiunion stuff and they were told that such T-shirts would be made available; that he

passed out the Austal shirts at the *LCS* gate when he came in to work on the night shift; that he did not know that the shirts were going to be made available that day and he saw the boxes when he got to work; that he did not think that he was on the clock when he passed out Austal’s shirts; that he passed out the shirts right around the shift change at 2:30 p.m.; that he never saw a supervisor passing out shirts with him; that he did not keep track of who took the shirt and who did not, and he was not asked to report this; and that a supervisor told him that he could not pass out buttons during his working time.

On cross-examination, Godwin testified that he thought that he passed out the Austal shirts two times; that there was a gray shirt and a blue shirt; that he passed out the shirts just inside the turnstile; that he knew that there were no supervisors passing out shirts because “there . . . [were] a lot of people out there with their hard hats on” (Tr. 441); that he was on the clock when he spoke with O’Dell about passing out some buttons; that he asked his supervisor, Jeremy Johnson, to see O’Dell; that he found out the shirts were being distributed when he came into work and he stopped and, without being asked, started handing out T-shirts; that supervisors could have been coming on and off shift while he was handing out T-shirts but at the time most of the supervisors, instead of going through the turnstile went through a midgate; that there were people from the administrative office handing out shirts; that it took him and McNair a total of 15 minutes to leave their workstation to talk to O’Dell about the buttons; that he could not remember if anyone, including himself, was wearing a hardhat when they were passing out shirts; that he did not remember if anyone was wearing a white hardhat; that they were instructed not to allow supervisors in the area where shirts were distributed; that office personnel wear white hardhats; that he did not remember seeing anyone with a white hardhat; that he wore a button that said, “Just Say No to Union” (Tr. 452); and that a supervisor, Joe Hymel, told him that he could not leave flyers on break tables.

Connolly, who was hired by Austal in February 2008 as the expatriate administrator in the HR department, testified that in March 2008 she did not supervise any employees<sup>15</sup>; that she agreed to and did pass out Austal Union Free T-shirts soon after she started working at Austal; that to her knowledge no supervisor passed out the shirts; that O’Dell told her that supervisors were not to pass out the shirts; that O’Dell conducted several supervisor meetings around that time where it was mentioned directly to supervisors that they were not to pass out T-shirts; that she passed out the shirts at the gate next to the commercial or *HFS* shed at shift change which began around 2:30 p.m. and ended at 4:30 or 5:30 p.m.; that she passed out shirts for about 20 minutes; that other people passed out shirts with her; that she did not keep track of who did or did not take a shirt; and that she was not asked to report back to anyone regarding those shirts.

On cross-examination, Connolly testified that she knew that O’Dell told supervisors at meetings that they were not to pass out the shirts because she had access to O’Dell’s calendar and from talking to O’Dell; that she was not at the meetings so she could not say with certainty that supervisors were told by O’Dell that they were not to be in the area when Austal’s shirts

<sup>15</sup> Connolly testified that she was responsible for taking care of Austal’s expatriate employees that were at Austal from its shipyard in Henderson, Australia, and that included their immigration paperwork, organizing their accommodations and vehicles and any other administration once they arrived on site in Mobile.

were being passed out; that she believed that O'Dell did tell the supervisors; that there were at least four people passing out shirts with her and one of them was Susan Sime, who is a member of HR; that she could not be certain that no supervisors were present when she passed out shirts because she did not know any supervisors; that she did not attend supervisory meetings; that she was a salaried employee at the time; that she left her position as the expatriate administrator in the HR in September 2008; and that this position was then dissolved, with the HR manager, Sandra Koblas, dealing with any immigration issues and the recruitment administrator, Jane Heath, dealing with any in-house issues that the expatriates still working at Austal in Mobile have.<sup>16</sup>

Clements, who was a structural foreman in aluminum production at Austal in March 2008, testified that he did not participate in passing out Austal Union Free T-shirts at that time; that the *LCS* is a stealth trimaran vessel, the first of its kind ever built for the United States Navy; that the *HSF* is a high-speed personal vehicle ferry, catamaran, used to cut down travel times between the Hawaiian islands; that he was aware that he was not allowed to pass out the Union Free T-shirts in that he and others were addressed by a HR director and told that they could hand these shirts out to supervisors and salary position employees but not to hourly employees; that he never participated in the distribution of the Union Free shirts; that employees typically have their hardhats off when they are coming in and out the gate; that in March 2008 his hardhat was white; and that foremen, supervisors, coordinators, administrative employees, quality inspectors, and visitors wore white hats.

On cross-examination, Clements testified that he did not know what date O'Dell told him and others that they could not pass out the Union Free shirts; that the meeting was held in a meeting room in the production/human resources trailer near O'Dell's office; that if he saw a safety issue or problem he would stop it or notify the person responsible for the issue; that he testified that people going out the gate would not have their hard hats on; and that he did not have an opportunity to observe the T-shirt distribution at the gates.

Lindley testified that she was aware that sometime in March 2008 Union Free T-shirts were passed out at the gates; that she did not pass out any of the shirts; and that she was told by O'Dell that she could not pass out the shirts because she was a supervisor. On cross-examination, Lindley testified that she supervised Nick Robertson, who was her benefits administrator; and that her office is in the same trailer as O'Dell and Connolly.

O'Dell testified that union free T-shirts were distributed prior to the Board election; that supervisors were absolutely not involved in that distribution; that he had meetings with the supervisors twice and made it very clear that they were not to hand them out, they were not to be in the area during distribution, and they would be disciplined if they did; that he had two administrative people on each side just to watch the shirts and keep those types of incidents from happening; that not one time did they come back and say a supervisor was there handing shirts or even watching or looking at what was going on; that Respondent's Exhibit 5 is a notice he had administrative assistant Robertson post; and that Austal has 8 to 10 bulletin boards

<sup>16</sup> Connolly explained that when O'Dell left Austal his position was not filled. Rather, Austal has a vice president of HR and an HR manager.

where notices to employees are posted. Respondent's Exhibit 5, which O'Dell sponsored, and which is on Austal letterhead, reads as follows:

To all employees:

Austal will be making shirts available this afternoon as part of our campaign asking you to vote "NO" on Election Day. Accepting or wearing these shirts is strictly voluntary. You can accept or decline the shirts as you wish. Neither acceptance nor refusal will cause reprisals or rewards, no supervisor will be involved in distributing the shirts, and no records will be kept of who accepts or declines a shirt. The same is true of buttons and stickers that will be made available to employees.

Thanks for your consideration.

3-19-08

Jeff O'Dell

Human Resources Director

O'Dell signed Respondent's Exhibit 5. He testified that he did not know the names of the people who accepted the T-shirts; that he did not ask; and that he did not keep any such records.

On cross-examination, O'Dell testified that employees and supervisors coming in for the afternoon shift, which started at 3:30 p.m., on March 19 would not have seen the notice regarding Austal's T-shirts before they entered the facility; that Administrative Assistant Buckley and Susan Sime were his observers, with one stationed at one site and the other stationed at the other site to make sure that everything was proper with the T-shirt distribution; that Buckley and Sime were instructed to tell any supervisor to leave the T-shirt distribution area immediately; that he did not want supervisors observing the passing out of T-shirts and he was told that this did not happen; and that Buckley was supposed to stay at the *LCS* gate the whole time and if she left the *LCS* area to go to the super ferry area that would have been a violation of his directions.

Westmorland testified that he is a supervisor over the outfit department at Austal; that he was hired in 2005; that he recalled that in March 2008 there were employees passing out "union free and proud to be" (Tr. 758) T-shirts; and that he did not ever pass out any of those T-shirts. On cross-examination, Westmorland testified that he was aware that Austal was passing out T-shirts because the Company asked for volunteers among the employees and a couple of guys on his crew volunteered; that his employees let him know that they were going down to hand out the T-shirts; that it was in the afternoon and he did not know if his employees clocked out when they left to hand out the T-shirts; that he leaves work at 5 p.m.; that his employees, including Amos Miller—who wore a gray hardhat, came back to work after they passed out the shirts; that at the time he wore a white hardhat; and that he did not attend any meeting with O'Dell regarding the shirts before the shirts were distributed.

Subsequently, Westmorland gave the following testimony:

JUDGE WEST: Did you have an understanding with respect to whether you should or should not be present when the "union free" T-shirts were distributed?

THE WITNESS: I personally, as a supervisor, I did not want to get involved with what was going on because I did not know enough about the situation, so I kind of stayed away from it.

....

JUDGE WEST: Did anyone in management tell you that you should not be involved in any way?

THE WITNESS: With the union stuff?

JUDGE WEST: With the distribution of the “union free” T-shirts.

THE WITNESS: I don’t remember that; I really don’t. I just know I didn’t have anything to do with it, but they did—I guess they put out a volunteer list because I had a couple of guys that actually volunteered to go down and do it.

JUDGE WEST: When you left the shed and go through the gate, which gate do you normally go through?

THE WITNESS: I go out the one on the *LCS* side.

....

THE WITNESS: Because I work in the *LCS* shed.

JUDGE WEST: That’s the turnstile gate?

THE WITNESS: You got . . . a turnstile and then you got one that goes out to the main road and you got one that goes over to the *HFS* side.

JUDGE WEST: Which one do you—

THE WITNESS: I go out the *LCS* side.

....

MR. MCCLUE: Just for the record, is that the main road sir?

THE WITNESS: That’s the main road. [Tr. 761 and 762.]

With respect to the distribution of the Austal union free T-shirts, Crawley testified as follows:

JUDGE WEST: . . . You worked for Austal as a supervisor in March of 2008?

THE WITNESS: Yes, sir.

JUDGE WEST: . . . Were you aware that at some point, perhaps on two different occasions, “Austal union free” T-shirts were distributed to employees?

THE WITNESS: Yes, sir.

....

JUDGE WEST: . . . Did you ever attend any meeting with a member of management where you were advised as to what you should or should not be doing when those T-shirts were distributed?

THE WITNESS: I was at a meeting that they called all of us, all the supervisors into, yes, sir.

JUDGE WEST: Who was in charge of the meeting, who spoke?

THE WITNESS: Jeff O’Dell.

JUDGE WEST: What did O’Dell say?

THE WITNESS: I can’t remember everything he said sir.

JUDGE WEST: Not everything, but in general what was Mr. O’Dell speaking about?

THE WITNESS: He was generally talking about what you can say and what you cannot say.

JUDGE WEST: Okay. What you can and cannot say. This is with respect to union activity, or a union supporter?

THE WITNESS: I’m not sure.

JUDGE WEST: Okay. Let’s focus just on the distribution of the “Austal union free” T-shirts. Did Mr. O’Dell say anything to you while you were in that meeting with the other supervisors with respect to what you could or could not do regarding the distribution of the “union free” T-shirts?

THE WITNESS: I can’t remember.

JUDGE WEST: Okay. Do you remember ever attending a meeting with other supervisors where Mr. O’Dell spoke about the distribution of the “Austal union free” T-shirts to employees?

THE WITNESS: Yes.

JUDGE WEST: You do remember that?

THE WITNESS: Yes.

JUDGE WEST: But you don’t remember what was said?

THE WITNESS: No, sir. [Tr. 767 and 768.]

Logan testified that he was aware that in March 2008 there were some employees passing out “Austal union free” T-shirts; that he never passed out those shirts, “[t]hat was for employees only to pass out, no supervisors was passing none out or permitted” (Tr. 778); that supervisors were told by O’Dell that they were not allowed to pass out the T-shirts; and that “we went to a meeting and it was for employees, if employees wished to pass out them T-shirts, they could pass them out, but no supervision . . . was allowed to pass them out” (Ibid).

On cross-examination, Logan testified that to his knowledge no supervisor passed out the union shirts; that he was not there to see who was passing out the Austal T-shirts; that he did not know if a supervisor came through the turnstiles while the shirts were being passed out; that none of his supervisors handed out the T-shirts; that he supervised 3 or 4 out of the approximately 100 supervisors; that he worked in the HVAC section; and that to his knowledge the Austal T-shirts were passed out one time.

Hall testified that he was a supervisor at Austal in March 2008; that he recalled around March 2008 there were employees passing out “Austal union free” T-shirts; that he never passed out a “union free” T-shirt at Austal; that he never passed out any shirt of any kind at Austal; that he was told by O’Dell that he was not supposed to pass out T-shirts at meetings with the supervisors and management team; that O’Dell said that they were not supposed to pass out “any kind of union, or any kind of paraphernalia at work, it didn’t matter what it was” (Tr. 790); and that “[c]orrect” (Ibid) O’Dell “specifically told you to not—that supervisors couldn’t pass out T-shirts.” (Ibid.)

On cross-examination, Hall testified that in March 2008 he had around 14 employees working for him in aluminum fabrication; that he worked to 5 p.m.; that he did not know if any of his employees passed out T-shirts; that shirts were passed out at least twice; that people talked about the shirts; and that employees were supposed to talk about sports and the union on their own time.

Subsequently, Hall testified that the meetings of supervisors and the management team where he was told he was not supposed to pass out T-shirts or any other kind of paraphernalia were held basically every week; and that it was not a specific meeting held on or about the time the “Austal union free” T-shirts were passed out. Hall then testified as follows:

JUDGE WEST: Okay. Did you attend, on or about the time that the “Austal union free” T-shirts were passed out, did you attend a meeting where O’Dell spoke specifically about the role you should not be playing regarding the distribution of those T-shirts?

THE WITNESS: I wouldn’t say it’d be anything specific, you know, a meeting specifically about that. It would have basically been in general, like a union update—

JUDGE WEST: Okay.

THE WITNESS: —for that meeting.

JUDGE WEST: So in this general meeting on or about that time, do you have any specific recall of Mr. O'Dell saying anything specific about the distribution of the "Austal union free" T-shirts?

THE WITNESS: Not specifically about the shirts.

....

THE WITNESS: It was pretty understood that we couldn't, you know, distribute stuff like that—

....

THE WITNESS: —as far as flyers or whatever. [Tr. 796.]

General Counsel's Exhibit 14 is an Austal Record of Warning to Slay dated "3/21/08." Under "Reason for warning" the following is typed: "This notice serves as a documented verbal warning for excessive absenteeism. Further absenteeism may result in a written warning up to termination of employment." Jackson, who Respondent admits was a supervisor at the time, signed the warning.

Slay testified that on March 21, 2008, she observed her supervisor, Jackson, selling a CD to one of the employees in their crew; that she, Jackson, and an employee named Sharon came through the gate a little before 6 a.m. and they went to the morning meeting room where employees meet to discuss safety issues and get assigned to the different work areas; that the other employees had not arrived yet; and that Jackson told Sharon that he got the CD she wanted, Sharon gave him some money, and Jackson gave her the CD. On cross-examination, Slay testified that this transaction occurred before the beginning of the 6 a.m. shift; and that this was the only time she saw Jackson sell a CD.

Hudson testified that a few days after his March 19 meeting with O'Dell and Crawley, Crawley heard him talking to some employees about the Union; that Crawley told him, "You know what Jeff O'Dell said, you talk about the union and he wouldn't hire you, anyway." (Tr. 248); and that there were four or five other employees present when Crawley made this statement in the break room. On cross-examination, Hudson testified that there were a few other employees around when Crawley spoke to him but he did not believe that they heard what Crawley said.

Crawley gave the following testimony:

Q. Now, let me just ask you flat out, you've been accused in this matter of impliedly threatening an employee that *you* would not hire a union supporter. You ever done that?

A. No, sir.

Q. Did you ever do that to Carl Hudson?

A. No, sir. [Tr. 765, with emphasis added.]

On March 25 Slay was terminated. General Counsel's Exhibit 16 is a statement signed by Jeremy Eddins. It reads as follows:

#### STATEMENT FORM

....

Persons Present: Stephanie Pate, Claudel Mack, Carolyn Slay, Jeremy Eddins

....

SUBJECT: Termination of Carolyn Slay

At approx. 4:15 pm, I received a call from Stephanie requesting that I bring Carolyn Slay to the H.R. trailer. Once all three of us arrived (Carolyn, Claudel, and my-

self), Stephanie informed Carolyn that she was witnessed (by a couple of personnel) sleeping during production hours. Stephanie informed Carolyn that this was a severe offense that has happened to other employees as well. This offense has led to the termination of these employees and has also led to Carolyn's termination. Stephanie then told Carolyn that as of today she is not longer employed by Austal. Carolyn then said that she felt that his was a set-up. Carolyn stated that Austal had been trying to fire her for quite some time and finally done it. Stephanie then asked for Carolyn's side of the story but Carolyn said "you already fired me." Stephanie then said "I just wanted you to be able to give your side of the story." Carolyn refused and said "you already fired me." Carolyn asked who the witnesses were but Stephanie said she could not give that information out. Stephanie then left the room to get a change of status form. During this time Carolyn made several calls. Once Stephanie returned, she asked again for Carolyn's side. Carolyn said she was not asleep and was watching the supervisor look at her. Carolyn said she did not hear the supervisor because she was wearing earplugs. Carolyn stated that she could not have been caught sleeping because she was working with Dion Mixon the whole time. Claudel Mack then escorted Carolyn to the vessel to get her tools. He then escorted her to the gate.

With respect to her termination on March 25, Slay testified that she came to work at 6 a.m. that day; that her welding machine was not working so her supervisor, Jackson, placed her with Mixon, who is an electrician, pulling cable; that she was working in block 14 of the *LCS* ship; that after they pulled the wire into the unit, Mixon attached the wiring; that she held the light for Mixon; that since the unit to which Mixon was attaching the wire was so close to the floor, she had to sit on the floor on a piece of fire cloth and Mixon sat next to her on a stool; that it was cold that day so she had on a sweatshirt with a hood on it; that she had the hood on her head and her hardhat, with union stickers, on top of that; that she was wearing safety glasses and earplugs; that she took her safety light off her hat and she held it in her hand so that Mixon could see what he was doing inside the unit; that she had her arm propped up on the door of the unit which was located right in front of her; that they pulled more cable and then Mixon would sit on the stool and work inside the unit while she shinned her light inside the unit; that she asked Mixon if he noticed how many supervisors and Navy personnel had been walking in and out of their work area all day; that she knew they were supervisors because they all had on white hardhats; that one supervisor stood next to her and Mixon for a long time watching them; that at the end of the day her supervisor, Jackson, came to her worksite and told her and Mixon to start cleaning up their hold so that they could go into another hold and help the rest of the crew clean up their hold; that she put her tools away and when she came back to go into the other hold Eddins and Mack were standing there; that Eddins told her that he had to take her to HR; that Mack did not accompany them to HR; that in HR Pate came in and asked where Mack was; that Pate said that they needed to wait for Mack, and she left the room for 5 to 10 minutes; that Pate came back into the room and when Mack arrived Pate talked about the sleeping policy on the company job; that Pate said to her "I have three witnesses say that you were sleeping on the job" (Tr. 151); that she told Pate that she had three witnesses that say that Pate's three witnesses are lying because she was not sleep-

ing on the job; that she asked for the names of Pate's witnesses; that Pate said that she could not divulge their names; that

she [Pate] said, I just want to get your side of the story. I said, [w]ell why do you want to get my side of the story? You told me I was terminated, so it don't matter what my side of the story is.

She said, [w]ell, we just want to understand what happened. And that's when she starts in with, [y]ou was sitting in a stool with your head in your hand. I said, No, I was sitting on the floor with a light in my hand. And then she kept saying that I was sitting on the floor [sic] with my head in my hand. I kept saying, No, I was sitting on the floor with my—with a light in my hand and a hood on my head.

She said that—she went back to saying that the three witnesses said I was sleeping, and she still wouldn't tell me who they were. She said, Well, you don't remember anybody putting their hand in your face? I said, No. They couldn't get close enough to put their hand in my face, because the unit was right in my face. She said, Well, you don't remember anybody shaking you or waking you up? I said, Didn't nobody touch me. She said, Well, didn't anybody say something to you? I said, If they did, I didn't pay them any attention, because it'd be so noisy in the hold and we have on earplugs, so I don't pay anybody no attention except for the person I'm working with. [Tr. 152.]

Slay further testified that other people from other crafts were working in the hold and there was a lot of noise in there; that during her meeting with Pate she told Pate that O'Dell was after her (Slay's) job, everybody knew that O'Dell was after her job, she knew what was going on, this conversation is over, and she walked out; that she and Mixon worked in the hold all day; that at no time during the day did anybody wake her up and tell her that she was sleeping and she had to go to HR; that during that day no one could kneel in front of her face; that employee Jarvis Griffin was in and out of the hold and he tapped her on the shoulder and spoke with her; that employee Rodger Williams came down in the hold twice that morning and just before lunch he asked her if she needed anything; that she was not aware that people said that she was sleeping at 1:30 p.m.; that it was strange that it is alleged that she was sleeping at 1:30 p.m., no one woke her up, and they let her stay in the hold until the end of the workday, 4:30 p.m.; that sleeping on the job is a safety hazard and she considered it part of her job that if she saw somebody engaged in a safety hazard, she would bring it to their attention; that she had a sticker with her name on it on her hard hat; that her supervisor, Jackson, wrote in his book where the employees were assigned to work; that she was not sleeping on March 25; that she was not sitting on a box fan on March 25; and that the fans are used to blow air into a hold or pull smoke out of a hold.

On cross-examination, Slay testified that on the day of her discharge she was working in hold B-14 on the *LCS*; that to get into the hold she had to climb down a ladder; that the employee's ID badge is hung outside the hold so it can be determined who is working in the hold; that she pulled cables and held a light for Mixon on the day of her discharge; and that throughout the day people passed through the area they were working in to go below decks.

With respect to disciplinary action taken by Respondent involving other employees sleeping on the job, the General Coun-

sel introduced a number of exhibits. General Counsel's Exhibit 21 is a position statement of Respondent dated April 21, 2008. As here pertinent, it indicates the following:

Ms. Slay is hardly the only employee to have been discharged for sleeping. Indeed, Austal has discharged other employees for sleeping, including several in the days and months immediately preceding Slay's discharge. For example, Chris Arnold was discharged more than one year before Slay (1/9/07); Curtis Williams was discharged more than seven months before Slay (8/2/07); Marquise Parker and Dustin Allen were discharged February 22, 2007; Chinda Xayaphay was discharged February 26, 2007; and Greg Nolte was discharged March 18, 2008. All were discharged for sleeping on the job before Slay's March 25, 2008 discharge. . . . Consequently, Slay was treated exactly the same as these employees who committed the same offense . . . .

General Counsel's Exhibit 22 is a "RECORD OF VERBAL WARNING," dated July 17, 2007, to employee Dustin Moore, which indicates (a) that it is for sleeping and (b) "[a]s I was instructing class yesterday Dustin continually fell asleep. Even after I woke him up a few times he continued to fall asleep. Finally, I just sent him home for the day. this is an attempt to correct his attitude." General Counsel's Exhibit 23 is a "RECORD OF WARNING," dated August 30, 2007, to employee Reginald Malone which reads "[s]leeping during work hours. Sent home for remainder of day and to report back to work at 06:00 hours on 31 Aug, 2007." General Counsel's Exhibit 24 is a "RECORD OF WARNING," dated July 21, 2007, to employee Sam Brown which indicates "Sam was caught sleeping in Block 6 @ 9:50 am. . . ." General Counsel's Exhibit 25 is a "LAST CHANCE AGREEMENT," dated July 26, 2007, to, employee Samuel Brown which, as here pertinent, indicates "[i]n order to continue your employment with Austal, the following conditions must be met: You must be productive while you are at work. This means no sleeping or loafing on the job. . . ." General Counsel's Exhibit 26 is a "RECORD OF WARNING," dated June 25, 2007, to employee Kelly Yelder which indicates "Kelly was found sleeping in BLK 17A. This is not the first incident of this nature. . . . Kelly is given a 3 day layoff beginning today. Further offense will result in termination."

General Counsel's Exhibit 27 is a handwritten statement of Pate, dated "3/25/08" which reads as follows:

After speaking to all the witnesses, I called Jeremy Eddins to escort Carolyn Slay up to Human Resources. Once Claudel Mack joined us in my office I told Carolyn that we had received notice that she had been seen sleeping in block 14 of the *LCS* around 1:30 that afternoon. I told her there were three witnesses who all claimed to have seen her. She said she was not sleeping and wanted to know who was accusing her. I told her I could not disclose witness information. She said, "Yes you can and I need to know who is accusing me of sleeping." I told Carolyn that because we had three witnesses who all saw her sleeping, her employment at Austal was ending as of today. Carolyn said her employment was ending out of retaliation for her filing an EEOC and because she is for the union. I told her I had no knowledge of her EEOC charge and she was being disciplined in the same manner as other employees who were caught sleeping. She said, "No, you

have always treated me differently.” I said, “No, you are being treated exactly the same.” She said, “OK.”

Jeff O’Dell called me into his office to ask about another employee situation while I was at the printer getting a COS [change of status] form.

Upon returning to my office I asked Carolyn that if she was not sleeping as she had stated, what was she doing. She said she was sitting down with her head propped up and she was cutting cable. She had stopped until Dion was done and was waiting on him in order to continue working. Carolyn said that Dion was working directly next to her. I told Carolyn that the witnesses had stated that Dion was working on something else and could not see her with the way her head was positioned. Carolyn stated the company was just waiting for her to do something so they could fire her. She stated that Jeff O’Dell was after here job and had supervisors following her just waiting for her to do something. I said, “Carolyn you just said you weren’t doing anything”. She said, “No I wasn’t doing anything and you already said I was fired.” I told Carolyn I was trying to understand from her point of view what had happened. She said she saw the supervisors in there but did not pay any attention to them and that she saw one of them standing in front of her because she saw his dirty boots. I told her that the supervisor stooped down in front of her face. She said he could not have because she was sitting on the floor and Dion was sitting next to her.

She said, “You said you have witnesses so go talk to them.” I said OK, [and] asked Claudel Mack if he had the paperwork he needed. He said, “Yes,” and everyone got up and left the office.

Frank Christopher Tindle testified that on March 25 he was a supervisor in Austal’s structural fire protection department supervising 10 to 12 employees; that his department deals with any issue to protect against fire; that before March 25 he did not have any contact with Slay; that on March 25 he was going to block 14 to check on two of his workers, he climbed down a ladder, and he saw an employee sitting on what he assumed to be a 5-gallon bucket; that it could have been about 1:30 p.m.; that the individual on sitting the bucket had “their face on their hand, with the elbow on the knee” (Tr.514); that he “noticed that there was the head bobbing, . . . [s]he was sleeping” (Ibid.); that he watched for a few minutes and he knelt down to see if he could see her face; that he could not see her face, and she had a hoodie on; that she did not respond to him kneeling down and looking at her face; that while he could not see her face when he knelt down, it did not follow that she might not have been able to see his face because “she would have been able to see my face because mine wasn’t—hers was partially covered with the hoodie (sweatshirt hood) on. . . . She had a hoodie on, see, and I couldn’t—I mean, I couldn’t tell you what she looked like” (Id. at 516); that he knelt down to tell if her eyes were closed or not and he could not tell; and that he then “watched for—I’m not sure how much longer it was, but then another supervisor came up and asked me what was going on with that, and I said, [i]t looks like they’re sleeping” (Id. at 516 and 517). Respondent’s attorney then elicited the following testimony:

Q. All right. Let’s stop there for a moment then. When you started to describe that you bent down or kneeled down, did you bend down or kneel down into the employee’s line of vision?

A. Correct.

Q. Okay And so if I understand your testimony correctly was the witness—excuse me—the employee having her head in her hand and her head bobbing. You leaned down to see if you could make eye contact.

A. Correct.

Q. Did the employee react to you in any way?

A. No. [Tr. 517.]

Tindle then gave the following testimony:

JUDGE WEST: I’m sorry for interrupting, but it’s your testimony that you could not see her eyes. Is that correct?

THE WITNESS: That’s correct. I couldn’t tell if they were open or closed.

JUDGE WEST: Okay. But you couldn’t see them. I mean, you couldn’t actually—

THE WITNESS: No, sir.

JUDGE WEST: No. All right. If you couldn’t see her eyes, how was—how were you in her line of vision?

THE WITNESS: Well, would you like me to give you a demonstration? I mean, it’s hard for me to describe. She’s like this, and I was about two to three feet away, and I knelt down to where I was—would consider it to be eye level. I mean, I actually knelt down.

. . . .

And looked, to try to see the face. She did have safety glasses on and the hoodie over, and I just couldn’t tell whether they were actually open or not, but if—I believe that if her eyes would have been open, then she would have saw [sic] me, because I was right there, this far away.

JUDGE WEST: For the record, this far?

THE WITNESS: two to three feet. [Id. at 517 and 518.]

Tindle further testified, “I’ve done it before at the house. I mean . . . you’re just nodding off, and you’re catching yourself” (Id. at 519); that the other supervisor who came up was Steve Richerson; that Richerson asked him, “[W]hat’s going on with this person. And I said, I believe *they’re* sleeping. And he agreed” (Ibid. with emphasis added); that they stood there and talked and as they were leaving Chief Hartley, who is a chief in the United States Navy and not employed by Austal, approached; that after a few minutes he left the area to talk to his foreman to find out who the involved electrical foreman was; that he found out it was Mack; that he did not know the employee’s name so he went back to the block and the person was up and walking, “[s]he had her hoodie off, so—had the hard hat back on. And then when I came back out, I saw the badge on the board. I got her name, and I took it to Claudel Mack” (Id. at 521 and 522); and that when an employee works in a hold or void, they leave their badge on a board outside the void so in case of an accident, others would be able to determine who is in the void. Tindle then gave the following testimony:

JUDGE WEST: . . . You said when you went back, you saw Carolyn [Slay].

THE WITNESS: Yes.

JUDGE WEST: And she had her hoodie off and her hard hat back on.

THE WITNESS: Right.

JUDGE WEST: Okay. To me, that means that when you saw her the first time, she had the hoodie but no hard hat?

THE WITNESS: Well, I don’t know if she actually had it on. She could have had the hoodie pulled over the hard

hat, but when I came back, it was just a hard hat showing, without the hoodie on

....

So I wouldn't want to say that she didn't have it on. I couldn't see it the first time.

JUDGE WEST: The hard hat, doesn't it have a brim or something in front?

THE WITNESS: Yes. But like I said, the hoodie—

....

... was pulled all the way down.

....

... so it would have covered it. [Id. at 522 and 523.]

Tindle further testified that when he saw Slay on the bucket there was a gentleman present who he assumed was working with Slay; that this man was down on his knees with his head in a panel or power box where all the cables ran; that the man was in front of Slay; that the man was talking on his cell phone with his back toward Slay; that this man and Slay were 3- or 4-feet apart; that he was asked to draft a statement regarding what occurred; that no one told him what to write and no one tried to influence him; that the person in the panel “[t]hey were actually working . . . [t]hey were on a cell phone” (Id. at 526); that he overheard one side of the telephone conversation and the man was asking someone questions; that the person on the bucket was not holding a flashlight; that he signed the first page of Respondent’s Exhibit 6, namely an employee change of status form for the termination of Allen on “2–22–08” for “Violating company policy. Sleeping”; and that he believed “[I don’t actually recall this.” (Id. at 527)] that Allen was someone who he caught sleeping in the past.

On cross-examination, Tindle testified that as a supervisor he has the responsibility, if he saw a possible safety violation, to stop it immediately; that while he saw an employee he believed to be sleeping, he did not wake the employee up; that not only did he not wake the employee up but he walked away from the employee; that Slay was 8 to 10 feet from the ladder; that there is a requirement that when one is on a ship one has to wear a hardhat; that Slay was required to wear a hardhat in the area she was working in on March 25; that he did not recall whether Slay had a hardhat on; that he knelt down to see if he could see her face; that he did not make any effort to move her to see if he could see her face; that “I actually wasn’t watching *them* sleep the whole time. I was trying to determine whether or not she was sleeping. Once I determined that I thought she was asleep, then I went to get her foreman/supervisor, so that he could take care of the situation” (Id. at 534); that he watched Slay for 3 to 5 minutes, then he knelt down to try to see her face for another minute, and then he continued to watch Slay for 1 to 1.5 minutes with Richerson; that he knew that the employee who was sleeping was in the electrical department because the guy sitting there with her had a green hat on and green is the electrical department; that as he was getting ready to go up the ladder Chief Hartley approached him from the forward side of the void to his left and asked him if he saw the same thing he saw; that Hartley approached from behind Slay; that his talk with Hartley was very brief “[j]ust long enough that basically he made that statement to me, and if I saw what he saw and I said yes” (Id. at 538); that he talked with Hartley for a minute or less; that he thought that the proper approach in the situation he was faced with was to get the employee’s supervisor; that after he finished talking with Hartley he, Tindle, left and he believed that Richerson was still there; that it was

not necessary to wake her up; that he was pretty sure that the employee was sitting on a five gallon bucket; that General Counsel’s Exhibit 42 is the statement he wrote that day and in it he wrote that the employee was sitting on a fan in front of a pepco panel; that when a fan is turned up on end it is like a cylinder; that the employee with his head in the panel was asking someone on the cell phone which cable hooked up to which switch; that he was wearing earplugs when he saw Slay sleeping; that when he saw Slay later she was wearing a green hardhat; that some of the employees wear their hardhats backwards so the brim is toward their back; and that his conversation with Richerson was about 4 feet from Slay.

Richerson testified that on March 25 he was a step-up supervisor on the night shift with the fitters and welders on the *LCS*; that he had never had any interaction with Slay before March 25; that on March 25 Slay was sleeping in block 14 of the ship about 1:30 p.m.; that he was on his way to check on what the day shift had done regarding the installation of floor grate; that when he climbed down the ladder into block 14 he saw Slay sitting on a bucket sleeping; that “Chris was right ahead of me, and he saw her, and then we walked over to see and looked at her a couple of minutes, and I bent over, looked her in her eyes, and she was sleeping” (Tr. 555); that “[s]he was sitting on a bucket, had her arms crossed, had her head down, had a hood over her hard hat” (Id. at 556); that her head was not moving in any way; that he did not see her head bobbing up and down; that he “near about got on my knees. I bent all the way over. I could see her eyes. She had a set of, I believe, prescription safety glasses on, and her eyes were closed” (Ibid.); that he was about 2 feet from her; that she did not react in any way to him, and she did not say anything to him; that he asked Tindle what he wanted to do and Tindle said, “[W]e’ll watch her a few minutes” (Id. at 557); that they watched her for 5 or 6 minutes and then Tindle said he was going to speak to his supervisor and he told Tindle that he was going to speak to his supervisor; that “we went up—went back up top to check her employee ID badge [,which was on the board before you go down in the tank.] to make sure who she is. I had no idea who she was. And we got her name and all off her ID badge” (Ibid.); that a Navy man, Chief Hartley, who walks the boat also saw Slay; that he did not have a conversation with Hartley; that there was a guy working on an electrical panel right dead in front of her, and the guy was facing sideways to her; that the guy turned around while he was there, looked at Slay, looked up at him and Tindle, and then just continued working; that the guy was not holding any kind of flashlight or anything; that he talked to his supervisor and later Tindle called him and said that they wanted them to write out a statement; and that he wrote out a statement about he occurrence.

On cross-examination, Richerson testified that Tindle went down the ladder into the hold right ahead of him, we hit the deck about the same time; that he and Tindle together got the information off Slay’s badge before he went to his supervisor; that he wrote her name down and he believed that Tindle did the same; that they then went to their supervisors; that about 1 hour later Tindle called him to come write a statement; that employees come in for the night shift about 3:30 p.m.; that he was at Austal at 1:30 p.m. to get the turnover (what has been done and what needs to be done) from the day-shift people; that when he looked into Slay’s face Tindle was standing right beside him; that Tindle was looking at him when he was looking at Slay; that he looked at Slay’s face just enough to tell that she

had her eyes closed; that when he got up he asked Tindle what they should do; that he told Tindle that her eyes were closed; that Tindle then said, “[w]ell, we’ll watch her for a minute or two. And then he said, you go talk to your supervisor and I’ll go talk to mine” (Tr. 564); that safety on the job is the most important thing; that if he sees a safety violation he is supposed to immediately stop it and correct the problem if he can; that they could have corrected someone sleeping by waking them up and taking them out of the hold; that the Navy guy was there when he left the hold; that the Navy guy’s hardhat was white; that he believed that Tindle’s hard hat was green but he was not sure; that Tindle’s hat had supervisor on it; that at the time there were about 25 people working in that space and it was very noisy; that he was wearing earplugs that day; and that he has been hard of hearing for 5 or 6 years.

Subsequently, Richerson testified, when asked what the guy with Slay was doing, that “[h]e was working on an electrical panel, like wiring up wires inside of an electrical panel.” (Tr. 567.)

Lindley testified that Respondent’s Exhibits 6(B) through (K) are documents showing that Respondent terminated nine employees between March 22, 2005, and April 2, 2008, for sleeping.<sup>17</sup> On cross-examination, Lindley testified that this group of documents are all-inclusive of the terminations for sleeping at Austal up until August 9; that those employees who were caught sleeping and not terminated were not included in this group of documents; that those situations where employees were caught and were not terminated occurred “early on” (Tr. 612); that as indicated in General Counsel’s Exhibit 23, a warning was issued August 30, 2007, for sleeping during work hours; that she would not consider August 30, 2007, “early on”; and that at least as of August 30, 2007, someone was not terminated for sleeping during work hours.

O’Dell testified that it was reported to him that Slay had been sleeping in the ship hull; that he told the supervisor who told him that he should put together their statements and he wanted to know who all was in the room; that he got statements from everyone in the room; that “[y]es he considered them”—those statements in ultimately making the decision that he made (Tr. 691); that Respondent’s Exhibit 73 is Tindle’s statement<sup>18</sup>; that there was another statement, Richerson’s<sup>19</sup>; that he consid-

<sup>17</sup> The April 2, 2008 termination was Mixon, who was the individual who was working with Slay on Marcy 25 when she was terminated for sleeping.

<sup>18</sup> Tindle’s statement, R. Exh. 73 reads as follows:

Tues. 3–25–08

Somewhere around 1:30 pm I was entering into B-14 when I turned around I saw a [sic] employee sitting on a fan in front of a pepco panel. This person had a hoodie on and was not doing anything. I stop[ped] and watched for 3–4 minutes. As I observed [sic] this person the only movement was their head bobbing. I need[ed] [sic] down to see if I could see their face. When I could not I stood back up. At this point they still have not moved. I had another supervisor come up to me & asked the employee [sic] work for me. When I replied no he said he saw them sleeping as well and Chief Hartley. I verified name by badge on void board Carolyn Slay.

Chris Tindle  
Supervisor SFP/outrt

<sup>19</sup> Richerson’s statement, R. Exh. 75, reads as follows:

I Steve Richerson fill in sup. on night shift. Went down ladder off of main deck to Block 14 tank top. I was behind Chris Tindle. We both saw this lady sitting on a bucket sleeping. App.

ered Tindle’s and Richerson’s statements in deciding what action to take; that he was the ultimate decision maker on the issue of termination or discharge for this incident; that he also talked with Chief Hartley who also was an eye witness before he decided to terminate Slay; that Hartley works for the U.S. Navy overseeing part of the construction of the *LCS*; and that Hartley told him<sup>20</sup> that

he was standing there behind who he did not know was a male or a female because they had the hood over the top of their head. He said that he stood there for two or three minutes. The other two supervisors came down in the hull, and he said that he put his arms up like this to the two supervisors.

....  
A. Like what’s going on here?

....  
A. . . . So he told me that he was saying—asked the two supervisors, what’s up with this, and then I said, well, what do you mean by that? And he said, well, for me is this how Austal’s spending U.S. federal money, U.S. Navy money? And I said, okay, well, what else did . . . did you see going on. And he told me that . . . she stayed there for about an additional three to four minutes after the other supervisors arrived, and was there sleeping.

And they were talking very loudly. He said that he had thrown a piece of steel or something on the ground [sic] to try to get her to get up, and that—then I asked him, I said—because at this point . . . through the whole Carolyn Slay and the whole union ordeal, I mean I walked on egg shells as to what to do with the people there—

....  
A. If I knew they were a union supporter, I knew that I was going to have to deal with these types of repercussions later down the road if actions were taken against an employee, disciplinary, period.

....  
A. So I asked Chief, I said, Chief, are you 100 percent certain, and will you testify, that that woman was sleeping in that room? And he said, Yes I will, and, yes, she was.

Q. Now, did that information carry any particular weight with you?

A. It was all the weight. I would not have fired her based upon these two statements. [Tindle’s and Richerson’s.]

Q. Why not?

A. Because of just what has happened. I know that I would have been chastised for terminating an employee who was a union supporter, a heavy union supporter. And the problem was that the policy had come down weeks before, a couple of months before, from Craig Percervelli [who is Austal’s vice president of operations], that anyone caught sleeping was to be terminated, because it was getting to be an epidemic on the ship.

1:30 p.m. I verified by her employee badge her name. *Carolyn Slay Elect.* [Emphasis in original.]

Richerson signed the statement. Respondent’s attorney indicated that he was not offering this statement and the statement of Tindle for the truth of the matter asserted but rather to show what O’Dell’s was basing his action, the termination of Slay, on.

<sup>20</sup> Respondent’s attorney indicated that this was not offered for the truth of the matter asserted but rather for O’Dell’s knowledge and his decision making.

Q. Okay. . . . So by your description you were cautious with your approach here?

A. Absolutely.

Q. Now you're aware, aren't you, Mr. O'Dell, that there have been other employees who have been terminated for sleeping?

A. Yes sir [as evidenced by Respondent's Exhibits 6(A) through 6(K)]. [Tr. 696-698.]

O'Dell further testified that he was aware that there were some employees who were not terminated from time to time for sleeping; that employees sleeping was coming up at a lot of the operations meetings and Percervelli told him, "[e]nough is enough, if employees are caught sleeping, they're terminated, plain and simple. There's no more second chances, there's no more . . . putting them out for two or three days. They're just gone" (Tr. 699-700); and that he could not remember when this occurred.

On cross-examination, O'Dell testified that Hartley told him that he grabbed a piece of steel and threw it on the ground to try to get the person up; that just he and Percervelli were at the meeting regarding employees sleeping at Austal; that he could not recall when the meeting occurred; that the investigation with Slay was done through Pate; that he talked to Hartley, Tindle, and Richerson; that Pate spoke to Mixon as far as he knew; and that "[Pate] talked to her [Slay] whenever she wrote her up and got her side of the story, and then we—then she and I had a caucus, we talked, she told me what she had to say to her, and then we went ahead and made the decision." (Tr. 755.)

Subsequently, O'Dell testified as follows:

JUDGE WEST: So its' your testimony that a subordinate to you, Ms. Pate, actually interviewed Carolyn Slay before the decision was made to terminate Carolyn Slay?

THE WITNESS: I had pretty much made my mind up after Chief Hartley told me what he told me, because we had not at that point—anybody that had been sleeping, we'd not given them any opportunity.

. . . .

THE WITNESS: So out of courtesy Stephanie [Pate] brought her up, wanted to get her side of the story. Stephanie came back in and told me, but, no, I'd already made the decision.

JUDGE WEST: All right. So Stephanie Pate was not on notice before she interviewed Carolyn Slay that Carolyn Slay was going to be terminated?

THE WITNESS: No. [Tr. 755-756.]

Pate was not called as a witness.

Antiunion T-shirts were passed out on March 28 to Austal employees.

Watkins testified that the second time Respondent passed out antiunion T-shirts, the shirts were gray (GC Exh. 32) and she saw Supervisor Ladd Mallard there passing out T-shirts; that the shirts have "AUSTAL WORKS BEST, AUSTAL, UNION FREE" on the front and back; and that Mallard was wearing a white hat and he had been a supervisor for about 2 months at that time, and he worked on the *Hawaii Super* freighter side of Austal.

Gatwood testified that individuals were passing out T-shirts to employees as they came in and left work at the turnstiles on a second occasion; that the individuals handing out shirts had white hardhats and khaki shirts on; that he took a company T-shirt this time; that the person who handed him the shirt did not

say anything to him; that he has seen the person who handed him a T-shirt around the shipyard before wearing a white hardhat; and that he thought that the person was a supervisor.

As noted above, Epperson testified that she was at the LCS gate both times Austal passed out T-shirts. On cross-examination, Epperson testified that the second day it was her and a couple of guys from the welding department or piping who passed out the shirts.

As noted above, Godwin distributed the gray Austal T-shirt in addition to the blue one.

Cleveland testified that the Union increased its efforts to organize Austal's employees in late March 2008 in that additional organizers were brought in, a house-call campaign commenced on March 24, and union representatives visited approximately 1200 people at their homes during that time period; that the Union sent several general information letters to the employees' homes; that after Wayne Jenkins and Gatwood were reinstated the Union formed an in-house committee and Slay was on the committee; that Slay was terminated by Austal on March 25, the day after the Union's home visits started; that after March 24 union representatives went to Austal's gate just about every morning, whether or not the Union had a handbill to give out, so that the union representatives could greet the employees as they went in and out of work; that on March 25 the Union had four teams of organizers handbilling at Austal's gate with 12 to 16 people on each team; that Slay was with the union representatives at Austal's gate on March 25; and that prior to this the Union had not had so many people handbilling at Austal's gate.

Slay testified that after she was fired she passed out material on behalf of the Union; and that she did not pass out union material at the gate before she was fired.

Pettibone testified that a week or two before the Board election, O'Dell talked to him about his union activities; that at the time they were in O'Dell's office; that O'Dell asked him why he would pay the Union for something that was not good for him; that he wore a union T-shirt given to him by Slay, he wore union pins, and he wore union stickers on his helmet; and that Slay wore union T-shirts.

The General Counsel and Respondent stipulated that General Counsel's Exhibit 30 was passed out to the employees in March 2008. They did not know how or exactly when it was passed out. The 1-page document is to all employees. It refers to a Board election to be held sometime in the future, it answers three questions (about union dues, decertification, and the Union contacting employees at home), and it concludes with "say NO to the union." One of Austal's answers to the questions it poses is "[i]f you don't want to pay dues to the union, encourage your coworkers to vote NO. Just do so during your non-working time (breaks and lunches, etc.)."

Petitioner's (Union's) Exhibit 1 is an e-mail from Connolly to Michelle Bowden, dated "3/31/08" regarding "Austal USA Vehicle Sale." It reads as follows:

Tired of using Grandma's Pinto to drive to work?  
 Do you feel the need for speed?  
 Austal cars are for sale this week!!  
 10 cars are displayed at the front of the  
 Admin Building for you[r] viewing pleasure.  
 Min Bid prices are in windows  
 Cash or Bank Checks only—no payroll deductions.  
 PLUS  
 that "new-car-freshly-detailed-scent"  
 comes free with the purchase!!!  
 See Bria in HR before Thursday afternoon to buy

Hudson testified that he saw a notice about bidding on vehicles posted on a number of bulletin boards at Austal during the union campaign; that he looked at the cars but did not place a bid; and that before this he did not see any such notices and there were not any car auctions at Austal. On cross-examination, Hudson testified that nobody was given a car; that the auction was open to everybody; and that there was a price tag on the windshield.

Gatwood testified that he saw a notice of the car auction posted on the bulletin board in the break room on the *Hawaiian* ferry side and by the timeclock; that when he worked at Austal up until he was laid off in 2002 there had never been any car auctions at Austal; that he looked at the cars outside the administration building; that he did not see any minimum bid posted on the cars; and that he did not bid on the cars and he did not know of anyone who made a bid.

Connolly testified that one of her responsibilities regarding expatriates was to provide them with an automobile under the terms of an expatriate agreement while they were in the United States; that Austal owned all of these vehicles; that in March 2008 there were at least 12 vehicles parked in the shipyard from expatriates who had left the United States; that if the number of Australians or expatriates had not been shrinking, there would not have been a car sale; that these vehicles, which were at least 7 or 8 years old, were registered, and Austal was paying insurance on them; that Austal did not need them anymore because Austal did not anticipate ramping up its expatriate work force<sup>21</sup>; that the HR decided to sell the vehicles; that she was asked to sell these cars in conjunction with Austal's accounting department, which helped HR come up with the price of the vehicle; that the vehicles were generally priced at their trade-in value and it was decided that the vehicles would be offered to employees first; that the vehicles were moved to a central location in the shipyard, the administration building, and they were left there for about a week so that employees could look at them; that the sale was advertised by flyers which were posted and e-mails; that the price of the vehicle was placed on one of its windows; that in one instance only did more than one person express an interest in the same vehicle, and in that instance one of the two decided he did want the vehicle after all; that Respondent's Exhibit 83 is a vehicle matrix that she maintained; that she recalled that in March 2008 vehicles were sold to Melanie Bachelor, James McNair, James January, Dwain Mur-

<sup>21</sup> Connolly explained that Austal has military contracts with the United States Government and there are limits on the number of people that can work on certain projects who are not American citizens; and that it was decided that unless expatriate employees were in a critical position, most of them would have to return to Australia at the expiration of their contract. Consequently, the expatriate work force was being downsized.

phy, Ronnie Glen, Ralph Compton, and Jay Coleman; and that she did not have a separate document showing the vehicles which were sold in March 2008.

On cross-examination, Connolly testified that one of the vehicles was purchased by Chris Moyle, who was the fabrication manager at the time; that another vehicle was purchased by Chad Lurie; that she was not sure whether Lurie was a supervisor; and that the vehicles had been sitting in the shipyard between 3 and 9 months.

General Counsel's Exhibit 12 is Austal's spring 2008 newsletter, "Aluminum Times" which was mailed to its employees just prior to the rerun election. There is a picture of Bob Browning, the president and CEO of Respondent, wearing a white hard (GC Exh. 12(a) is a color copy of the first page of the newsletter) hat on the first page of this newsletter with a letter to "Dear Fellow Employees." In the letter, Browning indicates, among other things, as follows:

In the next few days many of you will be asked to decide whether you want a union to represent you as it relates to your employment at Austal USA. It is a very important decision that you're being asked to make. If a union is elected, the very basis upon which the employer-employee relationship is based will change. No longer will it be permissible for you, as an individual, to deal directly with us and negotiate the terms of your employment, your concerns, or your working conditions. By law, your right will have been handed over to the union to do your talking for you. As you've learned, no one knows how that will turn out.

....

In my opinion, the best yardstick you can use to determine working conditions in the future is by looking at how far we've come from the past. Actions speak far louder than words! As far as promises made by others, outside the company . . . talk is cheap!

One of the articles on page 3 in the newsletter is titled "*Union Free and Proud to Be!*" (by Joe Rella). It reads, in part, as follows:

. . . Employees have the right to speak their mind, no matter whether you're for or against the union. Just make sure you are doing so during nonworking time rather than when you're performing your job duties. You don't have to stand by quietly while the union tries to divide the workforce. Let your voice be heard.

While you're speaking out, we'll do the same. It's no secret that we believe we're better off without 441. Why? We've made great progress in the past several years, growing from just a few employees to over a thousand. We've been able to do it because we've worked together with employees to bring great high paying jobs with outstanding benefits to Mobile. Unlike other shipyards, we don't have strikes and we don't fight against each other. Maybe that's why we're now among the fastest growing shipbuilders on the Gulf Coast and we've done it in just a few short years. And we've done it without any union asking employees to pay dues, especially a union that's had nothing to do with our success.

We're all looking forward to having this process end on April 9. We hope you'll help it end by voting "NO" on election day. In the meantime, let's keep working together to secure our future.

Another article on page 3 in this newsletter is titled "*Improved Employee Parking.*" This article reads in part as follows:

... The current parking area leaves little to be desired. However, our long-term plans include a complete revamping of our parking areas that will include:

- Paved parking areas for all employees
- Sufficient lighting for improved safety
- Landscaping
- Multiple entrance/exit locations
- Effective drainage (no more puddles to navigate)
- Clearly marked parking spaces
- Effective fencing for improved security

The current employee parking lot will be paved and remain as the parking area for Shipyard employees. Employees working in the modular facility will be parking on the South and East side of the new facility.

Our current plans include breaking ground mid-year and finishing construction by July of 09. While this might seem like a long time to wait, the results will be well worth the wait. . . .

And on page 4 this newsletter also contains an article titled "*Door to Door Prescription Drugs,*" which article reads as follows:

Mail Order Prescription Drug Service includes maintenance drugs which are generally used to treat chronic conditions and are taken for a period of 30 days or longer. You can order your prescriptions by calling the supplier, mailing in a required form or by ordering online. The benefits of using the Mail Order Service are cost and convenience. For example, a 90 day supply of a maintenance drug will cost you the same as a 60 day supply purchased at the pharmacy. You also have the convenience of home delivery which generally takes up to 14 days; however prescriptions can be shipped via an overnight carrier for an additional charge.

To find out if the drugs you are taking are available for this service, please contact the customer service number on the back of your insurance card. For more information about this benefit contact Terri Lindley or Nick Robertson in Human Resources.

Slay testified that on April 5 she received a newsletter in the mail from Austal (GC Exh. 12); that she had never received an Austal newsletter in the mail before receiving this one; that the newsletter referred to improvements to the employee parking lot, which would have been a benefit to employees; that in the past employees had complained about the parking lot, and sometimes when it rained she would ask a security guard to get her car out of the lot for her because the water would be so deep; that she believed that in November 2007 Respondent finished the crosswalk and the walkway from the parking lot; and that prior to this newsletter she was not aware of a door-to-door prescription drug benefit plan and such a plan would be a benefit to employees. On cross-examination, Slay testified that before the crosswalk and walkway were completed employees crossed the street en masse and walked the 1- long block either down the side of the road in high grass or in the middle of this busy road; and that it was a safety issue for employees to cross and to walk down that public road.

Hudson testified that he received General Counsel's Exhibit 12 in the mail sometime in March or April 2008 before the Board election; that during the union campaign the employee parking lot was so muddy at times that cars had to be pulled out; that employees made many complaints about the condition of the parking lot; that the improvements to the parking lot described in General Counsel's Exhibit 12 would have been a benefit to employees; that he had insurance through Austal and before he received this newsletter in the mail and saw this door-to-door prescription drug benefit this benefit was not, to his knowledge, included in the insurance he had; and that the door-to-door prescription drug program would be a benefit to employees.

Gatwood testified that he received General Counsel's Exhibit 12 in the mail in late March 2008; that before this he had never received any newsletters from Austal in the mail; that during the union campaign the employee parking lot had a lot of potholes and standing water when it rained; that there were a lot of employee complaints; that the article in the newsletter seemed to address some of the complaints of employees; that if Austal completed the proposed improvements it would have been a benefit to employees in that "[y]ou wouldn't get your feet wet in the morning getting out of your car, visible lines where you could park your car, better lighting, security, wouldn't worry about your vehicle getting broke into" (Tr. 302); that before April 9 the surface of the parking lot was graded to fill in the potholes; and that since his return to Austal in November 2007 that had not been done prior to that time.

In April 2008, before the Board election, Hudson, according to his testimony, was talking to employees about the Union once or twice a week while he was wearing a union shirt. Hudson testified that Coordinator Logan approached him by the toolboxes; that Logan told him that the higher ups were saying that he was causing chaos; that he asked who and he started giving Logan names; that Logan told him that it was higher up than the names he gave; that Logan said, "[Y]ou're trying to get me run out of here." (Tr. 250); that he was wearing a union shirt at the time and this conversation occurred around the toolboxes; that Logan told him that he could not say who and he should pipe down a little bit; that Logan said, "[H]e heard higher ups talking that I was talking about the union." (Id. at 252); and that Logan approached him two times, and both times Logan told him to pipe down about the Union.

Logan testified that he did not have discussions with Hudson where he indicated to Hudson anything about the Union; that he did not ever tell employees that were talking to any other employees about the Union that they should quit; and that he never told a union supporter that they should quit their job because they were supporting the Union.

Pettibone testified that prior to the Board election employees talked about nonwork-related matters like problems at home and women while they were working, and sometimes (maybe once or twice a week) he talked to supervisors about these topics while he was working; and that he was never told that he could not talk about those things while he was working.

Hudson testified that prior to the Board election on April 9, 2008, employees talked about non—work-related matters while they were working; that such conversations included fishing and hunting; that supervisors participated in these conversations; that employees have been told that they could not talk about fishing and hunting while they were working but rather they should do that on their breaks and at lunchtime; that not-

withstanding this directive, employees still talked about non-work-related matters while they worked; that he observed supervisors talking about topics like hunting and fishing during worktime all of the time; and that the prohibition was not enforced but people from the head office did not want it to occur and they were telling the coordinators and supervisors that too much talking was going on and not enough work. On cross-examination, Hudson testified that he was aware that employees have been disciplined for talking when they should have been working and it did not matter what the subject matter of the discussion was.

Gatwood testified that before April 9 he and other employees talked about nonwork-related matters such as hunting, fishing, and sporting events while they were working; that he had supervisors talk to him about these items while he was working; that he worked on crews with Pettibone; that prior to the Board election in April 2008 he saw an offer of a travel agent program on the employee bulletin board; that the substance of that offer was travel discounts, hotel discounts, car rental, and assistance from a travel agent; and that prior to seeing this notice he had not seen or heard of any similar offers to employees. On cross-examination, Gatwood testified that the travel agency notice was posted on two bulletin boards; that he had no idea who posted the flyer which referred to a specific travel agency; that these were discounts offered by that travel agency; and that he was not aware whether the discounts offered by the travel agency were specific benefits offered by Austal.

Lindley testified that since she has been at Austal (since September 2004), there has never been a travel agent program, there has never been a company sanctioned or sponsored discounts for employees regarding travel, and no such program, to her knowledge, was implemented in 2008 prior to the election.

Godwin testified that he discussed fishing, hunting, family, and sports while he was working.

Lindley testified that employees have been disciplined for (a) not doing their jobs while on working time, (b) for being unproductive, and (c) for talking too much when they're supposed to be working (R. Exh. 7); that she pulled the documents in Respondent's Exhibit 7 herself, which is a sample for 2006, 2007, and 2008<sup>22</sup>; that the disciplines in Respondent's Exhibit 7 are examples of disciplines during that time period and it is not intended to be all-inclusive; and that Respondent's Exhibits 7(B), (M), (O), (R), (X), and (KK), involve disciplines to employees for talking instead of working [usually described in the discipline in terms of standing around and talking (with one referring to a cell phone) and not doing the work assigned].

As noted above, on April 9 the Board's rerun election was held. Slay voted in the election.

Pettibone testified that he was an observer for the Union during the rerun election when Onie Barret could not be there.

General Counsel's Exhibit 29 is a five-page position statement of Respondent dated June 16, 2008. It refers to the alleged rule against talking about unions during working time, the "You won't be promoted if you support the union" allegation, the Carolyn Slay "I have the right to leave during working time to go get my cell phone" allegation, and the company distribution of shirts and literature.

By letter dated September 5 (GC Exh. 3), referring to charge Case 15-CA-18547 Respondent's attorney, Terry Dawson,

<sup>22</sup> The exhibit includes one example for each of the years 2003, 2004, and 2005.

advised counsel for General Counsel Kevin McClue, as here pertinent, as follows:

....

2. You requested the handbook in effect from January 1, 2007 to November 30, 2007. Austal's November 1, 2007 handbook was Austal's first published handbook.

3. You requested information concerning Slay's duty assignments. Slay's third amended charge alleges that she was 'repeatedly transferred' because of her union activities. This is simply false. Slay was classified as a welder in the electrical department throughout the relevant time frame. Slay worked for the following supervisors during the requested timeframe:

- a. Chad Steele until 11/11/07
- b. William Ready 11/12/07-12/9/07
- c. William Dilley 12/24/07-1/14/08
- d. Roderick Jackson 1/15/08-discharge<sup>1</sup>

Working for several supervisors is hardly unusual. Fitter Chris Bowdoin worked on the LCS (the same ship as Slay) for *five* [emphasis in original] different supervisors during the timeframe, as follows:

- 1. Lemuel Lewis 10/15/07-11/11/07
- 2. Richard Oliver 11/12/07-12/09/07
- 3. Chad Steele 12/10/07-4/13/08
- 4. Michael Vanhook 4/14/08-5/11/08
- 5. Ray Evans 5/12/08-present

Finally, you asked about any documents regarding Slay's discharge. Austal has previously provided Chief Hartley's affidavit, which reveals his discovery of Slay sleeping. As previously mentioned, two other supervisors, Chris 'Frank' Tindle, and Steve Richerson, also witnessed Slay sleeping. Neither was her regular supervisor and both witnessed her sleeping. Their brief statements are enclosed. [Exh. 2.]

....

<sup>1</sup> Roderick Jackson filled in as supervisor while William Dilley was on leave of absence.

While the attached affidavit of Chief Hartley was included as part of General Counsel's Exhibit 3, it was not received for the truth of the matters asserted therein.

By a letter also dated September 5 (GC Exh. 4), referring to charge Case 15-CA-18676 Dawson, as here pertinent, advised McClue as follows:

....

## 2. Shirt Distribution

As described in Austal's prior response, no supervisor or manager was involved in handing out shirts during the organizing drive. The employees who handed out shirts were Aaron Jordan (Fitter), James McNair (Fitter), and Jonathan Brooks (Welder). Jeff Garl (Subcontracts Buyer), Tracy Mathis (Supply Commodity), Caryn Buckley (Administrative Assistant), Rena Epperson (Administrative Assistant), Bria Connolly (Expatriate Compliance Administrator), and Susan Sime (Recruiter) were also present to assist and make sure that the process was conducted in an orderly way. Austal objects to providing personnel files for these persons, but has no objection to providing rele-

vant documents that establish that none are supervisors. The employees were told the same thing as in the posting that went up before any distribution (and which was provided in Austal's initial response); i.e., that the company wanted no report on who took such shirts or did not take them. As described at great length in its prior submission, NLRB case law establishes that Austal acted entirely within the law in so doing.

Regular supervisors wear white hats. No supervisor, including Yancy Allen, Clinton Hayes, and Gary Logan, distributed shirts. Indeed, Austal forbade any supervisor from being in the area at the time. There is no mandated color of pants for supervisors.

Austal has never employed anyone named Jim Clemmons. Yancy Allen was a Fabrication supervisor; Clinton Hayes was an HVAC Supervisor, and Gary Logan was an HVAC foreman. Jeff O'Dell is Director of Human Resources, Chad Steele was an Electrical Supervisor, and James Thomas was an HVAC supervisor. Diane Great-house was a temporary employee until March 31, 2008 when she became a Payroll Clerk. She has never been a manager or supervisor.

## 2. Miscellaneous

Your letter mentions that the union also alleges that supervisor James Thomas told employees they would not be promoted because of union activity. The allegation gives no details, but Thomas never said any such thing. Indeed, Austal allowed a known pro-union employee, David Gillett, to begin serving as a stepup supervisor in January of 2008 and promoted him to supervisor in March. Significantly, Gillett made no secret that he was a former union shop steward for the Sheet Metal Workers union and that he supported the union, the same union that was attempting to organize Austal. If Austal denied promotions to employees due to union sympathy, one certainly has a difficult time explaining Gillett's promotion.

Attachments to General Counsel's Exhibit 4 include a record of warning dated October 12, 2007, to an employee for showing others a picture on his "P.D.A." instead of doing the task assigned, a documented verbal warning dated March 18 to an employee for distribution of antiunion propaganda during work hours, and a copy of Austal's cell phone policy.

By e-mail dated September 15 (GC Exh. 7), McClue posed the following questions to Dawson:

Thank you for your position statements dated September 5, 2008 in Case Nos. 15-CA-18547 and 15-CA-18702.

Regarding 15-CA-18547, you indicated in the position statement that the employee handbook was published on November 1, 2007. What was the Employer's solicitation/distribution policy prior to the publication of the November 1, 2007 handbook? How was the policy disseminated to the employees?

Regarding 15-CA-18702, you indicated in the position statement that on March 21, 2008, Slay received a verbal warning for having accrued more than four occurrences. What are the dates she received the occurrences? Why did she receive the occurrences?

By letter dated September 19, Dawson responded, indicating as follows:

Prior to the dissemination of its handbook in November of 2007, Austal had no formal written policy. It nevertheless expected employees to be working when on working time rather than performing non-work activities as demonstrated by the information previously sent.

As to Ms. Slay's March 21, 2008 verbal warning for accruing more than 4 points, the following is her attendance record to that point:

2/5	absent	1 point
2/8	absent	2 points
2/14	tardy	2-1/2 points
2/22	absent	3-1/2 points
3/6	tardy	4 points
3/7	tardy	4-1/2 points
3/11	absent	5-1/2 points
3/14	absent	6-1/2 points
3/18	tardy	7 points

This history dramatically undercuts Slay's claim that she was somehow being more closely scrutinized than others. Indeed, Slay had truly accrued 7 points by March 21st, which meant she was nearly due a written warning (called for at 8 points). If Austal was truly 'more closely supervising' Slay, one would expect that the company would have been 'all over' her attendance points. Instead, it was lagging behind. Considering the complete lack of evidence (and credibility) of the allegations, it appears that the union is simply filing any claim it can think of in an effort to harass Austal. Austal respectfully requests that the charge be dismissed.

By letter dated November 14 (GC Exh. 10), Dawson advised the Regional Director for Region 15, among other things, that Austal posted the Board notices in accordance with the Board's Order of March 21, 2007, at multiple locations for 60 days beginning on November 26, 2007.

O'Dell stopped working for Austal in early January 2009.

### III. ANALYSIS

#### A. Alleged Unfair Labor Practices

Paragraph 8 of the complaint alleges that about December 2007, Respondent, by James Thomas, at its facility, told employees that they would not be promoted because of their support for the Union.

The General Counsel on brief contends that while it appears that Austal is taking the position that Thomas could not have made the statement to Hudson in March 2008 because Thomas was not employed by Austal at the time, Respondent did not introduce records that showed the exact date Thomas allegedly resigned; and that a supervisor suggesting to an employee that he would receive a promotion if he discontinued his union activity violates Section 8(a)(1) of the Act, *Leather Center, Inc.*, 308 NLRB 16 (1992).

The Union on brief argues that Thomas's denial of having made the statement at issue was perfunctory and should not be credited; that since Hudson is a current employee of Austal, he is putting himself in jeopardy by testifying against the interest

of his current employer; and that this behavior is obviously unlawful, *Dayton Tire & Rubber Co.*, 216 NLRB 1003 (1975).

Respondent on brief contends that if Thomas had been disposed to favor labor or management, he likely would have been biased in favor of labor; that Thomas owed the Union for helping him find work; and that the idea, therefore, that Thomas would threaten someone due to their union support is suspect and Thomas adamantly denied so doing.

In my opinion, James Thomas did tell Hudson that if he wanted to be supervisor, he had to shave, tuck in his shirt, not be a rebel, and quit wearing union shirts and union paraphernalia. Hudson impressed me as being a credible witness. James Thomas worked his way up from being an employee to being a supervisor in a short period of time at Austal. He had worked on many jobs with Hudson before and it would be only natural for him, once he became aware that Hudson wanted to be a supervisor, to offer Hudson some friendly advice—without realizing the legal ramifications of what he was doing since, at the time, he was a supervisor. As far as the timing of the statement is concerned, Hudson may have been mistaken when he testified that this conversation occurred in March 2008 before the Board election. As noted above, Hudson also testified that the conversation occurred after a notice was posted on a bulletin board at work regarding employees' rights under the Act. It appears that the Board notice to employees was posted for 60 days starting in late November 2007. The allegation in this paragraph of the complaint speaks to December 2007. Thomas could not remember when he became a supervisor. He did testify that he started at Austal in the summer of 2007 and was a supervisor when he left Austal. Although Hudson did not provide the exact date when James Thomas made the statement, it is clear that Thomas was a supervisor at Austal sometime between the posting of the Board notice to employees and the April 2008 Board election, and that Hudson worked for him while he was a supervisor at Austal.<sup>23</sup> In my opinion, Austal violated the Act as alleged in paragraph 8 of the complaint. What might have seemed, to Thomas, like friendly advice to Hudson was in fact a violation of the Act. A supervisor suggesting to an employee that if he wanted to be a supervisor at Austal, he would, among other things, have to quit wearing union shirts and union paraphernalia violates the Act, *Leather Center*, supra. No matter how well intentioned Thomas's statement might have been, it was the type of statement which would have reasonably tended to interfere with, restrain, and coerce Hudson from supporting the Union, and Austal thereby violated Section 8(a)(1) of the Act.

Paragraph 9 of the complaint alleges that about the last week of January 2008 or the first week of February 2008, Respondent, by Chad Steele, told employees they could not discuss the Union during working hours.

The General Counsel on brief contends that Respondent did not introduce any evidence that since the Board issued its Decision and Order on March 21, 2007, that it (a) published a written work rule prohibiting all nonwork-related talking or (b) announced a verbal work rule prohibiting all nonwork-related talking, such as talking while working or talking while waiting for a supervisor to come to solve a problem; that Respondent

<sup>23</sup> The General Counsel's request that an adverse inference be drawn against Respondent based on its failure to produce the change of status and/or personnel clearance report form of Supervisor Thomas to show his last day of employment with Respondent is granted.

did not institute a work rule prohibiting all nonwork-related talking; that the evidence of record clearly demonstrates that numerous employees talked about nonwork-related matters while working; that Connolly testified that employees in HR routinely stood around and talked to each other about, among other things, their social lives; that sometime between Christmas 2007 and February 28, 2008, Steel prohibited Nyanga from talking to other employees about the Union while he was working; that Steele's talking prohibition was strictly aimed at preventing employees from talking about the Union in that it did not restrict all nonwork-related talking and it did not restrict talking which interfered with production; and that as in *Austal USA, L.L.C.*, 349 NLRB 561 (2007), Respondent discriminatorily restricted employees from discussing the Union and violated Section 8(a)(1) of the Act when Steele prohibited Nyanga from talking about the Union.<sup>24</sup>

The Union on brief argues that there is no reason to disbelieve the testimony of admitted supervisor Steele on this point; that what occurred must be viewed in the context of a longstanding practice of allowing employees and supervisors to talk about all manner of things during their work; and that it is clearly unlawful to impose a no talking about the union rule while there is no rule against talking about other nonwork-related subjects, *Sam's Club*, 349 NLRB 1007 (2007).

Respondent on brief argues that Steel is a disgruntled former employee who was terminated for fighting and whose testimony is unreliable; that Steel's testimony was full of inconsistencies on a variety of topics; that even if one credits Steel's suspect testimony, Steele testified to nothing that established any violation or disparate treatment regarding a talking prohibition; that Steele mentioned only two isolated instances when he allegedly told employees to stop talking and get back to work; that on both occasions, Steele stated that he noticed the employees were not working while on the clock, but rather were standing around talking; that the Simon situation involved employees talking while they were supposed to be working, and Steele told Simon that he did not care what Simon did on his break; that on the other occasion Steele told Nyanga and another unnamed employee who were talking and did not return to their work station when breaktime ended; that in both situations Steele required employees who were not working while on the clock to get back to work; that even if Steele's testimony is believed, it establishes no violation because it is axiomatic that employers may expect employees to work while on the clock; that neither the General Counsel nor the Union presented Simon or Nyanga—the only two employees specifically identified—to corroborate Steele's story and, therefore, an adverse inference against the General Counsel and the Union may be drawn since they failed to call witnesses who may reasonably be presumed to be favorably disposed to their position, *Battle Creek Health System*, 341 NLRB 882, 884 (2004)<sup>25</sup>; and that “[i]n contrast, other supervisors . . . testified that if they heard

<sup>24</sup> At p. 65, fn. 14 in its brief, the General Counsel submits that although it is not alleged in the complaint, Respondent violated Sec. 8(a)(1) of the Act when in late November 2007 O'Dell told Gatwood he could not discuss the Union during working time, when Steele told Simon not to talk about the Union during working time, and when Respondent posted GC Exh. 30 on its bulletin board in March 2008 telling employees they could only talk about the Union during non-working time.

<sup>25</sup> Steel was an admitted supervisor. There is no need to corroborate his admission that he engaged in unlawful conduct.

any discussions *that interfered with work*, they would instruct employees to get back to work—regardless of the topic.” (R. 18.)

In my opinion Austal through Steele violated the act as alleged. At the time of the violation Steele was an admitted supervisor. While Respondent on brief wants to focus the spotlight on what was happening when Steel had his conversation with the employees, the real point of focus is what Steel told the employees. Also, with respect to the last argument of Respondent as quoted above, talking about the Union is not, according to the dictate of Steele, judged on the basis of whether it interferes with work. Rather, whether or not discussing the Union interferes with work, during working hours it is prohibited according to Steele. With respect to Austal’s argument regarding an adverse inference, it has not been shown that it is reasonable to presume that the employees involved are favorably disposed toward the Union or the General Counsel. Respondent could have called the involved employees. It did not. In my opinion Steele is a credible witness. Additionally, long before Steele told employees that they could not discuss the Union during working hours, Austal was found to have acted unlawfully in that it discriminatorily restricted employees from discussing the Union during working hours. *Austal USA, L.L.C.*, 349 NLRB at 566. As pointed out by the Board in *Sam’s Club*, supra at 1009,

It is . . . well established that “an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees’ work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work.” *Jensen Enterprises*, 339 NLRB 877, 878 (2003).

As noted above, Steele testified that while he was a supervisor at Austal employees talked about nonwork-related matters while they were working, and the topics included NASCAR, football, and girls, “we talked about anything and everything” (Tr. 85). By telling employees that they could not talk about the Union during working hours while allowing them to talk about other nonwork matters, Austal through Steele violated the Act as alleged in paragraph 9 of the complaint.<sup>26</sup>

Paragraph 10 of the complaint alleges that since about February 1, 2008, Respondent, by Roderick Jackson, threatened employees with termination because of their activities and support of the Union.

The General Counsel on brief contends that it should be noted that at the beginning of the trial Austal stipulated that as of February 1, Jackson was a supervisor; that when Slay became sick at work and had to leave in early March 2008, Jackson told her that if she left, to make sure she brought back an excuse because they were after her, and he was trying to protect

<sup>26</sup> As pointed out by the Board in fn. 2 of its decision in *Austal USA, L.L.C.*, supra, under certain circumstances, similar violations not alleged in the complaint could be found. Here, the other similar violations the General Counsel cites in fn. 14 of his brief serve to further demonstrate Austal’s longstanding position with respect to employees discussing the Union, vis-à-vis other nonwork-related matters during working hours. I believe that in the circumstances extant here these additional similar violations are cumulative and need not be specifically addressed further.

her; that later in the month of March 2008 Slay had to leave work early to pick up her daughter from school and Jackson again told her to make sure she brought back an excuse because they were after her and he was trying to save her; that Austal did not call Jackson as a witness in this matter and, therefore, Slay’s testimony is not refuted; that based on the fact that O’Dell previously told Steele he was setting Slay up by moving her from one crew to another, and other instances of antiunion animus in general and specifically against Slay, the only reasonable inference is that the “they” Jackson was referring to when he warned Slay was O’Dell; and that threatening an employee with termination because of their support for a union would certainly chill Section 7 activities and would, therefore, violate Section 8(a)(1) of the Act.

The Union on brief argues that admitted Supervisor Jackson was not suggesting that he had this animus or goal himself but rather he was passing along the knowledge that this was upper management’s approach; that Slay’s testimony about what Jackson told her is undisputed; that it is strong evidence of the unlawfulness of Slay’s termination; that Jackson’s own personal motive was not evil, but the speaker’s motive is not the dispositive question in the Board’s analysis of whether a statement is coercive; and that the information that Jackson passed on about the desires of higher-up management would naturally coerce and restrain employees in the exercise of Section 7 rights, thus, making this a violation of Section 8(a)(1) of the Act.

Respondent on brief contends that the General Counsel and the Union:

failed to present evidence regarding [p]aragraph 10 alleging that supervisor Roderick Jackson threatened employees with termination because of union activities and/or support for the Union. Rather than present evidence that Jackson threatened anyone, General Counsel actually presented evidence that Jackson was cognizant of and sought to protect employee rights. (Slay, 143, 176, 204.) [R.Br. 6.]

Austal’s approach on brief is “interesting, very interesting.” Talk about taking a negative and, with spin, presenting it as a positive. Austal did not call its supervisor in any attempt to refute this allegation. It is undisputed. I find Slay to be a credible witness. The fact that Austal chose not to challenge Slay with respect to what Jackson told her not only adds to her credibility but it leaves unchallenged this insight supplied by one of its supervisors into Austal’s motivation with respect to its treatment of Slay. As pointed out by the Union, while Jackson’s own personal motive was not evil, the speaker’s motive is not the dispositive question in the Board’s analysis of whether a statement is coercive. Notwithstanding Austal’s spin, Austal, for the reasons specified above (supplied by the General Counsel and the Union on brief), violated paragraph 10 of the complaint.<sup>27</sup>

Paragraph 12 of the complaint alleges that about February 1, 2008, Respondent, by Jeff O’Dell, at its facility (a) threatened employees with termination because of their activities on behalf of the Union; (b) interrogated employees about their union activities and the union activities of other employees; and (c) gave employees the impression their union activities were un-

<sup>27</sup> The General Counsel’s requests for adverse inferences regarding Austal’s failure to call Jackson to deny this testimony of Slay are granted.

der surveillance. And paragraphs 13 and 14 of the complaint allege that at all material times, Respondent, at its facility, has maintained a distribution and solicitation rule and by Jeff O'Dell has selectively and disparately enforced the rule by prohibiting union solicitations and distributions, while permitting nonunion solicitations and distributions.

The General Counsel on brief points out that in its November 2007 employee handbook, at page 14 of General Counsel's Exhibit 5, Respondent published a no-solicitation/no-distribution policy, namely, as here pertinent:

Austal has adopted rules about the solicitation for any cause and distributing literature of any kind in the workplace in order to prevent disruptions in business or interference with work. Employees may not, therefore, distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions or solicit for any other cause during working time. Employees who are not on working time (for example, those on lunch hour or breaks) may not solicit employees who are on working time. Furthermore, employees may not distribute literature or printed material of any kind in working areas at any time. . . .

The General Counsel contends that despite this work rule, the undisputed evidence is that in December 2007 Coordinator Bradford solicited Watkins to buy items for a school fundraiser while Watkins was in her work area working; that it is undisputed that Supervisor Jackson sold a CD in a work area; that there is no evidence that either Bradford or Jackson were disciplined; that employee McNair was allowed during his worktime to leave his work area, walk to HR, pick up some boxes containing antiunion shirts, and stage the boxes at Respondent's gate so that the antiunion shirts could be distributed to employees; that employees Miller, Garl, and Epperson passed out the antiunion shirts during their working time and while they were on the clock; that Respondent did not always follow its no-solicitation/no-distribution policy; that Respondent disparately enforced the policy to discourage activity that supported the Union, and to encourage activity that was against the Union; that Respondent enforced the no-solicitation/no-distribution against Slay when she distributed union T-shirts on February 1 but not against Bradford, Jackson, or any of the employees who assisted in the distribution of the antiunion T-shirts while they were on the clock; that Respondent selectively and disparately enforced its policy in violation of Section 8(a)(1) of the Act, *Waste Management of Arizona*, 345 NLRB 1339 (2005) (the discriminatory enforcement of a facially valid policy is a violation of the Act); that O'Dell's questioning Slay about her union activity of giving union shirts to employees and questioning her regarding whether Watkins was passing out union shirts to employees were unlawful interrogations in violation of Section 8(a)(1) of the Act; that by telling Slay that 10 witnesses said that she was passing out shirts, O'Dell gave the impression her union activity was under surveillance; that this implied impression of surveillance was also a violation of Section 8(a)(1); and that by telling Slay that she could be terminated for passing out the shirts to employees, O'Dell threatened Slay with termination in violation of Section 8(a)(1) of the Act.

The Union on brief argues that O'Dell, during his February 1 discussion with Slay, threatened employees with termination because of their prounion activities and interrogated employees about their union activities and the union activities of others; that it is indisputable that prior to November 2007 Austal had

no formal written policy about solicitation at work; that the adoption of this policy in the critical period and during the run-up to the second election, was unlawful and objectionable; that as the Board has recognized, even a facially valid no-solicitation policy is unlawful if it is adopted in order to interfere with the employees' right to self-organization, *Cannondale Corp.*, 310 NLRB 845, 849 (1993); that the fact that a policy is newly adopted and announced during the critical period makes out a prima facie case of a violation, *Harry M. Stevens Services*, 277 NLRB 276 (1985); that this is bolstered by the fact that the policy is accompanied by an announcement of the Company's antiunion stance, and the fact that there is no evidence that there was actually any other existing problem that the policy was designed to deal with; that the policy was unlawful in its motivation; that the reason that Austal adopted this new no-solicitation policy when it did was because this case was coming back for a new election; that Respondent selectively and disparately enforced this rule by prohibiting union solicitation and distributions while permitting other solicitations and distribution; that Respondent's Exhibit 4 demonstrates the enforcement of this rule as to union related matters; that Respondent's targeted enforcement of the no-solicitation policy with respect to Slay was a violation of the Act; and that the discriminatory enforcement of a facially valid policy is a violation of the Act, *Waste Management of Arizona*, supra.

Respondent on brief contends that Slay admits that O'Dell merely asked questions regarding whether she passed out shirts in working areas and whether she had instructed Watkins to do so; that this was a lawful investigation; that O'Dell acknowledged to Slay her Section 7 rights and explained that she could exercise them while she was not working; that, with respect to the impression of surveillance, no evidence other than Slay's discussion with O'Dell was presented in support of this allegation; that Slay's actions in passing out the union shirts from her work area was admittedly, however, no secret in that numerous persons, including supervisors, passed through, it is hardly surprising that it became known Slay was engaging in distribution in violation of Austal's policies; that the Board has long ruled that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance, *Fred'k Wallace & Son*, 331 NLRB 914, 915 (2000); that with respect to the alleged disparate enforcement of Austal's no-solicitation/no-distribution policy, Slay admitted that while Jackson sold the CD at work it was before the official start of the workday at 6 a.m.; that it is well settled that the no-solicitation rules do not apply with equal force to the conduct of a supervisor, *M.A.N. Truck & Bus Corp.*, 272 NLRB 1279, 1294-1295 (1984); that in March 2008 Godwin's supervisor told him to stop passing out antiunion buttons during working time and "Godwin was disciplined for so doing (Goodwin, 453, O'Dell, 722)" (R.Br. 30)<sup>28</sup>, and that Godwin had been

<sup>28</sup> At Tr. 452 and 453 Godwin gave the following testimony:

Q. Just say No to Union? And had you been wearing that button?

A. Yes.

Q. And then you were passing [them] out to coworkers. Is that correct?

A. I would, but not during the work hours, as I was instructed not to do.

. . . Okay. So at the time, I had a couple of flyers that I was putting on break tables, and I was in his area, and he reminded me, and I was like, Oh, I forgot, so—

Q. What was the supervisor's name?

A. I'm just drawing a blank. He's a friend of mine, and I just drew a blank on his name.

Q. Was the supervisor's name Joe Himel?

A. . . . Yes.

Q. Did you have any kind of meeting with Jeff O'Dell regarding you passing out these buttons?

A. No. I just asked him that one time about it. [The time he and McNair went to O'Dell while they were on the clock to ask O'Dell about passing out some antiunion buttons that he had gotten (Tr. 443) and what they could do to respond to the T-shirts handed out by the Union. See testimony of McNair at Tr. 428 - 430.]

Q. But you didn't go to him after Himel reminded you not to pass out those buttons?

A. No.

Q. Did you receive any kind of reminder from Jeff O'Dell about not passing out buttons?

A. No.

Also, at Tr. 440, Godwin gave the following testimony:

Q. Mr. Godwin, did you ever have a supervisor tell you that you couldn't pass out buttons during your working time?

A. Yes. *It was kind of in passing*, just to make sure that I wasn't doing it. He told me not to be passing out—I had a couple of flyers and stuff, and I'd forgotten—at the time, it was still a little sketchy, but they had—Austal had made a rule that you couldn't talk about union or nonunion stuff during work hours, so I ceased at that time.

Q. Okay. So he told you not to pass anything out during working time?

A. Correct, Right.

Q. And so you stopped.

A. Yes. [Emphasis added.]

As can be seen, it does not appear that Godwin was advised or even aware that he was being disciplined for passing out antiunion buttons or flyers. At Tr. 722 O'Dell testified that he was aware of someone being disciplined for passing out "antiunion shirts." Contrary to the testimony of the antiunion employee called as a witness by Respondent, Godwin, O'Dell testified as follows:

Q. You testified earlier that there was an employee who was also disciplined for passing out antiunion buttons. Is that correct?

A. Yes.

Q. Okay. In regards to that employee, did you call that employee into your office and read . . . [him] a notice like you read to Ms. Slay that's marked GC Exhibit 19?

A. I did speak to the employee, but I didn't read him this notice, no.

Q. Did you ask him to sign . . .

. . .

. . . any document like GC Exhibit 19?

A.. No.

Q. Thank you. Please look now at Respondent's Exhibit Number 4. After you met with the employee who you were disciplining and talking to about the distribution of the antiunion buttons, or other paraphernalia, did you post a notice like the one that was posted marked Respondent's Exhibit Number 4?

A. Well, first I didn't discipline her. So what's the rest of your question?

Q. I'm sorry. Well, I'm sorry, you did not discipline the employee who was handing out buttons?

A. Are you talking about Carolyn?

Q. No, sir, I'm talking about the employee who was passing out antiunion buttons.

A. Yes, he was disciplined.

Q. He was disciplined. Did you post a notice after that discussion with him like the notice that's identified in Respondent's Exhibit 4?

placed on notice, like other employees, regarding soliciting in appropriate times and places after the Slay incident, by Austal's posted notice, Respondent's Exhibit 4, which is referred to in Austal's position statement to the Board (GC Exh. 4).<sup>29</sup>

As indicated above, I find Slay to be a credible witness. Her testimony about what occurred on February 1 is credited. I do not find O'Dell to be a credible witness. On brief, the General Counsel contends that O'Dell was a misleading, untruthful and unreliable witness; that while O'Dell denied that he told Steele to more closely watch Slay's attendance or that he told Steele that he was trying to set Slay up, O'Dell did not deny that Steele prepared two write ups for Slay and O'Dell did not offer any explanation as to why Slay was transferred to Dilley's crew and/or why she was not issued the two writeups; that while O'Dell on February 1 told Slay that she could not distribute union shirts during working time and she might be terminated for doing this, O'Dell allowed McNair, Garl, Epperson, and other Austal employees to distribute antiunion shirts while they were on the clock and during working time; that initially O'Dell testified that there was no handbook in place when he arrived at Austal prior to the November 2007 employee handbook he drafted but he subsequently conceded that there was a less comprehensive handbook that was distributed to employees before he started at Austal; that O'Dell gave self serving testimony regarding the creation of the work rule that all employees caught sleeping were to be terminated in that he testified that prior to Slay's termination vice president of operations Perciavalle verbally announced to him a new work rule that from that point forward anyone caught sleeping would be terminated; that Respondent did not call Perciavalle as a witness and Austal did not present any evidence that Perciavalle's rule was disseminated to any of Respondent's employees, members of management, supervisors and/or HR, which demonstrates that O'Dell's testimony was a pretextual creation; that O'Dell's testimony about Hartley throwing a piece of steel on the ground to try to get an employee up who was allegedly sleeping on

A. Why repost the same notice? He knew that. He knew what he was supposed to do; I'd already spoken to him once about it. [So not only is O'Dell testifying that, contrary to the testimony of Respondent's witness Godwin, he had a disciplinary meeting with Godwin but now O'Dell is testifying that there was a second (prior) meeting with Godwin where he had already spoken to him once about it. Slay's meeting with O'Dell about her distribution of union T-shirts was her first and only meeting with O'Dell about this subject matter.]

Q. Was the incident with the employee who was distributing the antiunion buttons before or after the incident with Ms. Slay?

A. It was after. That I recall it was after.

Q. Now, just to make the record clear, did you post another notice like Respondent's Exhibit 4 after you met with and disciplined the employee who was disciplined for distributing the antiunion buttons?

. . . .

THE WITNESS: No, I didn't because the notice was up. So every time you disciplined somebody, I'm supposed to go in and repost things? That doesn't make sense. [Tr. 745-748.]

<sup>29</sup> One of the attachments to this Austal position statement reads as follows:

	Documented Verbal Warning
Issued to: Tom Godwin	Date: 28 [the 2 is written over with a 1] Mar-08
Issued by: J Hymel	Time: 4:15
This verbal warning was for the following:	
Distribution of antiunion propaganda during work hours.	

March 25 in one of the ships under construction was testimony concocted by O'Dell on the spur of the moment while he testified at the trial herein; that no such occurrence is referred to anywhere other than O'Dell's testimony; and that O'Dell's testimony that Pate was not on notice before she interviewed Slay that Slay was terminated is belied by the written statement of Eddins (GC Exh. 16), who was at the meeting with Pate and Slay and, indeed, by the written statement of Pate (GC Exh. 27), who Respondent did not call to testify about what happened and why with respect to the termination of Slay. For the reasons specified below, the termination of Slay was based on a pretext. O'Dell lost his credibility for, among other reasons, testifying untruthfully about Slay's termination. The General Counsel gives good reasons for not treating O'Dell as a credible witness. There are additional reasons as set forth below. It was a "nice touch" when O'Dell testified that the first time he remembered dealing with Slay in any way was the issue of her falling asleep, and he had to be "reminded" by one of Austal's counsel about his February 1 meeting with Slay when he threatened to fire her, interrogated her, and which meeting occasioned his e-mail exchange with Browning and the posting of a notice (R. Exh. 4), to all employees referring to, inter alia, the passing out of T-shirts. I will not credit the evidence of O'Dell unless it is corroborated by a reliable witness or a reliable document.

In my opinion, Respondent violated the Act as alleged in paragraphs 12, 13 (which sets forth the rule but is not in and of itself an allegation of misconduct), and 14 of the complaint, except to the extent noted below. To begin with, O'Dell lied under oath when he concocted his testimony that when he met with Slay about her distribution of union T-shirts while she was working, Slay refused to sign the notification he showed her. Respondent did not call Slay's coordinator to explain why he met with Slay the day after O'Dell met with Slay, and the coordinator told her he had something for her to sign which he guessed was a paper they forgot to have her sign at the meeting in O'Dell's office the day before. The General Counsel's request for an adverse inference against Respondent from Austal's failure to call the coordinator who would reasonably be presumed to be favorably disposed toward it is granted. Also, Respondent did not call Pate, who O'Dell testified he asked to listen, from just outside the room, to his meeting with Slay and, therefore, would have overheard O'Dell giving Slay General Counsel's Exhibit 19 to sign and Slay refusing to sign the notification he showed her when he met with her about her distribution of union T-shirts while she was working. The General Counsel's request for an adverse inference against Respondent based on Austal's failure to call Pate, who would reasonably be assumed to be favorably disposed toward it is granted. With respect to the General Counsel's contention regarding the selective and disparate application of the no-solicitation/no-distribution rule regarding supervisors Bradford and Jackson, as correctly pointed out by Respondent on brief, it is well settled that the no-solicitation rules do not apply with equal force to the conduct of a supervisor, *M.A.N. Truck & Bus Corp.*, supra.<sup>30</sup> The General Counsel is correct in his contention that the rule was applied selectively and disparately with respect to the

<sup>30</sup> That being the case, the General Counsel's request for an adverse inference regarding Austal's failure to call Jackson as a witness to testify about selling a CD in a work area during working time is denied. The same would apply with respect to Bradford's solicitation of Watkins to purchase items for his daughter's school fundraiser.

named employees who were involved in the distribution of Austal's union free T-shirts while the employees were on the clock.<sup>31</sup> O'Dell's testimony that he disciplined Godwin, which testimony is contradicted by Godwin, is yet another example of O'Dell lying under oath. The fact that Austal did not call Supervisor Hymel to clear up Godwin's testimony that Hymel only spoke to him in passing raises questions about whether the documented verbal warning submitted by Austal with its one of its position statements (GC Exh. 4), is a fabrication. Godwin was not aware of it. An adverse inference is warranted against Respondent with respect to Austal's failure to call Supervisor Hymel as a witness. Not only was the rule applied selectively and disparately but, in my opinion, the Union is correct in its objection that by implementing an employee handbook in November 2007, which handbook contained Austal's first no-solicitation/no-distribution rule, Austal engaged in an effort to undermine the Union's efforts during the revived union campaign before the second election. O'Dell is not a credible witness. Notwithstanding, the many times O'Dell's testimony is contradicted by other witnesses or documents, including Respondent's own evidence, Austal did not call witnesses to corroborate O'Dell with respect to material portions of its case. One is when Respondent decided to put together an employee handbook and what was the true motive for the handbook. O'Dell's testimony that it had nothing to do the union activity is not credited.<sup>32</sup> Austal did not call Spiegel to corroborate O'Dell's testimony that he instructed O'Dell to create a new employee handbook prior to O'Dell's first day of employment on March 3, 2007. The General Counsel's request for an adverse inference against Respondent from Austal's failure to call Spiegel who reasonably would be assumed to be favorably disposed toward it is granted. Both the General Counsel and the Union objected to the receipt of Respondent's Exhibit 18 which was sponsored by O'Dell, and which is O'Dell's draft of the employee handbook which was not the one distributed to employees but has the date of March 30, 2007, on the cover. To the extent that the date on the cover is meant to have any meaning with respect to the timing of the process, it is given no weight since O'Dell sponsored the exhibit and it was not shown that anyone else, namely a reliable witness, had anything to do with the dating of the document.

It is noted that the complaint does not specifically allege that Austal unlawfully promulgated and maintained a no-solicitation/no-distribution rule because of the upcoming second election. From a timing standpoint, the employee handbook, with Austal's first no-solicitation/no-distribution rule was distributed to employees in November 2007, 8 months after the Board

<sup>31</sup> The General Counsel's request for an adverse inferences based on Respondent's failure to produce its records to show that these employees clocked out from work prior to assisting in the distribution of Austal antiunion shirts or they received an occurrence for leaving work early is granted.

<sup>32</sup> The following testimony of O'Dell is not credited:

Q. . . . Did the timing of the handbook being distributed to employees [in November 2007 after the March 21, 2007 Board decision set aside the first election and remanded the case for a second election] have anything to do with union activity?

A. I guess the question is, why would it?

Q. Okay.

A. No, I would have no reason to tie that—those two together whatsoever. I was tasked in February of '07 to do a handbook and have it completed within 90 days. And I knew nothing about the union activity at that time. [Tr. 681.]

issued its March 21, 2007 decision (a) finding that Austal engaged in unlawful conduct which invalidated the first election, and (b) remanding the matter for a second election. As noted above, the second election was held on April 9, 2008. In its objections filed after the second election the Union asserts that

2. The Employer, through its agent(s), committed an unfair labor practice by implementing an employee handbook in November 2007 for the first time since the facility began operations. This institution of the employee handbook was virtually contemporaneous with the offers of reinstatement of discriminatees terminated prior to the first election. This employee handbook was an effort to threaten and intimidate employees, and rendered them unable to exercise free choice of a bargaining unit agent in the election.

I agree with the Union that Austal's adoption of the no-solicitation/no-distribution policy during the runup to the second election, was unlawful and objectionable in that as the Board has recognized, even a facially valid no-solicitation policy is unlawful if it is adopted in order to interfere with the employees' right to self-organization, *Cannondale Corp.*, supra. As noted above, the Union argues that the fact that a policy is newly adopted and announced during the critical period makes out a prima facie case of a violation, *Harry M. Stevens Services*, supra, and that this is bolstered by the fact that the policy is accompanied by an announcement of the Company's antiunion stance, and the fact that there is no evidence that there was actually any other existing problem that the policy was designed to deal with. When General Counsel's Exhibit 39, the February 1 e-mails between O'Dell and Browning, is read in conjunction with Respondent's Exhibit 4, O'Dell's subsequent notice to employees about employees handing out shirts, it would not be unreasonable to reach the conclusion that the motivation for this rule was the union campaign before the second election. The notice to employees (R. Exh. 4), briefly mentions in passing "girl scout cookies, little league candy, union issues, raffle tickets, etc." The reference to "girl scout cookies . . ." occupies 1 of 18 lines of the notice. The 17 other lines refer to the union campaign. Austal selectively and disparately enforced this rule by prohibiting union solicitation and distributions while permitting other solicitations and distribution.

Since it is not alleged in the complaint, I am not specifically finding that Austal's no-solicitation/no-distribution rule violates the Act because it was promulgated and maintained to interfere with the employees' right to self-organize rather than to maintain production and discipline.<sup>33</sup> Rather, I am finding that that Austal violated the Act by selectively and disparately enforcing its no-solicitation/no-distribution rule, and, thereby, undermined the validity of the rule with respect to the application of the rule to Slay.

Austal violated the Act by unlawfully utilizing its no-solicitation/no-distribution to threaten Slay with termination. Interestingly, O'Dell testified that he spoke with Godwin twice

<sup>33</sup> A violation not alleged in the complaint may be found but this might occasion issues regarding whether the matter had been fully and fairly litigated, and whether the absence of a specific complaint allegation precluded Respondent from presenting exculpatory evidence or altering its conduct of the case to address this allegation. *Champion International Corp.*, 339 NLRB 672 (2003). Any approach which might cause a delay in the resolution of this proceeding should be avoided.

about distributing antiunion buttons and at least one of these discussions occurred after he had spoke with Slay. Presumably, this would have been after the notice to employees (R. Exh. 4) was posted shortly after O'Dell's discussion with Slay. Yet, O'Dell did not testify that he threatened Godwin with termination or, indeed, terminated Godwin during the second discussion because he had already spoken to Godwin the first time and, as with Slay, he threatened Godwin with termination at the first meeting. As noted above, Respondent's witness Godwin testified that he did not have any disciplinary meetings with O'Dell over the fact that he, Godwin, had distributed antiunion buttons. O'Dell was lying under oath.

Austal violated the Act by unlawfully utilizing its no-solicitation/no-distribution policy to interrogate Slay about her union activities and the union activities of other employees.

Austal is correct in its argument on brief that that the Board has long ruled that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance, *Fred'k Wallace & Son*, supra. Here, Austal went beyond mere observation. Here, O'Dell misusing the no-solicitation/no-distribution rule unlawfully threatened to fire Slay and unlawfully interrogated her not only about her union activity but the union activity of another employee. During his meeting with Slay on February 1, he told her that he had 10 witnesses who said that she was passing out T-shirts during working hours. As indicated in *Flexsteel Industries*, 311 NLRB 257 (1993):

The idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. We have never required . . . evidence that management actually saw or knew of an employee's union activity for a fact, nor do we require evidence that the employee intended his involvement to be covert or that management is actively engaged in spying or surveillance. Rather an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. *Emerson Electric Co.*, 287 NLRB 1065 (1988).

It is one thing to observe. It is quite something else to unlawfully threaten and unlawfully interrogate an employee about her union activities and the activities of another employee, utilizing a rule that is selectively and disparately enforced, and as a part of that unlawful conduct tell the employee that you have 10 witnesses to the fact she violated the disparately enforced rule. Nonetheless, I do not believe that Austal unlawfully gave Slay the impression that her union activities were under surveillance simply because she engaged in the conduct at issue totally out in the open at her workstation where any supervisor or manager could see her. Accordingly, the allegation in 12(c) of the complaint will be dismissed.

Paragraph 16 of the complaint alleges that Respondent, on March 19 by Jeff O'Dell and in about the last week of March 2008 by Terry Crawley, impliedly threatened its employees that it would not hire union supporters.

The General Counsel on brief contends that O'Dell is not credible; that Crawley was present for the meeting between Hudson and O'Dell and Crawley was not sure if O'Dell did not

mention the word “union” during the meeting; that O’Dell told Hudson that based on what Hudson said earlier in their conversation O’Dell would not have hired him; that O’Dell impliedly threatened Hudson that Respondent would not hire union supporters; that a few days later, after Crawley overheard Hudson talking to some employees about the Union, Crawley told Hudson, “[Y]ou know what Jeff O’Dell said, you talk about the union and he wouldn’t hire you, anyway”; that during his testimony Crawley did not deny Hudson’s testimony; and that what Crawley did was answer, “No, sir,” to the following question of one of Austal’s attorneys: “. . . you’ve been accused in this matter of impliedly threatening an employee that *you* would not hire a union supporter. You ever done that?”

The Union on brief argues that Crawley’s purported recollection of the meeting with Hudson and O’Dell is laughably vague.

Respondent on brief contends that Hudson’s story makes no sense; that there would have been no reason for O’Dell to say he would not have hired Hudson based on his response; that Crawley adamantly denied telling Hudson, “You know what Jeff O’Dell said, you talk about the union and he wouldn’t hire you anyway”; and that even if Crawley made such a statement, Hudson admits that he knows of no one else who heard the comment.

The Respondent violated that Act as alleged in paragraph 16 of the complaint. Hudson is a credible witness. His detailed testimony regarding his meeting with O’Dell and his subsequent conversation with Crawley is credited. O’Dell is not a credible witness. As noted above, Crawley’s testimony about the O’Dell/ Hudson meeting consists of (1) “No, sir” he has never “*heard* Jeff O’Dell say . . . something like he would not hire Hudson *if he gave* the wrong answer about the union” (Tr. 765), and (2) while he was in the 15- to 20-minute meeting with O’Dell and Hudson, he did not remember if O’Dell mentioned the word union during his meeting with Hudson, and “[t]he only thing I remember of that meeting was that you cannot be a supervisor if you’ve been written up.” (Id at 766.) Regarding Hudson’s testimony about what Crawley said to him Crawley testified as follows:

Q. Now, let me just ask you flat out, you’ve been accused in this matter of impliedly threatening an employee that you would not hire a union supporter. You ever done that?

A. No, sir.

Q. Did you ever do that to Carl Hudson?

A. No, sir. [Tr. 765.]

Crawley did not specifically deny that at the outset of the meeting O’Dell asked Hudson if he thought Austal needed a union. Then Crawley got equivocal with his “never heard” and “if he [Hudson] gave the wrong answer about the union.” The testimony that Crawley was responding to was that O’Dell said, “[t]he answer that you gave me before, . . . to be honest with you, I wouldn’t hire you.” (Tr. 246.) O’Dell did not say anything about “if you give the wrong answer . . .” Then Crawley attempted to bail out by testifying that the only thing he remembered about the 15- to 20-minute meeting was that you cannot be a supervisor if you’ve been written up. The problem with the attempted bailout is that Hudson went to the meeting to discuss the fact that he wanted Austal to give him 10 hours of pay he lost when his supervisor would not let him work and sent him home because he was on a prescription medication. As

Hudson testified, he never discussed becoming a supervisor with O’Dell. Even O’Dell did not claim that he and Hudson discussed becoming a supervisor. With respect to what Crawley said to Hudson a few days later, as noted above, Crawley gave the following testimony:

Q. Now, let me just ask you flat out, you’ve been accused in this matter of impliedly threatening an employee that *you* would not hire a union supporter. You ever done that?

A. No, sir.

Q. Did you ever do that to Carl Hudson?

A. No, sir. [Tr. 765 with emphasis added.]

As noted above, Hudson testified that Crawley told him, “You know what Jeff O’Dell said, you talk about the union and he wouldn’t hire you, anyway.” (Tr. 248.) As correctly pointed out by the General Counsel on brief, Crawley did not specifically deny the statement Hudson testified Crawley made about O’Dell, and, therefore, Hudson’s testimony is undisputed. Crawley’s testimony regarding the O’Dell/Hudson meeting was not credible. It was not only equivocal, but Crawley’s testimony about Hudson becoming a supervisor was not corroborated by either O’Dell or Hudson. Indeed, it was refuted by Hudson. Hudson did not testify that Crawley subsequently told him that he, Crawley, would not hire him. Rather, Hudson testified that Crawley reminded him in the presence of other employees, who may not have heard what Crawley said, what O’Dell said during the O’Dell/Hudson March 19 meeting, thereby—as a supervisor—unlawfully repeating the implied threat. Austal violated the Act as alleged in paragraph 16 of the complaint.<sup>34</sup>

Paragraph 18 of the complaint alleges that about March 19 and 28, 2008, Respondent, by David Bliss and other supervisors and agents<sup>35</sup> interrogated its employees about their support for or against the Union by soliciting employees to accept anti-union shirts.

The General Counsel on brief contends that the undisputed evidence, Pettibone’s testimony, is that Supervisor Herbert passed out Austal antiunion T-shirts to employees; that contrary to Supervisor Clement’s denial, Slay did see him passing out Austal antiunion T-shirts to employees; that contrary to the denials of Supervisors Lindley and Hall, Watkins did see Lindley and Hall passing out Austal antiunion T-shirts to employees; that that the undisputed evidence, Watkins’ testimony, is that Supervisor Mallard passed out Austal antiunion T-shirts to employees; that that contrary to Supervisor Westmoreland’s denial, Hudson did see him passing out Austal antiunion T-shirts to employees; that the testimony of Slay and Watkins that they saw supervisors wearing white hardhats distributing Austal antiunion T-shirts to employees should be credited; that the testimony of Gatwood that he saw supervisors wearing white hardhats with their name and supervisory position on the hard-

<sup>34</sup> In view of the above, the request of the General Counsel to draw an adverse inference with respect to Crawley’s failure to deny what he told Hudson is denied.

<sup>35</sup> At the outset of the trial herein, counsel for the General Counsel was allowed to amend par. 7(a) of the complaint to include the following as supervisors and agents: Supervisor Yancy Allen, Supervisor Tim Clements, Supervisor Clinton Hayes, and Coordinator Claudel Mack. Counsel for the General Counsel indicated that “there is evidence to be presented that these individuals were individuals who were handing out T-shirts . . . as supervisors to employees.” (Tr. 10.)

that distributing Austal antiunion T-shirts to employees should be credited; that the denial of Respondent's witnesses that any of the individuals who distributed Austal antiunion T-shirts wore supervisory hardhats is equivocal; that Respondent's distribution of the antiunion shirts constituted 8(a)(1) coercion and a violation of the Act, *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994) [supervisors directly distributing paraphernalia opposing a union to employees effectively put employees in the position of having to accept or reject the employer's proffer and is a violation of Sec. 8(a)(1)]; that there is also evidence of supervisors openly observing employees receiving the Austal antiunion shirts in that Respondent's witness McNair testified that his supervisor walked through the LCS gate while he was passing out shirts to employees and Respondent's witness Epperson testified that two or three supervisors came through the LCS gate while she was passing out shirts to employees; and that the fact that these supervisors were able to observe whether employees took the Austal antiunion shirts was a violation of Section 8(a)(1) of the Act.

The Union on brief argues that direct distribution of antiunion shirts by supervisors has been recognized as coercive interrogation in that it requires an employee to accept or reject a shirt in a way that can be viewed by management as support or rejection of the antiunion position, *Circuit City Stores*, 324 NLRB 147 (1997); that Austal placed a great emphasis, in the presentation of evidence, on the assertion that it did not keep track of who accepted a shirt and who did not; that this factual assertion, whether or not it is true, is irrelevant, *Circuit City Stores*, supra at 147 fn. 2; that since the Austal shirts were distributed at the gates employees were faced with making a choice whether to accept the Austal shirts; that neither Herbert nor Mallard testified to deny the testimony that they distributed the Austal antiunion shirts to employees; that the supervisors were recognizable by their white hardhats with their supervisory positions and names on them; and that this conduct was a violation of the Act under *Circuit City Stores*, supra, and requires a new election.

Respondent at page 49 of its brief contends that:

Austal management specifically forbade any supervisor from passing out shirts. (O'Dell, 708–709, Logan, 778; Hall, 790; Garl, 340; Huguen, 390; Connolly, 468–469; Epperson, 365–366.) To ensure that supervisors were not involved, O'Dell met with them on two separate occasions and forbade them from distributing shirts or even being in the area. (O'Dell, 709.) Austal also posted a notice prior to making the shirts available to employees. (O'Dell, 710–711); R 5.) The notice notified employees that no supervisors would be involved in the distribution of shirts and that employees were free to accept or reject the shirts without fear of reprisal.

Respondent further contends that the fact that some supervisors on the afternoon shift did not have the opportunity to see the notice<sup>36</sup> was of no moment because O'Dell met with supervisors on two occasions to instruct them in person that no supervisor was allowed on pain of discipline to be involved in the distributing Austal shirts; that the Austal shirts were distributed by volunteer hourly employees as well as a group of non-supervisory administrative employees; that there is no evidence

<sup>36</sup> The involved notice, which O'Dell testified that he would have given to his administrative assistant, Robertson, to post opens with "To all employees."

that Austal kept track of who accepted an Austal shirt or that any employee reported such information to any supervisor or manager; that the General Counsel failed to establish supervisory participation; that no evidence was presented that Mallard possessed supervisory authority beyond a mere conclusory witness statement that he was a supervisor; that the burden of proving supervisory status rests on the party asserting it; that only Pettibone, who was a former employee and union observer at the election, identified Supervisor Herbert as being a supervisor who distributed Austal shirts, and so there is considerable reason to doubt the veracity of his testimony; that the mere possibility that a supervisor may have seen shirts being distributed is not enough, *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1259 (2004); that the General Counsel failed to meet his burden of establishing agency status on the part of the nonsupervisory employees involved in the distribution of the Austal shirts; that even if the employees distributing the Austal T-shirts in March 2008 were supervisors or agents of Austal, their conduct was lawful since there was no evidence of coercion or monitoring of employees, *Philips Industries*, 295 NLRB 717, 733 (1989) (supervisor distributed company shirts and there was no evidence of coercion); *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1092–1093 (1984) (supervisor did not monitor whether employees wore the procompany buttons he gave them); and *Daniel Construction Co.*, 266 NLRB 1090, 1100 (1983) (supervisors were not tracking employee union views when they solicited employees to purchase procompany jackets); and that "to establish an unlawful act, General Counsel must establish the individuals distributing T-shirts were monitoring employee union sentiments (i.e., polling) or otherwise coercing employees to accept shirts (in addition to establishing that they were supervisors or agents)" R. Br. 62.

Did O'Dell meet with supervisors on two occasions and forbade supervisors from distributing shirts or even being in the area? On brief, Austal cites the testimony of O'Dell to support this assertion. But O'Dell has no credibility. Some of the testimony elicited from the witnesses called by Austal supports Austal's position that at least some supervisors were told by O'Dell at a meeting (he claims there were two) that they were not allowed to pass out the Austal antiunion shirts to employees. But the supervisors called by Respondent's did not testify that they were also told by O'Dell that they could not even be in the area when the Austal shirts were distributed. Some of the testimony of Respondent's witnesses does not support Austal's assertion that O'Dell held two meetings with supervisors before the Austal antiunion shirts were distributed to tell the supervisors that they could not distribute the Austal antiunion shirts to employees and they could not be in the area. And some of the testimony elicited from Respondent's witnesses about the alleged two O'Dell supervisory meetings is at best equivocal. Connolly's attempt to corroborate O'Dell's testimony falls short in that on cross-examination she conceded that she was not present at the alleged meetings. O'Dell also testified, "I would have given it to Nick [Robertson] to post" (Tr. 711) referring to Respondent's Exhibit 5 which exhibit he sponsored and which purports to be a notice to all employees regarding the first distribution of the Austal shirts. It appears that O'Dell asserts that it was posted the day of the first distribution of the Austal shirts. When asked by one of the attorney's for Austal how many boards would things be posted on, O'Dell testified that there were about 8 to 10 boards, and "[h]e'd [Robertson] be able to tell you exactly." (Tr. 711.) On cross-examination,

O'Dell testified that he did not know where Robertson posted the document about Austal's shirts that day, March 19, when the Austal antiunion shirts were distributed. Nonetheless, Respondent did not call Robertson, who was an administrative assistant to O'Dell, as a witness. I draw an adverse inference against Respondent from Austal's failure to call Robertson as a witness in that it is reasonably assumed that O'Dell's administrative assistant in HR would be favorably disposed to Austal. I do not believe that administrative assistant Robertson is a bystander employee. For some reason Austal did not further attempt to clear up questions surrounding the asserted posting of this document to employees notwithstanding the fact that there was an obvious need to do just that. The testimony of O'Dell, who is not credible, and a copy of the document (R. Exh. 5), are the only evidence cited by Austal on brief to support the assertion that employees were notified on the first day of distribution that no supervisors would be involved in the distribution of shirts; that employees were free to accept or reject the shirts without fear of reprisal; and that no records will be kept of who accepts or declines a shirt.<sup>37</sup> I do not credit O'Dell's equivocal testimony that Respondent's Exhibit 5 was posted. O'Dell is not a credible witness. Austal concedes that, even if such notice was properly posted, those who worked on the afternoon shift (employees and supervisors) would not have seen the notice before coming to work and being faced with making an unavoidable and open decision as to whether to accept or reject the Austal antiunion T-shirt which was being handed out at the gate on their way into work.<sup>38</sup>

At least one supervisor, Herbert, was not called to dispute a witness' testimony that he distributed Austal antiunion T-shirts to employees. Another individual identified as a supervisor, Mallard, by an employee, Watkins, was not called by Respondent to dispute her testimony that he distributed Austal shirts to employees.<sup>39</sup> The record does not demonstrate, without equivocation, that all supervisors were notified before the Austal antiunion shirts were distributed that they should not distribute

<sup>37</sup> If an employee of a company which engaged in unlawful conduct in the past, including unlawfully terminating a number of employees, reads a notice to employees that no records will be kept of who accepts or declines a shirt, it is reasonable to conclude that that employee would wonder if just the opposite was true because the Company had acted unlawfully in the past. That being the case, that employee, realizing that there is a good chance that there will be a record, would be coerced. But it has not been unequivocally established that this notice was actually posted before the first distribution. Moreover, as noted below (a) the wearing of the Austal antiunion shirt constitutes a perpetual record, and (b) any issue regarding whether Austal kept a record of who accepted or declined a shirt is irrelevant in that employees would be well aware of the fact that Austal had the potential to do so. *Circuit City Stores*, supra at 147 fn. 2.

<sup>38</sup> Or in the case of a supervisor, helping out with the distribution or watching it. In view of the testimony of some of the supervisors called by Respondent, I do not believe that it can be concluded that all supervisors were notified at the two meetings O'Dell allegedly indicated that they should not be involved in the distribution or even be in the area.

<sup>39</sup> The General Counsel requests adverse inferences in view of Austal's failure to call Herbert and Mallard because they would reasonably be assumed to be favorably disposed toward Austal. It is not alleged that Mallard was a bystander employee. He did not testify to deny that he was handing out Austal's antiunion T-shirts to its employees at a gate as the employees either entered or exited Austal's facility. An employee who apparently is in a position to know identified him as a supervisor. An adverse inference is granted both with respect to Mallard and to admitted Supervisor Herbert.

them and they should not even be in the area. Regarding the latter, there is evidence of record from Respondent's own witnesses that a number of supervisors were in the area when Austal's shirts were distributed. There is also evidence of record, some of it challenged, that a number of supervisors were involved in distributing Austal antiunion shirts to employees.

The Board indicated in *Circuit City Stores*, supra at 147 that

Under established Board precedent, employers may make antiunion paraphernalia available to employees at a central location, provided that supervisors are absent from the distribution process and there is no other coercive conduct in connection with the distribution. *Barton Nelson, Inc.*, 318 NLRB 712 (1995); *Gonzales Packing Co.*, 304 NLRB 805, 815 (1991). However, employers are precluded from creating situations in which employees are forced to disclose their union sentiments. *Lott's Electric Co.*, 293 NLRB 297, 303-304 (1989), enfd. mem. 891 F.2d 281 (3rd Cir. 1989). Thus, employers may not distribute campaign paraphernalia in a manner pressuring employees to make an observable choice that demonstrates their support for or rejection of the union. *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994). In *A. O. Smith*, the Board found that by having its supervisors directly offer employees antiunion paraphernalia, the employer effectively put employees in a position of having to accept or reject the employer's proffer and thereby make an observable choice that would reveal something about their union sentiments.

In footnote 2 at 147 in its decision in *Circuit City Stores*, supra, the Board indicated "we find irrelevant any issue of whether the Employer actually kept track . . . Employees would be well aware of the fact that the Employer had the potential to do so."

There is a vast difference in a union handing out union T-shirts and an employer handing out antiunion T-shirts. If the employee takes and wears a union shirt at work, it is totally voluntary. That employee has decided to voluntarily declare himself or herself in support of the involved union, notwithstanding any possible ramifications. In my opinion, coercion is implicit when an employer puts an employee in the position that he or she has no choice but to reject or take and wear an antiunion shirt. An employer does not know whether an employee who does not wear a union shirt will or will not support the union. But an employer can take a reading on an employee who does not accept and wear an antiunion shirt when the employer puts all of its employees in a position where they have to reject or accept and wear the antiunion shirt. When the union offers a shirt it is indicating that the union would like the employee to voluntarily declare his or her support for the union by wearing the shirt, and perhaps he or she would thereby influence other employees to support the union. When an employer offers an antiunion shirt in a situation where the employee has to reject it or accept and wear it, the employer, who pays the employee's wages and benefits, is letting the employee know that the employee is expected to declare involuntarily either (a) by accepting and wearing the antiunion shirt, that he or she ostensibly does not support the union or (b) by rejecting the company shirt, that he or she does not support the company. Obviously, an employee can accept and wear the antiunion shirt and still vote for the union. But just as the union hopes that an employee voluntarily wearing a union shirt will influence other employees to support the union, the employer would employees

even involuntarily wearing antiunion shirts to influence other employees not to support the union. The union has no leverage over the employee. The employer has a great deal of leverage over the employee. The union cannot, as a practical matter, cause an employee to involuntarily wear its shirt. The possible denial of the opportunity to earn a living at Austal could easily, in and of itself—especially where, as here, the employer previously engaged in unlawful conduct, including unlawfully terminating a number of employees—cause an employee, when he believes that he has no choice, to involuntarily wear an antiunion shirt. It is almost meaningless for an employer to declare that they are not monitoring the situation when the shirts are given out. The shirt is a walking billboard. The declaration, which is constant while it is worn, can be noted at any time. Indeed, the employer need only keep track of how many shirts were purchased and how many shirts it had on hand after the distribution to have a preliminary indication (poll) of how many of its employees would most likely (because, as indicated above, some employees may accept and wear the antiunion shirt and still vote for the union) support the union.

O'Dell testified that Administrative Assistant Buckley and Sime were his observers for the Austal antiunion T-shirt distribution. Also, O'Dell testified that not one time did they come back and say a supervisor was there handing out shirts or even watching or looking at what was going on. O'Dell is not a credible witness. Other of Respondent's witnesses testified that supervisors were in the area when Austal antiunion shirts were distributed. Employees testified that supervisors were handing out the shirts, employees named a number of supervisors, and two of the named supervisors did not testify at the trial herein. The General Counsel's request that an adverse inference be drawn against Respondent for failing to call Administrative Assistant Buckley to provide the names and duty positions, to the extent she knew this information, of the employees who passed out the antiunion shirts at the LCS gate is granted. Also, an adverse inference is drawn against Respondent for its failure to call Administrative Assistant Buckley to corroborate O'Dell's testimony that not one time did she come back and say a supervisor was there handing out shirts or even watching or looking at what was going on. O'Dell is not a credible witness.

Bliss was not specifically named by any witness. Otherwise, Austal violated the Act as alleged in paragraph 18 of the complaint.

Paragraph 20 of the complaint alleges that Respondent, by Gary Logan, at its facility, (a) on or about late March 2008 or early April 2008, told employees who were talking about the Union that they needed to pipe down on the union stuff, and (b) on or about the first week of April 2008, told employees who were talking about the Union to other employees that they should quit (changed below to delete "quit" and insert, in its place, "pipe down").

The General Counsel on brief contends that the Board in its aforementioned March 21, 2007 decision involving Austal found that Austal violated the Act when it instructed employees not to read or discuss union material during working time; that in accordance with this ruling Austal posted the notice to employees at its facility for 60 days starting on November 26, 2007; that Austal did not introduce any evidence that since the Board's March 21, 2007, decision Austal published a written rule or announced a verbal rule prohibiting all nonwork-related talking; that evidence of record clearly demonstrates that numerous employees talked about nonwork matter while working;

that Logan, by telling Hudson on two occasions to pipe down, prohibited Hudson from continuing to talk about the Union while Hudson was working; that neither one of these incidents involved the morning start up meeting; and that Logan did not prohibit all nonwork-related talking, only talking about the Union.

The Union on brief argues that Hudson's testimony on this matter was more credible than Logan's denial; and that Logan merely exhibited the common tendency to deny having done something unlawful, and his denial should be rejected as a matter of credibility.

Respondent on brief contends that coordinator Logan was a longtime member of the Union; that it would have been surprising, therefore, if he bore any animosity toward the Union; that Logan denied the allegations; and that on the one hand, no one was called to corroborate Hudson's testimony, and, on the other hand, even if the allegations could establish a violation, the alleged conduct would not support a new election in that it is undisputed that Logan's alleged statements were directed only to Hudson and there is no evidence that these statements were ever communicated to any other employee<sup>40</sup>.

Logan was not taking an antiunion or a procompany stance. What he was doing was trying to keep Hudson out of trouble when he said pipe down. Contrary to (b) of paragraph 20 of the complaint, there is no evidence of record that Logan told anyone who was talking about the Union to other employees that they should quit. True to his union background,<sup>41</sup> Logan was warning Hudson that management was aware of Hudson's union activities, they were talking about him, they were not happy with him, and he should pipe down a little bit (Hudson's own words). In his attempt to convey the gravity of the situation to Hudson, Logan said, "[Y]ou're trying to get me run out of here" (Tr. 250) when Hudson tried to pin him down on who was saying that he, Hudson, was causing chaos. To no avail to its cause, Respondent is correct in its contention on brief that it would be surprising that Logan bore any animosity toward the Union. However, taking into consideration (1) what Logan said, namely pipe down about the Union; (2) an environment where Austal was unlawfully prohibiting employees from discussing the Union while they were working even though Austal did not implement a policy either verbally or in writing prohibiting the discussion of other nonwork-related subjects; (3) the fact that Logan was a coordinator over supervisors at the time and it is reasonable to conclude that an employee would treat what he was saying as coming from Austal; and (4) Logan's intent or motivation is not relevant, a finding that Austal violated the Act through Logan when he told Hudson two times to pipe down is warranted. I find Hudson to be a credible witness. Hudson's very specific testimony is credited. Logan's general denial is

<sup>40</sup> It is noted that on cross-examination one of Respondent's attorneys elicited testimony, apparently to show that the violation was not disseminated, from Hudson that no one other than he and Logan was present during their first conversation. Also, it appears that Hudson was alone when Logan approached him by the toolboxes for the second "pipe down" conversation. That being the case, it is not clear who could have been called to corroborate Hudson. Nonetheless, Respondent makes its lack of corroboration argument while at the same time arguing that no one other than Hudson and Logan were involved so the election should not be set aside.

<sup>41</sup> Logan was in Local 441 from September 9, 1990, to December 6, 1996, when he was laid off at Litton. Logan was not a member of the Union when he worked for Austal.

not credited. Logan did not specifically deny Hudson's testimony.

Austal violated the Act as alleged in paragraph 20 of the complaint, with the modification of 20(b) to replace the word "quit" with "pipe down."

Paragraph 21 of the complaint alleges that about the first week of April 2008, Respondent, by its newsletter promulgated and since then has maintained a rule that "[e]mployees have the right to speak their mind, no matter whether you're for or against the union. Just make sure you are doing so during non-working time rather than when you're performing your job duties."

The General Counsel on brief contends that as in *Austal USA, L.L.C.*, 349 NLRB 561 (2007), Austal discriminatorily restricted employees from discussing the union and violated Section 8(a)(1) of the Act when Austal published the newsletter limiting talking about the Union to nonworking time.

The Union on brief argues that on page 3 of the newsletter it sent to employees just before the election on April 9 Austal indisputably promulgated a rule which, as here pertinent, reads, "Employees have the right to speak their mind, no matter whether you're for or against the union. Just make sure you are doing so during nonworking time rather than when you're performing your job duties"; that the ban on discussion of the union, while working, was in marked contrast to the existing practice with regard to discussion of other topics; that there was no written or unwritten rule that prohibited talking about other subjects while working; that many witnesses testified that talking about all manner of things while working was quite common, and it was accepted so long as the work got done; that supervisors participated in such conversations; that there is no evidence of anyone being disciplined for talking, so long as they're working too; that there is only evidence of people being disciplined for talking instead of working, which is different; and that by imposing a rule against talking about this one subject, Austal blatantly violated its employee Section 7 rights, and interfered with the fairness of the election, *Sam's Club*, 349 NLRB 1007, 1009 (2007) (unlawful to impose no-talking-about-union rule while there is no rule against talking about other subjects).

Respondent on brief contends that the General Counsel's own witness, Hudson, confirmed that supervisors counsel employees to refrain from talking about any subject when working; that Hudson testified that plenty of times he was told by a supervisor that he was not to talk about topics that did not relate to work, other than union matters; that Hudson later testified "that the 'no talking' rule was not enforced, but gave no examples of when any specific supervisor was aware this was true, other than when supervisors themselves engaged in the behavior" (R. 15); that later Hudson testified that supervisors were aware of individuals talking about nonwork-related matters but identified no one; that employees have been disciplined for being nonproductive and for talking instead of working, no matter the subject; that the newsletter was consistent with past practice and demonstrates that Austal was concerned only that employees do their jobs when working, particularly due to the *LCS* launch schedule; and that Austal required only that employees refrain from soliciting when working.

Its last contention speaks to Austal's true intent. Not all discussions about the Union between employees would involve solicitation. But Austal wanted to preclude any chance of solicitation while employees were working and it wanted to limit,

as much as possible, any discussion among employees about the Union while they were working. It appears that Austal decided that the best way to do that is to prohibit all communications about the Union while the employees are working. Generally, employees are allowed to and have discussed a broad range of topics unless and until it interferes with their work. Supervisors, i.e., Steel and others, engage in discussions with employees regarding nonwork-related topics during working time. Hudson testified that supervisors talk about nonwork-related topics during worktime all the time. As pointed out by the Union, employees are only disciplined if the discussion of the nonwork-related topics interferes with their work performance. Austal did not call a single manager or supervisor to testify, and it did not introduce a single document to demonstrate, that Austal has a written or verbal rule which has been disseminated to its employees prohibiting the discussion of all nonwork-related topics when employees are working.<sup>42</sup> Respondent has not shown that any employee has been disciplined for talking about any nonwork-related topic when it did not negatively impact his production or the production of others. As pointed out by the Union, by imposing a rule against talking about this one subject, Austal blatantly violated its employee Section 7 rights, and interfered with the fairness of the election, *Sam's Club*, 349 NLRB 1007, 1009 (2007).

Austal violated the Act as alleged in paragraph 21 of the complaint.

Paragraphs 22 and 23 of the complaint allege that on March 25, 2008, Respondent terminated employee Carolyn Slay because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

The General Counsel on brief contends that, as found above, Slay was unlawfully interrogated and threatened by O'Dell when she brought union T-shirts to work to give to employees; that on March 24 the Union significantly increased its organizing efforts by going to employees' homes and talking to them about the Union; that on the morning of March 25 the union handbilled at Austal's gate with the assistance of over 48 organizers; that it was no coincidence that when Slay arrived at her work area on March 25, her welding machine was sabotaged; that Slay did not fall asleep while she was working with Mixon and no one told her that she was accused of sleeping on the job until the end of the day; that Pate terminated Slay before even asking Slay for her side of the story; that Tindle and Richerson's testimony is replete with contradictions of each other and lies; that Austal did not call Perciavalle to corroborate O'Dell's testimony that a couple of months before Slay was terminated Perciavalle told him to terminate any employee caught sleeping on the job<sup>43</sup>; that O'Dell's testimony is not reliable or believable; that there is no evidence that this alleged new work rule regarding terminating an employee caught sleeping was disseminated to supervisors, managers, HR personnel, and/or employees; that there is no showing that this alleged new work rule was posted on bulletin boards; that this alleged

<sup>42</sup> The General Counsel's request that an adverse inference be drawn against Respondent based on its failure to produce a copy of a written work rule notifying all employees that all nonwork-related talking was prohibited is granted.

<sup>43</sup> In this regard, the General Counsel's request for an adverse inference in that Austal failed to call Perciavalle, who would reasonably be assumed to be favorably disposed toward Austal, is granted.

new work never existed; and that Slay would not have been terminated but for her protected conduct.

The Union on brief argues that Slay was an active and open union supporter; that, as admitted by O'Dell, Austal knew of her pronoun stance and activity; that Slay was terminated because she was an active union supporter; that one of her former Austal supervisors, Steele, testified that O'Dell was looking for some way to get rid of Slay; that Austal did not conduct a good-faith investigation of the alleged sleeping on the job incident; that on February 1 O'Dell unlawfully threatened and interrogated Slay when she brought union T-shirts to work to pass out to employees; that in March 2008 Austal Supervisor Jackson, who did not testify at the trial herein, told Slay that management was after her and he was trying to save her; that Slay did not sleep on the job; that if Slay had been sleeping, it would have been a safety issue of the type that should have been dealt with immediately in order to avoid a dangerous situation; that the people who testified that she was sleeping did not testify that they tried to wake her up; that the reasonable inference is that they knew that Slay was not sleeping for if they believed that she was sleeping, they would have woken her up; that remarkably, in deciding to terminate Slay, Austal did not even ask Slay or the person she was working with, Mixon, what evidence they could provide; that Slay's testimony that she was terminated even before being asked what happened is corroborated by the written statements of Eddins and Pate; that this was a sham investigation designed to reach a predetermined conclusion; that the reality was that this was a handy way to fire high-profile union supporter Slay; that in its April 21, 2008 position statement to the Board Austal did not claim that there had been any new get tough policy about sleeping on the job; and that the alleged new policy was not published to anyone other than allegedly to O'Dell.

Respondent on brief contends that with respect to the termination of Slay, O'Dell was particularly cautious because Slay was an open and "heavy" union supporter and he knew there would be "repercussions" if action was taken; that Pate interviewed Slay<sup>44</sup>; that the General Counsel's and the Union's failure to call Mixon warrants an adverse inference since it is reasonably assumed that Mixon would be favorably disposed to the General Counsel's position as a settled doctrine of law, *Battle Creek Health System*, 341 NLRB 882, 884 (2004)<sup>45</sup>; that

<sup>44</sup> Pate was not called by Respondent to clear up a number of questions. The General Counsel requests an adverse inference regarding, among other things, her failure to testify to deny that she told Slay that she was terminated before she asked Slay for her side of the story. Both Pate's written statement, GC Exh. 27, and Eddins' statement, GC Exh. 16 indicate that Pate terminated Slay before was asked what happened. In these circumstances, there is no purpose for an adverse inference. O'Dell is not a credible witness.

<sup>45</sup> In the case Respondent cites the individual was a union steward. Here, Mixon was a bystander employee. Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling a bystander employee. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996), aff'd. on point 123 F.3d. 899, 907 (6th Cir. 1997). Respondent could have called Mixon as a witness. It is noted that shortly after Slay's termination, O'Dell signed a termination document for Mixon for sleeping. The General Counsel has not requested an adverse inference regarding Pate to the extent she should have been called by Austal to clear up the question of whether she acted on her own in terminating Slay in view of O'Dell's testimony that she was not on notice that Slay was being terminated before she, Pate, met with Slay. If O'Dell did not tell her to

Steel had no involvement in Slay's discharge; that Austal's good-faith belief prevails even if it was mistaken; and that

Vice President of Operations Craig Perciavalle had instructed O'Dell weeks before Slay's termination that *Austal could not tolerate employees sleeping on the job any longer*, hardly a surprise considering that the launch deadline was looming (O'Dell, 699-700). *O'Dell further testified, without contradiction, that a notice was posted to so inform employees.* (O'Dell, 748) [R. 42 with emphasis added.]

From start to finish, Slay's termination is based on a fabrication. The termination is a pretext. The start is the set up which is testified about by Supervisor Steel. The testimony about management's intent is not denied by Supervisor Jackson in that he was not called as a witness by Austal. The finish is Austal's attorneys on brief palming off a further fabrication in Austal's attempt to justify its unlawful conduct towards Slay.

The following is Transcript 748:

and repost things? That doesn't make sense. [<sup>46</sup>]

Q. BY MS. WALKER: You testified about a verbal conversation between yourself and Mr. Percervelli regarding an employee sleeping at Austal. Do you recall that testimony?

A. Yes.

Q. Who all was at that meeting?

A. Just Craig and I.

Q. When did it occur?

A. I don't remember.

Q. Let me point you to what's been marked Respondent's Exhibit 19. I believe you testified that you posted, or had someone post, this document on the bulletin boards at Austal. Is that correct?

A. Yes.

Q. And were notices posted on the bulletin board because that was the primary and best way to communicate with the hourly employees at Austal?

A. Yes. Sometimes letters went to their houses.

MS. WALKER: Your Honor, if we could just take a minute, please?

JUDGE WEST: Off the record.

MS WALKER: Thank you.

(Off the record.)

Q. BY MS. WALKER: Mr. O'Dell, you testified earlier that you sent a Ms. Buckley to be present at the T-shirt [The question continues on Tr. 749.]

As noted above, the following notice (R. Exh. 19) was posted, on Austal letterhead:

DATE:	September 25, 2007
TO:	All Austal Employees

terminate Slay before she met with Slay, then the question is on what basis was she proceeding. There is no evidence of record that she met with Hartley. O'Dell testified that he would not have proceeded on the basis of Tindle's and Richerson's observation alone. There would have been a lot of questions to resolve with Pate. Austal choose not to call her to resolve them. Since it is reasonable to assume that Pate is favorably disposed to Austal, an adverse inference, namely that she would not have corroborated O'Dell, is warranted with respect to Austal's failure to call her.

<sup>46</sup> This is a reference by O'Dell to the failure to post a notice for the handing out of antiunion buttons like R. Exh. 4, which as noted above, referred to handing out shirts during worktime and in working areas.

FROM: Jeff O'Dell, Human Resources Director  
 RE: National Labor Relations Act

It has come to my attention that a supervisor asked an employee to remove stickers or writing from their hard hat or they could be disciplined. I further understand that the hard hat contained a pro-union sticker. Please understand that Austal repudiates this action and wants you to know that the National Labor Relations Act gives all employees the right to self-organization, to form, join, or assist labor organizations, to bargain as a group of [sic] through a representative of your own choosing, and to engage in other protected concerted activities for collective bargaining or other mutual aid or protection. The National Labor Relations Act also gives you the right to refrain from such activities. Austal values free speech rights of all employees (whether for or against the union) and wants you to know that employees may wear stickers on their hats if they so choose (whether the message is for or against the union). Austal reaffirms its commitment to respecting employee rights under the National Labor Relations Act and will not interfere with those rights.

Hopefully, this will clear up any confusion and you are encouraged to speak to your supervisor if you have any questions.

As can be seen, the notice referred to on page 748 of the transcript in this case has nothing to do with a notice to inform employees that "Austal could not tolerate employees sleeping on the job any longer" or even "that the launch deadline was looming." This is not an innocent mistake in that Respondent's Exhibit 19 is exactly that; it is Respondent's own exhibit. It is not an exhibit of the General Counsel or the Union. In my opinion, this amounts to an intentional material misrepresentation of the record. This is not slanting. This is not an omission. This is referring to something that has not been shown to exist. It highlights the approach taken in this proceeding, and it highlights Austal's realization regarding the ramifications of the nonexistence of such a notice.

With respect to Slay's termination, one expects minor inconsistencies in the testimony or statements of two witnesses to the same event. As noted above and below, Tindle's and Richerson's renditions have some major inconsistencies.

Before getting into the specifics of March 25, it is helpful for an understanding of what occurred to go back to former Austal Supervisor Steele's testimony. As noted above, I find Steele to be a credible witness. Steele testified that he and others attended a meeting in the production room around Thanksgiving 2007 with O'Dell and his assistant, Pate; and that O'Dell told them "that he wanted to know if we would—if we heard of any of the people on the floors talking about the union . . . and that if we knew of anyone that was in favor of the union and they were talking about it, to let him know immediately." (Tr. 70.)<sup>47</sup> Steele also testified that on other occasions O'Dell (a) asked

<sup>47</sup> The General Counsel's request for an adverse inference regarding the failure of Pate to testify and deny that O'Dell told supervisors to let him know which employees were talking about the Union is granted. Also, the General Counsel's request for an adverse inference regarding O'Dell's failure to deny (a) that when he told the supervisors to report to him if they knew anyone who was in favor of the Union and talking about it, and (b) that Steele reported to him that Simon was talking about the Union is granted.

him, as here pertinent, to keep his eyes on Slay; (b) told him that if Slay was not at her jobsite when the bell rang, he wanted Slay written up; and (c) told him, after he wrote Slay up—even though she had a valid excuse, that

Claudel [Mack] got rid of the writeup and that what he was doing was setting Ms. Carolyn up for—he didn't care about the writeups. What he was wanting to make it look like Ms. Carolyn was having a problem with was authority. And with him moving her from the welding division to the electrical division, to my crew, and then moving me from—moving her from my crew to another crew, it's making her look like she can't deal with authority.

And he was setting her up by getting her to move crews instead of having her written up for not showing up for something petty. He was just making it look like she couldn't get—she couldn't work with her management. [Tr. 79.]

The General Counsel requests an adverse inference against Respondent in that Coordinator Mack was not called by Austal to deny the existence or explain what he did with the two writeups Steele gave him for Slay and why they were not given to her. The request is granted. The fact that Mack was not called by Respondent lends further credence to Steele's testimony. Slay was moved to Dilley's crew just after this.

In January or February 2008 when Steele wrote up 16 employees for being at the timeclock early, O'Dell told him

Chad we don't want to fire everybody at Austal; we [are] really only trying to get the people who's pushing for the union. . . .

And that's when they was like, look Chad, it's the union situation we're after. . . . We don't want to write everybody up. We just want to attack the ones that are going for the union. . . .

. . . .  
 He named about five people. He named Ms. Carolyn Slay. . . . I think he named four. I'm not quite sure. . . . [Tr. 81 and 82.]

The General Counsel requests an adverse inference against Respondent based on O'Dell's failure to deny he met with Steele regarding some writeups prepared by Steele for employees who were lining up at the timeclock early and telling Steele that he did not want to fire everybody; just the people pushing for the Union. O'Dell, who is not a credible witness, did not specifically deny this testimony of Steele. The General Counsel's request for this adverse inference against Respondent is granted.

As noted above, on or about March 10, 2008, Slay got sick and she had to leave work early to go to the doctor. Supervisor Jackson told her that if she left early she was to make sure that she brought an excuse back because they were after her and he was just trying to save her. Also when Slay had to leave early one day to pick her little girl up from school, Jackson again told her to make sure you bring me an excuse because they are after you and I'm just trying to save you. As noted above, Supervisor Jackson was not called by Respondent to deny saying this, the General Counsel's requests for adverse inferences against Respondent based on Austal's failure to call Jackson to deny this testimony are granted, and it is concluded that Austal violated the Act by Jackson's statements.

With respect to the inconsistencies between Tindle and Richerson, it is noted that Tindle, on the one hand, testified that that on March 25 he was going to block 14 to check on two of his workers, he climbed down a ladder, and he saw an employee sitting on what he assumed to be a 5-gallon bucket; that it could have been about 1:30 p.m.; that the individual on sitting the bucket had *“their face on their hand, with the elbow on the knee”* (transcript page 514); that he *“noticed that there was the head bobbing, .... [s]he was sleeping”* (Ibid, with emphasis added); that he watched for a few minutes and he knelt down to see if he could see her face; that he could not see her face, and she had a hoddie on; that she did not respond to him kneeling down and looking at her face; that while he could not see her face when he knelt down, it did not follow that she might not have been able to see his face because *“she would have been able to see my face because mine wasn’t—hers was partially covered with the hoodie (sweatshirt hood) on. . . . She had a hoodie on, see, and I couldn’t—I mean, I couldn’t tell you what she looked like”* (Id. at 516); that he knelt down to tell if her eyes were closed or not and he could not tell; and that he then *“watched for—I’m not sure how much longer it was, but then another supervisor [Richerson] came up and asked me what was going on with that, and I said, [i]t looks like they’re sleeping”* (Id. at 516 and 517 with emphasis added); that a few minutes later, after he spoke with Hartley, he left the area to talk to his foreman to find out who the involved electrical foreman was; that *when he left he believed that Richerson was still there; that he found out it was Mack; that he did not know the employee’s name so he went back to the block and the person was up and walking, [s]he had her hoodie off, so—had the hard hat back on. And then when I came back out, I saw the badge on the board. I got her name, and I took it to Claudel Mack”* (Id. at 521 and 522 with emphasis added); that there is a requirement that when one is on a ship one has to wear a hardhat; that Slay was required to wear a hardhat in the area she was working in on March 25; that *he could not see Slay’s hard hat the first time, “she could have had the hoodie pulled over the hard hat . . .”* (Tr. 522 with emphasis added) and *“[s]o I wouldn’t want to say that she didn’t have it on. I couldn’t see it the first time.”* (Tr. 523, with emphasis added); that he knelt down to see if he could see her face; that he did not make any effort to move her to see if he could see her face; that *“I actually wasn’t watching them sleep the whole time. I was trying to determine whether or not she was sleeping. Once I determined that I thought she was asleep, then I went to get her foreman/supervisor, so that he could take care of the situation”* (Id. at 534); that *he watched Slay for 3 to 5 minutes, then he knelt down to try to see her face for another minute, and then he continued to watch Slay for 1 to 1.5 minutes with Richerson; that he knew that the employee who was sleeping was in the electrical department because the guy sitting there with her had a green hat on and green is the electrical department; that when he saw Slay later she was wearing a green hardhat; and that some of the employees wear their hardhats backwards so the brim is toward their back.*

Richerson, on the other hand, testified that *when he climbed down the ladder into block 14 he saw Slay sitting on a bucket sleeping; that “Chris [Tindle] was right ahead of me, and he saw her, and then we walked over to see and looked at her a couple of minutes, and I bent over, looked her in her eyes, and she was sleeping”* (Tr. 555 with emphasis added); that *“[s]he was sitting on a bucket, had her arms crossed, had her head*

*down, had a hood over her hard hat”* (Id. at 556 with emphasis added); that her head was not moving in any way; that *he did not see her head bobbing up and down; that he “near about got on my knees. I bent all the way over. I could see her eyes. She had a set of, I believe, prescription safety glasses on, and her eyes were closed”* (Ibid. with emphasis added); that he was about 2 feet from her; that she did not react in any way to him, and she did not say anything to him; that he asked Tindle what he wanted to do and Tindle said, *“[W]e’ll watch her a few minutes”* (Id. at 557); that they watched her for 5 or 6 minutes and then Tindle said he was going to speak to his supervisor and he told Tindle that he was going to speak to his supervisor; that *“we went up—went back up top to check her employee ID badge [which was on the board before you go down in the tank,] to make sure who she is. I had no idea who she was. And we got her name and all off her ID badge”* (Ibid. with emphasis added); that *Tindle went down the ladder into the hold right ahead of him, we hit the deck about the same time; that he and Tindle together got the information off Slay’s badge before he went to his supervisor; that he wrote her name down and he believed that Tindle did the same; that they then went to their supervisors; that when he looked into Slay’s face Tindle was standing right beside him; that Tindle was looking at him when he was looking at Slay; that he looked at Slay’s face just enough to tell that she had her eyes closed; that when he got up he asked Tindle what they should do; that he told Tindle that her eyes were closed; and that Tindle then said, “[w]ell, we’ll watch her for a minute or two. And then he said, you go talk to your supervisor and I’ll go talk to mine”* (Tr. 564).

As can be seen, the testimony of Tindle and Richerson differ with respect to whether they both went into block 14 at the same time, whether Slay was wearing a hardhat when they allegedly saw her sleeping [First, Tindle testified that he did not want to say Slay was not wearing a hardhat when he saw her the first time because he could not see it.<sup>48</sup> Then, Respondent called Richerson, who testified that Slay had her hoodie over her hardhat. (Slay testified that she was wearing her hardhat over her hoodie. Her testimony is credited)], whether her head was bobbing, whether it was Tindle, or Richerson, or both who knelt down or almost knelt down, whether Slay’s eyes were closed, whether they discussed whether Slay’s eyes were closed, whether they left block 14 together, and whether Tindle first noted the name of the employee when he first left block 14 with Richerson, which would have meant that there was no need for him to later return to the area just outside block 14 to get the name of the employee. Since there was an obvious inconsistency in the testimony of Tindle and Richerson on the point of when Tindle first noted the name of the alleged “sleeper” from the badge located just outside block 14, one would expect that to clear this question up Respondent would have called Coordinator Mack to testify about whether Tindle did not have the name of the alleged “sleeper” when he first approached Mack. Austal did not call Mack as a witness. In view of the fact that it is reasonable to presume that Coordinator Mack would be favorably disposed toward Respondent, an adverse inference is drawn that Mack would not have corroborated the testimony of Tindle with respect to his conversation

<sup>48</sup> Tindle’s testimony is incredible in that (a) for safety reasons employees are required to wear a hard hat in the involved area, (b) Tindle did not attempt to explain where Slay’s hard hat was if it was not on her head, and (c) if a person is wearing a hoodie over a hardhat, it is obvious.

with Mack. The testimony and statements of Tindle and Richerson are not credited.

The inconsistencies became obvious during the trial. When O'Dell testified after Tindle and Richerson, he attempted to bolster the situation by giving some incredible testimony. O'Dell twice testified that Hartley told him that he threw a piece of steel on the "ground" to try to wake the employee up.<sup>49</sup> This testimony is incredible for a number of reasons. First, a navy man would never describe the surface he is standing on while aboard ship as the ground. There is no ground aboard a ship other than an electrical ground. The ground, to a navy man, is that which he or she steps on when he or she leaves the ship. O'Dell, being an infantryman, would describe what he is standing on in terms of the ground. Second, if Hartley wanted to wake the employee up who was allegedly sleeping all he had to do was tap the employee on the shoulder or helmet. Third, no one other than O'Dell even mentions the throwing of a piece of steel on the ground. O'Dell is not credible. His testimony is not credited.

There was no real investigation before Slay was terminated. As demonstrated by the written statements of Eddins and Pate, Slay was not asked about what happened until after she was terminated. Since Slay was not really interviewed until after she was terminated, O'Dell's speculation that Pate interviewed Mixon is just that. O'Dell is not credible. Austal did not call Pate as a witness to explain the investigation process and whether she even interviewed Mixon. Also Austal did not call Pate to explain on what basis she terminated Slay since O'Dell testified that Pate was not on notice that Slay was terminated before Pate interviewed Slay. Indeed, O'Dell testified that "[Pate] talked to her [Slay] whenever she wrote her up and got her side of the story, and then we—*THEN* she and I had a caucus, we talked, she told me what she had to say to her, and then we went ahead and made the decision." (Tr. 755, with emphasis added.) According to the written statements of Eddins and Pate, this is not what occurred. Pate terminated Slay before Pate "got her [Slay's] side of the story." Since as already noted, it can reasonably be presumed that Pate, who was O'Dell's administrative assistant, would be favorably disposed toward Austal, an adverse inference is drawn that if she had testified she would not have corroborated the testimony of O'Dell with respect to whether she interviewed Mixon before terminating Mixon, and with respect to whether O'Dell told her even before she interviewed Slay that Slay was terminated. O'Dell is not a credible witness.

The termination of Slay was a pretext. The evidence relied on by Austal in its attempt to justify this termination was a fabrication from start to finish. That being the case there is no need to go through a mixed motive analysis. Austal violated the Act as alleged in paragraphs 22 and 23 of the complaint.

#### *B. The Union's Objections to the Election*

1. The Employer, through its agent(s), committed an unfair labor practice on or about February 1, 2008, by discriminatorily applying its "no solicitation" policy so that management and antiunion employees were allowed to discuss antiunion sentiments and distribute antiunion campaign insignia on the Employer's property and during worktime, while union supporters, including Carolyn Slay, Tracy Watkins, and Utsetsi Nyanga,

<sup>49</sup> He was subsequently corrected in that on a ship it is not referred to as the ground.

who verbally encouraged union support during worktime and distributed prounion campaign insignia and materials, including T-shirts and DVDs were disciplined and/or terminated. This restraint and intimidation, which was known to all employees and eligible voters, rendered them unable to exercise free choice of a bargaining unit agent in the election.

Objection 1 is sustained. Austal promulgated its no-solicitation/no-distribution policy during the critical preelection period. Indeed, Respondent has not credibly demonstrated that this policy was conceived before the Board's March 21, 2007 decision setting aside the first election and remanding the case for a second election. O'Dell is not a credible witness. An adverse inference is drawn from Austal's failure to call Spiegel to testify, namely that if called, Spiegel would not have corroborated O'Dell. Consequently, there is no credible evidence of record with respect to when the employee handbook was conceived. The evidence demonstrates that it was disseminated to employees in November 2007, well after the March 21, 2007 Board decision herein. Before this employee handbook, Austal did not have a formal written policy regarding soliciting at work. Other than the revival of the union campaign for the second election, it is not shown that anything happened at the facility which would explain why Austal adopted this new no-solicitation policy at the time it did. Perhaps the fact that the employee handbook which contains Austal's first formal no-solicitation/no-distribution policy also contains for the first time a statement on unions, namely "Austal is a union free facility," provides the answer. (P. 1 of GC Exh. 5.) As concluded above, Austal's new no-solicitation/no-distribution policy was selectively and disparately enforced in violation of the Act.<sup>50</sup> As the Board pointed out in *Harry M. Stevens Services*, 277 NLRB 276, 276 (1985) "an otherwise valid [no-solicitation/no-distribution] rule violates the Act when it is promulgated to interfere with the employee right to self organization rather than to maintain production and discipline." (Citations omitted.)

2. The Employer, through its agent(s), committed an unfair labor practice by implementing an employee handbook in November 2007 for the first time since the facility began operations. This institution of the employee handbook was virtually contemporaneous with the offers of reinstatement of discriminatees terminated prior to the first election. This employee handbook was an effort to threaten and intimidate employees, and rendered them unable to exercise free choice of a bargaining unit agent in the election.

Objection 2 is sustained. The Union points out that Austal's "STATEMENT ON UNIONS," namely that "Austal is a union-free facility," which appears on page 1 of the employee handbook disseminated to employees in November 2007 does not appear in Austal's preliminary draft of the employee handbook (R. Exh. 18). For the reasons specified with respect to Objec-

<sup>50</sup> I do not credit Austal's claim that Godwin was disciplined. O'Dell lied under oath about meeting with Godwin twice to tell him not to distribute antiunion buttons during work time. Godwin, in effect, denied that he was disciplined. Godwin testified that he did not meet with O'Dell regarding the past distribution of antiunion buttons. Godwin was not aware of any verbal warning. Notwithstanding this, Austal did not call Supervisor Hymel to explain the situation. This drew an adverse inference that if Hymel were called, he would not corroborate O'Dell that Godwin was disciplined. This means that Austal has failed to establish that Hymel's alleged documentation of a verbal to Godwin is not a fabrication.

tion 1, the one thing that has been established is that Austal's first real employee handbook came into being, as far as the employees were concerned, during the critical preelection period. Also, what has been established is that Austal used its first published employee handbook to engage in unlawful conduct, as set forth above.

3. The Employer, through its agent(s), Jeff O'Dell committed an unfair labor practice on or about March 19, 2008, by unlawfully interrogating employees, including Carl Hudson, regarding their union activities, sentiments, and affiliation. This interrogation coerced and intimidated the employees rendering them unable to exercise their free choice of a bargaining unit agent in the election.

Objection 3 is sustained. Hudson is a credible witness. O'Dell and Crawley are not. On March 19 Hudson was not wearing a union shirt when he spoke with O'Dell in the presence of Crawley. Also, Hudson was not wearing a union shirt on March 18 when he spoke with O'Dell. As concluded above, Respondent violated the Act during their March 19 conversation by impliedly threatening Hudson that Austal would not hire a union supporter. The prelude to the implied threat was what, in my opinion, was an unlawful interrogation. Austal did not show that O'Dell was aware that Hudson was an open and active union supporter, which would be taken into consideration in determining whether that interrogation was unlawful. The interrogation was combined with the implied threat. Coming from the HR director in the HR director's office, this resulted in intimidation and coercion. Notwithstanding that this interrogation is not alleged to be an unfair labor practice, it was objectionable.

4. The Employer, through its agent(s), Jeff O'Dell committed an unfair labor practice on or about February 1, 2008, by unlawfully threatening Carolyn Slay with termination in retaliation for her union activities. This threat of termination coerced and intimidated the employees rendering them unable to exercise their free choice of a bargaining unit agent in the election.

Objection 4 is sustained. This objection is identical to paragraph 12(a) of the complaint herein. As noted above, it is concluded that Austal violated the Act as alleged in paragraph 12(a).

5. The Employer, through its agent(s), committed an unfair labor practice on or about March 25, 2008, by terminating Carolyn Slay for her support of the union and exercise of Section 7 rights. Many employees and eligible voters had knowledge of the termination of this vocal union supporter because of her union activities which rendered them unable to exercise free choice of a bargaining unit agent in the election.

Objection 5 is sustained. This objection is identical to paragraphs 22 and 23 of the complaint herein. As noted above, it is concluded that Austal violated the Act as alleged in paragraphs 22 and 23.

7. The Employer, by and through its agent(s), on or about March 28, 2008, and continuing up through the election, offered gifts, bribes, or other financial assistance to employees and eligible voters by announcing upcoming employee-only car auctions. This was the first such offer of car auctions since the facility began operations. This gift, bribe, or other financial assistance coerced the entire work force because it was offered to all employees just weeks prior and up to the election. All employees and eligible voters were offered these inducements rendering them unable to exercise free choice of a bargaining unit agent in the election.

Objection 7 is overruled. Contrary to the position taken by the Union, while the timing of this event may be cause for speculation, this was not a gift, bribe, or other financial assistance to coerce employees. It was not shown that the sale of the idled (in terms of activity and not value) vehicles was anything other than an arm's-length transaction with the vehicles being sold at fair market value. Also, in my opinion, the timing of the event (the decreasing expatriate staff) was adequately explained.

The remaining objections will be taken out of order so that those objections dealing with Austal's newsletter can be analyzed together.

9. The Employer, by and through its agent(s) granted the benefit of an improved physical working condition in November 2007 by providing a concrete walkway from the employee parking lot to the shipyard. This grant of benefit before the election coerced all employees and eligible voters rendering them unable to exercise free choice of a bargaining unit agent in the election.

Objection 9 is overruled. Austal's planned unit development plan created in November 2006 includes the 1150-foot long involved sidewalk to Austal's facility from the employees' parking lot at Addesco Road and Dunlap Drive. (R. Exh. 36 which is dated "11/07/2006".) The job was put out for bids in June 2007 and the estimated completion date was July 2007. The sidewalk had become a safety issue in that hundreds of employees were walking either down the middle of Dunlap Drive or in the grass at the side of the street. As indicated above, Supervisor Steele testified that before the sidewalk was installed, he was run over by a Mobile Department of Transportation truck when he was walking on the side of the road from Austal's big parking lot to work. It has been demonstrated that the sidewalk was planned before the Board's March 21, 2007 decision. The critical period in a second election is that period between the first and second election, *Star Kist Carbide, Inc.*, 325 NLRB 304 (1998), citing *Times Wire & Cable Co.*, 280 NLRB 19, 20 fn. 10 (1986), and *Singer Co.*, 161 NLRB 956 (1966). But it would have been a disservice to employees and anyone else walking between the involved parking lot and Austal's facility to delay the installation of the sidewalk. Inasmuch as a matter of safety was involved, I do not believe that it can be concluded that the overriding purpose of this benefit or the timing thereof was meant to influence the outcome of the second election.

10. The Employer, through its agent(s), granted the benefit of a travel agent program within weeks of the election. Prior to the re-initiation of the union organizing campaign, there had not been any travel agent program. This program was established to coerce all employees and eligible voters in and effort to threaten and intimidate them, and rendered them unable to exercise free choice of a bargaining unit agent in the election.

Objection 10 is overruled. The evidence proffered by the Union with respect to this objection is inconclusive.

12. The Employer, through its agent(s), Jason Clark and Brandon Henderson, unlawfully interfered with the election and interrogated and/or polled employees by having supervisors distribute antiunion campaign insignia, including "Austal—Union Free and Proud to Be" T-shirts. This conduct was coercive to all employees and eligible voters and was an effort to threaten and intimidate them, and rendered them unable to exercise free choice of a bargaining unit agent in the election.

Objection 12 is sustained. This objection is substantially identical to paragraph 18 of the complaint herein. As noted above, it is concluded—for the reasons specified above—that Austal violated the Act as alleged in paragraph 18.

11. The Employer, through its agent(s), granted the benefit of a mail order prescription drug service on or about April 5, 2008. Prior to the re-initiation of union organizing campaign, there had not been any mail order prescription benefit service. This program was established to coerce all employees and eligible voters in and effort to threaten and intimidate them, and rendered them unable to exercise free choice of a bargaining unit agent in the election.

The Union on brief contends as follows regarding objection 11:

The law, as reflected in such cases as *Sun Mart Foods*, 341 NLRB 161 (2004), is that a new benefit granted during the critical period will be presumed objectionable. An employer can perhaps rebut that presumption, by proving to the Board's satisfaction that there was a legitimate reason for the timing, other than a desire to sway the election. But as explained in *Sun Mart Foods*, an employer cannot prevail merely by showing that the timing of its *decision to grant the benefit* was legitimate; even if the *decision* was not timed to interfere with the election, still an *announcement to employees* about the new benefit is objectionable unless the employer has evidence to explain a legitimate reason for the timing of the *announcement*.

Here the evidence shows that both the decision and the announcement came in the critical period. Indeed, the initial decision to talk with Blue Cross about possibly procuring this benefit came as the Union was ramping up its campaign. And the employer's prominent announcement of the new benefit came just days before the election, in a newsletter sent to employees (e.g., Tr. 295, Tr. 173); and that announcement was part of a newsletter that was directed explicitly towards convincing employees not to vote for the Union.<sup>2</sup>

<sup>2</sup> Several employees testified to having received the newsletter. Based on that testimony, and based on the very nature of the newsletter itself, it is apparent that the newsletter was intentionally disseminated by Austal itself to most if not all of the voting-eligible employees. That was, on the face of the newsletter, the purpose; to reach the employees before they voted. Therefore, it should be found that the newsletter (including the various objectionable aspects of it) received very wide dissemination; and so these grounds for objection easily warrant a new election in themselves.

Austal's Human Resources Director O'Dell asked Human Resources employee Lindley to check on the possibility of a prescription drug mail order benefit in November or December of 2007. [Tr. 599.] This was triggered by an employee request, made during a meeting of employees. [Tr. 600, 614–615.] As we have noted, this was when the Union's campaign was picking up steam, following the reinstatement of discriminatees. Lindley contacted Blue Cross in December 2007 [GC Exh. 29].

Austal then negotiated with Blue Cross and reached an agreement in January 2008. [Tr. 601.] The effective date was February 1, 2008 [Tr. 602; U. Exh. 5]. This was an-

nounced to employees in the early April newsletter, and by posting in January. [Tr. 603.]

The April newsletter, on the eve of the election, could hardly have been clearer in its tying of this new benefit to Austal's plea for anti-union votes. The opening of the newsletter [GC Exh. 12] had Austal President/CEO Bob Browning telling employees, "In the next few days many of you will be asked to decide whether you want a union to represent you . . . . In my opinion, the best yardstick you can use to determine working conditions in the future is by looking at how far we've come from the past. Actions speak far louder than words! As far as promises made by others outside the company, talk is cheap!" Thus Browning explicitly asked employees to consider the change in working conditions that Austal had made, as a reason to expect more in the future if the employees voted against the Union. Page four of that very same newsletter than had an "article" about the new mail order prescription drug benefit, touting its benefit in terms of "cost" (reduced) and "convenience" (increased).

Thus Browning's message was a perfect example of the very reason why Board law has long recognized this sort of new benefit as objectionable: it is the classic "iron fist in the velvet glove" routine.

As to the timing of the *decision* to grant the new benefit, Austal certainly has not rebutted the legal presumption that this was an effort to sway the election. In fact, the timing was very much out of line with what would have been the norm. That is, the annual renewal date for Austal's contract with Blue Cross is December 1; that date is generally when any contract changes in the benefits become effective. [Tr. 619–620.] Austal had already just gone through that date, and yet it soon thereafter decided to add the prescription drug benefit. [Tr. 620.] Obviously Austal was doing something out of the ordinary here, in terms of the timing of its decision to add this benefit. The obvious reason, un rebutted by any real evidence, is that the timing reflects an intention to sway the election.

And as to the *announcement* of the benefit, the newsletter on the eve of the election is crystal-clear. True, there had been a posting of the new benefit earlier, but there is no evidence to show that such a posting would have been widely noted. There was, quite obviously, a *reason* why Austal decided to put this article about the new benefit in the newsletter that it distributed on the eve of the election. One does not have to be a mind reader to see the reason. In the context of the anti-union appeals in the newsletter, including Browning's plea that employees should consider past improvements in working conditions as they think about their vote, this was perfectly clear. The reason for the timing of this announcement is that the election was very close at hand:

For this reason, both the *decision* to grant the new benefit, and the *trumpeting* of it in the election-eve newsletter were objectionable conduct under *Sun Mart Foods* and similar case law. The election should be set aside on this basis. [P. Br. 4–8, with emphasis in original.]

Respondent on brief argues that Austal's actions were entirely lawful; that Austal "explored the change in December 2007—almost 4 months before the election—not weeks before

the election as the union alleges” (R. Br. 70); that there is not evidence that there was any discussion of the Union, the effect such a program might have on an organizing attempt, or even if a significant amount of employees would be interested in using the option; that Lindley testified that the program had nothing to do with the union election; that “no election had been scheduled when she announced the option in January; and that the Union, therefore, failed in its burden to show that the mere addition of a mail order option to an existing insurance plan could somehow threaten and intimidate employees.

First, as can be seen above, the Union does not allege that Austal explored the change “weeks before the election.” Second, unless Lindley is a mind reader, she could not know whether the mail order drug option had anything to do with the Union. Third, Austal’s attorneys appear to be laboring under a misunderstanding of the law. As a matter of law, the critical period for the second election is that period between the first election and the second election. The critical period is not the period between the date when the holding of the second election was announced and the holding of the second election. Fourth, the Union does not have any burden to show that the mail order option threatens and/or intimidates employees. The Union’s counsel has fully and correctly explained what is involved. For the reasons she gives, Objection 11 is sustained.

8. The Employer, by and through its agent(s), on or about April 5, 2008, promised to improve parking conditions by paving the parking area for all employees, installing sufficient lighting for improved safety, landscaping, creating multiple entrance/exit locations; providing effective drainage, clearly marking parking spaces, fencing for improved security, and building a covered walkway from the employee parking lot to the shipyard. This promise before the election coerced all employees and eligible voters rendering them unable to exercise free choice or a bargaining unit agent in the election. The Employer, by and through its agent(s) granted the benefit of limited parking lot improvements by grading the parking lot prior to the election. This grant of benefit before the election coerced all employees and eligible voters rendering them unable to exercise free choice of a bargaining unit agent in the election.

The Union on brief contends that at the very least, the timing of the announcement of the improved parking facility, in the same election-eve newsletter that was used to announce the mail order prescription benefit, was an objectionable effort to sway the election, and was therefore, unlawful under the case law described under Objection 11 above; that the employees had been complaining about the parking lot for some time; that an internal Austal e-mail (U. Exh. 3) reflects that as of late February 2008, just about 6 weeks before the election, Austal was preparing an article for the employee newsletter to discuss the “parking situation” that management “hears so much about”; that in context, this reflects a plan by management to communicate to employees on the eve of the election that a new benefit was coming to address a problem that employees had been complaining about for some time; that the newsletter which came out to all employees just days before the election touted the improvements that were planned for the parking lot; that the best inference from the evidence is that even the timing of Austal’s decisions was, in substantial part, based on a desire to defeat the union campaign; that all of the relevant decisions took place within the critical period, and indeed took place after the Board’s decision setting aside the first election; that Austal’s decision took place at a time when Austal knew that it

would be facing another election; that Austal wanted to win, and so it decided to use the age-old but patently objectionable tactic of granting new benefits; that even if there were doubt about whether the timing of the decision was objectionable, still it is clear that the timing and nature of the newsletter announcement was objectionable; that an election should be set aside when the announcement of a benefit is timed to affect the election; and that under the authorities cited above, this objection requires a new election.

Respondent on brief argues that Austal’s parking lot had nothing to do with the election; that the parking lot changes were already known to employees for a considerable time prior to the election; that, therefore, the brief section in the April newsletter was simply included to provide an update as to the status of the project; and that plans for the parking lot had previously been disclosed to employees in April 2007.

As noted above, the article in question, which appears on page 3 of the newsletter disseminated in April 2008 just before the election is titled “*Improved Employee Parking.*” This article reads in part as follows:

... The current parking area leaves little to be desired. However, our long-term plans include a complete revamping of our parking areas that will include:

- Paved parking areas for all employees
- Sufficient lighting for improved safety
- Landscaping
- Multiple entrance/exit locations
- Effective drainage (no more puddles to navigate)
- Clearly marked parking spaces
- Effective fencing for improved security

The current employee parking lot will be paved and remain as the parking area for Shipyard employees. Employees working in the modular facility will be parking on the South and East side of the new facility.

Our current plans include breaking ground mid-year and finishing construction by July of 09. While this might seem like a long time to wait, the results will be well worth the wait. . . .

The timing of the planned improvements to the current parking lot, and the timing of the announcement were meant to unlawfully influence voters in the upcoming election. The critical period here is from the first election to the second election. This portion of the newsletter which was mailed to employees just before the second Board election was an objectionable effort to sway the election. The Union’s contentions are correct. Objection 8 is sustained.

17. The Employer, through its agent(s), Bob Browning, on or about April 5, 2008, unlawfully threatened all employees and eligible voters with reprisals and or retaliation by stating in the Aluminum Times newsletter that “If a union is elected, the very basis upon which the employer-employee relationship is based will change. No longer will it be permissible for you as an individual, to deal directly with us and negotiate the terms of your employment, your concerns, or your working conditions. By law, your right will have been handed over to the union to do your talking for you.”

The Union on brief contends that Austal told employees that if they voted for the Union and the Union won the election individual employees would no longer be permitted to bring even their “concerns” to management on their own; that this

was in contrast to the situation as it existed before the election, under which employees were told that they were welcome to bring any of their concerns to management if they wished (see Respondent's open door policy in Austal's employee handbook, GC Exh. 5, p. 1); that the statement was patently unlawful under *Associated Roofing & Sheet Metal*, 255 NLRB 1349 (1981); that as the Board recognized in *Associated Roofing*, in assessing an extremely similar set of facts, this type of message amounts to a threat that the employer will unilaterally withdraw an existing benefit if the employees vote the union in; that as recognized in *Associated Roofing*, even union-represented employees do have the legal right to deal with the employer directly, so long as their adjustment of their own grievances is not inconsistent with the collective-bargaining agreement; that here as in *Associated Roofing*, the employer threatened to take away that right unilaterally; and that this threat, which Austal intentionally disseminated to all employees on the eve of the election, is enough in itself to require a new election. See *Associated Roofing*; *Dent's Poultry*, 260 NLRB 1219 (1982); *Greensboro News Co.*, 257 NLRB 701 (1981); and *Mead Nursing Home, Inc.*, 265 NLRB 1115 (1982).

The Respondent on brief argues that Austal's newsletter lawfully stated that its relationship with its employees would change if the Union was elected; and that the Board has long held that such language is perfectly legitimate, starting with *Tri-Cast, Inc.*, 274 NLRB 377 (1985), up through *International Baking Co. & Earthgrains*, 348 NLRB 1133 (2006).

In *Tri-Cast, Inc.*, supra, the Board, Chairman Dotson, and Members Hunter and Dennis, was faced with a situation where the employer distributed a letter to employees on the day of the election indicating as follows:

We have been able to work on an informal and person-to-person basis. If the union comes, in this will change.

We will have to run things *by the book* with a stranger, and will not be able to handle personal requests as we have been doing. [Emphasis added.]

The Regional Director concluded that these statements misrepresented employee rights under Section 9(a) of the Act; that they amounted to a threat to take away existing rights since the employer was implying, contrary to Section 9(a), that personal requests would not be handled as before because of unionization; and that, citing—among other cases—*Greensboro News Co.*, 257 NLRB 701 (1981), the statements were objectionable and warranted setting aside the results of the election. The Board indicated as follows:

We do not agree with the Regional Director's finding that the Employer threatened to withdraw rights preserved by Section 9(a). The Employer's statement, crafted in layman's terms, simply explicates one of the changes which occur between employers and employees when a statutory representative is selected. There is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before. This is especially so, as implied in the Employer's statement here, where a collective-bargaining agreement is negotiated. [Footnote omitted.] Section 9(a) thus contemplates a change in the manner in which employer and employee deal with each other. For an employer to tell its employees about this change during the course of an election campaign cannot

be characterized as an objectionable retaliatory threat to deprive employees of their rights, but rather is nothing more or less than permissible campaign conduct.<sup>5</sup>

<sup>5</sup> Cf. *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982). To the extent that the cases relied on by the Regional Director, cited above, are to the contrary, they are overruled.

In *International Baking Co. & Earthgrains*, supra, the Board, Chairman Battista and Members Liebman and Schaumber, with, as here pertinent, Member Liebman dissenting, was faced with a situation where the employer told the employees that in the event they were even 5 minutes late getting to work "unfortunately under a union contract if there is a disciplinary procedure in that union contract we would not have the luxury of deviating from it because we end up with union grievances as a result of it." At page 1135, the majority of the Board indicated as follows:

Generally, an employer does not violate the Act by informing employees that unionization will bring about "a change in the manner in which employer and employee deal with each other." *Tri-Cast, Inc.*, 274 NLRB 377 (1985). An employer may lawfully tell its employees that its freedom to deal directly with them will be constrained if they choose union representation. This is especially so, where, as implied in . . . [the employer's] statements, the change would be as the result of a negotiated collective-bargaining agreement. The fact that such a statement might tend to discourage union support among employees who prefer to deal with their employer on an individual basis, does not render the statement unlawful. [Footnote omitted.]

In the instant proceeding, Browning, as here pertinent, wrote "No longer will it be permissible for you as an individual, to deal directly with us and *negotiate* the terms of your employment, your concerns, or your working conditions." (Emphasis added.) In my opinion, current Board law dictates that this statement is not unlawful. Consequently, Objection 17 is overruled.

At the outset of the trial herein Respondent, citing *Coastal Lumber Co.*, 332 NLRB 1597 (2001), argued that alleged unfair labor practices not mentioned in the objections should not be considered with respect to whether the second election should be set aside. The Union on brief points out that in *Coastal Lumber Co.* there were no objections filed at all and that is why the alleged misconduct which the employer belatedly raised in test-of-certification case could not be considered as grounds for setting an election aside; that here by contrast the Union did file timely objections which cover nearly all of the matters addressed at the hearing; and that Austal's contention has no real force in this case. Respondent revisits this issue on brief. Here, timely objections have been filed. Those which have been sustained justify setting aside the second election.

Since Petitioner's Objections 1, 2, 3, 4, 5, 8, 11, and 12 are sustained, it is recommended that the results of the election held on April 9 be set aside and that Case 15-RC-8394 be remanded to the Regional Director for Region 15 for the purpose of conducting a new election at such time as she deems the circumstances permit the free choice of a bargaining representative.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in 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 engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) About December 2007, Respondent, by James Thomas, at its facility, told employees that they would not be promoted because of their support for the Union.

(b) About the last week of January 2008 or the first week of February 2008, Respondent, by Chad Steele, told employees they could not discuss the Union during working hours.

(c) Since about February 1, 2008, Respondent, by Roderick Jackson, threatened employees with termination because of their activities and support of the Union.

(d) About February 1, 2008, Respondent, by Jeff O'Dell, at its facility (1) threatened employees with termination because of their activities on behalf of the Union, and (2) interrogated employees about their union activities and the union activities of other employees, and (3) has, at all material times, selectively and disparately enforced Respondent's distribution and solicitation rule by prohibiting union solicitations and distributions, while permitting nonunion solicitations and distributions.

(e) On March 19, 2008, by Jeff O'Dell and in about the last week of March 2008 by Terry Crawley, impliedly threatened its employees that it would not hire union supporters.

(f) About March 19 and 28, 2008, Respondent interrogated its employees about their support for or against the Union by soliciting employees to accept antiunion shirts.

(g) Respondent, by Gary Logan, at its facility, (1) on or about late March 2008 or early April 2008, told employees who were talking about the Union that they needed to pipe down on the union stuff, and (2) on or about the first week of April 2008, told employees who were talking about the Union to other employees that they should pipe down.

(h) About the first week of April 2008, Respondent, by its newsletter promulgated and since then has maintained a rule that "[e]mployees have the right to speak their mind, no matter whether you're for or against the union. Just make sure you are doing so during nonworking time rather than when you're performing your job duties."

4. By, on March 25, 2008, terminating the employment of its employee Carolyn Slay because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act.

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

Respondent has not violated the Act in any other manner.

6. By the foregoing violations of the Act that occurred during the critical period before the second election, and by the conduct cited by Petitioner in its Objections 1, 2, 3, 4, 5, 8, 11, and 12, Respondent has prevented the holding of a fair election, and such conduct warrants setting aside the election conducted on April 9, 2008, in Case 15-RC-8394.

## REMEDY

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

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>51</sup>

## ORDER

The Respondent, Austal USA, L.L.C., of Mobile, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they would not be promoted because of their support for the Union.

(b) Telling employees they could not discuss the Union during working hours.

(c) Threatening employees with termination because of their activities and support of the Union.

(d) Threatening employees with termination because of their activities on behalf of the Union, interrogating employees about their union activities and the union activities of other employees, and selectively and disparately enforcing Respondent's distribution and solicitation rule by prohibiting union solicitations and distributions, while permitting nonunion solicitations and distributions.

(e) Impliedly threatening its employees that it would not hire union supporters.

(f) Interrogating its employees about their support for or against the Union by soliciting employees to accept antiunion shirts.

(g) Telling employees who were talking about the Union that they needed to pipe down on the union stuff.

(h) Promulgating and maintaining a rule that "[e]mployees have the right to speak their mind, no matter whether you're for or against the union. Just make sure you are doing so during nonworking time rather than when you're performing your job duties."

(i) Discharging or otherwise discriminating against any employee for supporting Sheet Metal Workers International Association Union, Local 441 or any other union.

(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) Within 14 days from the date of the Board's Order, offer Carolyn Slay full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without

<sup>51</sup> 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.

prejudice to her seniority or any other rights or privileges previously enjoyed.

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

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Mobile, Alabama, copies of the attached notice marked "Appendix."<sup>52</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, 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 December 2007.

(f) 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.

IT IS FURTHER ORDERED that Petitioner's Objections 1, 2, 3, 4, 5, 8, 11, and 12 to the election held by the Board in Case 15-RC-8394 be sustained, the second election is set aside, and said case is remanded to the Regional Director for Region 15 for the purpose of conducting a third election at such time as she deems the circumstances permit the free choice of a bargaining representative, and with a notice of election consistent with the findings herein.

Dated, Washington, D.C., September 30, 2009.

#### APPENDIX

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

<sup>52</sup> 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."

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 tell you that you would not be promoted because of your support for Sheet Metal Workers International Association Union, Local 441.

WE WILL NOT tell you that you can not discuss the Union during working hours.

WE WILL NOT threaten you with termination because of your activities and support of Sheet Metal Workers International Association Union, Local 441.

WE WILL NOT threaten you with termination because of your activities on behalf of Sheet Metal Workers International Association Union, Local 441.

WE WILL NOT interrogate you about your union activities and the union activities of other employees.

WE WILL NOT selectively and disparately enforce our distribution and solicitation rule by prohibiting union solicitations and distributions, while permitting nonunion solicitations and distributions.

WE WILL NOT impliedly threaten you that we would not hire union supporters.

WE WILL NOT interrogate you about your support for or against Sheet Metal Workers International Association Union, Local 441 by soliciting you to accept antiunion shirts.

WE WILL NOT tell you when you are talking about Sheet Metal Workers International Association Union, Local 441 that you need to pipe down on the union stuff.

WE WILL NOT promulgate and maintain a rule that "[e]mployees have the right to speak their mind, no matter whether you're for or against the union. Just make sure you are doing so during nonworking time rather than when you're performing your job duties."

WE WILL NOT discharge or otherwise discriminate against you for supporting Sheet Metal Workers International Association Union, Local 441, or any other union.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Carolyn Slay full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Carolyn Slay whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Carolyn Slay, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

AUSTAL USA, LLC