

Ozburn-Hessey Logistics, LLC and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC. Cases 26-CA-023675 and 26-CA-023734

November 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On December 27, 2010, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief, and Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions as modified herein³ and to adopt the recommended Order⁴ as modified.

¹ On July 1, 2011, the Board approved the Union's request to withdraw its petition in Case 26-RC-008596, a representation case consolidated for hearing with this unfair labor practice case. Consequently, we do not address Respondent's exceptions that relate only to the judge's rulings, findings, and recommendations regarding the representation case, as those issues are no longer before the Board.

No exceptions were filed to the judge's dismissal of the allegations that the discipline of Jennifer Smith violated Sec. 8(a)(3) and (4).

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

³ In affirming the judge's conclusion that the termination of employee Glorina Kurtycz violated Sec. 8(a)(3), we find that the judge's analysis comports with the Board's standard set forth in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We agree with the judge that the Respondent's proffered reason for terminating Kurtycz was shown to be pretextual, and that the Respondent therefore failed to rebut the Acting General Counsel's initial case by showing it would have terminated Kurtycz' employment in the absence of her union support. In reaching this conclusion, we do not rely on the judge's speculation regarding whether employees would likely collect union authorization cards 2 weeks before an election. We find the judge's use of a four-part analysis in his consideration of *Wright Line* rather than the three-part analysis applied by the Board of no consequence here. See, e.g., *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011).

We affirm the judge's conclusion that Human Resources Manager Young unlawfully interrogated employee Rayford during their November 10, 2009 conversation in Young's office. Contrary to the judge, we find insufficient evidence to conclude that Young also unlawfully solicited Rayford to persuade her daughter to abandon support for the Union during the same conversation. We shall modify the judge's recommended Order by deleting reference to this conduct and by adding a provision referring to the judge's finding of unlawful denial of overtime for Rayford.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ozburn-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for subparagraphs 1(b) and (c).

“(b) Denying overtime opportunities to employees because of their union support or activity.

“(c) Coercively interrogating any employees about their union support or activities or the union support or activities of other employees.”

2. Delete the final paragraph of the recommended Order that refers to Case 26-RC-008596, which is no longer before the Board.

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

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC or any other union.

WE WILL NOT deny overtime opportunities to you because of your union or protected concerted activity.

Member Hayes finds it unnecessary to pass on whether either Manager Young or Vice President White interrogated Rayford about the union activity of Rayford's daughter, as doing so would be cumulative and would not affect the remedy.

⁴ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of this notice.

WE WILL NOT coercively question you about your union support or activities or the union support or activities of other employees.

WE WILL NOT unlawfully tell you that you would not be allowed to work overtime in an account other than the one you are assigned to because of your union activity.

WE WILL NOT threaten you with an unspecified reprisal if you discuss with other employees a conversation between you and a manager.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Glorina Kurtycz 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 Glorina Kurtycz whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Glorina Kurtycz, 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.

WE WILL, within 14 days from the date of the Board's Order, offer Glenora Rayford overtime in the Remington department to the extent that overtime is available for employees who are assigned to accounts other than the Remington department.

WE WILL make Glenora Rayford whole for any loss of earnings and other benefits suffered as a result of the discrimination against her plus interest compounded daily.

OZBURN-HESSEY LOGISTICS, LLC

Linda M. Mohns, Esq. and Christopher J. Roy, Esq., for the Acting General Counsel.

Ben H. Bodzy, Esq. and Stephen D. Goodwin, Esq. (Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.), of Nashville, Tennessee, for the Respondent.

Lynn Agee, Esq. and Mr. Ben Brandon, for the Charging Party/Petitioner.

DECISION

JOHN H. WEST, Administrative Law Judge. The charge in Case 26-CA-23675 was filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the Union, Charging Party, or Petitioner) on March 4, 2010, against Ozburn-Hessey Logistics, LLC (Ozburn or OHL), and it was

amended on May 5, 2010. The charge in Case 26-CA-023734 was filed by the Union on May 5, 2010. On May 6, 2010, a complaint and notice of hearing was issued in Case 26-CA-023675. On May 7, 2010, the Regional Director for Region 26 of the National Labor Relations Board (the Board) in Cases 26-RC-008596 and 26-CA-023675 issued a Supplemental Decision and Order Consolidating Cases in which it is indicated that an election was conducted on March 16, 2010; that of the approximately 317 eligible voters, 119 were cast for the Petitioner Union and 180 votes were cast against the Petitioner; that there was 1 void ballot and 11 challenged ballots, a number not determinative of the results of the election; that on March 22, 2010, the Petitioner timely filed objections to conduct affecting the results of the election; that the withdrawal of specified objections was approved; that the remaining Petitioner's objections raise substantial and material factual issues which may best be resolved on the basis of record testimony; and that the Petitioner's objections are consolidated with Case 26-CA-023675 for hearing, ruling, and decision by an administrative law judge. On June 14, 2010, a second order consolidating cases, amended consolidated complaint and notice of hearing (hereinafter referred to as the complaint) was issued in Cases 26-CA-023675, 26-CA-023734, and 26-RC-008596. The complaint alleges that Respondent violated (1) Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about the union activities of other employees and about the employee's union activities and sympathies, by soliciting an employee to persuade another employee to abandon the employee's support for the Union, by a manager of Respondent telling an employee that he did not want the employee to work in a specified department of Respondent's operation because of the employee's union activities, and by threatening an employee with unspecified reprisal if the employee discussed with other employees the conversation between the involved manager and the employee; (2) Section 8(a)(1) and (3) of the Act by refusing to allow employee Glenora Rayford to work overtime in a specified department, by issuing a final written warning and a 1-day suspension to employee Jennifer Smith, by discharging employee Glorina Kurtycz, and by engaging in this conduct because these three employees joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities; (3) Section 8(a)(1); and (4) of the Act by issuing a final written warning and a 1-day suspension to employee Jennifer Smith because she participated in and gave testimony under the Act. Respondent denies violating the Act as alleged.

A hearing on these consolidated cases was held before me on July 14, 15, and 16, 2010, on August 31, 2010, and September 1, 2010, in Memphis, Tennessee. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel,¹ the Respondent, and by the Union, I make the following

¹ The counsel for the Acting General Counsel's unopposed motion to correct the transcript and one exhibit herein is granted and received in

FINDINGS OF FACT

I. JURISDICTION

Ozburn, a Tennessee corporation, provides transportation, warehousing, and logistics services for other employers at its facilities in Memphis, where during the 12-month period ending March 31, 2010, it (1) performed services valued in excess of \$50,000 for employers located outside the State of Tennessee, and (2) received goods valued in excess of \$50,000 directly from points located outside the State of Tennessee. Ozburn 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

During the first day of the trial herein, the parties entered into the following stipulation, Joint Exhibit 1:

1. At all relevant times, William Pope has been a supervisor and agent of Respondent within the meaning of Section 2(11) and 2(13) of the Act.

2. At all relevant times, Terri Cheshier has been a supervisor and agent of Respondent within the meaning of Section 2(11) and 2(13) of the Act.

3. At all relevant times, Willie Dye has been a supervisor and agent of Respondent within the meaning of Section 2(11) and 2(13) of the Act.

4. On Respondent's Timecard Report documents, the Remington Department designation is 67001.

A. Alleged Interrogations

Nichole Bledsoe, who has been an Ozburn employee for a total of 7 years, testified that she works in Ozburn's Uzaki department; that her mother, Rayford, and her mother's aunt, Helen Herron, both work in Ozburn's Water Pik department; that she has two other relatives who work at Ozburn;² that in late 2009 her mother came to her and told her that Van Young and Karen White called her mother to the office and told her mother that Nichole had a supervisor on the floor crying; that, according to her mother, (a) Young asked her mother "what's up with Nicki" (Tr. 73), (b) her mother told Young that she did not know what was up with Nicki who was a grown woman, (c) Young told her mother "Well, you know she's got a supervisor on the floor crying and I also heard that she was in the Union" (ibid.), and (d) her mother told Young "I don't know but I'll go talk to her" (ibid.); that the supervisor who was crying was Sandy Pugh; that when her mother told her about the meeting with Young and White, she told her mother that she was in the Union and it was not a secret; and that later that day, in the evening after she left work, her mother telephoned her and they continued the discussion regarding her mother's meeting with Young and White. Her mother asked her for a union authorization card for Herron, and she told her mother that she did not have a card, but that she would get one for Herron.

evidence as GC Exh. 38. It is noted that, contrary to one of the proposed corrections, there is no "noisy" on l. 23 on p. 23.

² Cousin Eric Collins and Uncle Troy Hewlett.

On cross-examination Bledsoe testified that the affidavit she gave to the Board on May 19, 2010, does not contain a reference to either Young or White saying anything about the Union in their late 2009 meeting with her mother; that her supervisor knew that she was for the Union; that she spoke out at meetings at the Company about the Union, and she passed out brochures on her birthday, March 10, 2010; that she attended several Company meetings about the Union and they occurred both before and after November 2009; and that it was no secret that she was for the Union before November 2009.

On redirect, Bledsoe testified that with respect to November 2009, she had not handed out union flyers in front of Ozburn's facility yet (this occurred in March 2010); that she was not wearing steelworker T-shirts to work; that Ozburn passed out no-union flyers and her supervisor, Pugh, would have a meeting with the employees, going over the flyer and asking them if they had any questions; that she challenged Pugh every time she read something and she asked Pugh questions; that this is how the argument occurred between her and Pugh which resulted in Pugh crying; that in November 2009 she spoke to employees about joining the Union; that she told Pugh about joining the Union, how she felt about joining the Union, the reason why she was in a Union, and the reason why the employees needed a Union; that during this meeting Pugh said that she hoped that the employees did not have any questions because they needed to be thankful that they had a job; that she, in effect, told Pugh that it was going to get better; that Pugh said "Well, Nichole, if you're not going to listen to me, the hell with you" (Tr. 122); that she told Pugh "You just disrespected me. I'm going back to work"; and that before this meeting she had told Pugh that she believed that the employees needed a union.

Rayford, who has worked for Ozburn since 2000, testified that she works the first shift (8 a.m. to 4:45 p.m.) in Water Pik Monday through Friday; that she has two 15-minute breaks, usually at 10 a.m. and 3:15 p.m., and 45 minutes for lunch, usually at 12:30 p.m.; that while she does not clock out for breaks, she does clock out and back in for lunch; that during the latter part of 2009 her supervisor was Dye; that the volume of work can affect when breaks are taken and in high volume situations the supervisor tells the employees when they can take a break; that in November 2009 she was not openly supporting the Union at work in that she was not wearing prounion pins or T-shirts, and she had never handed out union flyers as employees were coming or going to Ozburn's facility; that on November 10, 2009, she had a conversation with Human Resources Manager Young in her office at about 2 p.m.; that Dye had told her that Young wanted to see her in Young's office; that it was just her and Young in the office; that Young asked her what was up with Nichole; that she asked Young what she meant; that Young said that White, who is vice president of Ozburn, came to her and said that your daughter Nichole is a union supporter; that Young told her that White told her that an employee on the floor came to White and told her that Nichole was supporting the Union; that she told Young "Well, I'm going to talk to her for you," (Tr. 288) and Young said "After all I've . . . [done] for you and your family, Nichole . . . I've got her job back" (ibid.); that she told Young that she

would speak to Nichole for Young; that Young told her to “talk to Nichole for me” (ibid.); that Young then asked her “Are you for it” (ibid.); that she told Young “no” (ibid.); that Young said that “she didn’t see how people would do her like this” (ibid.); that when Young said that she did not know who to trust, she told Young that she could trust her, she would not cross her, and she was her friend; that Young started crying and she told Young to give her a hug, which Young did; that they left Young’s office and walked into the open doorway of White’s office; that she asked White how she was doing and White asked her “Is everything okay with Nichole” (id. at 290); that she told White that she had a talk with Young and she was going to talk to Nichole for Young; that White asked her if Nichole was going to listen to her, and she told White “yeah, . . . she was my daughter” (ibid.); that Young told White that Rayford could get through to Nichole and White said okay; that she then went downstairs to Nichole’s department and told Nichole that Young had her and Rayford in her office and was questioning her about her, Nichole, being for the Union; that Nichole told her, “she told me wants to save the Union”³ (Tr. 291) and she did not care who knew; that she told Nichole to be careful and Nichole said okay; that later that day, at her 3:15 p.m. break, she telephoned Nichole and they discussed again why Young called her into her office earlier that day; that she and Nichole discussed the fact that Young called her into the office to discuss the Union and the fact that Young, in a different conversation either a week earlier or earlier during the week of the November 10, 2010, above-described conversation, brought up what happened between Nichole and Nichole’s supervisor, Pugh; and that she had the conversation with Young, about Nichole causing Pugh to cry, while she and Young were in the breakroom.

On cross-examination, Rayford testified that she has known Young since 2000; that when she is in the breakroom Young has asked her for some of the food she has; that she has offered her food to Young; that she heats up her food in a microwave which is located in an office near Young’s office; that she does not go to Young’s office on her own, but rather she goes to Young’s office at Young’s behest; that Young called Dye to have her, while she was on work time, go to Young’s office two or three times a week; that she started being called up to Young’s office two or three times a week when she started working in Water Pik 3 years ago; that she is no longer called to Young’s office two or three times a week; that prior to her November 10, 2009 conversation with Young in her office about the Union, Young had brought up the Union before telling her that “she [Young] had a list with everybody [sic] name on it that was for the Union” (Tr. 363); that Young held the list up and showed it to her; that she asked Young where she got the list and Young told her that she had somebody working for her; that she had only two conversations with Young about the Union in Young’s office, namely about Nichole and about the list; that White asked her whether Andrew Wardlow was for the Union; that White told her that

she needed to talk with Wardlow and she brought Wardlow up to speak with White; that she did not tell the Board agent about the list or Wardlow when she gave her affidavit; that on November 10, 2009, Young, through Dye, called her upstairs and asked “What’s up with Nichole” (Id. at 365); that Young said that White told her that Nichole is a union supporter, which was something White learned from an employee who works on the floor; that Young said to her “after all I did for you and your family Nichole do this shit to me” (id. at 365); that Young asked her if she was for it and was she going to talk to Nichole for her; that when she went down the hall to White’s office, White asked her was everything okay with Nichole; that she told White that she told Young that she was going to talk to Nichole for her; that White asked if Nichole was going to listen and she told White she would since Nichole was her daughter; that before the November 10, 2009 conversation (within a week of the November 10, 2009 conversation), Young mentioned to her that Nichole had an interaction with supervisor Pugh and Pugh was crying; and that she was not called to Young’s office since November 10, 2009.

On redirect, Rayford testified that her conversation with White about Wardlow occurred around October or November 2009; that White had a union flyer on her desk, and White was talking about Wardlow, saying that they had misspelled his name; that White said something about Wardlow being in the Union and she wanted her to talk to him for her about him participating in the Union; that during this conversation she and White were standing in the doorway of White’s office; that White’s desk was about 10 feet away; that the union flyer was laying on White’s desk; that the same flyers were on the table in the breakroom; that White walked over to her desk and she pointed out Wardlow’s name; that White showed her the flyer that was laying on her desk; that White said that she could not talk to Drew; that she went to the floor, got Drew, and brought him to the office where White was; that her conversation with White occurred before October 22, 2009; and that GC Exh. 23 is the union flyer White had on her desk, and “Andrew Woodlow” is named, along with 21 other individuals, in the union flyer to hourly Ozburn employees regarding who to contact with respect to attending a fish fry sponsored by the in-plant organizing committee on October 22, 2009, at the union hall.

Subsequently, Rayford testified that White picked the Union flyer up and showed her, by pointing, where Andrew Wardlow’s first name (and not his last name) was misspelled on the flyer.

Herron, who has worked for Ozburn for 10 years, testified that she works on the first shift in the Water Pik department; that during the latter part of 2009 her supervisors were Dye and Phillips; that during the latter part of 2009, around November, she was not doing anything openly at work that would indicate where she stood on the union issue; that she did not wear union pins or clothing and in November 2009 she had not handed out union flyers or leaflets as people were coming or going to work; that one day in November 2009 she was going through the metal detector on her way to lunch and Young asked her if she could speak with her; that Young led her to the manager’s entrance and then asked her “What’s up with G [Glenora

³ The counsel for General Counsel’s unopposed motion moves to change the word “save” to “support.” As noted above, the unopposed motion was granted.

Rayford] and Nichole” (Tr. 126); that she asked Young what she meant; that Young then said “What’s up with G and Nichole with this Union” (ibid.); that she then told Young “They are both grown women. They make their own decision. I don’t have anything to do with that” (ibid.); that she then said “I don’t trust them. Why should you” (ibid.); that she then went out to the parking lot to take her lunchbreak and she telephoned Rayford; that later she went to the breakroom to speak with Rayford, who had not finished her lunch; that she returned to the parking lot and when Rayford did not come there she telephoned Rayford and told her “Look, this is a lady [Young] that’s out to get us” (id. At 128); that when Rayford came to her from the breakroom she told Rayford exactly what she and Young said; that she then said to Rayford that she needed a union card; that Rayford telephoned Bledsoe and then Rayford told her that Bledsoe did not have a union card at that time but she would get one for her the next day; and that she wanted to sign the union card so that she would feel safer.

Rayford testified that on November 11, 2009, the day after she had the conversation with Young and White about Nichole, Herron came to her in the breakroom where she was on lunchbreak and told her that she needed to talk with her about Young; that she went to the lobby in the downstairs breakroom and Herron told her that Young came to her and asked her “What’s up with G and Nichole” (Tr. 294); that Herron told her that she told Young “I’m going to do me” (ibid.), and that Young then said “I knew you wasn’t [sic] like them” (ibid.); that Herron asked her to tell Nichole to bring her a union card; that later that day she telephoned Nichole and told her what Herron said and that Herron wanted a union card; and that she understood the conversation between Herron and Young to be about the Union and not about Nichole causing her supervisor, Pugh, to cry.

White, who is a regional vice president of OHL in charge of OHL’s Memphis operation, testified that she has known Rayford for 6 or 7 years; that before the Union and during the union campaign, usually on a daily basis, Rayford came to the area where her office is located to see Young or to warm up her lunch in the microwave, which is in the nearby copy room; that normally her office door is open and she saw Rayford go into Young’s office quite a bit; that once the union campaign began Rayford did not come into the office area and discuss the union campaign; that a couple of times Rayford did come into the office and discuss Wardlow with her; that Rayford made a couple of comments about Wardlow’s union support or lack of union support, saying that she was trying to turn him around; that Rayford told her that she should talk with Wardlow, and she told Rayford that Wardlow had the right to choose; that she also told Rayford that Wardlow, just like any other employee, could come and see her at any time; that one day in November 2009 she overheard, through her open office door, Young and Rayford talking about Nicki; that subsequently Young and Rayford headed toward her office and she stood up; that she asked Rayford if “everything is okay, [i]s Nichole okay, [and] [i]s there something we can do” (Tr. 946); that she asked if Nichole was okay because a few days before this there was a meeting on the floor and supervisor Pugh told her that Nichole was visibly upset, she was really upset, something was going

on, and she thought that HR might need to talk to her; that she was not sure what the issues were with Nichole; that when she asked if Nichole was okay she was referring to what she had been told by Pugh; that Rayford said that she was going to talk to Nichole; that during this conversation Rayford did not mention whether or not Nichole supports the Union and Rayford did not indicate that she was going to try to convince Nichole to support the company in the union campaign; that she did not say what’s up with Nichole and this union thing; that she said “hey, is everything okay with Nichole. Is she okay.” (Tr. 947); and that she did not ask “Young whether Ms. Rayford could get through to Nichole.” (ibid.)

Young, who is the regional human resource manager, testified that she works at OHL’s Memphis campus; that part of her duties involve discussing employee complaints with them, and it is common for employees to come to her to talk about concerns, either personal or dealing with the OHL; that she had a conversation with Rayford in November 2009 about Rayford’s daughter, Nichole; that she has known Rayford for about 10 years and Rayford comes to her office often; that sometimes she called Rayford to her office, but most of the time Rayford just came in on her own; that she and Rayford discussed things involving OHL or personal matters, relationships, or food; that Rayford often brought her food; that there is a microwave, which Rayford often used, in her row of offices; that in November 2009 Rayford came to her office on her own and said that she was worried about Nichole because Nichole was upset about something and she had told Nichole to go to see Young; that she told Rayford that Nichole knew that and Nichole had never had any problems talking to her about any issue; that 1 day later Nichole came and talked with her; that on a different occasion Rayford came into her office and the following occurred:

[S]he [Rayford] was upset and she was just mad and she said she was upset . . . with Nichole because Nichole had lied to her. And . . . I said about what? She said she—. . . I’ve been asking Nichole and asking Nichole . . . is she going to these meetings and Nichole keeps saying that she went, but then she just lying to me. I said well, Glenora, leave her alone. No, I’m hurt. And she would use a few cuss words. I’m her mamma and she don’t lie to me. I don’t care about these people out here.

So she kept going on and on. She was getting more and more upset. And so where my office sits is you can look directly down and see the picnic area where the employees have breaks. At this time, she—Nichole was down there talking to a young lady named Linda Gill, but everybody calls her KK. And she said she is down there talking to KK and stuff. You know, I ought to go down there and knock her in her “D” head and all that kind of stuff.

And I said whoa, hold on, Glenora, wait a minute. That’s your daughter and . . . that’s your child I understand that. But if you go down there and even argue with Nichole, then you’re going to put yourself in a position where . . . you could get terminated. You can’t have—I

don't—look, I understand you're upset. You all need to take that at home.

And she said no, she don't lie to me. I said I understand what you're saying, Glenora, but you've got to take that home. You cannot—you need to calm down, because you're getting too upset and you just need to leave it at the moment. No, I'm going to go down there and do all this.

And so Karen kind of overheard the conversation. I said Karen come over here and go calm yourself down. And so we were walking down the hallway and Karen happened to hear . . . some of—. . . you can sometimes hear if your voice is real inflated. And so Karen asked . . . Glenora, are you okay and stuff. And so she went on to telling Karen the story and everything.

And so she said—I think Karen said something . . . well, I asked you was she okay. You said she was upset about something. Did she ever come and talk to Van and she said no.

. . . .
. . . . And so she said no, she was—Karen just pretty much went on agreeing with me. Well . . . Van is telling you right. You need to calm down, You can't—whatever it is, you know, whatever is going on with her, you can't go address it. I know it's your child, but you can't just do that, because, you know, at the end of the day, you both are still employees of OHL. [Tr. 984–986]

Young further testified that neither she nor White asked any questions about who is for the Union or who is not for the Union during this conversation; that she was not crying during her conversation with Rayford about Nichole; that Rayford did not give her a hug during this conversation; that she did not, during her conversation with Rayford about Nichole, (a) refer to the Union and tell Rayford “after all I've done for your family, I got Nichole's job back” (Tr. 1007) (b) say “I don't see how people can do me like this” (ibid.), (c) say “I don't know who to trust” (ibid.), (d) say “I had a talk with my God and told him I was going to be okay” (ibid.), and (e) ask who was for the Union and who was not; that about 1 week before her conversation with Rayford when she was upset with Nichole, she did not call Rayford to her office to talk about Pugh and Nichole in the breakroom or anywhere else; that she has known Herron for 10 years; that some weeks after she had the conversation with Rayford about Nichole, which conversation spilled over into Whites' office, she asked Herron in passing about Rayford, who had been “just kind of real dry” (id. at 987); that when Herron asked her why she was asking, she told Herron that Rayford seemed like something was wrong with her; and that Herron then made the following statement: “I told you to stop fooling with Glenora a long time ago. I'm her aunt and she don't care nothing about me, so who are you? And I looked. I said okay. She said you'll listen. I said girl—we both left.” (id. at 989); that there was no mention of the Union in her conversation with Herron; that she did not ask Herron “what's up with G and Nichole with this union” (id. 989); that she did not talk at all about Nichole with Herron during this conversation; that in her numerous conversations with Rayford

she did not tell Rayford that she had a list of the people who were for the Union; and that she never had such a list.

On cross-examination, Young testified that when Rayford was in her office on the clock, it was about work and it was not a social visit; that she denies (a) that she became emotional in her office when Rayford was present, and (b) that Rayford consoled her with a hug; that very early in the union campaign Rayford would come to her office and voluntarily express her opinions about the Union, and her displeasure about what was going on; that she never knew that Rayford supported the Union because Rayford, basically, expressed her displeasure about what was going on with it; and that she denies ever initiating the topic of the Union in her discussions with Rayford.

Kurtycz, who was terminated by Ozburn twice, testified that she was first hired in July 2008; that she worked for Ozburn until she was terminated after she could not work for several months after a car accident in October 2008; that in April 2009, when her doctor released her for work, she was rehired by Ozburn; that she was again terminated by Ozburn on March 2, 2010; that she worked in Ozburn's HP department as an operator on the first shift, Sunday through Friday, with Saturday and one other day, which changed, off; that her supervisors in 2010 before she was terminated were Pope, who reported to Vania Washington, who reported to Vice President White and Area Manager Phillip Smith; that during January or February 2010, or earlier, she did not wear union T-shirts or union buttons to work or hand out union leaflets at the curb where employees were coming and going; that on March 1, 2010, at 9:30 a.m. Buddy [Kurtycz did not know his last name (Lowery).], who works in the office with Washington, came up to her while she was working and he said to her “You are on my list” (Tr. 171); that she asked him what kind of a list he was talking about; that Buddy showed her a piece of paper (GC Exh. 4), pointed at it, and said to her “If you select the United Steelworker . . . it's not going to happen” (ibid.);⁴ that Buddy asked her “What do you think about the Union” (id. at 172) and she told him “Union is good” (ibid.); that she told Buddy that (a) the problem was that when she came to work she never knew what time she would be able to go home, (b) that week on Sunday she asked her supervisor, Pope, if she could go home after 8 hours of work because she already had 34 hours of overtime, and (c) Pope spoke with Washington and then he told her that she would have to work beyond the 8 hours that day; that Buddy made notes while she told him this; that Buddy then told her “I don't know anything about it” (ibid.); and that Buddy then walked over to her Team Leader, described only as Earl.

On cross-examination, Kurtycz testified that on March 1, 2010, Buddy talked to Earl (Johnson) after Buddy spoke with

⁴ Kurtycz testified that prior to this she had received (from the Union) a copy of the same “NOTICE TO EMPLOYEES” in the mail, which is dated “2/12/10,” which was signed by a representative of Gerber Legendary Blades, and which, as here pertinent, indicates “WE WILL NOT tell you that we will pull our account with Ozburn-Hessey Logistics if you select the United Steelworkers Union, or any other labor organization, to represent you.” (Emphasis added.) The emphasized words on GC Exh. 4 are highlighted in yellow.

her; that she did not approach Buddy about the fact that she was upset because she could not get the day off for her daughter's birthday; that her complaints to Buddy on March 1, 2010, referred to something that happened before March 1, 2010, and not on March 1, 2010; that in response to her complaints Buddy said "I don't know anything about your account," (Tr. 192) which was HP; and that she did not hear any of the conversation between Buddy and Johnson.

Ernest (Buddy) Lowery, who manages Ozburn's Operational Excellence (efficiency) Program, testified that on Monday, March 1, 2010, he was having a conversation on the floor with Lead Earl Johnson in the HP account about a topic that he was supposed to talk to the people who were assigned to him that day; that he could not remember what the topic was; that Kurtycz, who seemed upset, interrupted them, saying something to the effect that she was scheduled to work on Sunday and she didn't get her day off during the week and it was her daughter's birthday and she wanted that day off; that he directed her to talk to her manager or supervisor because he was not over that account; that he might have had a notebook in his hand; that he "wouldn't think" (Tr. 769) that he had General Counsel Exhibit 4, a notice to employees, in his hand when he was talking to Earl Johnson or Kurtycz; that he wanted to say that he saw the notice posted on one of Ozburn's boards at the office; that he did not ever possess a copy himself; that he wanted to say, and he was not sure, that Earl Johnson did not stay while he spoke with Kurtycz; that this was the only time he spoke with Kurtycz on March 1, 2010; that he did not think he told Kurtycz that she was on his list, and she was not; that he did not say anything about the Steelworkers or the Union; that the only things they talked about were the issues that she had on her mind, namely getting off for her daughter's birthday; that although he did not ask Kurtycz what she thought about the Union, Kurtycz said something to the effect that that was why the employees needed the Union, because she was working Sunday, she could not get off, and it was not right; that he did not believe that he made any comment about the Union in response to what she said; that his office is across from Washington's office; that he was not present later on March 1, 2010, for any conversation Washington and Jim Cuisino may have had with Kurtycz; that he was not asked or consulted for a recommendation about whether to terminate Kurtycz; and that he did not have any part in the decision to terminate Kurtycz.

On cross-examination, Lowery testified that on March 1, 2010, he was on the floor speaking to the employees about a topic related to the union campaign, but he could not recall what the topic was; that this is what he was discussing with Johnson on March 1, 2010, and it had nothing to do with efficiency; that he was trying to get information out to all the hourly employees about what was going on with the campaign; that he had a list of people assigned to him to talk to; that General Counsel Exhibit 4 was posted on the walls in the breakroom on the bulletin board; that since March 1, 2010, was a Monday, the Sunday Kurtycz was referring to would have been either the day before they had the conversation or the coming Sunday; that he was pretty sure that as Kurtycz was talking to him he wrote a note for Washington, her manager, to come and talk to her about her issues; that his conversation with

Kurtycz lasted about 5 minutes, but he could not recall what else they talked about; that he could not remember who else was on his list to talk to that day; that Kurtycz was not on his list on March 1, 2010; that Kurtycz raised the issue of the Union in the conversation after Earl had walked off; that Kurtycz said something about that was why the employees needed a union because she was having to work on Sunday and she couldn't get off; and that he did not remember what he said in response. Subsequently, Lowery testified that not only did he not recall who, other than Johnson, was on his list of employees who he was supposed to talk to that day but he did not recall who he did talk to after Johnson that day.

B. Distribution and Solicitation

Regarding employees selling items while the seller or the purchaser is on worktime, Ozburn's employee Sandra Hayes, who has worked for Ozburn for 3 years, testified that she works in the Water Pik department; that she is familiar with Ozburn's policy on soliciting or sales activity by employees because in a company meeting which was held about February or March 2010 about the Union, Ozburn Area Manager Phillip Smith told the employees that an employee was terminated for selling; that employees are not supposed to sell, solicit, or do anything on Company property; that employees selling something while not on break "is a regular thing like coming to work" (Tr. 25); that an employee named "Shaky," who before she was moved to another building in about July 2009 worked in Water Pik, sold DVDs in Water Pik; that "Shaky" transported the DVDs on her pallet jack; that the manager in Water Pik, Randy Phillips, had to see them because Phillips eats sunflower seeds, "Shaky" brought the seeds in for Phillips, and Phillips got the seeds off the pallet jack of "Shaky"; that she has purchased DVDs from Cynthia Rivers, who worked in Water Pik for about 2 years but has not been there since about March 2010; that she paid Rivers \$3 for each DVD, and she was on work time when she made the purchase; that Rivers delivered the DVDs before the morning meeting of the employees in the Water Pik department with supervisors and the lead; that Rivers kept the DVDs on her pallet jack where they could be seen; that she never saw Phillips purchase a DVD from "Shaky"; that she never saw Phillips in the presence of "Shaky" when "Shaky" sold or delivered DVDs to an employee while the employee was working; that Doris Kilpatrick, who works in Ozburn's quality control department, sells Avon products; that Kilpatrick takes an Avon order every week; that Ozburn employee Renee (she did not know Renee's last name) looked through the Avon book and placed an order while on worktime; that Kilpatrick comes out on the floor to do inventory and she has the Avon books with her notepad and she passes them out; that on one occasion, a couple of months before Rivers was fired in March or April 2010, she saw Ozburn Supervisor Dye looking into River's bag which had been left in his office and had "Avon" on it; that a guy (she did not know his name) in National Geographic sells DVDs; that white antiunion T-shirts were sold for \$1 around the first time the employees were supposed to vote last fall; that about 1 month after the white antiunion T-shirts were distributed, orange antiunion T-shirts were handed out free of charge to employees who were working by an

employee who works in inventory with Kilpatrick, and Supervisors Randy Phillips and Alfreda Owens both received one; that while she was on her lunch break sitting in her car in the parking lot in about July 2009 she saw Ozburn employee Rayford sell two purses to Ozburn human resources manager Young; and that Rayford does not sell purses anymore.

On cross-examination Hayes testified that she attended a meeting of Water Pik employees at which Phillip Smith said that employees could not sell or solicit on Company property, and there would be no soliciting on work time on the property; that Smith cited the termination of a lady who worked in HP (Hewlett Packard) and who sold food; that Ozburn Vice President White and Young were at this meeting; that "Shaky" sold the DVDs around July 2009; that Randy Phillips had to see the DVDs on "Shaky's" pallet jack when he went to that pallet jack to get seeds; that employees are not supposed to have DVDs at work; that in order to get the DVDs into the facility, an employee would have to get past a metal detector with a guard standing there; that she never saw a supervisor or manager witness "Shaky" selling DVDs; that 2 weeks before she testified at the trial herein on July 14, 2010, she saw Kilpatrick bring an Avon book to Jill McNeal, which McNeal has on her desk; that Kilpatrick carries the Avon book on her clipboard, but not on top; that she did not know if any Ozburn manager or supervisor was aware of McNeal having an Avon book at her desk; that she saw Young give the money to Rayford for the two purses Young purchased in the parking lot, which she considers to be a working area because she was told that she was not allowed to sell or solicit in the parking lot; that she did not know whether Rayford or Young was on break; that since they start work at different times she and Rayford take breaks at different times; that Ozburn employee Renee purchases Avon products from Kilpatrick on almost a weekly basis; that when she is on the work floor Kilpatrick has the Avon books under a clipboard or a stack of papers; that Kilpatrick tells Renee that she has her order and Renee tells Kilpatrick that she will be up to get it; and that Ozburn employee Tasha purchased Avon products on about May 2010, and while she did not see Tasha make the purchase, she saw Tasha return to the floor with the product.

On redirect, Hayes testified that she saw people look at the Avon books while on the work floor and on worktime; that when Kilpatrick came back through her department the employees would tell her what they wanted or they would write it in the Avon book and write their name on the book; and that the employees were not on break when they were out on the floor; that Kilpatrick comes out on the floor to check inventory and check on an account and product; and that there are about 19 employees on day shift in Water Pik. On recross, Hayes testified that she was not aware of any Ozburn supervisor or manager seeing Kilpatrick handout Avon books; and that Ozburn's policy is that the employees cannot distribute or solicit anywhere on the property.

With respect to Ozburn's policy on soliciting and selling items in the workplace, Bledsoe testified that it is in the Ozburn handbook; that a supervisor goes over it with the employees; that at the end of 2009, when the handbook was changed, was the last time she was told about the policy; that at that time her

supervisor, Pugh, went over the handbook with the employees, telling them that they should not sell things; that one morning in December 2009 she purchased three DVDs for a total of \$9 from Rivers, who worked in Water Pik, after they had clocked in; that she was aware of Rivers selling DVDs on a daily basis in 2009; that Rivers passed out a list of the DVDs she had and the next day she would bring in the DVDs chosen by employees; that she chose the three DVDs from a list she saw in the breakroom; that while she was on the floor she gave money to Rivers for another employee for the purchase of DVDs; that she did not know whether any supervisor was aware of Rivers' sale of DVDs at work; that she never saw a Ozburn supervisor or manager purchase a DVD from Rivers, nor did she see a supervisor in the immediate area when an employee was purchasing a DVD on the floor; that a lady who does inventory sells Avon products while at work in Ozburn, and she purchased a watch for her daughter from this woman; that this transaction occurred around Christmas 2009, after she had clocked in after coming back from lunch she gave the woman the money for the watch; that she has seen another Ozburn employee, described only as Kay Kay, looking at the Avon book when she was on the floor, on working time, and not on break; that sometimes when she is on the work floor she looked through the Avon book when she saw the book on her supervisor's, Pugh's, desk or on Kay Kay's desk, which is right next to Pugh's desk; that she has seen Avon bags with items in them on pallet jacks; that she saw an Ozburn employee in HP selling hot food in the parking lot during lunchtime, but at the time of her testimony at the trial herein, July 2010, the woman was no longer with Ozburn; that in 2009 her mother, Rayford, sold purses to a lot of employees during worktime when they were not on break, and Rayford sold purses to Young; that on one occasion in mid-2009 when she was on break in the breakroom her mother came up to her with a purse and she asked her mother what she was doing; that her mother told her that she was fixing to sell the purse to Young;⁵ that to get to Young's office one has to go through the breakroom; and that her mother did not come back out with the purse.

On cross-examination, Bledsoe testified that from her personal knowledge and observation no Ozburn supervisor or manager witnessed the sale of the DVDs or Avon products; that after she picked up the Avon watch she purchased from Kilpatrick she put it on her pallet jack since she did not have a locker at the time; that she has never seen an Ozburn supervisor or manager go to somebody and ask them about their Avon bag; and that she never saw her mother and Young exchange money for purses in Young's office.

On redirect, Bledsoe testified that when she had the conversation with her mother about her mother going to Young's office with respect to the sale of a purse, her mother approached her and told her this while Bledsoe was working on the floor and she did not know whether her mother was on the clock.

Herron testified that her understanding of Ozburn's policy regarding soliciting or selling items is that if she wanted to give

⁵ This testimony was offered and received as corroboration of the testimony of Rayford.

a union card, she could not; that if she wanted to sell something, she could not; that she could not sell or do anything on Company time; that from 8 a.m. to 4:45 p.m. she did not do anything, but when she gets off work she pushes her card; that she is aware of Ozburn employees selling items at times when they are not on break; that Rivers, who worked in Water Pik before she was terminated, used to sell DVDs and she bought some 30 or 40 of them from her; that Rivers kept the DVDs on her pallet jack; that she placed the orders for the movies with Rivers and bought the movies for \$3 each while she was on Company time, which she understood to be from the time she clocked in to the time she clocked out; that one day Rivers was selling her a DVD at 8 a.m. at the morning meeting, Phillips told Rivers to do it at break, and Rivers told Phillips "to shut up" (Tr. 133); that nothing changed after Phillips told Rivers to do it at break; that Kilpatrick, who works in the inventory department, sells Avon products while people are on worktime; that she ordered Avon products by looking through the Avon book, putting her initials on what she wanted, folding the page, and giving the Avon book back to Kilpatrick in her office during worktime; that she paid Kilpatrick when the order came in; that Kilpatrick would tell her when her order came in, she would go to Kilpatrick's office and pay for the order, and then she would place the product on her lift while she worked; that she saw Ozburn employee Renee Harris looking at the Avon book while she was out on the floor on Company time; that there were plenty of other times she saw an Ozburn employee looking at the Avon book while on Company time; that she had never seen an Ozburn supervisor or manager order Avon from Kilpatrick; that she purchased the T-shirt she was wearing from Young in November 2008, during the Presidential race; that the T-shirt she was wearing when she testified at the trial herein had "Obama," "Dr. King," and "the dreamer" on it (Tr. 147); that a couple of weeks after she placed the order she overheard Dye tell Rayford that Young wanted to see her in human resources; that later Rayford came back to the floor and told her that her shirt was up there; that she had ordered the T-shirt from Rayford earlier when she was out on the floor working; that when she picked her shirt up in Young's office she was not on breaktime; that she did not pay Young for the T-shirt when she picked it up, but rather she paid her \$5 for the T-shirt the next day when she saw her coming down from human resources; and that in 2010 an Ozburn employee described only as Annie sold strawberry shortcake in the breakroom during lunchbreak.

On cross-examination, Herron testified that she placed one order with Kilpatrick for Avon products and that occurred in July 2009; that when Rivers and Phillips had their above-described verbal exchange the morning meeting had already started and Phillips said to Rivers "Hey, do that on your own time" (Tr. 156); that Rivers then told Phillips to "Shut up" (Ibid), and she did not stop selling the DVDs; that she could not recall the year or month that the verbal exchange between Rivers and Phillips occurred; that she could not recall when Rivers left Ozburn; that although she was sure that Annie sold the strawberry shortcake in 2010, she could not specify the date; that Harris works in PTO (sorting) in Water Pik on the first shift; that Rayford took orders for the "Obama" (Tr. 159) T-shirt before the November 2008 election; and that when the

shirts came in a couple of weeks later Rayford told her, and she went to Young's office to get her shirt while she was not on a break.

Kurtycz testified that at about 2:10 p.m. on March 1, 2010, a supervisor told her that Washington wanted to see her; that she went to the office and met with Washington, a second shift supervisor, described only as Jim, and Phil Smith; that during this meeting Washington told her that there were two people giving management statements that she was soliciting on the floor, and forcing people to sign a union card; that she told Washington that it never happened; that she had not talked to any of her coworkers about the Union on March 1, 2010, and she had not talked to any of her coworkers about the Union while she was at work in the days before that; that before she was sent home on March 1, 2010, she did not have any union cards with her that day at work; that she never talked to any employees or tried to give them any union cards on March 1, 2010; that she had not tried to give employees union cards while she was at work before March 1, 2010; that Washington told her "we are going to investigate from the floor" (id. at 175); that Jim told her that she needed to go home even though her shift was not over; that she asked if she could go back to her station to get her pen, and Jim escorted her to get the pen and to the time clock to punch out at 2:45 p.m.; that she asked Jim why Buddy was questioning her about the Union that morning and Jim told her that Buddy could do whatever he wanted because Buddy was in management; that Jim told her to telephone Washington at 11 a.m. on March 2, 2010; that as she left Ozburn's property former Ozburn employee Jerry Smith was handing out union flyers to employees and he gave her one; that she parked her car and she helped Jerry Smith hand out union flyers until 5 p.m. that day; that this was the first time she handed out union flyers, she had never done it before that day; that while she was handing out union flyers she saw Phil Smith; and that Jerry Smith was saying it is time to vote and Phil Smith, who was in his car leaving Ozburn property, said "Let's vote" (id. at 176).

On cross-examination, Kurtycz testified that on the morning of March 1, 2010, she did not do any kind of union solicitation during working time and in working areas, she did not ask any employees for their names and addresses so the Union could contact them, and she did not pass out any kind of union cards or union literature of any kind; that she does not know who Tiraney Crawford, Jearl Moore, or Lashunda Hill are; that she signed Respondent Exhibit 3, which is an acknowledgement and receipt of a handbook dated "8-31-09"; that in September 2009 she received a writeup from Phil Smith for selling food on Company property after she had been told not to do that; that she sold the food during her lunchtime and not on working time; that before September 2009 Washington told her in the breakroom in late June 2009 that she needed to stop selling food because "the Union is coming" (id. at 195), and when she received the final warning Washington told her that she was jeopardizing her job by selling food; that she continued to sell food after late June 2009, but she did it outside the gate on Holmes Road until Randall Coleman came to that location and told her that she could not sell food there; that after June 2009 she continued to sell food on Ozburn property because her

husband had lost his job and they needed the money; that when she received her final warning her husband was back to work and she did not do it anymore; that after September 2009 she did not continue to sell food anywhere inside the gates of Ozburn; that Phil Smith did not talk to her before she got her written, final warning about Ozburn's solicitation policy; that Smith did not have a meeting with her where he read a letter regarding what the solicitation policy is at Ozburn; that Phil Smith never talked to her while she was selling food out of her car in the parking lot; that she never admitted to Smith that she was selling food in the parking lot and he never told her that Ozburn did not want her selling food out of her car because people might get sick and she would have health issues; that no one ever reported to her that they got sick eating her food; that on September 29, 2009, she was in the breakroom at lunchtime when Ozburn Vice President White came in and saw an open cooler with food and drinks in it; that White left and returned a few minutes later with Young; that Young asked her where the cooler was; that she had put the cooler in the ladies shower room next to the breakroom; that another employee told Young that the cooler was in the ladies room; that at the end of the day on September 29, 2009, Washington, who had told her to stop selling food in June 2009, told her she was jeopardizing her job; that she signed Respondent Exhibit 4, which is a final written warning dated "9/29/09";⁶ that she met with Phil Smith and another supervisor whose name she did not know when she received her final warning; that while the employee performance report of September 29, 2009, indicates that she claimed no knowledge of any cooler, the situation involved her not answering when asked who the cooler belonged to; that the first time she was warned was in late June 2009 when Washington told her to quit selling food; that the second warning was probably the time Randall Coleman told her to stop selling food when she was outside the gate; that when she signed the September 29, 2009 final warning she knew that any further issues with the solicitation policy could lead to her termination; that when she was being escorted back to her department on March 1, 2010, to retrieve her pen she asked Jim "How come Buddy can talk about the Union and I can't" (Tr. 215); that she did not ask this question during her March 1, 2010 meeting with Washington, Phil Smith, and Jim; that while Jim escorted her to get her pen and then to the timeclock on March 1, 2010, she asked Jim "why Buddy that morning . . . was talking about the Union and just like me, the employee, we cannot speak out about the Union" (id. at 216); that she had no idea why she asked Jim about employees speaking out about the Union if she had not done it that morning; that she did not solicit on the morning of March 1, 2010; that sometime before March 1, 2010, she had been informed that Jerry Smith had been terminated by Ozburn; that her hand billing on March 1, 2010, with Jerry Smith after she was sent home is the first time she engaged in any kind of open union support; that when Phil

Smith was leaving the Ozburn facility on March 1, 2010, Jerry Smith told Phil Smith "It's time to vote" (id. at 220) and Phil Smith said "Let's vote" (ibid.), "Let's do it; let's vote" (ibid.); that after the final written warning in September 2009 she stopped selling food at Ozburn; and that Phil Smith never told her to stop selling food, but she met with him when she received her final notice on September 29, 2009.

On redirect, Kurtycz testified that she started selling food to her coworkers in April 2009 out of the back of her car in the parking lot when she was on lunchbreak; that in late June 2009 Washington told her that she had to stop because the Union was coming and what she was doing was solicitation; that she then sold food out of the back of her car outside the gate off Ozburn's property on Holmes Road (GC Exhs. 16, 17, and 18); that Coleman drove up next to her car and told her to stop doing what she was doing; and that on March 1, 2010, when she was handing out union flyers Phil Smith looked at her.

On recross, Kurtycz testified that on September 29, 2009, when she was selling food in the breakroom it was after she stopped selling food out of her car on Holmes Road; that "after June 2009 . . . [she] continued to sell food either in the breakroom or in the parking lot inside the gate" (Tr. 238); that when she sold food out of her car on Holmes Road her car was parked in the street in front of a private residence on the same side of the street as the plant, but off Company property; and that she made sandwiches, salads, sometimes she cooked hot food like chicken on a stick, and she also sold chips and a drink.

Jeremiah Walker, who is a second shift OHL supervisor in the HP account, testified that he never supervised Kurtycz who works on the first shift; that he was asked by Phil Smith to sit in on two meetings between Smith and Kurtycz; that the first meeting occurred about August (presumably 2009); that Smith told him that he had to give something to Kurtycz and he needed another salaried employee to be there, but Smith did not tell him in advance what discipline or specifically what the purpose of the meeting was; that it is a regular practice that when you are going to meet with an employee for disciplinary purposes that you have another manager or supervisor present; that he and Smith met with Kurtycz in an office near the entrance to the HP warehouse; that during this meeting Smith told Kurtycz that she was selling food and she was not allowed to sell food; that Smith presented to and read to Kurtycz a letter which indicated that it was against company policy to sell food or engage in any type of solicitation; that Kurtycz did not deny that she was selling food; that Smith told Kurtycz that if she continued to sell food, it could lead to further disciplinary action; that Smith gave the letter to Kurtycz at this meeting; that 2 or 3 weeks later Smith again asked him to be present at a meeting Smith had with Kurtycz; that the door to the office was closed during the second meeting; that at this meeting Smith gave Kurtycz a 1-day suspension for selling food; that Kurtycz said that she was selling food because her husband had been laid off and she was trying to supplement her income; that Respondent Exhibit 4, which is dated "9/29/09" and is a final written warning for selling food (in this instance, from a cooler in the breakroom, and the Employee Performance Report reads in part: "This is the 3rd time Glorina [Kurtycz] has been

⁶ The "EMPLOYEE PERFORMANCE REPORT" indicates that this is the "3d time Glorina has been warned to cease from selling food prepared by her on OHL property" and "any future violations of OHL's solicitation policy will result in further disciplinary action up to and including termination."

warned to cease from selling food prepared by her on OHL property.) was given to Kurtycz at this second meeting during which he was present; that Smith read the final warning to Kurtycz and he gave a copy of it to her; that Kurtycz did not take issue with the indication in the final warning that this was the third time she had been warned to cease selling food on OHL property, and she signed the document; and that Smith read to Kurtycz that portion of the final warning which referred to further disciplinary action up to and including termination.

On cross-examination, Walker testified that the office utilized for the first meeting between Phil Smith and Kurtycz at which he was present was Washington's office; that Washington was not present during that meeting; that the first meeting between Phil Smith and Kurtycz for which he was present occurred sometime between July and September 2009; that the situation involved in the first meeting was that Kurtycz was selling food out of her vehicle in the OHL parking lot outside the warehouse; that in the 3 years he has been a supervisor at OHL he has never been involved in any other investigation or discipline relating to employee solicitation activity; and that Kurtycz is the only employee he is aware of who received discipline for violating the solicitation policy.

Ozburn employee Jearl Moore testified that she works in the HP account at Memphis; that on March 1, 2010, Kurtycz worked in HP on the same shift she was on; that she saw Kurtycz on March 1, 2010, "handing out Union rep cards to one of the other associates . . . to tell her to vote for the Union" (Tr. 592); that "Yes, sir . . . [she] did see her handing these to the employees" (Ibid.); that this occurred on working time, Kurtycz was at work on the floor, we were all at work in aisle 15 on the HP floor; that Kurtycz "told us . . . to fill out the card and vote for the Union" (Id. at 593); that, with respect to whether Kurtycz was asking for any information about their addresses or anything like that, Kurtycz "told us the Union card had all the information that they needed for the name, the address, and phone number. She said fill that out and vote for the Union" (Ibid.); that this occurred after their last break and it was between 1:30 and 1:45 p.m.; that she went and reported what happened to Manager Washington; that the following day, March 2, 2010, she received a telephone call instructing her to come into the Ozburn facility and write out a statement; and that she wrote out the statement (R. Exh. 9), and gave it to Supervisor Pope. Moore's statement reads as follows:

March 2, 2010

Every day Mrs. Kurts [sic] would talk to the employees about voting for the Union. She would have the union cards in her pocket trying to get people to fill them out and also to get them to go to the Union meeting. I witness her yesterday giving one of the cards to employee telling her to fill out that card and vote for the Union.

Jearl V. Moore

On cross-examination, Moore testified that she worked the second shift in HP, but she was put on the first shift in the early part of March 2010 or in February 2010; that when she worked the second shift she worked from 3 p.m. to 11:45 p.m. and her shift overlapped with the first shift; that Kurtycz worked on the first shift; that when she worked on the first shift her hours

were 7 a.m. to 3:45 p.m.; that Pope telephoned her at 8 a.m. on March 2, 2010, on her cell telephone (it was his day off) and told her to come in and submit a statement regarding what happened the day before; that she wrote the statement at home and brought it in at 9 a.m. on Tuesday March 2, 2010; that Kurtycz talked to employees everyday about the Union starting when the employees started having Ozburn meetings about the Union; that she estimated that Kurtycz spoke to employees about joining the Union everyday for 2 weeks; that the first time she recalls Kurtycz speaking about the Union was when she spoke with her between 8 and 8:30 a.m., telling her that they needed a Union and everybody needed to vote; that she told Kurtycz that she did not want to hear it and she walked away; that she did not recall when the Ozburn meetings about the Union started; that she did not know that the Union started organizing in late Spring 2009; that she decided to report the activities of Kurtycz on March 1, 2010, because she saw Kurtycz hand another employee a union card and told the employee to fill out the card and vote for the Union; that she only knew the first name of the employee who Kurtycz gave the union card to on March 1, 2010, and while she did not include the name of the employee in her statement, she did tell Pope the first name of the employee who received the card the day she drafted her statement and she told Washington on March 1, 2010; that the other employee's first name is Evette and she did not know her last name; that when Pope telephoned her he said that Jim was supposed to tell her to write out a statement before she left work on Monday, and she should write out a statement and bring it into his office; that when she left work on March 1, 2010, at 3:45 p.m. she saw Kurtycz out by the curb but she did not pay any attention; that "[i]f she was out there [by the curb handing out leaflets], I didn't see her" (Tr. 610); that she could not say there was anybody handbilling out at the curb on Holmes Road on March 1, 2010, when she left the facility; that she saw Kurtycz give the union card to Evette after the last break, and the last break is a 15-minute break between 1:30 and 1:45 p.m.; that she saw Kurtycz give Evette the union card between 1:30 and 1:45 p.m. during the breaktime, but "[w]e was not out the [sic] building. We was still on the floor" (id. at 614); that on March 1, 2010, she told Washington "I'm just tired of hearing about the Union" (id. at 616) even though on March 1, 2010, no one was talking to her about it; that she did not see Kurtycz with a union card before March 1, 2010; that Kurtycz gave Evette the union card when everybody was clearing out to go on break at about 1:30 p.m.; that she knew what the union card looked like because another employee received one in the mail and the employee (she did not know the employee's name) showed the card to her during worktime the week before March 1, 2010, and "[w]e get in the mail, they were coming to our addresses" (id. at 620); that she did not open the mail from the Union; that she does not discuss the Union with anybody; that with respect to the employee who showed her a union card in the week before March 1, 2010, they were not talking about a union card on work time in that "[h]e was just showing me the card" (id. at 621); that the employee who showed her the card no longer works at Ozburn; that "Yes" it was a woman who showed the union card to her about a week earlier than March 1, 2010, "No" she did not

know her name, and “No” she did not ever know her name (id. at 624); that she did not report this incident to Pope or Washington because “[s]he never asked me to fill out the card. She just told what the card looked like” (ibid.); and that the union card that Kurtycz gave to Evette was white and not blue or green.

On redirect, Moore testified that she told Washington that Kurtycz gave the union card to Evette in the cluster area where she was picking parts; and that Evette, who worked on the second shift, came to work early that day, she had just come in, and she was not on break.

On recross, Moore testified that when she saw Kurtycz give a union card to Evette she was going on break, the supervisor had already hollered break; and that she continued to pick on her breaktime when Kurtycz gave the union card to Evette.

Subsequently, Moore testified that she did not originally testify that Kurtycz handed union cards to other employees on worktime; that the only employee she saw Kurtycz give a union card to was Evette; and that when Kurtycz solicited her during worktime about joining the Union she did not report this to management.

Ozburn employee Lashunda Hill testified that she works in the HP account; that she saw Kurtycz talking to people about the Union the whole time the union thing was going on [“once they started giving us the Union flyers saying that there would be an election” (Tr. 637)], all the way up until she was terminated; that on more than one occasion, when she was working on the floor picking in the cluster area, Kurtycz gave her a union card and tried to get her to sign it; that she had the same working hours as Kurtycz; that on one occasion when she was with Moore, she saw Kurtycz hand union cards out in the cluster in that Kurtycz “walked up to both of us and handed—gave us union cards and asked us to sign them” (id. at 638); that this occurred on a Monday and it was “the last time she [Kurtycz] did it” (Ibid.); that “the last time was the same week maybe within . . . [7] days of it [when Kurtycz was no longer at Ozburn]” (id. at 639); that this was the last time that Kurtycz gave her a union card and this was the only time she was with Moore when this occurred; that this might have occurred the day before because she was not at work the day Kurtycz was terminated; that Kurtycz had tried to hand her a union card before this; and that she had seen Kurtycz trying to hand cards to other people before and it happened on worktime out on the floor.

On cross-examination, Lashunda Hill testified that Kurtycz tried to get her and Moore, when they were together, to sign union authorization cards around March 1, 2009, shortly before Kurtycz was terminated; that Kurtycz also told them that they should vote for the Union; that she did not take the card from Kurtycz, and “I told her to leave me alone because I was tired of hearing about the Union” (Tr. 642); that Moore went to inform a manager; that she did not know [“I have no clue.” (ibid.)] what time of day Kurtycz tried to give her and Moore union cards to sign, she did not know if somebody had just hollered break, but she “just knew” (ibid.) that they were on the clock because they were on the floor; that breaks do not start until the employees leave the cluster picking area; that it is possible that someone hollered break before Kurtycz walked up

to her and Moore; that Moore was standing in the area when Kurtycz tried to give her and Hill a union card; that she does not go by the name Evette; that Evette is not a nickname or a name anyone calls her; that she immediately told lead Earl Johnson what happened with Kurtycz, saying that “I’m tired of hearing about the Union” (id. at 646) and “Glorina is constantly hounding us about the Union.” (ibid.); that she had seen a union card before when a lady who worked in another account showed her a white union card where one specifies their name, address, and phone number; that she did not know the name of the lady who approached her once to try to get her to sign the card in the breakroom when the organizing first started in August 2009; that she did not report that solicitation to management; that she did not tell anyone other than her lead about the Kurtycz solicitation; that she never reported the other occasions when she was solicited to sign a union card; that she reported the March 1, 2010, Kurtycz solicitation because she was fed up, “I was tired of the Union thing” (id. at 650); that March 1, 2010, which was Kurtycz’ last day on the clock working in the HP department, was the day Kurtycz tried to get her and Moore to sign a union card; that Kurtycz has approached her in the breakroom about the Union; that on March 1, 2010, she, Kurtycz, and Moore could have been within an arm’s length of each other; that she has never taken a union card from Kurtycz; that she did not observe Kurtycz approaching Moore and offering her a card prior to March 1, 2010; that when she left work on March 1, 2010 at 3:45 p.m., she saw union people handing out flyers, but she did not know who was handing out union flyers that day; and that she was not sure about the color of the union card an employee tried to get her to sign in August 2009, and she did not look at the card Kurtycz asked her to sign.

Washington, who is an operations manager at Ozburn’s Memphis facility, testified that from 2009 through March 2010 she reported to White, who at the time was area director and is now regional vice president; that supervisor Pope reported to her; that in 2009 and 2010 Kurtycz was one of the employees under her management at the HP account; that Antonio Faulkner, who was at the time in his first 90 days, complained that he bought some food from Kurtycz and he had gotten sick; that Faulkner had received attendance points and he did not believe that it was fair because he had bought food from someone on campus (described as buildings 5510 and 5540 on Ozburn’s premises); that around the end of August or the beginning of September 2009 she met with Young who instructed her to meet with Kurtycz, inform her that the Company had a solicitation policy and she, Washington, had to start following it by enforcing it as far as employees selling food, Avon, or anything on campus; that since she knew that different people were selling different things she did not meet individually with Kurtycz, but rather she had a meeting with the first-shift employees in HP as part of their morning startup meeting; that she told the employees that due to an issue with an employee, she had to start enforcing the solicitation policy, she gave them the page number of the policy in the handbook, and she told them there could be no more selling of anything on campus; that she also had several informal conversations [“reminders” Tr. 665]] with Kurtycz in regards to her selling

after employees told her that Kurtycz was still selling food; that Kurtycz denied selling food and she told Kurtycz that she was at risk of being written up; that between 1:30 and 1:40 p.m. on March 1, 2010, Moore told her that Kurtycz was asking employees for their phone numbers, addresses, and to sign a union card; that she then telephoned Young who told her that she was off site and she should contact White or Coleman, who is the vice president; that she telephoned Coleman, whose office is around the corner from hers; that Coleman asked her if Kurtycz engaged in this conduct during working hours; that she went and asked Moore this question and Moore said yes it was done during working hours and it occurred in the cluster area at the table where they pack the cards into the envelopes; that Coleman told her to meet with Kurtycz; that she met with Kurtycz with Jim Cousino, who is the second-shift operators manager in HP, present; that Cousino, who led the conversation, told Kurtycz that management had received a complaint from a picker that she was harassing employees on the floor; that Kurtycz denied this and asked Cousino what he was talking about; that Cousino told Kurtycz that the employees felt harassed because she was asking for addresses and their telephone numbers and to sign a card; that Kurtycz responded "how is that any different from one of your managers, specifically Buddy Lowery, coming out on the floor and talking to us, talking to me about the Union" (id. at 669); that during this meeting Kurtycz did not deny asking people for names and addresses and to sign union cards; that Kurtycz was told that she was suspended pending a further investigation and she should call her by noon the following day; that she went to get a statement from Moore, but she had already been sent home because the volume was low; that Pope came to her and Cousino and Pope "said that he has another [p]icker who had complained, Crawford" (id. at 670); that she did not know about Crawford when she sent Kurtycz home; that Pope told her that Crawford complained that Kurtycz had asked employees for their name, address, telephone number, and to sign a union card; that she told them to get a statement from Crawford; that she reported all of this to Coleman; that Cousino told her that Ozburn employee Florida Marshall told him that Kurtycz did not approach her but she observed Kurtycz talking to other pickers about the Union; that Pope gave her his own statement about his conversation with Crawford (R. Exh. 11);⁷

⁷ Pope's statement reads as follows:

Tiraney Crawford came into the inplant office around 2:15 pm on 3/1/10 and asked if she could speak with me. I replied yes, what's the problem? She asked if it was okay for an employee to pass out union cards and ask people to sign it. I replied, only if it's during non-working hours. I asked who the individual you are referring to is. She replied, the little Chinese lady. I asked if she was referring to Glorina Kurtycz. She said yes. I then asked her to explain in detail what had taken place. She stated that she had observed Glorina talking to several employees at the table where Glorina was stuffing the cards into envelopes. Glorina was telling them about the union and trying to get them to sign cards. Tiraney stated that she was not in the group but was close enough to hear what was being said.

I then found Vania Washington, operations manager for the HP account, and informed her of the situation. My next call was to Phil Smith who is our security manager.

that on March 1, 2010, she was aware that Kurtycz had received a final written warning in September 2009, she had the warning in her hand when she met with Kurtycz on March 1, 2010, and she discussed this final written warning with Kurtycz on March 1, 2010; that on March 1, 2010, Kurtycz told her that she understood Ozburn's solicitation policy and she explained it again to Kurtycz during the March 1, 2010 meeting; that she never told Kurtycz that she had to quit selling food because of the Union; and that prior to March 1, 2010, when Kurtycz was passing out union cards, she did not know how Kurtycz felt about the Union.

On cross-examination, Washington testified that in the spring of 2010 the second break (afternoon break) for the day shift in the HP account would be about 1:15 or 1:30 p.m.; that in late August or early September 2009 she had a conversation with Faulkner after Pope spoke with Faulkner and Pope told her what happened; that she told Faulkner that he needed to speak with HR about getting points because as far as she was concerned he would be getting the points; that subsequently (in early September 2009) she spoke with Young about the Faulkner incident, Young told her that she had spoken with Faulkner, Young asked her if she was aware that OHL had a solicitation policy, Young told her that she needed to enforce this policy, and Young told her that employees should not be selling anything on the campus; that she told Young that employees sell Avon and Mary Kay products; that Young said "Well, that stops today. So you need to meet with your group" (Tr. 687); that she knew about the sale of Avon and Mary Kay products in her department and it was something she had tolerated; that she was not aware of people selling DVDs in HP; that she heard that prior to the presidential election in November 2008 Young had been selling Obama T-shirts, but she did not buy one; that Pope and not Faulkner told her that Faulkner bought the food from Kurtycz; that the next day she held a departmental meeting (during the regular startup meeting) with HP employees in which the Company rules were discussed; that at this meeting she told the employees "[d]ue to an issue with an employee, OHL has a solicitation policy that . . . I have now been told by HR that I have to enforce, which includes no selling of anything on campus, on property. . . . And if anyone is found in violation, they could be . . . disciplined for it" (id. at 693); that she had never counseled an employee or had a meeting about solicitation activity prior to that time; that during the meeting she listed, in response to an employee's comment, some of the things that she knew were being sold on campus, namely clothing, Mary Kay products, Avon, and Girl Scout cookies; that she told the employees "[t]here will be no selling of anything" (id. at 695) and then she went on to list some of the items she knew about; that she did not mention a union card at this meeting; that she was present at a meeting with Phil Smith and employee James Bailey regarding alleged employee complaints that Bailey was distributing a flyer in working areas during working time, which is memorialized in an August 25, 2009 letter from Phil Smith to Bailey (GC Exh. 31); that notwithstanding the Bailey matter, it was her testimony that her conversation with Young in early September 2009 was the first time that she learned that OHL intended to start enforcing its solicitation policy; that she

did not recall ever speaking to Kurtycz about selling food before the above-described departmental meeting in early September 2009; that she was aware that Kurtycz was selling food, but she was not sure when Kurtycz started; that she never purchased food from Kurtycz prior to the above-described departmental meeting, but Kurtycz did give her a sandwich and did not charge her for it; that she ate the sandwich and it was okay; that after the departmental meeting she had informal conversations in 2009 and maybe early 2010 with Kurtycz after she had been told by employee Yessenia Calix and Fed Ex Coordinator Diane Gooden, that Kurtycz was still selling food in the parking lot and upstairs in the breakroom; that she did not see Kurtycz selling food, but she told Kurtycz "I'm hearing that you're still selling food" (Id. 699) which Kurtycz denied; that she estimated that she spoke informally with Kurtycz three to five times between the time of the departmental meeting and March 1, 2010, about selling food; that she was aware Kurtycz received a final warning in September 2009 the same day the warning was given; that of the three to five times, she estimated that she spoke with Kurtycz two times about selling food after the September 2009 final warning; that since she did not see Kurtycz selling food after the September 2009 final warning, she did not formalize or memorialize her response to the situation (notwithstanding the fact that she had complaints from employees); that each time she spoke with Kurtycz about selling food after the final warning, Kurtycz denied it; that she did not report to Young that she was getting reports that Kurtycz continued to violate the involved Company policy; that she did not ask Calix and Gooden to provide written statements; that prior to March 1, 2010, she had never conducted in the 10.5 years she was in HP any kind of investigation relating to an employee violating the solicitation policy; that on March 1, 2010, Moore came to her office about 1:40 p.m., which could have been breaktime; that Moore told her that she was with a group of employees at the table when Kurtycz asked the employees for names and addresses and to sign a USW card; that Moore told her that this occurred on the floor during working hours; that the employees generally do not take breaks on the floor; that Moore told her that it happened during working hours when she went back to Moore and asked her at the behest of Coleman; that if the employees were on break it would not have been a violation of the Company's solicitation policy; that she doubted that there would have been a need for the March 1, 2010 meeting with Kurtycz if Moore had told her that what she observed occurred after break was called even though the employees were on the work floor; that Evette Gonzalez works on the second-shift in HP; that during the March 1, 2010 meeting she told Kurtycz (a) asking employees for their addresses and phone numbers is a form of solicitation, (b) it was a violation of the Company's solicitation policy because she was doing it on worktime and not breaktime, and (c) she was allowed to pass out cards or flyers during breaks, nonworking hours, or on the parking lot; that during the March 1, 2010 meeting Kurtycz never denied soliciting employees during worktime, and Kurtycz asked "[h]ow is it any different from what Buddy does when he come out to the floor to talk to me" (id. at 716); that Kurtycz said "[w]ell Buddy comes out and he . . . spoke with me about the

Union. So how is that any different from me talking to my coworkers about the Union" (id. at 717); that Cousino explained to Kurtycz that Lowery is a manager who was just giving out information and not asking anybody for anything; that she was not sure if, when she left the facility on March 1, 2010, she saw Kurtycz handing out union flyers with other people; that she was told on March 1, 2010, by someone, she could not remember who, that they had seen Kurtycz out on the line handing out flyers; that she did not take formal action against Kurtycz when she allegedly continued to sell food after the final written warning because she did not see it herself; and that she herself never saw Kurtycz engage in any kind of union solicitation or distribution prior to the time she was fired.

On redirect, Washington testified that Kurtycz never said that she was on break or that the employees she was giving cards to were on break; and that since her September 2009 meeting with HP employees regarding solicitation, she was not aware of any other employees that violated OHL's solicitation policy.

Subsequently, Washington testified that if a supervisor announces a break and one of the employees on the floor decides that he or she wants to just finish up the task that they are doing at that moment, the fact that that employee continues for a minute or so does not nullify the fact that the supervisor has declared a break, it is still a break; that when the supervisor or lead declares a break, the conveyor line, which runs throughout the HP operation, is shutdown, the noise level is reduced, and you can hear a lot better; and that during her meeting with Moore on March 1, 2010, Moore did not mention either Evette Gonzalez' or Hill's name.

Crawford testified that she works for Ozburn in the HP account; that on March 1, 2010, she came to work "[a]round about 3:00 p.m." (Tr. 743); that when she came to work she was going back into the cluster area and she saw Kurtycz in the corner talking to other employees about the Union; that Kurtycz then came over to her and another employee, Nia Johnson, and asked for their names, numbers, and if they were interested in the Union; that Kurtycz asked them if they read the material she gave them the day before, a pamphlet about the Union, and they told her they had not; that she then reported the conversation to her supervisor, Pope; that when Kurtycz gave her the pamphlet she was working at the time in a work area; that she was asked to write a statement (R. Exh. 10) about her conversation with Kurtycz; that the statement shows that her March 1, 2010 conversation with Kurtycz occurred at 2:15 p.m.; and that neither she nor the other employees were on break at 2:15 p.m. As received, the copy of the statement reads as follows:

& other OHL Employees @2:15p today (03-01-2010) & asked i[f] we were voting for the union, did we read the materials she had given out the day before. We replied 'no.'

She then asked if we woul[d] like to give our address & n[Since the line ends with only 'n,' it is not clear the word is number or name or some other word beginning with the letter 'n.']] for the union to contact us.

We replied 'no' & walked aw[ay.]

Regarding this statement, Crawford testified that it reads “Me and other OHL employees at 2:15 today. . . .” (id. at 745); that she did not have the original of this statement in that she left it in the office at Ozburn after she wrote it; that the word “Me” which appeared before “& other OHL employees. . . .” was over on the left-hand side of the statement; and that there was nothing in the original statement, except the word “Me” that does not appear on the document received in evidence at the trial herein as Respondent Exhibit 10.⁸

On cross-examination, Crawford testified that she could not remember if she came into work for her second shift at 2 or 3 p.m. on March 1, 2010, but she believed that it was 3 p.m.; that her above-described March 1, 2010 statement indicates that she came into work at 2 p.m. on March 1, 2010; that Kurtycz approached her and Nia Johnson, who is also a second-shift employee, when they were in the middle of the floor, not in an aisle and not where there is a table; that she and Nia Johnson were preparing their carts to go pick and Kurtycz came up to them and asked Nia Johnson if she had reviewed the pamphlet she gave to Nia Johnson the day before; that Nia Johnson told her she did not; that Kurtycz asked her if she was going to vote for the Union and she told Kurtycz that she did not think that was any of her business; that Kurtycz asked her if she gave her some information would she look it over; that when she replied in the negative, Kurtycz gave her some material and then went on to other people; that she threw the material away; that Kurtycz had a list with names and with peoples’ numbers in her hand and she asked them if she could take their name and write their number or addresses down so she could come to us and tell us more about the Union; that the conversation with Kurtycz occurred about 2:15 p.m. on March 1, 2010; that she immediately reported this conversation to her supervisor, Pope, who asked her if she was willing to write a statement; that while she was in Pope’s office she wrote the statement, signed it, dated it, and gave it to Pope; that she told Pope that Kurtycz gave her a pamphlet; that she did not tell Pope that Kurtycz had union cards that day; that her statement does not mention the pamphlet she received and she does not name Nia Johnson in the statement; that she made a mistake in indicating in her statement that there were other employees as opposed to just one other employee, Nia Johnson; that she told Pope that Nia Johnson was with her when Kurtycz spoke to her on March 1, 2010; that she did not tell Pope that she overheard Kurtycz talking to a different group of employees; and that she did not look at what was on the pamphlet, but rather she assumed that it was a union pamphlet.

On redirect, Crawford testified that she, Nia Johnson, and Kurtycz were not on break when the involved conversation took place; that Kurtycz was talking to other employees who were not on a break before Kurtycz approached her and Nia Johnson; and that Nia Johnson told her that the pamphlet Kurtycz gave her the day before was about the Union. On recross, Crawford testified that Nia Johnson told her that the

pamphlet was about the Union when Kurtycz gave her the pamphlet on March 1, 2010.

Jerry Smith, who worked at Ozburn from 2007 until he was terminated on August 28, 2009, testified that he gave union handbills to arriving and departing employees in front of Ozburn’s facility on Holmes Road in Memphis on March 1, 2010, beginning at 2 p.m.; that between 2:30 and 3 p.m. Kurtycz was driving out of the facility and she told him that they sent her home; that when he asked her why Kurtycz said “Because of the Union” (Tr. 274); that Kurtycz parked her car and then helped him handbill; that while he was handbilling with Kurtycz that day he saw Phil Smith in the line of vehicles leaving Ozburn’s facility; that he told Kurtycz, who was standing next to him, not to give Phil Smith a handbill, Smith pulled his hand back, and Smith said “Yeah, let’s vote” (Tr. 275); and that he and Kurtycz left from in front of Ozburn’s facility at 5 p.m. that day.

On cross-examination, Jerry Smith testified that when he handbilled on March 1, 2010, it was 2 weeks before the election; and that Phil Smith only said “Let’s vote” (Tr. 277).

Subsequently, Jerry Smith testified that Phil Smith said three words and not two words, namely “Yeah, let’s vote” (Tr. 278); that he did not say anything to Phil Smith before Phil Smith said these three words; that he did say “Let’s vote” (Tr. 279) to the people in the car in front of Phil Smith and then Phil Smith said “Yeah, let’s vote” (ibid.) as he drove up to Kurtycz and Jerry Smith; and that Phil Smith was in a position to overhear what he and Jerry Smith told the people in the car in front of him.

Kurtycz testified that on March 2, 2010, she telephoned Washington at 11 a.m. and was told by Washington that she should call her at 1 p.m.; that when she telephoned Washington at 1 p.m. she was told that the matter had not yet been resolved and Washington would call her later; that Washington telephoned her at 4 p.m. and asked her if she could come to the office; that Washington and Jim Cuisino were in the office and she was asked if she remembered whether 6 months ago she was soliciting; that when she said she remembered, she was told she was terminated; that they asked for her badge and they gave her a notice of separation (GC Exh. 5),⁹ that during the meeting Jim read her something but she did not understand what he was reading and she asked for a copy of it so that she could hold it and read it herself; that Jim and Washington both said “no” (Tr. 179); that when she asked for a copy of the statements that employees gave to them Washington said “no” (ibid.); and that they asked her to sign a document other than the separation notice, she asked for a copy, they said “no” (ibid.), and she refused to sign the document.

Washington testified that on March 2, 2010 [“the following day” (Tr. 675)], the statements of Pope, Crawford, and Moore regarding the conduct of Kurtycz were sent to human resources; that she was not “involved in any decision about any disciplinary action resulting from this incident” (ibid.); that she was not “involved in any decision about terminating” (ibid.);

⁸ This cannot be correct in that even with “Me” added the first sentence is not complete. Also, it appears that four of the words at the end of lines were not copied fully so that whatever appears at the end of those four lines are not complete words.

⁹ On the lines following “If other than lack of work, explain the circumstances of this separation:” the following is written: “violation of company policy solicitation.”

that Kurtycz telephoned her around noon on March 2, 2010, but she had not received any instructions at that time about what disciplinary action would be taken, if any; that later in the day when she was instructed to terminate Kurtycz she called her to come to her office; that Respondent's Exhibit 5 is an employee performance report that she prepared and gave Kurtycz on March 2, 2010, to read;¹⁰ that she told Kurtycz at the March 2, 2010 meeting that (a) they did the investigation, (b) they turned the information over to HR, and (c) they had been given permission to terminate her based on the violation of the Company's solicitation policy; that Kurtycz asked if she could take a copy of Respondent's Exhibit 5 home because she wanted her husband to read it; that she told Kurtycz that Company policy does not allow management to give out copies of it; that although given the option, Kurtycz did not write any comments on Respondent's Exhibit 5; that Kurtycz was told she was accused of asking employees for their names and addresses during working time in work areas; and that she prepared a statement about the events of March 1, 2010. It reads as follows:

Jearl More, a picker in the HP shipping department, approached me ... yesterday around 1:40 pm and asked if I had a minute to speak with her. I responded yes, and asked what could I do for her? She said that management needed to speak with one of the pickers because she was harassing the employees. I asked who was the picker and why did she feel she was being harassed? She replied Glorina Kurtycz was the picker. She then went on to explain that Glorina had approached several employees asking if they wanted to sign a union card. Jearl also stated that Glorina had asked for their phone number and address so that a USW rep could contact them.

I immediately informed Evangelia Young. She told me to get with Randall Coleman or Karen White because she was not on site. I informed Randall and he asked me to go back to Jearl and ask if this occurred on the floor during work or while they were on break. I went back to Jearl and asked where the interactions had occurred. She replied on the warehouse floor while we were trying to pick in the cluster area.

James Cuisino and I called Glorina into my office. He explained to her that we had received a complaint from one of her co-workers in regards to her conversations with them about the union. He went on to remind her that she was

¹⁰ The employee performance report, which is dated "03/02/2010," has check marks next to "Discharge" and "Violation of Company Policy." The following appears under "Explanation of Employee Performance:" "2 employees went to management to complain about Glorina soliciting union information to [sic] them during working hours. Management asked the employees to provide statements to [sic] their observations. All statements were turned over to HR for review." And, the following appears under "Action Taken:" "Glorina is already on a final written warning for solicitation on 9/29/09. OHL Corporate has ruled this is a terminable offense." Nothing is written under "Employee Comments." Kurtycz did not sign on the line which indicates "I have read this report and am aware that I may express my view."

already on a Final Written Warning for solicitation. I then intervened and reminded her of the company's policy regarding solicitation during working hours. I told her that it was okay to pass out her flyers or cards during breaks and non-working hours but she would not be able to solicit her co-workers during working hours. I asked if she understood, she replied yes. Jim told her that we would be sending her home pending an investigation. I gave her my phone number and asked her to call me by 12 pm on 3/2/10 before returning to work. [R. Exh. 12]

On cross-examination, Washington testified that she believed she received Pope's statement regarding his conversation with Crawford on March 2, 2010; that she sent her statement and the statements of Moore, Crawford, and Pope to Young in HR on the morning of March 2, 2010; that this was the extent of management's investigation and it was completed on the morning of March 2, 2010, and forwarded to HR; that she was not consulted or asked for a recommendation regarding the disciplining of Kurtycz with respect to what allegedly occurred on March 1, 2010; that on the afternoon of March 2, 2010, she received a telephone call from either White or Pope who told her to go ahead and terminate Kurtycz; that she telephoned Kurtycz and asked her to come in; that she read the EPR out loud to Kurtycz, who had a copy of it so that she could read it; that she asked Kurtycz if she had any comment and Kurtycz said "[n]" (Tr. 728); that when Kurtycz asked for a copy of the EPR she told Kurtycz that the Company did not make copies for anyone to take out; and that she told Kurtycz that she received a final warning in September for solicitation and by soliciting during working hours or on the floor while pickers were working this second time, that automatically terminated her because she had already gotten a final warning earlier.

Cousino, who is a second-shift operations manager of OHL for HP Home and Home Office, testified that on March 1, 2010, Washington came to him and told him that Kurtycz was soliciting folks on the floor and Washington wanted him to be present at her meeting with Kurtycz; that the meeting occurred in Washington's office with just the three of them present; and that the following transpired:

Conversation that we had with Ms. Kurtycz was that we had heard through an individual that she was soliciting union membership on the floor. We were asked to talk to Glorina about the situation, so we pulled her in the office. We explained that what she was doing, at that time, was not allowed and we also reminded her that, at that time, she had already been on a final written warning though the company for a previous solicitation event.

At that time, we had asked, at the end of the conversation, Glorina that she was suspended for the balance of the day. That we would contact her or have contact by the next day on coming back in to resolve the situation. [Tr. 806]

Cousino further testified that he was not involved in Kurtycz' previous warning; that Kurtycz did not deny the allegation at the March 1, 2010 meeting; that Kurtycz said that she thought that it was okay to engage in that activity and

Kurtycz brought up why it was okay for a member of management to involve themselves in similar type activity; that Kurtycz named Lowery; that Kurtycz was then told that Lowery is a member of management and he is allowed to pass information along and he was not soliciting or asking anything in return; that he escorted her out on March 1, 2010; that he was not further involved in this situation until March 2, 2010, after the decision was made on the resolution of this matter; that during the meeting he and Washington had with Kurtycz on March 2, 2010, an employee performance report (R. Exh. 5), was presented to Kurtycz which indicated that she was terminated due to the solicitation event and having been on a previous written warning; that Kurtycz did not sign Respondent's Exhibit 5; that Kurtycz said that she wanted to take the form home and have her husband review it; that Kurtycz was told that this was not allowed; that during the March 2, 2010 meeting "the only question that still remained was why was it okay for Mr. Buddy Lowery to do what he did and not for her, but there was no denying of the claim against her" (Tr. 810-811); that he did not remember if Kurtycz said that she was on her breaktime when she was doing the soliciting; that he did not recall Kurtycz asking for any statements of the witnesses; that before this situation he did not know how Kurtycz felt about the Union; that depending on volume second-shift employees can start as early as 1 p.m.; that on Monday, March 1, 2010, Ivette Gonzalez reported to work at 1 p.m. (see R. Exh. 14 which is her timecard record) and her first break would have been at 3 p.m.; that on March 1 and 2, 2010, Phil Smith was not involved with the meetings with Kurtycz; and that he did not recall if Phil Smith was standing in the doorway while the conversations with Kurtycz took place.

On cross-examination, Cousino testified that he was not aware of any other employee, as of March 1, 2010, other than Kurtycz, receiving discipline for violating a solicitation rule; that before the March 1, 2010 meeting with Kurtycz, Washington told him about Kurtycz' prior final written warning, and he was informed that one person had come forward about Kurtycz' solicitation on March 1, 2010; that at the March 1, 2010 meeting Kurtycz did not deny the allegation and she only asked why she couldn't do it and somebody else could; that he did not ask Kurtycz to give a written statement about the allegation; that on March 1, 2010, he escorted Kurtycz out of the facility; that he never told Kurtycz that she was harassing her coworkers; that there have been times when he was asked to provide feedback on a list of employees; that he provided the feedback verbally to his manager, Scott Durban, and White; that the feedback involved indicating if any of the employees were having any specific issues or if they had any questions that needed to be answered; that he was not aware that Kurtycz handed out union flyers when she left the facility on March 1, 2010; that as he recalled it, Kurtycz asked for the original of the employee performance report to take to show her husband; that if Kurtycz had asked for a copy of the employee performance report, regardless of whether she signed it, she would have been provided a copy; and that the only reason Kurtycz did not get a copy is that she did not ask for one.

Rayford testified that her understanding of Ozburn's policy on soliciting or selling items in the workplace is not to sell or buy at work, but it is allowed on employees' breaks and lunch; that she has sold or helped to sell items to coworkers while either she or they were not on break or they were not on lunch; that in October 2008, before the election of President Obama, while she was on her lunch break, she saw Young in the breakroom with a pink Obama T-shirt; that Young told her that "she was doing it for her mama campaign, which was in Collierville or Cordova, that where the campaign—headquarters was at" (Tr. 319); that Young told her that the shirt costs \$10, and she told Young that she wanted two; that she offered to solicit orders for the T-shirt from employees in Water Pik; that she went to Young's office and Young gave her a document showing the colors and sizes available and told her that she wanted her to write the orders down on a blank sheet of paper; that Young told her to do the whole building, including "Nat Geo" (id. at 321); that she went to clock in from her lunchbreak and then she came back to Young's office; that "I got the pink shirt that was on her" (ibid.) and she took the piece of paper and told Young that she would be back; that she showed the pink T-shirt to employees and took orders for Obama T-shirts; that she told employees that she was selling the T-shirts for a lady because Young told her not to mention her name; that between 25 and 30 people in Water Pik indicated that day that they wanted an Obama T-shirt; that the employees would sign the paper indicating the color and size they wanted; that she sold one to supervisor Dye who told her that he could not write his name on the paper so she wrote his name and indicated that he wanted a black shirt, size 2X; that Dye and the approximately 30 employees who signed the paper were on the floor working when she solicited them; that she told Dye that she had to go to the Fiskars account in the same building and she drove her pallet jack over there with the pink Obama T-shirt and the sheet of paper; that about 30 people in Fiskars, who were not on break, ordered the T-shirt; that she spent about 15 to 20 minutes in Fiskars; that she went to another account in the same building, Nat Geo, and signed up about 30 to 35 people there; that the people in Nat Geo were not on break; that she did not go to HP because Young told her that somebody else was taking care of the employees in that account; that she then took the paper with the orders to Young; that on this day she had taken her lunchbreak about 11:45 a.m. to 12:15 p.m.; that when she went back to Young's office it was close to the time she and Rayford were getting off from work, namely 1:45 p.m.; that she estimated that she returned to Young's office at about 1:15 p.m.; that when she handed Young the sheet of paper with the orders Young said "Girl, you work miracles" (id. at 327); that Young told her that the shirts would come in the following week; that the following week she was working on the floor and Dye told her that Young needed to see her in Young's office; that there were shirts laying everywhere in Young's office and Young pointed to a box indicating that "The Water Pik is in that box" (id. at 328); that she helped Young pack some of the boxes; that she got Dye to carry the box with the T-shirts for Water Pik from Young's office, take it downstairs, and put it on her pallet jack; that she was not on break at this time and Dye told her not to hold the T-shirts up

and she should not pull all of the shirts out of the box at one time; that she drove to Water Pik, collected money from the people, and handed out the T-shirts; that if anyone received the wrong size, she told them to see Young; that she took the money she collected to Young at about 1:30 or 1:40 p.m.; that when she distributed the T-shirts, starting about 1 p.m., neither she nor the employees she distributed shirts to were on break; that Young asked her to distribute some more T-shirts; that she then distributed shirts in Nat Geo to employees who were not on break; that for about 1 year (2008 to October 2009) she sold designer purses that she purchased at a flea market to other employees when they were not on break; that she sold the purses out of the trunk of her car; that she sold a total of six to eight purses to Young at different times; that some of this was done on her worktime; that Dye would tell her that Young needed to see her in Young's office, she would go to Young's office, Young would tell her that she needed a certain color or style purse, she would go to her car and get the purse, put it in a plastic bag, and go back to Young's office and give it to her; that when she went to Young's office and then got the purse out of her car trunk she was not on breaktime; that she sold purses to a lot of employees at Ozburn in the HP, Nat Geo, and Fiskars accounts; that they used to come to her and ask her if she was the woman selling purses, she did not even know them, she would ask them what type of purse they wanted, she would take the money, and then she would go to the trunk of her car and get the purse; that sometimes when she had these conversations with other employees she was not on break, but she did not know if the other employee was on break; that if she did not have the purse the employee wanted, she would bring it in the next day; that she has brought purses to employees in the warehouse while she was on worktime; that Young came out to her car and picked out two or three purses; that Rivers, who worked in Water Pik for about 1 year, leaving earlier in 2010, sold DVDs; that Rivers had the name of the movie and the name of the employee to whom she was selling the DVD to on the DVD which she carried on her pallet jack; that Rivers sold the DVDs on Company time; that she bought about 10 DVDs from Rivers and each time she was on Company time when she purchased (for \$3) a DVD from Rivers; that supervisors Dye and Phillips were aware that Rivers was selling DVDs; that Rivers collected the money and handed out the DVDs while the employees were in their morning meeting for the 25 to 30 shipping and receiving employees in Water Pik; that Dye and Phillips were present for these morning meetings; that in October 2009 she observed Dye receiving a DVD from Rivers and Dye giving money back to Rivers; that Rivers had DVDs at the morning meeting everyday; that an employee from Fiskars, who she knows only as Annie, sold strawberry shortcakes in March 2010 sometime after the Board election; that she bought one of the cakes for \$3 and told Annie that she was not supposed to be doing that to which Annie responded "Phil Smith gave me permission to do this" (id. 341); that when she asked, Annie told her that she was taking the cakes to the floor in her department; that a woman named Doris, who works in inventory in Water Pik, sells Avon products at Ozburn; that Doris came on the floor on Company time and distributed Avon catalogues and told the employees to put the number of the item

they wanted on the front of the catalogue, she would bring a receipt back and let them know how much it is, and when the order came in she would bring it to them; that she has looked at the Avon catalogue while she was on Company time and noted on the cover the item she was ordering; that Dye looked into her Avon bag and she saw Dye looking into River's Avon bag; that when Doris delivered an order to her and other employees they would be on worktime picking orders; that she has left her Avon bag on her pallet jack while she was working; that during the 3 years that she has worked in Water Pik, Doris has been selling Avon products; that when she testified at the trial herein on July 15, 2010, Doris was still selling Avon products at Ozburn; that before the Board election, Tammy Stewart sold a nonunion T-shirt which had thumbs down for the Union (and thumbs up for Ozburn) to her and, at Stewart's behest, she asked Herron who also purchased one; that when the shirts came in, White came to Water Pik and told her and Helen to go over to building 5540 to get their T-shirts from Tammy; that she and Herron were on Company time when White approached them; that Stewart was not there and she gave another employee \$2 for her and Helen's shirt, but the employee did not have the correct sizes; that later Stewart told her that she left their T-shirts in the office with Dye; that while she was on working time she went to Dye's office and retrieved her T-shirt from by the window while Dye was in the office; that an individual who she identified only as Brian, who she believed worked in Fiskars inventory, passed out free, orange "Vote no Union" (id. at 350) T-shirts to employees; that he gave her a shirt; that Supervisors Dye and Phillips were on the floor when Brian passed out the antiunion T-shirts; and that she has never been disciplined for selling or purchasing items in the workplace on worktime.

On cross-examination, Rayford testified that you have to go through security when you are coming on the floor to go to work; that she brought a T-shirt through security and Dye brought a whole box through security; that she brought purses through security and Young knew that she sold purses on the floor; that she told Young that she was selling purses and Young saw the purses on her pallet jack; that Annie sold the strawberry shortcake right after the Board election and Annie told her that "somebody gave her permission to do it" (Tr. 392); that just before the Board election, which was held on March 16, 2010, her name appeared in a union flyer which was distributed in the breakroom at Ozburn; and that she did not have a problem at that point with anyone knowing that she supported the Union.

Ozburn's employee Jenifer Smith testified that she has observed Ozburn employees sell candy, T-shirts, and Avon while they are not on break at the Ozburn facility; that Ozburn employee James Mitchell sold chocolate candy in her department for his son in mid- or late 2009; that James Mitchell sold the candy while the employees were working because he had it on his pallet jack; that James Mitchell also had some candy under Supervisor Alfreda Owens' desk, which is not a break area; that she and other employees in her department buy candy from James Mitchell while they were on work time, Shiley Milan and Shelia Childress; that she observed Supervisor Owens buying candy from James Mitchell while

Mitchell was not on break; that just before the March 2010 Board election she saw Ozburn employee Sondra Mitchell, who does not work in her department, come into her department and sell orange Vote No T-shirts to employees for \$1 while they were on worktime on the dock, which is a work area on the warehouse floor; that Sondra Mitchell was in her, Smith's, department selling T-shirts on 2 days; that Ozburn employee Marshall Trotter from the Roland department came to her department three or four times in late 2009 and sold candy; that she bought candy from Trotter one time while she was working; that she saw coworkers Gladys Dawson and Bobby Hill purchase candy from Trotter while they were on work time; that two other individuals, who she identified only as Ms. Betty and Ms. Peggy, sold gift baskets in HP filled with "knick-knacks" (Tr. 4542) while they were at work at Ozburn, and although she asked Ms. Peggy about the baskets, she did not purchase one and she never saw anyone else buy one of the baskets; that Sondra Mitchell is an Avon representative who brings Avon books to the employees and asks them if they want to order an Avon product; that while she was in HP between 2006 and 2007 she ordered, while she was off the clock, Avon from Sondra Mitchell; that when the Avon order came in she paid Sondra Mitchell for it and received it while she, Smith, was on the work floor and not on break; that "more recently than when . . . [she] made her purchase" (id. at 468) she has seen Sondra Mitchell come into the department and give Avon books to employees who are on worktime; that she has seen Ozburn employees looking through an Avon book while they are not on break or lunch; and that more recently she has not seen Avon bags in her department.

On cross-examination, Jennifer Smith testified that she guessed that employees are not supposed to be selling things on the floor; that she did not recall a meeting where the supervisors or managers explained that employees are not to be selling things on the floor; that she does not know anything about the solicitation policy at Ozburn; that she did not recall the solicitation policy being covered in any meetings with employees that she attended; that it did not cross her mind that James Mitchell, Trotter, and Sondra Mitchell were not supposed to be selling things to her on the work floor because they had been doing it for so long; that while she signed off indicating that she received a copy of the new employee handbook in September 2009, she was not going to say that she read it (Ozburn stipulated that it did not have and it did not produce a handbook receipt acknowledgment for Jennifer Smith for anytime in 2009 (Tr. 523)); that she did not know whether Ozburn has a solicitation policy which prohibits people from selling things on the floor; and that Owens was at the desk on the floor when she saw Owens purchase candy from James Mitchell.

Phillips, who is an operations manager at Ozburn's 5510 Holmes Road facility, testified that he manages the Water Pik, Kodak, and Palm Ghost accounts; that he supervised and managed an employee, Sharon Johnson, who had the nickname of Shaky; that Shaky has given him sunflower seeds from her pallet jack; that he has seen one or two CDs or DVDs on Shaky's pallet jack; that he was sure that employees bring in CDs to play on some of the radios that are in the Water Pik

account; that he never saw Shaky selling any DVDs; that he managed Rivers and he did not ever see her selling CDs or DVDs; that he never saw Rivers with CDs or DVDs at a morning meeting; that he never had a conversation with Rivers about CDs or DVDs where he told her to stop selling them and she told him to shutup; that he was not aware of employees purchasing Avon products on the work floor; that he has never seen Avon bags on the work floor; that he has never seen anyone selling chocolate bars in the Water Pik department or anywhere on the work floor at Ozburn; that he did see employees wearing orange vote no T-shirts during the union campaign; that he never saw anyone distributing the orange or white, with thumbs up and down, T-shirts to employees on the work floor; that he did see employees wearing the white, with thumbs up and down, T-shirts; and that he has never seen any employee sell anything on the work floor during worktime.

On cross-examination, Phillips testified that he has heard the employees in Water Pik listen to music on the floor everyday; that he did not see the Obama T-shirts being distributed around the workplace, but he did see employees wearing them; that he never saw Rayford, who works in his department while he is at work (there is no second shift in Water Pik), collecting money, taking orders for, and distributing Obama T-shirts; that he is in Young's office once a week maybe, but he was not aware that Young had the Obama T-shirts which she was facilitating the distribution of through the facility; and that while Company policy prohibits cell phones for leads and employees, there is no policy prohibiting radios and they are allowed in the facility.

Owens testified that she never purchased a candy bar from employee James Mitchell; that she never saw James Mitchell or Trotter selling chocolate out on the floor; that on one occasion James Mitchell brought a box of chocolate out on the floor and she told him that he could not have it on the floor, he could not sell it, he needed to walk it back to the office, and it had to remain there; that she was transferred to the Water Pik account on February 22, 2010; that employees in the Water Pik account, like pretty much every department at OHL, have CD players on the floor and they play music; that she has never supervised in the HP account; and that she has never seen an employee selling DVDs or CDs on the work floor.

White testified that sometime during the summer of 2009 Phil Smith told her that he heard that there was an employee selling food in the parking lot and in the breakroom at OHL; that subsequently Young told her about someone who became sick as a result of food being sold by the same employee, Kurtycz, on company property; that at management's weekly staff meeting those present were told that they needed to stop any kind of selling and warning letters should be given out to make sure that the employees understand that this couldn't happen; that the position that management took was that the selling of everything had to cease; that it was not limited to food because she did not want to discriminate; that managers communicated this to supervisors as well; that subsequently Phil Smith told her that Kurtycz was selling food again on OHL property, he had given Kurtycz a letter regarding no solicitation, and he told Kurtycz that it needed to cease immediately; that subsequently she heard that Kurtycz was still selling food and then one day she was holding a meeting near

the breakroom in Building 5510 in which HP is located, and when she went to get ice she saw a large cooler which held sandwiches, juices, sodas, and a lot of things by the ice machine; that she asked the approximately 15 people in the breakroom, which included Kurtycz, whose cooler it was; that the employees did not answer her; that she went back to the conference room and got Young to accompany her back to the breakroom; that when they got back to the breakroom the cooler was gone; that Young sat down and asked one of the employees where the cooler was; that the employee told her that it was in the bathroom; that they found the cooler in an open shower stall; that Kurtycz followed her and Young into the shower area; that she then asked Kurtycz if it was her cooler and Kurtycz shook her head up and down; that she asked Kurtycz had she not been warned many, many times about selling food on OHL property and Kurtycz shook her head up and down again; that she and Young took the cooler and she told Kurtycz that there would be an investigation and she would get back with her later; that she contacted Phil Smith and told him that he needed to talk to Kurtycz about this, she felt like it should be a final written warning in view of the employee getting sick, but she wanted HR to make the final determination; that OHL's handbook policy on solicitation does not cover food specifically; that as vice president who is in charge of the campus, she is able to have a more restrictive policy than the OHL handbook policy; that in July or August 2009 some Avon books were found in the HP breakroom and she told Liz Fitzgerald that she could not sell Avon products or anything else on OHL property anymore; and that she never told Rayford or Herron that they could go pickup white T-shirts from Stewart in a different building.

On cross-examination, White testified that Young told her in the summer of 2009 that Faulkner came to her office about an attendance point and told her that he wanted it removed because he had gotten sick eating the food sold by Kurtycz; that she did not know if he still works for OHL or if his sickness was independently verified; that the union campaign was ongoing when managers and supervisors were told, at the next scheduled staff meeting after she heard about Faulkner, that all selling of items on the premises had to stop; that an executive management group (her, Young, and Phil Smith) decision was made to stop the sale of anything on OHL premises, including Girl Scout cookies, T-shirts, and Avon products; that she did not hear and she was not aware that Young sold "Obama T-shirts" (Tr. 965); that she was not aware and she was not told that DVDs were sold on the premises; that she goes into Young's office usually once or twice a day, but she travels for OHL and there are times she is out of town for a week; that Fitzgerald, who is no longer with OHL, worked in inventory control; that she spoke to Fitzgerald about the same month that Kurtycz received her final warning; that Fitzgerald, who was a salaried employee, was not in the salaried meeting where the no selling on OHL premises was discussed since she comes to work in inventory at 3 a.m.; that she talked to Fitzgerald and told her that it had to cease immediately and that was it; that employees were told at startup meetings no selling on the property; that there were other nonsolicitation letters given out to employees for violations of the solicitation policy and they

ceased when they got the letters; that the nonsolicitation letters is the employee's first warning, it is just a counseling advising them; that she was not aware of Anne Slater selling shortcakes or bringing in strawberry shortcakes to the facility around March 2010; that she was not aware of Kilpatrick selling Avon from January through April or May 2010, she knew Young spoke to Kilpatrick, but she was not sure of the month; and that she saw the "Vote No" T-shirts, but she did not see them being sold.

On redirect White testified that to her knowledge no OHL manager or supervisor sold T-shirts to employees; that around the time of the Kurtycz cooler incident she had no idea that Kurtycz supported the Union; and that when she made the announcement to her management and supervisors about no more selling, it had nothing to do whether or not people could solicit for the Union during break times or in nonworking areas, and employees were allowed to do this.

On recross, White testified that there was no formal written notice posted on the bulletin boards or in breakrooms to inform employees of this new policy prohibiting the selling of anything on the OHL property; and that management and supervisors were told to tell employees at startup meetings that nothing could be sold on the OHL property.

Young testified that she heard about some employee getting sick after eating some of Kurtycz' food; that Phil Smith was handling that matter until the employee, Faulkner, came to her because he had received some occurrence points for returning late from his lunch, and he told her that he did not think it was fair that he got the points because he got sick from food he bought from Kurtycz, was in the rest room for some time, and he was late coming back from lunch; that she spoke with Phil Smith about the matter; that on September 29, 2009, she was in a meeting with White, and a customer; that White left the room to go the breakroom to get some ice from the ice machine for drinks; that White returned to the conference room and told her that there was a cooler in the breakroom full of food; that she asked if Kurtycz was in the breakroom and White said that she was; that when they got to the breakroom the cooler was gone; that she and White asked the employees in the breakroom where the cooler was; that she sat down at a picnic table and asked Sharon Todd where the cooler was and Todd told her in the ladies restroom in the shower; that she pulled back the curtain and there was the cooler; that Kurtycz was standing behind them, White asked Kurtycz if it was her cooler, and Kurtycz nodded her head up and down; that White asked Kurtycz why she did not tell them it was hers at the outset and had they not talked to her several times about selling food on the OHL campus (Kurtycz said yes.); that she and White took the cooler and then White contacted Phil Smith, who is responsible for all safety matters; that it was decided that Kurtycz would receive a final warning and be told that if it happened again she could face termination; that on Monday, March 1, 2010, she was not in the office, and she received a telephone call from Washington who told her that some employees came to complain to her that Kurtycz was harassing them on the floor "trying to get them to, I guess, go for the Union or sign some cards or something of that nature" (Tr. 997); that since she was not on campus, she told Washington to

get with Coleman, White, or Phil Smith; that she was not involved in the investigation of the March 1, 2010 Kurtycz matter and she was not involved in the decision to terminate Kurtycz; that before March 1, 2010, she did not have any idea whether or not Kurtycz supported the Union; and that prior to Kurtycz' termination she had never seen Kurtycz selling food.

Young further testified that during the presidential campaign in 2008 on a casual Friday she came to work wearing a T-shirt that had a picture of Obama and Dr. King on the front; that she got the shirt from a friend who has a T-shirt shop; that Rayford asked her about the shirt; that she called her friend regarding the shirts and the next day Rayford ordered two shirts; that Rayford told her that some more people wanted the shirts and she told Rayford that she needed to collect the money first; that she did not send Rayford out on the floor to sell these T-shirts; that the T-shirts were never stacked up in her office; that she brought the T-shirts to work after she received the money for them and she told the employees that they could get them from her truck during breaks or after work; that in 2009 she was told that an employee named Doris, who worked in Water Pik, was selling Avon products; that she spoke with Doris, who told her that sometimes she sold Avon products when she was out there talking to people; that she told Doris to stop and handle it off OHL property; that this was the end of Doris selling Avon products as far as she knew; that she has never seen Avon books on Pugh's desk; that she bought a purse from Rayford at Rayford's car in the parking lot when Rayford was not on the clock; that she did not know anything about a person named Anne who was selling strawberry shortcakes around the time of the election; that she did not see any of Rayford's purses on her power jack; and that she was not the decision maker regarding the termination of Kurtycz, but she emailed some documents to Andrew Tidwell (R. Exh 19).

On cross-examination, Young testified that it was first brought to her attention that there was some issue concerning Kurtycz selling items in midsummer 2009 when Phil Smith told her that there were complaints about Kurtycz selling food; that Faulkner came to her because he was upset because he received an occurrence point; that she could not recall the date of the Faulkner conversation; that Phil Smith apparently had talked to Kurtycz about selling food before Faulkner came to her regarding his occurrence point; that there were no other reports about that time from other employees who ate Kurtycz' food and suffered some problem; that her conversation with Faulkner was prior to Kurtycz receiving a final warning; that apart from Kurtycz she is not aware of any other employee being disciplined for violating the solicitation rule at OHL; that the Faulkner situation was discussed at a Tuesday meeting of the managers and White was present; that the decision was made at the meeting to prohibit selling because of the health concerns; that it was decided later, way after the Faulkner situation, to prohibit the selling of Avon products, but she could not recall when the ban was extended to Avon products; that Phil Smith and Washing observed Kurtycz selling food out of her truck in 2009; that Phil Smith told her that he had a meeting with Kurtycz when he learned she was selling food out of her truck; that the initial limitation was just on the selling of food items, and then at a later point it was determined that the best

policy would be to just not allow anything to be sold; that the latter restriction was carried out during the union campaign; that there was no posting of a notice or revision of the solicitation policy that appears in the handbook; that she was not involved in the investigation of Kurtycz' conduct in early March 2010; that Tidwell is her direct boss; that the statements she emailed to Tidwell were given to her by Washington; that she was not consulted nor did she make any recommendations as to what discipline should be imposed on Kurtycz in March 2010; that OHL retains discretion and there are times when an employee who has received a final warning is not terminated when an additional infraction occurs; that OHL employee Kenneth Eason received disciplines (GC Exh. 33), for having a cell phone on the warehouse floor during working hours, namely a written warning in January 2009, a final warning in February 2009, a suspension in March 2009, and then an additional final warning in June 2009; that in August 2009 OHL employees Carolyn Jones and James Bailey might have been crossing the line on the solicitation policy when they engaged in union solicitation, and they were given a letter reminding them of what the policy was; that prior to midsummer 2009 Avon products, candy, and Easter baskets were sold in the OHL facility; that she was not aware of DVDs being sold in OHL facilities; that school fundraising items have been sold in the OHL facility; that Rayford originally ordered two Obama T-shirts when she was in her office; that when Rayford told her that different people wanted one, she told Rayford that she had to get the money and she would place an order for Rayford; that she had the T-shirts in her truck and Rayford got them at the end of her shift; that there was only one order that she passed on to her friend after Rayford originally ordered the two shirts; that subsequently Rayford came to her and told her others wanted the T-shirt and the process was repeated; that she herself never distributed any shirts; that she testified at the hearing held on March 3, 2010 (GC Exh. 34), that she handed out T-shirts from her truck in the parking lot after work directly to employees because Rayford had left for the day; that she denies that she brought T-shirts up to her office; that she did not know anything about Willie "Dodd" (Tr. 1053) carrying a box out of her office and down to where Rayford's lift was so that she could distribute them through the warehouse (the supervisor's name is Dye); that the T-shirts were not in her office; and that she did not know if Rayford was taking orders for the T-shirts on worktime.

On redirect, Young testified that Supervisor Van Jones told her that Eason was not fired, but rather given a second written warning because his father was ill; that Eason was told that if there was an emergency, a specified telephone number should be called and they would get him to a phone; and that when she was talking with White about the selling of food, there was also talk about if they were going to stop the selling of food, they needed to stop all the selling.

Andrew Tidwell, who is OHL's vice president of human resources, testified that he works in Brentwood, Tennessee, and is in charge of Human Resources for the 5000 employees OHL has nationwide; that he does not usually get involved in day-to-day disciplinary decisions; that in 2009 Young told him that an employee had become sick from the food he bought on OHL

premises in Memphis; that this was a health and safety concern and local management expanded OHL's solicitation policy to include no selling of any kind; that it was no selling of any kind as opposed to just no selling of food because "a broader bright line rule is much easier to administer than a very specific one. We don't want to argue with people about whether they're selling food or whether they're selling candy or anything like that" (Tr. 1076); that at the time he heard about the employee becoming sick, he did not know the identity of the employee who sold the food; that he approved the termination of Kurtycz; that Respondent Exhibit 19 is the final written warning for Kurtycz and some more recent employee statements which he received by email from Young on March 2, 2010;¹¹ that he believed that everything in Respondent Exhibit 19 was attached to the email that he received; that when he received Respondent Exhibit 19 he understood that this was a review for a termination based on the last step of discipline that was administered, and he was being asked to sign off on it and approve the termination of Kurtycz; and that he communicated his approval of Kurtycz' termination to Coleman.

On cross-examination, Tidwell testified that OHL's corporate headquarters in Brentwood are just outside Nashville; that OHL employees voted not to be part of the Union, since then unfair labor practice charges have been filed against OHL, and OHL has been very careful in reviewing all disciplinary cases to avoid future incidents; that he does not normally get involved in general discipline issues, but he did review some termination decisions; that he guessed that the solicitation policy was made more strict to ban all selling some time in 2009; that he was asked to approve Kurtycz' termination and he did not sign a document; that he understood that when Young sent him a final warning with details about a following incident, termination was being considered; that Young, in sending Respondent Exhibit 19 to him, was implicitly recommending that he approve Kurtycz' termination; that it was his understanding that he was approving another person's recommendation, and he did this verbally when he spoke with Coleman and he told Coleman that he approved; that he did not recall the exact time he spoke with Coleman, but he believed that it was after March 2, 2010; that he did not give his approval on the day of the email, namely March 2, 2010; and that there was no authorization until he got back to Coleman.

On redirect, Tidwell testified that the "9/29/09" final warning to Kurtycz would indicate that the total ban on selling on the OHL campus was "around that time"; and that he does

not have a clear recollection of exactly which day he spoke with Coleman giving his approval, and it is possible that he spoke with Coleman on the same day (presumably the same day he received the email from Young, namely March 2, 2010).

Subsequently, Tidwell testified that before she emailed Respondent Exhibit 19, Young telephoned him and told him that he would be receiving some information to review, but she did not say outright that it was a proposed termination; that he noticed that there was no statement from Kurtycz in Respondent Exhibit 19, but "I rely on my local HR professional staff to conduct the investigation and make the recommendation" (Tr. 1089); and that he does not interview and that it was not his role in the process.

Phil Smith, who is a senior operations manager or area manager with OHL in Memphis, testified that among his duties is site and safety and security manager for the entire Memphis campus; that he has responsibility for multiple accounts across multiple buildings; that in mid to late August 2009 he was told by an employee (he could not remember which employee) that Kurtycz was selling food out of the back of her car in the parking lot on OHL's Memphis campus; that he drove over to the HP parking lot where he saw two individuals leaving the vicinity of the rear end of Kurtycz' vehicle both carrying what looked like sandwiches in clear bags, and Kurtycz was just closing the back of her vehicle; that he did not say anything to Kurtycz at this point in time because he did not see any transaction take place; that 7 to 10 days later he received a phone call from someone in another building on OHL's campus indicating that Kurtycz was selling food on the OHL campus; that again he drove to the HP parking lot where he saw Kurtycz handing an employee what appeared to be a sandwich item in a bag and the employee was handing Kurtycz money; that he asked Kurtycz if she was selling food and Kurtycz said "yes" (Tr. 1094); that he told Kurtycz that she could not do that on OHL property, it was a health issue, it was hot, she did not have a refrigerator in the back of her car, she just could not do that, they could not take the risk; that Kurtycz did not respond negatively; that he told White about Kurtycz selling food out of the back of her car in the HP parking lot at OHL; that subsequently Young told him that an OHL employee became sick after purchasing food from Kurtycz; that Kurtycz was given a letter that basically was an excerpt from the employees' nonsolicitation policy, and he read the letter to Kurtycz when he gave it to her; that he was not sure if Kurtycz was given the letter the day before the incident involving the employee getting sick or the day after; that the letter was the same letter that he had been handing out to people who had been soliciting during the summer of 2009; that he handed Kurtycz an original of the letter and he had a copy; that Kurtycz took her copy with her and he threw his away; that this was not a disciplinary measure and it was an informational meeting; that the meeting with Kurtycz where he gave her the letter occurred in Washington's office in the HP, with Joe Walker present; that Washington was not in her office at the time; that Kurtycz did offer some reason for why she was selling food and he told her that he did not care why she was selling food and the prohibition only involved OHL property; that after the employee got sick, management revisited the policy and they

¹¹ Young's March 2, 2010, 1:08 p.m. email to Tidwell reads:

This is the information on Glorina Kurtycz. Prior to the final we had verbal discussions with Glorina because an employee complained that the reason he got an occurrence point was because he purchased some food that Glorina was selling out of her truck on the parking lot and got sick. When we spoke with her she denied that she sold anything out here on the campus. When she got the final it is because she had a cooler that she was putting in the breakroom and allowing employees to purchase food.

This exhibit also contains Kurtycz "9/29/09" final warning, Washington's "3/2/2010" statement, Pope's statement, Crawford's "03/01/ 2010" statement, and Moore's March 2, 2010 statement, all of which are set forth above.

decided to say that no one could sell food items, and they reevaluated that and decided that they could not just isolate food items and there would be no selling of any kind of merchandise; that he told the management staff at the next weekly Tuesday meeting, with White there, after the employee got sick, and those managers were told to tell their respective employee groups about the prohibition; that the policy was changed during the following weeks and Young covered the fact that an employee had gotten sick; that the new policy was communicated to the employees during prework meetings; that he attended some of these prework meetings; that in the meetings he attended and his supervisors reported back that the employees were told that due to an employee getting sick from eating food they were stopping the sale of all merchandise across the campus, and there would be absolutely no selling allowed of anything; that he estimated that the announcement took place in late September or early October 2009; that White told him about Kurtycz having a cooler of food in the breakroom and she asked him to speak with Kurtycz about it; that they decided to give Kurtycz a final warning, see the third page of Respondent Exhibit 19; that the first time referred to in Kurtycz' final warning is when he spoke with her by her car in the HP parking lot, the second time is when he gave Kurtycz the letter regarding solicitation in Washington's office with Walker present, and the final warning was the third time; that his third meeting with Kurtycz was also held in Washington's office, with Walker present and Washington was not there; that at the third meeting he gave a copy of the final warning and he read his copy verbatim to her to the end of the "ACTION TAKEN" portion; that Kurtycz signed the final warning; that he was not involved at all in the decision to terminate Kurtycz, and he was not involved at all in investigating the final incident that led up to her termination; that on March 1, 2010, he did see Kurtycz with Jerry Smith; that Jerry Smith said "lets vote" and he then said "lets vote"; that he did not tell anyone that he had seen Kurtycz handbilling on the afternoon of March 1, 2010; and that he has never seen an OHL employee named Annie selling strawberry shortcake at the OHL Memphis facility, and he did not give her permission to do this.

On cross-examination, Phil Smith testified that when he was told that Kurtycz was selling food out of the back of her vehicle in the HP parking lot in mid to late August 2009 employees, under OHL's solicitation policy in effect at that time, could sell items in nonwork areas during nonwork times, but there was a health concern about food prepared at home being sold out of the back of a car in August; that he did not keep his copy of the letter he gave to Kurtycz because it was an informational letter, it was nondisciplinary so he had no reason to keep it; that his meeting with Kurtycz, with Walker present, when he gave Kurtycz the letter was in late August or early September 2009, within 10 days of when he told Kurtycz that she could not sell food out of the back of her car; that he had given out at least two similar letters to employees Carolyn Jones and Bailey; that he did not keep copies of the letters to Jones (GC Exh. 35), dated August 11, 2009, or Bailey (GC Exh. 35), dated August

25, 2009, either;¹² that he gave Kurtycz her letter prior to OHL changing its policy restricting the selling of food items; and that he did not prepare the letters that were given to Jones and Bailey, but rather they were given to him to give to Jones and Bailey.

On redirect, Phil Smith testified that prior to seeing Kurtycz handbilling on March 1, 2010, he had no idea of whether she supported the Union.

General Counsel's Exhibit 36 is an email, dated March 02, 2010, with a time of 2:56 p.m., from White to Young which reads as follows: "Vania & Jim are calling Glorina in to take care of this but I need a separation notice. Can you step out and get me one by 3:30PM?"

General Counsel Exhibit 37 is a position statement of OHL dated "March 22, 2009." The letter opens with "In response to your e-mail of March 9, 2010" Obviously, the date on the letter should be March 22, 2010. As here pertinent, the statement summarizes the reasons for the termination of Kurtycz.

C. Overtime

Carlos Shipp, who worked for Ozburn for about 1 year at the time he testified at the trial herein (July 2010), testified that he works first-shift from 7 a.m. to 3:45 p.m.; that he worked in the Remington department the whole time he has worked for Ozburn; that during the last 2 weeks of the month he starts work at 5 a.m.; that employees from other Ozburn departments come to work in the Remington department during busy periods the last 2 weeks of the month; that he has seen Rayford working in the Remington department during the busy periods during the last two weeks of the month when there is overtime; that Rayford worked in Remington from 5 to 7 or 8 a.m. (overtime) and then she went to work at her regular account; that she started working overtime in Remington in August 2009 and he did not see her working in Remington after November 2009; that when the Remington account was slow he has worked in other accounts, namely HP, Water Pik, Brown Halco, and Kodak; that when he comes to work and goes directly to an account other than Remington, he punches in at the timeclock of the other account, using the code of that account which is posted by that timeclock; and that initially when he did not know to use the code of the other account when he clocked in at the other account, his supervisor in Remington, Steve Shelton, added the code to his timesheet, and told him the correct procedure. On cross-examination, Shipp testified that, to his knowledge, Shelton never adjusted his time records for any other reason.

Rayford testified that during the latter part of 2009 she worked in Ozburn's Remington department, which is in a

¹² Both letters have the same language in the opening paragraph, namely:

It was brought to our attention by more than one employee in your work location that you were distributing a flyer in working areas of our facility during working time. It is a violation of company policy to distribute materials and literature during work time in work areas.

The letter then quotes the solicitation/distribution policy from the OHL employee handbook and ends with "This is a reminder of OHL policy and not a disciplinary notice."

different building than Water Pik; that she knew Remington had overtime from a friend, Cynthia Craig, who worked there; that in May 2009 she telephoned Roy Ewing, who is the manager of that department, and asked him if there was overtime available for her in Remington; that Ewing answered in the affirmative; that she and Ewing reached an understanding, namely that she would start the overtime at Remington at 5 a.m. or 6 a.m. and then she would start at her regular department, Water Pik, at 8 a.m.; that she started working overtime in the Remington department in July 2009, doing a couple of days in July and August 2009 (a day or two in July and the same in August); that she did 7 days of overtime in Remington in September 2009; that she worked a week of overtime in Remington in October 2009 and that might have included weekend work as well; that Remington got busy and had overtime work available the last 2 weeks of the month; that after Ewing approved her to work overtime at Remington, she dealt mostly with the floor supervisor in Remington, described only as Greg, with respect to when she would be working overtime there; that her September 2009 overtime at Remington included 2 weekend days; that when she worked overtime in Remington on a Monday through Friday she would work from 5 or 6 a.m. to 7:45 a.m.; that she worked overtime in all of the other departments that Ozburn has; that if she was required to work overtime in her department, Water Pik, during the last week of the month, she would tell Ewing in Remington or Pope in HP that she could not work overtime in their departments during that period; that Water Pik normally worked overtime the last week of the month, and Remington normally worked overtime the last 2 weeks of the month; that when she works at departments other than Water Pik, she punches the time clock in that department (except when she works in HP, which is in the same building as Water Pik) and punches in the code number for that department; that sometimes when she did not know the code number for the other department she would not enter it when she punched in at that department, but she would tell her supervisor in Water Pik; that on mornings when she worked overtime at Remington she did not clock out at Remington but she did clock in when she started working at Water Pik; that if there was a problem with her time working in Remington, her supervisor, Dye, would call her into the office for an explanation and then he would fix the weekly time sheet; that on November 17, 2009, after she clocked in at Remington, she spoke with Stephanie Adams, who is an Ozburn employee who works at Remington; that Adams told her that Young looked stressed, and she told Adams that she had to give Young a hug because she had been crying; that Adams said she was not for the Union, and she told Adams "That's you" (Tr. 311); that later that same day she was leaving from Water Pik to go to a doctor's appointment and as she was going to Ozburn's parking lot she saw Young who asked her "why was I putting her business down at Remington" (Tr. 313); that she asked Young what she was talking about and Young said "Why are you spreading my business at Remington" (ibid.); that she told Young "Remington? I ain't spreading your business. Oh, somebody could have told you—only somebody could have told you that was Stephanie. I'm going to call Stephanie and see why she lied on me" (ibid.); that Young told her to "Just

leave it alone" (ibid.); that later that day she had a voicemail on her phone from Ewing who indicated that he wanted her to call him; that she telephoned Ewing who told her that he did not want her to come into Remington in the morning to work overtime; that when she asked Ewing why, he told her "he didn't want this Union shit down in here" (id. at 314); that when she then asked Ewing what he meant he told her "They trying to get a Union going on" (ibid.); that she asked Ewing "Why would you come to me like this," (ibid.) and then he asked her "Are you for the Union" (ibid.); that she told Ewing she was not for the Union; that Ewing told her "Glenora, this is something that I know . . . [r]espect my decision" (Ibid.); that Ewing told her that she was down there talking to employees, and she told him that the only employee she talked to down there was Adams and she was lying; that she asked Ewing if he was going to cut her overtime based on what Adams said; that when she told Ewing that she was going to call Adams and ask her why she lied, Ewing told her not to call Adams because "Me and Stephanie have a bond. She trusts in me" (id. at 315); that Ewing also told her that if the conversation got back out in the warehouse, there would be repercussions and she would not like the outcome, he did not want her at Remington, and if he needed her to work overtime, he would call her; General Counsel Exhibit 13 is a cell phone bill which, as here pertinent, shows a 27-minute telephone call to Ewing on November 17, 2009, at 4:41 p.m.; that after November 17, 2009, she did not work in the Remington department; that subsequently she did not request to work overtime in Remington because Ewing told her he would call her if he needed her to work overtime in Remington; that she has continued to work overtime in her own department, Water Pik; that she did not recall working in other departments since mid-November 2009; and that in March 2010 she asked White if she could work in Ozburn's Uzaki department, White told her that she would get back with her, but she never did hear from White.

On cross-examination, Rayford testified that she has known Ewing since 2000, the year she started at Ozburn; that when she works overtime at the Remington account it is voluntary overtime; that an employee at Remington, her friend Craig, told her about the available overtime in that account; that Remington employee Adams is not her friend, but she is her ex-niece-in-law; that she had Ewing's telephone number programmed in her telephone because previously he was her supervisor when she worked in HP; that at the end of the month she worked in Remington from July to November 2009; that she telephoned Ewing, who approved her to work overtime in Remington; that subsequently she dealt with the supervisor in Remington, Greg; that on November 17, 2009, she had a conversation with Adams in Remington at 5 a.m.; that on November 17, 2009, while she worked in Remington she did not have any issues with a printer not working, she did not have any issues with the microwave not working in a breakroom in that she was picking and when she left there it was time for her to go to her job in Water Pik, and she did not have any trouble finding lift equipment in that she used a manual pallet jack; that she did not have any recordings of any conversations she had with Ozburn managers in November 2009; that in her opinion, Adams told Ewing something which caused him to no longer

allow her, Rayford, to work overtime at Remington; that Ewing told her not to call Adams, and if she did, she would not like the repercussions; that Ewing said that he had a bond with Adams; that she did not tell anyone at Ozburn about Ewing keeping her from working overtime because Ewing told her that if she did, she would not like the outcome, and she did not want to lose her job; that Ewing told her that it better not get back out in the warehouse so she was scared to tell anyone at Ozburn about it; that she has not been made aware of any overtime opportunities in any account at Ozburn since November 17, 2009; that she asked White about working overtime in the Uzaki account, White told her that she was going to get with the supervisor there, Kelvin, and White would get back with her; that White never did get back with her regarding overtime at the Uzaki account; and that she has not called Ewing to request overtime since November 17, 2009.

Evangelia Young, who is Ozburn's regional HR manager, testified that she is the custodian of records; that, with respect to General Counsel Exhibit 20—which is a subpoena duces tecum served on Ozburn by the Board, she gathered all of the documents; that with respect to Item 20 of the subpoena, namely overtime assignments in Remington from November 15, 2009 to the present, the time information was pulled from Ozburn's time recording system, "Unitime," (Tr. 527); that the only times this record is changed is if an employee misses a punch or does not properly record a transfer from one account to another account, and a manager or supervisor for the account to which the employee is assigned modifies the time at that point to make the correction; that if an employee reports to his or her regularly assigned account all he or she has to do to clock in is to swipe his or her badge; that if a Water Pik employee works overtime in Remington, to transfer those overtime hours, the employee, a manager or a supervisor has to punch in the code of the Remington account; that a comparison of General Counsel Exhibit 21, which is a June 8, 2010 position statement submitted to the Board by one of Ozburn's attorneys, with General Counsel Exhibits 22 and 24, both of which were provided pursuant to a subpoena duces tecum of the General Counsel, shows that the position statement contains transfer work in the Remington account which is not specifically designated as transfer work in the Remington account on General Counsel Exhibits 22 and 24 (the hours worked are included in GC Exhs. 22 and 24, but there is no transfer code specified for these entries, and while Young was able to identify the author of the handwritten entries, Dani Bowers, on GC Exh. 21, she could only speculate that Bowers made the handwritten entries based on information provided to her by the manager of the Remington account, Ewing); and that she was not sure of the basis of Bowers' handwritten entry, "wrong transfer looks like," involving the Remington department which appears on General Counsel Exhibit 25.

General Counsel Exhibit 14 is the "Timecard Report" for Rayford from "8/11/2009" to "7/2/2010." It shows that Rayford worked in Remington during this period on the following dates: 10/19, 20, 21, and 26/2009, and 11/17/2009.

In addition to General Counsel Exhibits 21, 22, and 24, which collectively refer to transfer work in the Remington account by Alvin Fitzgerald, Wanda Staples, and Alfred

Stewart, General Counsel introduced General Counsel Exhibits 26 and 27, which, respectively, refer to transfer work done in the Remington account by Mark Williams and Daniel Cunningham.

OHL Operations Supervisor Owens, who was transferred to Water Pik on February 22, 2010, testified that she has supervised Rayford; that twice she offered Rayford voluntary overtime; that the first time was in a group setting and it was offered to everyone present; that the second time she went around with a pad and pencil and asked everyone individually if they were interested in doing volunteer overtime in a new account; that Rayford did not volunteer either time; that a couple of times Rayford did volunteer for overtime when she offered it to her; and that when Rayford turned down overtime she said that she had other obligations.

Ewing, who as noted above is OHL's operations manager of the Remington Arms account, testified that he has known Rayford for over 10 years; that in 2007 he directly supervised Rayford for about 1.5 years in OHL's Hewlett-Packard account; that in October 2009 Rayford began working overtime in the Remington department, after she saw him in passing and asked him if she could come over and do voluntary overtime work during Remington's peak times, the last 2 weeks of the month; that subsequently she called him from four to six times asking him to work in the Remington account; that in November 2009 Rayford worked overtime in Remington, starting at 5 a.m. and working there until about 7:45 a.m. when she would go to her assigned account; that on November 17, 2009, before she left the Remington account for the day she asked him to give her a call after she got off from her assigned account at 4:30 p.m. since she had "some concerns about my working over here today that I want to talk to you about" (Tr. 927); that he called Rayford about 4:30 p.m. on November 17, 2009, and when Rayford returned his call they spoke for about 30 minutes as follows:

. . . When she—when I called her, I said hey, you asked me to give you a call. What's going on? She said well, I just want to bring some things to your attention. She said when I was working over in the firearm's cage, because she is assigned to work in the firearm's cage area, . . . the people, the employees that I normally work with, she said, Stephanie Adams, James Kerry and Cynthia Craig seemed to be a little distant with her. They wasn't [sic] very engaging.

They wasn't [sic] assisting her very much when she needed some assistance on some things. And so I asked her immediately, . . . where was her supervisor and she said well, he was in the building. And I said did you go out and seek any type of support from him? And she said I couldn't find him.

So I said well, do you mind explaining to me in detail the concerns that you have? And she said well let's start with my RF equipment, which is a hand-held piece of equipment that all the employees use to work with. She said I didn't have an RF gun. No one wanted to assist me with the RF gun.

She went on to state that she had a problem finding a piece of equipment to work with as far as the forklift

equipment. She had issues with the Zebra printer machine. And when she reached out for these three individuals to help her, all of them seemed to be pretty reluctant. And so I was asking her what do you mean by reluctant?

And she went on to state well, in the past . . . they would make themselves available to her. And so I asked her . . . to walk me through the process and so she did. And then when she mentioned the issue she was having with the equipment, she also mentioned that when she went on break, that she had a problem getting to a microwave, that the microwaves were being occupied.

And so when she was asking individuals to help her . . . could she get to the microwave? Everyone seemed to be somewhat standoffish with her. So throughout the conversation I was just trying to assure her that . . . everything was okay and that . . . she was more than welcome to come back, because she had mentioned that. She said well, Roy, I don't know if I'm going to come back tomorrow. And I said well, why . . . are you not going to come back? She says I don't think I'm going to come back because I didn't feel welcome this particular time.

And I said well, okay. Well, let me know. And she says well, if you don't see me that next day, then that was an indication that I decided to stay away and I said okay. And I asked her was there anything else and she said well—I said well, can you be more specific in individuals?

I said—I asked her about James Kerry. I said, you know, did you have a conversation with James? She said well, he wasn't readily available. And I said what about Cynthia? She said we talked in passing. I said what about Stephanie? And she said well, Stephanie I kind of talked about some things in general.

And so I asked her about that conversation and she said her and Stephanie were just having some disagreements about what was going on within the work place. And then I assured her that hey, if there was any problems [sic] there that needed to be addressed, just let me know and that I would have a conversation with Stephanie. And she said okay.

. . . .
[Rayford] . . . indicated that she wanted to reach out and talk with . . . [Stephanie] and I asked her if she wouldn't. And she said well, why you don't [sic] want me to reach out to her? I said because I don't want that confusion in my building. And what I meant . . . [was] the Remington Building. . . . I said I don't want any confrontation, because you are a visitor and I have employees that are here every day.

And if you come down and become disruptive, then I have to hear that from the employees. So I would prefer you wouldn't address Stephanie. Let me address Stephanie and then let me get back from talking to her what I come up with. And she said that was fine, Roy. [Tr. 928–931]

Ewing further testified that during this conversation he did not ask Rayford whether she was for the Union, and the Union did not come up; that he did not tell Rayford not to tell anyone

about the conversation and if she did there would be repercussions; that the following day he saw Rayford in her assigned account when he was on his way to HR for a meeting; and that they had the following conversation:

And I said I noticed that you wasn't at the account this morning and she said yes, I decided that I would just stay over here in my building and that I would . . . not come back down to your account.

And then I went on to say hey, you are more than welcome. If something has happened and you want to talk more in detail, please, feel free. But you are more than welcome to come down and work overtime any time. And she said, okay, Roy. I'll keep that in mind. And so she just walked away. [Tr. 932–933]

And Ewing further testified that since November 18, 2009, she has never called him to request to work overtime in Remington; that prior to November 17, 2009, all of Rayford's overtime in Remington had been initiated by her calling him; that Rayford could work overtime in Remington if she wanted to; and that during the conversation with Rayford on November 17, 2009, he did not tell her that he did not want "the union shit here" (Tr. 933) or that he did not want "that shit" here. (Ibid.)

On cross-examination, Ewing testified that the RF device Rayford referred to was a scan gun; that Rayford had a problem with the scan gun she was using; that Rayford told him that an electric power jack was not available; that Rayford took a break in Remington around 6:45 or 7 a.m.; that OHL's policy is that if an employee works 2 hours or greater, they are due a break; that in the fall of 2009 he had concerns about having union supporters influence the employees that were regularly assigned to the Remington account; that he did not recall sending, "I didn't send one" (Tr. 937), an email to Van Young on September 29, 2009, in which he "indicated that he did not want Carolyn Jones or other union proponents to have access to . . . [his] employees" (Tr. 936); and that General Counsel Exhibit 32 is an email he sent to Young dated September 29, 2009, which reads as follows:

On Friday, September 25, 2009

I received a radio call from the security officer (Isaiah Shipp). After entering through the metal detector from the warehouse I witnessed OHL employee Carolyn Jones speaking to Officer Shipp in a very rude and unprofessional manner near the employee's main entrance. I asked Carolyn Jones to see her in private (both of us were standing in the parking lot near the main entrance). This was an attempt to see if there was a concern regarding Officer Shipp's behavior or his actions.

Carolyn Jones stated during our conversation that she wanted to enter our facility to meet with Remington's hourly employees. I informed Carolyn Jones that her behavior was unacceptable and that she couldn't enter the facility based on many variables. My list of concerns as followed: 1 thru 5

1. We handle Firearms and Ammo within this facility (SENSITIVE PRODUCT)

2. Security concerns (because of her lack in knowledge regarding our security and safety processes and procedures[]).
3. Carolyn Jones is not an assigned OHL employee to this campus.
4. Solicitation during working hours are [sic] prohibited
5. Safety concerns/Carolyn's well being overall

As the assigned Operations Manager to the Remington account my greatest concern during Carolyn's visit was her lack of professionalism and aggressiveness with me Officer Shipp and other OHL employees. Upon my arrival from the parking lot I was approached by several employees asking why Carolyn Jones was granted access to the facility when there's NO DESIRE for a union or union participation within the Remington Account. As the Operations Manager I went on to assure each concerned employee that all participants regarding this union matter would be treated fairly according to the law and OHL Employee Handbook.

Enclosing, Carolyn Jones did issue union literature to multiple Remington employees on the above date Friday September 25, 2009.

Thanks for your time and patience regarding this matter.

White testified that Rayford asked her about working overtime in the Azoki account, which started up around March 2010; that she told Rayford that the only people who could work on the account were the people who were signed and validated on the customer's manual system; and that since Azoki has started up, employees from other accounts have not gone to Azorki to work overtime.

D. Jennifer Smith

Jennifer Smith, who has worked for Ozburn as a permanent full-time employee since June 2008, testified that prior to 2008 she worked at Ozburn as a temporary employee; that from 2009 to the time she testified at the trial herein on July 15, 2010, she worked in Ozburn's Brown Halco department; that for the first several months of 2010 her immediate supervisor was Owens; that manager Phil Smith was above Owens; that on February 17, 2010, she appeared as a witness in a Board hearing in which Ozburn was the Respondent, and in which she testified about Phil Smith destroying Union literature in a breakroom at Ozburn; that on March 2, 2010, she was called into an office with Phil Smith and Owens, and Phil Smith told her that she had 13 attendance points; that she asked Phil Smith how she had 13 points; that Phil Smith explained, going through the dates; that General Counsel Exhibit 7 is a "PROGRESSIVE DISCIPLINARY ACTION" form which is dated "3-2-10," which indicates that she received a "Final [The form also has a line for "First Written Warning."] Written Warning (any additional unexcused absences or lates may well result in termination of employment.)," and which indicates "13 combined points Suspension Date 3/3/10"; and that General Counsel Exhibit 6 is a blue "Post-it" (Tr. 437) sheet on which the dates of her points were written when she met with Phil Smith and Owens on March 2, 2010. The document reads as follows:

Jennifer Smith		
3-3-09		2 pts.
3-4-09		2 pts.
8-14-09	Leave early	3 pts.
	Car stolen	
10-23-09	Tardy	1 pt.
12-2-09	Tardy	1 pt.
12-4-09	Tardy	1 pt.
1-7-10	Tardy	1 pt.
<u>XXXXXXXXXXXXXXXXXX</u>		
2-27-10	2 pt	13 pts.

As noted, whatever appeared on the next to the last line of the document is crossed out. Also, next to "3-3-09" the word "Call" is written and then crossed out. Jennifer Smith further testified that the handwriting on General Counsel Exhibit 6 is Owens'; that with respect to the "3-3-09" entry, (a) she asked Owens in the morning if she could leave work and Owens pointed out to her that it was busy at the time, and (b) at about 3:45 p.m. when "the work kind of slacked up" (Tr. 413), Owens told her that she could leave, and she left; that her "Timecard Report" for March 3, 2009, General Counsel Exhibit 8, shows that she clocked in at 8:56 a.m. and she left work at 4 p.m. (designated as 1600 military time on the document); that in March 2009 her hours were 9 a.m. to 5:45 p.m.; that she told Phil Smith and Owens at the March 2, 2010 meeting that she should not received points for March 3, 2009, because she was at work; that an employee does not receive points for leaving early if their supervisor tells them they can go home for the remainder of the day if the work is slow; that when she left on March 3, 2009, she had permission from Owens; that March 4, 2009, was a "court date" (Id. at 417) and she did not come to work that day; that she does not remember if she discussed this date with Phil Smith and Owens at the March 2, 2010 meeting, but she believes that she should not have received points for that absence because that would have been an excused absence in that she had documentation for that day which she submitted to Ozburn in advance of the court date; that she was not sure exactly what this court date was for in that she had different court matters pending at that time [She did not know "if it was Juvenile Court or . . . like a traffic ticket or something." (Id. at 419)]; that on one other occasion when she missed work due to a court date, when she gave the documentation to HR the point for April 1, 2009, was taken off; that on March 4, 2009, she took paid time off; that points stay on the absence record for 1 year; that at the March 2, 2010 meeting she mentioned that the March 2009 points were about to come off her absence record and Phil Smith said "Well, they not off yet. . . ." (Id. at 421); that with respect to the "8-14-09" entry she told Phil Smith and Owens at the March 2, 2010 meeting that she did not leave early that day and she should not receive points for that day; that when she got up to go to work on August 14, 2009, her car was not there, she telephoned Phil Smith and Owens and when they did not answer she left a message, explaining to Owens that she was coming to work that day, she had to get a ride, and she would arrive at work before 11 a.m.; that General Counsel Exhibit 9, which is her "Timecard Report" for August 14, 2009, shows that she clocked in at 10:55 a.m. and she left work at

5:45 p.m.; that on the afternoon of August 14, 2009, she asked Owens if she was going to get points for that day and Owens told her that she would not; that a couple of days later Owens asked for documentation for the August 14, 2009, absence so that it could be treated as an excused absence; that she never did provide the documentation to Owens for the time she was absent on August 14, 2009; that she did not contest the fact that she was late getting to work on October 23 and December 2 and 4, 2009; that at the March 2, 2010 meeting she told Phil Smith and Owens that the weather was bad on January 7, 2010, but she came to work and she was tardy, but she should not receive a point; that when she approached the timeclock to clock in on January 7, 2009, she saw Phil Smith, she asked him if she was going to get points, and he told her “No” (Id. at 429); that General Counsel Exhibit 10 is the “Timecard Report” for January 7, 2010, it shows that she clocked in at 9:11 a.m. and clocked out at 5:46 p.m.; that Ozburn has a bad weather attendance policy, but she does not clearly understand it; that there was a lot of snow and ice on January 7, 2010, 12 or 13 people work in her department, and she thought that maybe one-half were there when she clocked in at 9:11 a.m.; that the next-to-last line on General Counsel Exhibit 6 was already “scratched out prior to . . . [her] seeing it” (Id. at 432) on March 2, 2010; that at the March 2, 2010 meeting she told Phil Smith and Owens that the “2-27-10” 2-point entry was voluntary overtime and how could they give points for that; that Phil Smith said “Well, we’re going by the books. And we have to give points for that” (Id. at 433); that she told Phil Smith and Owens that she never received points for a voluntary overtime day; that regarding the February 27, 2010 Saturday voluntary overtime in another account, when a supervisor who she identified only as Terri came around on Friday, February 26, 2010, and asked her if she wanted to work overtime in another account, she told the supervisor that she wanted to work overtime, but she had some stuff going on, she was having a meeting at her house that morning, and she was not sure she was going to be able to make it; that supervisor Terri told her “Well, if you don’t—if you don’t come in, it’ll be fine. You don’t have to worry about it if you can’t make it” (Id. at 435); that in the past she has missed voluntary overtime days and to the best of her knowledge she did not get points on those two or three occasions; that she could not recall the specific dates of those two or three occasions; that Terri had a pad but she could not recall if Terri wrote her name on the pad; that she did not write her own name on the pad; that she was told at the March 2, 2010 meeting that she was being suspended on March 3, 2010; that she was asked to sign General Counsel Exhibit 7 and she refused because she did not believe that the points were correct; that at the March 2, 2010 meeting she discussed whether she had 12 or 13 points and at one point Phil Smith said that she had 12 points and he said “Well, you’re still getting suspended” (Id. at 438); and that General Counsel Exhibit 28 is a “PROGRESSIVE DISCIPLINARY ACTION” form dated “4-17-09,” which (a) is a “First Written Warning,” (b) shows that she received “2 pts.” on “4-1-09,” and (c) shows that the two points were taken off with the notation “ok per Phil.”

On cross-examination, Jennifer Smith testified that Respondent Exhibit 7 is an “ATTENDANCE & PUNCTUALITY POLICY ACKNOWLEDGEMENT” receipt which she signed, and which indicates the she received a copy of the policy (R. Exh. 6), and has familiarized herself with its contents (it also indicates that she agreed to abide by the guidelines outlined within the policy);¹³ that March 2, 2010, was not the first time she had been warned about her attendance; that she did not know how many times she had been previously warned about her attendance; that she was not sure that the attendance warning she received in April 2009 (GC Exh. 28), was before there was any union activity at Ozburn; that her supervisor, Owens, knew that she was a Union supporter because they had a conversation about it, but she could not remember the date of the conversation; that she believes that she received attendance points for March 3 and 4, 2009, because of her union sympathies or activities in that the points for those 2 days are not legitimate, she did not sign the April 2009 “writeup” (Tr. 476) because they were supposed to go back and correct it and they never did; that when she was given the April 2009 write-up she did not at that time claim that she was given those points because of union activity; that she did not have any reason to disagree with alleged prior testimony that the union activity at Ozburn started with a meeting in May 2009; that she, in addition to her conversation with Owens about her support for the Union, had previously worn union buttons and paraphernalia and she handbilled; that the conversation she had with Owens about supporting the Union occurred in October 2009, and that during this conversation Owens spoke with her in reference to the union support and what did she feel about it and what did she think about it; that on March 3, 2009, her shift time was 9 a.m. to 5:45 p.m.; that she did not find out that she was given points for March 3, 2009, until she received the writeup on April 17, 2009, and then she spoke with Owens, Phil Smith, and Young; that she did not know if she spoke with Young about her March 3, 2009 points; that she took the day off on March 4, 2009, to go to court; that paid time off has to be approved and she has submitted documentation to her supervisor to show that she had a legitimate reason to take the day off; that subsequently Phil Smith told her that she did not need documentation if she was taking paid time off; that she had to get paid time off approved in advance; that Owens asked her for documentation of her car being stolen 3 or 4 days later, but she never provided it; that with respect to February 27, 2010, Terri came back to her later and told her that the voluntary overtime was in a new account, Uzaki; that she did not recall telling Terri Chessier to come back to her; that she would not expect to receive attendance points if she had volunteered and was committed to work overtime at an account on Saturday, February 27, 2010, and did not show up; that Ozburn’s attendance policy, the first page of

¹³ Among other things, under “Purpose” the policy indicates “Please keep in mind this policy also applies to overtime (mandatory and voluntary) . . .” and under “Definitions” the following appears: “A workday is viewed as any day for which an employee is regularly scheduled to work, a scheduled overtime workday, or a day for which the employee is typically off but has volunteered to work.”

Respondent Exhibit 6, the third paragraph under “Purpose,” indicates that the attendance policy also applies to voluntary overtime; that in her affidavit to the Board on March 27, 2010, she did not make any reference to raising the March 2009 points with Phil Smith and Owens at the March 2, 2010, final warning meeting; that Respondent Exhibit 8 shows that she punched out at 4 p.m. on March 3, 2009, had no punches for March 4, 2009, punched in at (a) 10:55 a.m. on August 14, 2009, (b) 9:01 a.m. on October 23, 2009, (c) 9:02 a.m. on December 2, 2009, (d) 9:01 a.m. on December 4, 2009, and (e) 9:11 a.m. on January 7, 2010, and was absent on February 8 and 27, 2010; that she did not call anyone to say she wouldn’t be present on February 27, 2010; that under Ozburn’s attendance policy a no-call, no-show, calls for one point;¹⁴ that she volunteered for overtime with the lead, described only as Shanelle, at the Eastman account, did not show up, did not let anyone know, never received points, but she could not recall when this occurred; and that several times she was supposed to come for overtime at the HP account, she did not show up, and she did not receive any points.

On redirect Jennifer Smith testified that she left messages with Phil Smith and Owens on August 14, 2009, about 1 hour before start time and told them that her car was stolen and she would be late coming to work; that the three points she was charged for August 14, 2009, are not the correct number of points that should be charged for being tardy; that on other specified days she was only charged one point for being tardy; that she is not notified when she receives an absence point or points; and that the only way she finds out is when she asks or she receives a discipline.

Young testified that Ozburn distributed a new handbook in either August or September 2009 (GC Exh. 30), which was still in effect at the time she testified at the trial herein on July 15–16, 2010.

General Counsel Exhibit 11 is a newspaper article dated January 7, 2009, which refers to snow and slippery roads that morning, and which indicates that the Tennessee Department of Transportation had not closed any roads.

General Counsel Exhibit 12 is a March 22, 2010 position statement submitted to the Board by one of Ozburn’s attorneys. As here pertinent, one of the attachments, an entry on page two of the “2010 Attendance Controller” for Leonard Humphrey indicates “1/7/10 TARDY-EXCUSED-SNOW DAY.” The copy of one page of the Unitime record for Humphrey included with the position statement shows that on three of the five full days listed in late January and early February 2010 Humphrey clocked in at 4:54 a.m., and on the other two he clocked in minutes before 7 a.m. This exhibit also contains a “SEVERE WEATHER POLICY ACKNOWLEDGMENT” which

¹⁴ P. 2 of R. Exh. 6, OHL’s attendance and punctuality policy, specifies the following:

Points will be assigned for unexcused absences, being late, leaving early, and no call/no shows as outlined below. . . .

No call/no show:	4 points
Unexcused late call or leave early:	3 points
Unexcused absence:	2 points
Unexcused late:	1 point

employee Christopher Barnes signed for on “5-21-09.” It reads as follows:

Severe weather is almost certain during particular times of the year. While it is sometimes difficult to get to work, our customers expect us to provide uninterrupted services, regardless of the weather. Therefore it is imperative that all associates report to work as usual during inclement weather. In the interest of safety, associates will be allowed to arrive reasonably later than the start of their shift.

In the event that an associate fails to arrive for his or her scheduled shift, they will be assessed the prevailing number of points allowable according to the company attendance policy. Associates who do not report to work will be allowed to use PTO time (if available) to make up lost work time, at management discretion.

As here pertinent, Ozburn’s most recent handbook (GC Exh. 30), does not contain the following sentence which apparently was in effect up until the time of this handbook: “In the interest of safety, associates will be allowed to arrive reasonably later than the start of their shift.”

General Counsel Exhibit 15 is Jennifer Smith’s “2010 Attendance Controller” and her “2009 Attendance Controller.” As here pertinent, the documents contain the following notations: “3-3-09 left at 4 p.m. (unexcused),” “3-4-09 called in.” The calendar for March 3 and 4, 2009, has a “U” apparently meaning unexcused. The notes for the August 2009 calendar read as follows: “vehicle stolen 8-14 late in left early @ 3:45 [The document originally read “(excused)” but this is crossed out.] no docu. U.” The August 2009 calendar has a “TE” with “U” written over the “E” apparently indicating that originally the tardy was excused and then when documentation was not provided the excused was changed to unexcused. The calendar for January 7, 2010, is marked “T” and there are no notes at the bottom of the calendar. There is no notation on the calendar for Saturday, February 27, 2010, and there are no notes at the bottom of the calendar for this date. The following notation appears at the bottom of the February 2010 calendar: “2/8 snow day,” and there is a “U” on the calendar for February 8, 2010, and “2” in the margin of the calendar on this line of the calendar.

General Counsel Exhibit 29 consists of two emails. The first reads as follows:

From: Owens, Alfreda
 Sent: Tuesday, August 11, 2009 12:07 PM
 To: Young, Evangelia
 Cc: Smith, Phil
 Subject: Conversation recap
 Importance: High

Van,

This is a recap of the conversation.

Thank you,
 Alfreda Owens

. . . .

Date: August 11, 2009

Time: 11:40 AM approximately
 RE: Recap of conversation

Anita Buford and Alfreda Owens were in general conversation (prayer) when she stated the Jennifer Smith had approached her about union activity (joining and more information on the subject). Anita said that Jennifer asked for her telephone number and said she wanted to talk to her more. Anita refused to give her telephone number and said she replied by referring Jennifer to Van Young if she wanted information on a union. Further, Anita told Jennifer that unions were for people who do not want to work but she (Anita) said I want to come to work. I asked Anita when did all this happen and she said on last week.

Initially, I contacted Van Young with a voicemail then tried to make contact with Phil Smith and Kelvin Davis. Van did return my call and the above information was given.

Alfreda Owens
 Operations Supervisor

The second email reads as follows:

From: Young, Evangelia
 Sent: Tuesday, August 11, 2009 12:27 PM
 To: Tidwell, Andrew
 Subject: FW: Conversation recap-FYI
 Importance: High
 Attachments: Jennifer Smith.doc

I asked Alfreda to recap this conversation for record. This is the 5540 building. The building across the parking lot from where my office is.

Van Young
 Regional HR Manager

....

General Counsel Exhibit 19 is an October 22, 2009 email from Young to Phil Smith and Owens which reads as follows:

I have reviewed the document that Jennifer submitted to the HR dept and have determine[d] the document is sufficient to support her request to be absent due to court. In the future please when Time off Request forms are submitted for matters of this nature, please return the approval or denial within 72 hours. If it is a provisional approval pending supporting documents please write on the approved request and discuss with the employee. Advise if you have any questions.

Trina Watkins, who is an OHL operations supervisor for the Eastern Bell Sports account, testified that she was involved in the startup of this account on March 1, 2010; that as part of the startup she asked for volunteers to come from other accounts to assist with the startup of the Eastern account; that she asked for volunteers for overtime on Saturday, February 27, 2010; that she received a list of volunteers from Cheshier for February 27, 2010, and Jennifer Smith's name was on the list, without any qualification beside it; that it is her understanding that when an employee signs up for overtime that employee is expected to showup and if they do not, they get attendance points; that

Jennifer Smith did not showup on February 27, 2010, and she did not call in to explain why she was not showing up to work overtime in the Eastern Bell account (Tr. 856-857); that she reported this to Phil Smith, who was administering the attendance because the Brown-Halco account where Jennifer Smith worked did not have a supervisor at the time; and that two other volunteers were either late or did not showup on February 27, 2010.

Owens, who as noted is an operations supervisor at OHL, testified that she switched from the Brown-Halco account to the Water Pik account on February 22, 2010; that when she was making the switch there was about a 3-week period that the Brown-Halco account was without a supervisor; that while she was in the Brown-Halco account she supervised Jennifer Smith; that she had a contentious relationship with Jennifer Smith long before she knew that Jennifer Smith supported the Union; that as the supervisor for the Brown-Halco account one of her responsibilities was to administer the attendance for that account; that General Counsel Exhibit 15 is the 2010 attendance controller or calendar that she kept for Jennifer Smith; that R. Exh. 8 is the unitime report ("TIMECARD REPORT") which show when Jennifer Smith received attendance points; that first page of Respondent Exhibit 8 shows that Jennifer Smith, who was scheduled to start work at 9 a.m., clocked in at 10:55 a.m. on August 14, 2009; that on August 14, 2009, Jennifer Smith called and left a voice message for her indicating that her car had been stolen from her driveway; that later that day Jennifer Smith told her "that her roommate had come home about 1 a.m. and discovered that her car was no longer in the driveway and that she wanted to file a police report and make an insurance claim and that was the reason for her being late in" (Tr. 864); that shortly after her lunch break, Jennifer Smith came to her and said that she wanted to leave work and go and pick up a police report and get information from her insurance company regarding her stolen vehicle; that she told Jennifer Smith that she could go and obtain a police report and/or her insurance information, but that she needed to return to OHL with the documents so that OHL would have proof that there really was a car stolen; that she told Jennifer Smith that if she did not return with the documents "an unexcused leave early would constitute three points against her attendance, that we were willing to waive any attendance points if she could bring back the documents stating that the vehicle had been, in fact, stolen and/or insurance information that a claim had been filed" (Id. at 865); that Jennifer Smith agreed; that she thought that Jennifer Smith punched out following this conversation, but in subsequently reviewing the unitime report she noted that Jennifer Smith, without authorization from her, went to work in a different account (noted as "XFER" on the report) at 4:08 p.m. and then clocked or punched out from that account at her regular quitting time, 5:45 p.m.; that as indicated on page five of Respondent Exhibit 8, Jennifer Smith clocked in at 9:11 a.m. on January 7, 2010, and there was no reason to apply OHL's severe weather policy that day; that as indicated on Respondent Exhibit 15, another employee other than Jennifer Smith, Dennis McLarty, came in after 9 a.m. (9:03

a.m.), and he received an attendance point for that day;¹⁵ that Jennifer Smith did not tell her that Phil Smith told her that it was all right for her to be late that day; that as indicated on page 6 of Respondent Exhibit 8, Jennifer Smith did not punch in on February 8, 2010, and she received two points; that February 8, 2010, was a day when OHL's inclement weather policy was in effect, but if an employee does not show up at all, even though the inclement weather policy is in effect, the employee receives points; that as shown on page seven of Respondent Exhibit 8, Jennifer Smith did not come to work on February 27, 2010; that she was told by Phil Smith that Jennifer Smith volunteered to work overtime in another account, she did not show and she did not call-in on February 27, 2010; that as indicated on page 9 of Respondent Exhibit 8, on March 3, 2009, Jennifer Smith left early, at 4 p.m.; that she gave Jennifer Smith attendance points for March 3, 2009, because she was asked to bring in her documentation for her stated doctor's illness and she did not do it; that as indicated on the last page of Respondent Exhibit 8, Jennifer Smith did not come to work on March 4, 2009, she called in and said that she was sick, she received points, and she never said that she had to go to court on that day; that General Counsel Exhibit 6 are notes she took regarding Jennifer Smith's attendance; that she was involved in attendance issues relating to the Brown-Halco account in March 2010 even though she had been transferred to the Water Pik account because at that time there was no covering supervisor and she had prior knowledge of the account; that she did not know why Jennifer Smith's February 8, 2010 absence for which she received points was not included on the blue "Post-it" (GC Exh. 6); that she and Phil Smith had a meeting in his office with Jennifer Smith to review General Counsel Exhibit 7, which is dated "3-2-10" and is a final written warning and suspension; that Jennifer Smith refused to sign the disciplinary action for the suspension; that Jennifer Smith said that she could not have been tardy on certain dates in December, and she refuted the January 7, 2010 entry, saying that she had permission to come in late without indicating who had given her the permission; that no one had told her that Jennifer Smith was excused for January 7, 2010; and that Jennifer Smith did not mention the Union during this meeting.

On cross-examination, Owens testified that she was not aware of the fact that Jennifer Smith had testified in a Board proceeding against OHL some weeks earlier when Jennifer Smith received her March 2, 2010 discipline; that she learned of that when she was about to testify in the instant proceeding; that sometime in August 2009 she became aware that Jennifer Smith supported the Union; that she sent an email to Van Young in August 2009 reporting that Jennifer Smith had spoken in favor of the Union to another employee who in turn reported it to her; that she told Phil Smith about Jennifer Smith, without authorization, on August 14, 2009, going to another account and working in that account from 4:08 p.m. to her quitting time, 5:45 p.m.; that when she asked Jennifer Smith about transferring to the other account without authorization Jennifer Smith said that she worked at the other account to

makeup the time she had lost on the front end; that Jennifer Smith was not disciplined (apart from the three attendance points) for transferring to another account without authorization; that if management was only dealing with the late arrival of Jennifer Smith on August 14, 2010 under the attendance policy she would have only received one point for tardy; that page three of General Counsel Exhibit 15 is the 2009 attendance controller for Jennifer Smith and there is a "TU" for tardy and unexcused in the August 14, 2009 box; and that to the right of the week which contains August 14, 2009, on page 3 of General Counsel Exhibit 15 there is a "3" for the three attendance points which were assessed.¹⁶

On redirect, Owens testified that regardless of whether Jennifer Smith actually left OHL premises early on August 14, 2009, she never provided any documentation to excuse the one point for being late on August 14, 2009.

Cheshier, who is an OHL supervisor for the Dukal account, testified that at the behest of Phil Smith on the Friday before the last weekend in February 2010 she went around and collected volunteers to work overtime the next day, February 27, 2010, on the Eastern Bell account; and that, among others, she asked Jennifer Smith who told her

She wanted to work. And then as I started to walk away, she said well, wait a minute, I may not want to work. And so I asked her, I said well do you want to work or not. And she told me she said well, just keep—she said let me think about it and then come back to me before you turn in the names. [Tr. 917]

Cheshier further testified that later that afternoon she went back to Jennifer Smith and asked her if she had made up her mind as to whether or not she wanted to work the overtime; that Jennifer Smith "said yes she wanted to work" (id. at 918); that she wrote Jennifer Smith's name on the list which she gave to Phil Smith, a copy of which she emailed to Trina Watkins; that Jennifer Smith never told her that (a) she wasn't sure whether she was going to be able to make it on that Saturday, or (b) she had a lot going on at home that Saturday; that as a practice she would not let an employee give her a maybe for voluntary overtime; that she found out that Jennifer Smith did not show up for the voluntary overtime work on February 27, 2010, when she telephoned Watkins on Monday to find out if the employees on her list showed up; and that she conveyed this information to Phil Smith.

¹⁶ The following "Notes" are written at the bottom of the August 2009 calendar, GC Exh.15:

Vehicle stolen 8-14 late in
left early @ 3:45 (excused) [the word "excused" is crossed out] no doc. U

There are no points written in the column at the end of the week in August which includes August 22, 2009, which has "LE" and a check mark in the box. It therefore appears that the "left early @ 3:45 ..." refers to the August 14, 2009 entry and not the August 27, 2009 entry. Also, it is noted that "Vehicle stolen 8-14 late in" takes up the entire space on the first line provided for "Notes" forcing the writer to use the second line not because it refers to a different incident but rather because there was no room on the first line to finish the note regarding August 14, 2009.

¹⁵ R. Exh. 16, McLarty's 2010 attendance controller, has a "T" and a check mark for January 7, 2010.

Young testified that Jennifer Smith came to her because she received an occurrence because she was out to attend a court appearance even though she had the documentation; that Jennifer Smith told her that she told the supervisor the day before that she had to go to court; that she telephoned Phil Smith and she sent an email to Owens and the points were removed; that Jennifer Smith did not come to her to challenge any other points she received; that if an employee is absent and it is unexcused, the employee can use a paid time off day in order to get paid, but it does not affect the occurrence point and the employee would still get the point; that if an employee is suspended, the employee cannot use paid time off to be compensated for the time they are off due to a suspension; that two former OHL employees, Stephanie Gentry and Antwan Bland, were discharged on March 1, 2010 (R. Exhs. 17 and 18), respectively, after both volunteered for overtime on Saturday, February 27, 2010, they were governed under the attendance policy, Gentry received an unexcused absence, Bland was tardy, and both received occurrence points which led to their discharges; and that General Counsel Exhibit 19, which is an email she sent to Phil Smith on October 22, 2009, deals with the sufficiency of documentation Jennifer Smith submitted to HR regarding an absence due to court in October 2009 and not in March 2009.

Phil Smith testified that the Brown-Halco account at OHL falls under his umbrella; that Owens came to him and told him that Jennifer Smith was late one day because her car was stolen; that he told Owens to tell Jennifer Smith that if she provided proper documentation the attendance point for being tardy that day would be forgiven; that Jennifer Smith never produced the documentation; that regarding January 7, 2010, the roads had been cleared by 8 a.m. so anyone who came in late did receive points in that the inclement weather policy did not apply; that everyone in the Brown-Halco account who came in late on January 7, 2010, did receive attendance points; that he did not tell Jennifer Smith on January 7, 2010, that she was not going to receive points for arriving late on January 7, 2010; that February 8, 2010, was another day where there was inclement weather and on that day, even though the inclement weather policy was in effect, if the employee does not showup he or she received points; that he is familiar with the situation where volunteers were collected for overtime in the Easton account, which is one of his accounts, on February 27, 2010; that, as here pertinent, he asked Cheshier to seek volunteers in the 5540 Building which houses the Brown-Halco account; that Jennifer Smith's name was on the list of employees who volunteered for the overtime on February 27, 2010; that Jennifer Smith's name on the list was not qualified in any way and, indeed, the employee either commits or the employee does not commit in that there is no "if I can" (Tr. 1111); that if an employee commits to coming and does not showup, the employee receives attendance points; that for about 6 to 8 weeks in early 2010 that account was without a supervisor because Owens, who was the supervisor for the Brown-Halco account, transferred to the Water Pik account; that during this 6 to 8 weeks he kept the attendance calendars for the Brown-Halco account; that he was involved in administering the final written warning suspension (GC Exh. 7), to Jennifer Smith (GC Exh. 7

indicates that Jennifer Smith had 13 points); that the March 2, 2010 meeting with Jennifer Smith was held in his office with Owens present; that they went over a note with the dates for which she was getting points (GC Exh. 6), and Jennifer Smith's calendar; that Jennifer Smith "questioned some different points and we removed and left the ones that were appropriate" (id. at 112); that Jennifer Smith questioned the one about the three points for the leave early for the theft of her car and he asked her if she ever brought the information to Owens regarding the police report or the insurance and she said she did not; that he told Jennifer Smith that in view of that the points would not be removed; that while Owens was no longer Jennifer Smith's supervisor, he had Owens there because a lot of the points were assessed during the time Owens managed Jennifer Smith; that Jennifer Smith did not give a compelling reason during this meeting to remove enough points to get her under the category of a final written warning; that points remain on the employee's record for 12 months; that one point is given for being late and two points are given for being absent; that an employee gets a final written warning at 12 points and Jennifer Smith had 11 points and then received 2 points for her absence on February 27, 2010, which gave her 13 points; that as demonstrated by General Counsel Exhibit 28, which refers to—among others—points assessed on March 3 and 4, 2009, Jennifer Smith succeeded during her first written warning meeting with him and Owens on April 17, 2009, in having 2 points for "4-1-09" taken off her record; and that during the March 2, 2010 meeting Jennifer Smith did ask him whether it was 12 or 13 points and he told her it did not really matter in that 12 or 13 would result in the final written warning.

On cross-examination, Phil Smith testified that he was OHL's designated representative in the earlier trial that was held in February and March 2010 and so he knew that Jennifer Smith testified in that proceeding that she observed him destroying or disposing of union literature in the breakroom; that employees who are tardy arriving within 2 hours of their start time, having called in, receive one point; and that when Owens asked him if she should give Jennifer Smith points for coming in late the day her car was allegedly stolen, he told Owens that for Jennifer Smith not to get the tardy points she would have to provide documentation to verify what Jennifer Smith is saying is actually true.

On redirect, Phil Smith testified that of the 13 attendance points that Jennifer Smith had when she received her final written warning only 2 of the points were given to her after she testified in the prior proceeding involving OHL in February 2010, which are the 2 points she received for not showing up for the overtime she volunteered for on February 27, 2010.

General Counsel Exhibit 37 is a position statement of OHL dated "March 22, 2009." As noted above, the letter opens with "In response to your e-mail of March 9, 2010. . . ." Obviously, the date on the letter should be March 22, 2010. As here pertinent, the statement summarizes the reasons for the suspension of Jennifer Smith. Among other things, OHL indicates:

Actually, Ms. Smith could have received four points for a no-call no show [on February 27, 2010 when she volunteered for

overtime and did not show], but instead, the company displayed leniency and only issued two points. These two points resulted in Ms. Smith having a total of 13 points. Again, the company displayed leniency and only suspended Ms. Smith, even though 13 points is enough to warrant termination under OHL's attendance policy.

Analysis of the Alleged Unfair Labor Practices

Paragraph 7(a) of the complaint alleges that Young, at OHL's Memphis facility, on or about November 8, 2009 interrogated an employee about the union activities of other employees.

Counsel for General Counsel on brief contends that when Herron was interrogated by Young in November 2009, she had not been engaged in any open union activity; that Young asked Herron "What's up with G and Nichole with the Union"; that the testimony of Rayford and Bledsoe corroborates Herron's testimony concerning the interrogation; that Young admits that her conversation with Herron took place at the same location Herron identified, but Young asserts that she only asked Herron "hey, is Glenora okay"; that in determining whether an interrogation violates Section 8(a)(1) of the Act, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act," *Bloomfield Health Care Center*, 352 NLRB 252 (2008), citing *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984); that relevant factors to be considered are whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation, *Bloomfield Health Care Center*, supra; that here Young's question to Herron concerning whether Rayford and/or Bledsoe were union supporters constituted an unlawful interrogation; and that this is especially so since Herron was not an open union supporter and Young is a high-ranking member of management who was seeking information concerning the union sentiments of employees who had not engaged in open union activity.

OHL on brief argues that there must be a finding that the alleged interrogation "interferes with, restrains, or coerces employees," *Rossmore House*, supra at 1178; that Young has known Herron for 10 years; that Herron is the aunt of Rayford and the great-aunt of Bledsoe; that Young did not ask Herron about Rayford in the context of the Union, but rather Young testified that she asked about Rayford because it seemed that there was something wrong with her; that this conversation between long-time acquaintances who met briefly by chance, not in the presence of other employees, without any objective signs of threats or coercion, is at most de minimis; and that "[i]n Herron's own version of how she described this conversation to Rayford, she did not add the phrase 'with this Union' (R. 294-95)." (R. Br. 26.)

The following is the testimony of Rayford on Tr. 294–295:

Q. And tell me again what Helen [Herron] told you she was questioned about.

A. She said Van Young came to her and asked her what was up with G and Nichole? And she said she was afraid; she told

Van that she was going to do her. And Van, she said Van said to her that I know you wasn't [sic] like them.

Q. Do you know what that conversation—what did you understand that conversation to be about?

A. The Union, Union doing —Union.

Q. Okay, so it wasn't about—was it about Nichole making her supervisor cry?

A. No, the Union.

What appears on Tr. 294–295 is not, as Respondent asserts on brief, "Herron's own version of how she described this conversation to Rayford. . . ." Rather, it is Rayford's version of how Herron described her conversation with Young to Rayford. When a person repeats what they were told about a conversation that someone else had, there is always the risk that it will not be repeated verbatim. However, as pointed out in the testimony of Rayford on Tr. 295, there was no doubt that Herron conveyed to her that Young's conversation with Herron was about the Union. This is reinforced by Rayford's testimony that Herron said she was scared, she was afraid, and by the fact that "Helen asked . . . [Rayford] to call Nichole . . . to tell Nichole to bring her [Herron] a Union card." Tr. 294

First, did Young say what Herron alleges she said? Herron is a credible witness. Young is not a credible witness. Dye did not testify to deny that he carried a box of T-shirts from Young's office to Rayford's pallet jack. Rayford testified that when Dye came to Young's office to get the box there were a number of T-shirts bundled in the office. Dye did not testify to deny this. Young denies that there were bundles of T-shirts in her office. She also denied that she distributed the T-shirts until she was shown the testimony she gave in the prior Board trial. Since Dye did not testify to deny Rayford's testimony about him being in Young's office when there were bundles of T-shirts there, Rayford's testimony is credited. Young lost her credibility with her testimony regarding the "Obama" T-shirts. Young did not impress me as being a credible witness. Young said what Herron testified Young said. When Young interrogated Herron, she was not an open union supporter. Young, as regional resource manager, is OHL's highest ranking human resources manager on site in Memphis. While it appears from the timing of the interrogation that at the time management was aware Bledsoe had, with Pugh, demonstrated that she supported the Union, management was trying to determine if Rayford supported the Union. Also, it would appear that this interrogation occurred after Rayford told Young and White that she would speak to Bledsoe about her support of the Union. Apparently, Young was trying to determine from Herron whether Rayford was having any success with her daughter, convincing her to give up her support of the Union. As to whether the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act, it is noted that Herron testified that she was scared and she was afraid. While these are subjective declarations, the fact that Herron, after Young interrogated her, asked for a union card to sign for protection demonstrates that as far as Herron was concerned the interrogation did restrain, coerce, and interfere with the rights which are guaranteed by

the Act. Rayford and Bledsoe corroborate Herron's testimony that she asked for a union card following this interrogation. And Rayford corroborates Herron regarding Herron's interrogation by Young. In my opinion, a finding that Young's interrogation of Herron reasonably tended to restrain, coerce, or interfere with the rights guaranteed by the Act is warranted. Respondent violated the Act as alleged in paragraph 7(a) of the complaint in that Young interrogated Herron about the union sympathies of Rayford and Bledsoe.

Paragraphs 7(b), (c), and (d) of the complaint collectively allege that Young, at OHL's Memphis facility, on or about November 10, 2009 (1) interrogated an employee about the union activities of other employees and the employee's union activities and sympathies, and (2) solicited an employee to persuade another employee to abandon the employee's support for the union.

Counsel for General Counsel on brief contends that Rayford provided detailed and credible testimony about her interrogation by Young and White on about November 10, 2009; that conversely Young and White provided vague, non-specific testimony about their exchange with Rayford regarding Bledsoe's support of the Union; that the questioning of Rayford in a private office area by high-ranking management was clearly coercive; that Young's questioning of Rayford about whether everything was okay with Bledsoe was unlawful inasmuch as Young, by posing the question, was seeking to elicit information regarding the union sympathies and activities of another employee; that questioning Rayford about whether she supported the Union was unlawful; and that Young's efforts to have Rayford persuade Bledsoe to abandon her allegiance to the Union violates Section 8(a)(1) of the Act.

Respondent on brief argues that there was no union conversation at all by Young at any time during the conversation which General Counsel contends occurred on November 10, 2009; that Rayford's testimony about the November 10 conversation with Young is simply unbelievable given her absurd characterization of her relationship with Young at the trial herein; and that Rayford's failure to come forth with these allegations until after the election in March 2010 about events at OHL in November 2009 smacks of recent fabrication.

According to Rayford's testimony, this interrogation commenced with Young telling her that White came to Young and told Young that an employee on the floor told White that Nichole is a union supporter. Young did not specifically deny this testimony. White did not specifically deny that she told Young that an employee on the floor came to her and told her that Nichole Bledsoe is a union supporter. So, on the one hand, the two management witnesses do not specifically deny the events which triggered the interrogation. On the other hand, Rayford's testimony regarding this interrogation is corroborated, after the fact, by (a) Bledsoe's testimony, (b) Herron's testimony regarding Young subsequently interrogating her to, among other things, find out from her if Rayford indeed was trying to convince Nichole to stop supporting the Union, and (c) Young's statement to Rayford after Young found out what Rayford told Adams at the Remington account. Add to the mix Young's total lack of

credibility. Rayford's testimony regarding her November 10, 2009 meeting with Young is credited. In November 2009 Rayford was not openly supporting the Union at work in that she was not wearing prouion pins or T-shirts and she had never handed out union flyers as employees were coming and going to OHL's facility. The interrogation, as here pertinent, was conducted by OHL's regional manager of human resources in her office. On this occasion, her supervisor, Dye, told Rayford that Young wanted to see her in Young's office. During this meeting, Young, after bringing up the Union, asked Rayford "are you for it." (Tr. 288) As noted above, the issue regarding Young's interrogation of Rayford on November 10, 2009, is whether it reasonably tends to restrain, coerce, or interfere with the rights guaranteed by the Act. During this meeting, Young reminded Rayford that she had done a lot for Rayford and her family including getting Bledsoe's job back. Young also told Rayford that she did not know who to trust and "she didn't see how people would do her like this" (Tr. 288). In other words, Young was telling Rayford that she had betrayed the trust Young had placed in Rayford. All things considered, Young's asking Rayford if she was for the Union reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. Respondent violated the Act as set forth in paragraph 7(c) of the complaint to the extent Rayford was asked about her union sympathies. OHL also violated the Act as set forth in paragraph 7 (b) of the complaint in that one of the purposes of Young's interrogation of Rayford on November 10, 2009, was to verify whether Bledsoe did in fact support the Union.

With respect to the allegation that Young solicited Rayford to persuade Bledsoe to abandon her support of the Union, Rayford's testimony is credited. As noted above, Young is not a credible witness. Also, as noted above, Young did not specifically deny how she opened this meeting, namely telling Rayford that White told her that an employee on the floor told White that Bledsoe supported the Union. Rayford's testimony is credited. Young, in effect, told Rayford that Rayford's family, Bledsoe, had betrayed Young even after Young had "got her [Bledsoe's] job back." (Tr. 288) All of this led up to one of the purposes of the meeting, namely Young wanted Rayford to talk to Rayford's daughter for Young and White. Respondent's solicitation of Rayford to persuade Bledsoe to abandon her support of the Union is a violation of Section 8(a)(1) of the Act, *Meat Processors of Green Bay*, 228 NLRB 984 (1977). As set forth in paragraph 7(c) of the complaint, Respondent violated the Act by soliciting Rayford to persuade her daughter, Bledsoe, to abandon her support of the Union.

Paragraph 8 of the complaint alleges that on or about November 10, 2009, Respondent, by White at Respondent's facility, interrogated an employee about the union activities of another employee.

Did White on November 10, 2009, interrogate Rayford about the Union activities of Bledsoe? It appears that all are in agreement that before the November 10, 2009 conversations between Young, White, and Rayford, Bledsoe had a verbal exchange with her supervisor, who was placed on notice by Bledsoe that she supported the Union. As noted above, Young opened her November 10, 2009 meeting with Rayford by telling her that White told her, Young, that Bledsoe supported

the Union. OHL's management had already been told that Bledsoe supported the Union. I credit the testimony of Rayford regarding what White said to Rayford on November 10, 2010. White was aware that Young had just told Rayford that management was aware that Bledsoe supported the Union in that White had previously conveyed this information to Young. When Rayford told White on November 10, 2009, that she was going to speak to her daughter for Young, White knew exactly what Rayford was talking about. White's question was whether Bledsoe was going to listen to her mother, Rayford. This was the solicitation of a confirmation from Rayford by White that Rayford was going to attempt to persuade Bledsoe to abandon her support of the Union. White's question was in furtherance of Young's solicitation of Rayford to persuade Bledsoe to abandon her support of the Union. With her interrogation, White was also seeking confirmation that Bledsoe supported the Union. White's question was both an interrogation regarding Bledsoe's union support and a continuation of Young's solicitation effort, which undoubtedly originated with White when White told Young that she had been told Bledsoe supported the Union. Both White and Young made a choice. They could have left the matter alone when they were made aware of facts which appeared to demonstrate that Bledsoe supported the Union. Instead, they chose to use Young's relationship with Rayford as leverage to get Rayford to persuade Bledsoe to abandon her support of the Union. Respondent, by White questioning Rayford regarding the solicitation effort and, in effect, Bledsoe's union support, violated Section 8(a)(1) of the Act.

Paragraphs 9(a), (b), and (c) of the complaint allege, respectively, that Ewing by telephone from Respondent's Memphis facility (a) interrogated an employee about the employee's union activities and sympathies, (b) told an employee that he did not want the employee to work in the Remington department because of the employee's union activities, and (c) threatened an employee with unspecified reprisal if the employee discussed with other employees the conversation between Ewing and the employee.

Counsel for General Counsel on brief contends that the evidence adduced establishes that in November 2009 Ewing told Rayford that he did not want her working in the Remington account because he did not want "this union shit in his account," *General Trailer, Inc.*, 330 NLRB 1088 (2000) (unlawful to tell an employee he is being denied overtime opportunities in retaliation for union support); that Ewing unlawfully asked Rayford "are you for the Union"; that Ewing's denial that he made such a statement should not be credited; that Ewing made an unlawful threat of unspecified reprisal when he told Rayford there would be repercussions if she discussed their conversation with other employees; that the Board has held that an employer cannot prohibit discussions of workplace matters such as overtime, discipline, sexual harassment, insurance copayments, and wages absent a legitimate and substantial business justification; that the Board has held that nonspecific threats such as Ewing's threat that she would not like the outcome if she told coworkers about their conversation, violate Section 8(a)(1) of the Act, *California Gas Transport, Inc.*, 347 NLRB 1314 (2006); that in the context

given that Ewing's threat immediately followed his interrogation of Rayford and the unlawful denial of continued overtime, the implication is clear that Rayford could expect additional unspecified reprisals against her in the future if she did not comply with Ewing's unlawful demands; and that following this conversation with Ewing, Rayford reasonably concluded that further requests to work overtime in the Remington account would be futile.

OHL on brief argues that Ewing did not ask Rayford whether she was for the Union during the 30-minute telephone conversation on November 17, 2009; that the Union did not come up during the telephone conversation, and Ewing did not tell Rayford that he "didn't want the union shit here"; that Ewing did not tell Rayford not to tell anyone about the conversation with him or there would be repercussions; that Ewing told Rayford she was welcome to return to Remington to work overtime; and that since November 18, 2009, Rayford has not requested to work overtime at Remington.

As set forth below, Ewing lied under oath about a material fact, namely, whether he met with any of his employees individually about the union campaign. Ewing is not a credible witness. Rayford's testimony regarding what Ewing said during their long telephone conversation on November 17, 2009, is credited. By threatening Rayford with an unspecified reprisal, Ewing unwittingly corroborated—before she testified at the trial herein—Rayford's testimony. The reason Ewing threatened Rayford if she discussed with other employees their conversation is that Adams had just told him that Rayford discussed with her Rayford's conversation with Young. Rayford told Adams that she gave Young a hug when Young was upset and crying about the union campaign. Adams did not testify to deny this. Although Young testified, she never specifically denied asking Rayford, after Rayford spoke with Adams in Remington, "why was . . . [Rayford] putting her [Young's] business down in Remington" (Tr. 313) and "[w]hy are you [Rayford] spreading my [Young's] business at Remington" (Ibid.) Ewing did not want Rayford repeating what he told her, as he knew that Rayford did with respect to what happened with Young, so he threatened her with an unspecified reprisal. Respondent violated the Act as alleged in paragraphs 9(a), (b), and (c), except that Ewing did not specifically interrogate Rayford about her union activities, but rather he interrogated her about her union sympathies.

Paragraph 10 of the complaint alleges that on or about March 1, 2010, Respondent, by Ernest (Buddy) Lowery at Respondent's facility, interrogated an employee about the employee's union sympathies.

Counsel for General Counsel on brief contends that it is undisputed that Kurtycz was not known by OHL to be a Union supporter prior to March 1, 2010, when Lowery unlawfully interrogated her on the work floor around 9:30 a.m.; that Lowery approached Kurtycz and told her that she was on his list, he showed her a Board notice, and he told her that if the Steelworkers Union was selected, it was not going to happen; that Lowery asked Kurtycz what she thought about the Union and she told him that the Union was good, and she proceeded to tell him about the excessive overtime while Lowery appeared to be taking notes; that while Lowery denies interrogating

Kurtycz as alleged in the complaint, Lowery (a) admitted that he was on the work floor because he had a list of employees he was instructed to speak to about the union campaign, and (b) did not definitively deny having a notice to employees with him that morning; that Lowery's memory was highly selective and his testimony evasive when he was asked about the list and the union topics he was instructed to discuss with the hourly employees on that day; and that Lowery's testimony should not be credited in light of his evasive uncorroborated testimony and implausibly selective memory of that day.

OHL on brief argues that in subsequent conversations with Cousino and Washington, Kurtycz did not report that Lowery had improperly questioned her; that Lowery denies under oath that (a) he was holding the notice to employees, (b) he told Kurtycz you are on my list, (c) he discussed the Steelworkers or the Union, and (d) he asked Kurtycz how she felt about the Union; that Lowery had no motive to lie; that Kurtycz obviously had the stronger motive to fabricate because this allegation can be argued to support her 8(a)(3) allegation; that even if Kurtycz' testimony is credited, this brief conversation fails to pass the *Rossmore House*, 269 NLRB 1176 (1984), test for coerciveness in that (1) it happened out on the work floor, (2) Kurtycz did not feel compelled to talk to Lowery, who was not in her chain of supervision, (3) Kurtycz voluntarily shared her complaints and a brief statement about the Union, (4) this "interrogation" did not take place in the presence of other employees, and (5) this was a very brief conversation; that nothing about this conversation could be objectively interpreted to "interfere with, restrain, or coerce"; and that at most, it was a de minimis violation, *Yellow Enterprise System*, 342 NLRB 804, 810 (2004).

Kurtycz was not an open union supporter before her conversation with Lowery on March 1, 2010. Lowery admits talking with Kurtycz on March 1, 2010, but it is his position that Kurtycz initiated the conversation and she voluntarily offered, without being asked, that the Union was good. Contrary to the assertions of OHL on brief, (a) Kurtycz did bring up her interrogation by Lowery earlier on March 1, 2010, when she was being suspended later that day, and (b) Lowery did not unequivocally deny that he showed Kurtycz a copy of a notice to employees. Rather, as noted above, Lowery testified that *he wouldn't think* that he had General Counsel Exhibit 4 (a notice to employees) in his hand when he was talking to Kurtycz. Also, as set forth above, Lowery, regarding what occurred on March 1, 2010, *could not remember* what the Union related topic was that he was supposed to discuss with employees on his list, he *might have had* a notebook in his hand, he *did not think* he told Kurtycz that she was on his list, he *could not remember* who, other than Johnson, was on his list, but Kurtycz was not, and he *did not recall* who he did talk to after Johnson that day. Kurtycz' testimony was unequivocal. Lowery's testimony was equivocal. Kurtycz' testimony is credited. Lowery's testimony is not credited. In the context in which it occurred, Lowery's interrogation of Kurtycz would reasonably tend to restrain, coerce, and interfere with the rights guaranteed by the Act in that Lowery combined his interrogation of Kurtycz with the declaration of the futility of selecting the Steelworkers because, according to Lowery, it was

not going to happen. As alleged in paragraph 10 of the complaint, OHL violated the Act when Lowery, on March 1, 2010, interrogated Kurtycz about her union sympathies.

Paragraphs 11(a) and (d) of the complaint collectively allege that since November 17, 2009, Respondent has refused to allow Glenora Rayford to work overtime in the Remington department because she joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

Counsel for General Counsel on brief contends that here it has been shown that protected concerted activity was a motivating or substantial factor in the adverse employment action, namely the refusal to allow Rayford to work overtime in the Remington account, *Wright Line*, 251 NLRB 1083 (1980) *enfd.*, 662 F.2d 800 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); that if such a showing is made, the burden shifts to the Respondent to prove that it would have taken the same action even in the absence of the employee's protected activity; that if the reasons given for the employee's actions are pretextual, namely false or not in fact relied upon, the employer does not meet its burden and no further analysis is required; that employer conduct which reflects hostility toward unionization may be relied on to show antiunion animus, even though that conduct is not itself unlawful; and that OHL's refusal to allow Rayford to work overtime in the Remington account after November 17, 2009, violated Section 8(a)(3) of the Act, *Sprain Brook Manor*, 351 NLRB 1190 (2007) (unlawful reduction in overtime in retaliation for employee's union support).

OHL on brief argues that the General Counsel has failed to make a prima facie case under *Wright Line*, *supra*, in that there is no evidence of protected activity by Rayford as of November 17, 2009, nor any motivational link or nexus between Rayford's protected activity and any adverse employment action; and that the General Counsel has failed to prove an adverse employment action in that Rayford did not seek overtime before it can be refused.

The only overtime involved here is that which was available in the Remington account. As noted above and below, Ewing lied under oath about a material fact, namely, whether he met with any of his employees individually about the union campaign. Ewing is not credible. His testimony is not credited. The testimony of Rayford is credited. Rayford did not continue to seek overtime in the Remington account because Ewing made it clear to her that such an endeavor would be futile. General Counsel has shown that Rayford engaged in concerted protective activity which was viewed by Ewing as a demonstration of her support of the Union. The antiunion animus of OHL is spread throughout this record. As found in this decision, OHL violated the Act on a number of occasions. Ewing himself provided the nexus between the protected activity and the adverse employment action. So we have protected activity, employer knowledge, adverse employment action, antiunion animus, and a showing of nexus. OHL does not concede that there was an adverse employment action. OHL has not shown that it would have taken the action it did absent the protected activity. OHL has not shown that it had any lawful business justification for what it did to Rayford. The version of events offered by Ewing, who has no credibility, was

a total fabrication. OHL violated the Act as alleged in paragraphs 11(a) and (d) of the complaint.

Paragraphs 11(b), (d), and (e) of the complaint collectively allege that on about March 2, 2010, Respondent issued a final warning and a 1 day suspension to its employee Jennifer Smith because she (1) joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, and (2) testified on behalf of the General Counsel at an unfair labor practice hearing on February 17, 2010, in Cases 26–CA–23497, et al.

Counsel for General Counsel on brief contends that OHL was aware of Jennifer Smith's prounion sentiments; that Jennifer Smith testified in mid-February 2010 in the hearing before Judge Carson and provided damaging testimony concerning Phil Smith and Alfreda Owens; that within weeks of this testimony, Jennifer Smith was given a final warning and a 1 day suspension for attendance violations; that Respondent's testimony regarding the basis for assessing three points against Jennifer Smith on August 14, 2010, for leaving early was a poorly assembled fabrication; that Jennifer Smith should not have been charged one point for tardiness on January 7, 2010, because Humphrey's tardiness was excused on that same day due to weather conditions; that the February 8, 2010 attendance infraction was not relied on by OHL when the March 2, 2010 discipline was issued to Jennifer Smith; and that the only thing that changed after January 2010 was Jennifer Smith's testimony against OHL in February 2010.

OHL on brief argues that Jennifer Smith's current claim regarding the points for March 3 and 4, 2009, is a recent fabrication; that Jennifer Smith was told on August 14, 2009, that she would get three points for leaving early if she did not bring back the documentation (she did not) showing that she had reported that her car was stolen; that the evidence shows that Owens was consistent in assigning points for tardiness on January 7, 2010, notwithstanding the supposedly inclement weather; that Jennifer Smith admits that she was absent on February 8, 2010; that on February 27, 2010, Jennifer Smith did not show up for work and she did not contact anyone to explain her absence; that General Counsel failed to make a prima facie case under *Wright Line*, supra, which is applicable to Section 8(a) (3) and (4) charges (*Freightway Corp.*, 299 NLRB 531, 532 (1990)), to support the allegation that the 1 day suspension of Jennifer Smith was due to her union activity or in retaliation for her testimony at a prior Board proceeding; that Jennifer Smith's attendance problems arose long before any overt union activity, and there is absolutely no showing supporting a motivational link or nexus between Jennifer Smith's protected activity and her 1 day suspension; that all the imposition of occurrence points, except for her no-show on February 27, 2010, occurred prior to her Board testimony; that Humphrey worked in a different account than Jennifer Smith on January 7, 2010, there is nothing in the record to show what time Humphrey was scheduled to start work on January 7, 2010, the weather was worse in the early morning hours of January 7, 2010, and the General Counsel did not lay the proper foundation for a comparison because there is no evidence in the record from which one could conclude that Humphrey and Jennifer Smith were similarly situated; that Jennifer Smith did

not give OHL the documentation showing that she reported her car being stolen and, therefore, Jennifer Smith could have received a point for coming to work late that day; that no matter how the points are examined, the end result under any calculation is that Jennifer Smith incurred the twelve points to receive the suspension; and that even if the burden shifted to OHL under the *Wright Line*, supra, analysis, OHL has carried its burden of showing that Jennifer Smith would have been suspended regardless of her union support or Board testimony.

Jennifer Smith never specifically denied Owens' testimony that Owens told her on August 14, 2009, that she was being allowed to leave early with the understanding that if she did not return with the documentation supporting her assertion that her car was stolen, she would receive three points for leaving early.¹⁷ In view of this, is it reasonable for General Counsel to contend that "Respondent's testimony regarding the basis for assessing three points against Jennifer Smith on August 14, 2009, was a poorly assembled fabrication designed to support the unlawful actions. . . .?" (GC Br. 54.) As noted above, on brief General Counsel contends that the only thing that changed after January 2010 was Jennifer Smith's testimony against OHL in February 2010. This is not true in that the triggering event occurred on February 27, 2010, when Jennifer Smith did not call in and did not showup for overtime that she had volunteered for, and she was, therefore, given two attendance points.¹⁸ Since she never produced the documentation to show that her car, as she asserts, was stolen, Jennifer Smith could also have received one point for being late that day without documentation. Additionally, OHL could have counted the February 8, 2010 infraction in determining what discipline to give Jennifer Smith. Jennifer Smith supported the Union and she engaged in a protected activity, namely testifying in a Board proceeding against OHL. OHL knew this. Antiunion animus has been shown. There was an adverse employment action. It has not been shown that there is a nexus between

¹⁷ It is noted that Jennifer Smith testified before Owens testified; that Jennifer Smith did not testify as a rebuttal witness; that when Jennifer Smith was called by General Counsel Jennifer Smith testified that a couple of days after August 14, 2009, Owens asked Jennifer Smith for the documentation for the August 14, 2009, alleged theft of her car; and that Jennifer Smith testified that the three points she was charged for August 14, 2009, are not the correct number of points that should be charged for being tardy in that on other specified days she was only charged one point for being tardy. Since Jennifer Smith did not testify on rebuttal, she did not even attempt to specifically refute Owens' testimony and the documentation that on August 14, 2009, she, Jennifer Smith, left her normal account early after Owens told her that she would get three points for leaving early if she did not provide documentation showing that she reported her car being stolen, and when she left her normal account early on August 14, 2009, she worked, without the proper authorization, in another account.

¹⁸ As noted above, two points are given for an unexcused absence. When the incident involves a no-call/no-show, the employee is supposed to receive four points. While General Counsel correctly moved to delete the reference to the no-call/no-show in R. Exh. 8, Watkins testified, without contradiction, that Jennifer Smith did not showup on February 27, 2010, and she did not call in. Under OHL's rules, Jennifer Smith should have received four points and not two points for February 27, 2010. She conceded that she did not call in on February 27, 2010.

testifying in the prior Board proceeding and the discipline in that all of the points in question, except two, were received before Jennifer Smith testified in the other Board proceeding, and on brief General Counsel does not seriously contest the two attendance points Jennifer Smith received after she testified in the other Board proceeding. Indeed, in contending that “[t]he only thing that changed after January 2010 was Jennifer Smith’s testimony against Respondent in February” General Counsel is refusing to acknowledge in the argument portion of her brief that Jennifer Smith volunteered for overtime on February 27, 2010, she did not call in, and she did not showup for work on that day.¹⁹ Even if it was determined that the burden of going forward had shifted, which it has not, OHL has demonstrated that it would have taken the same action it did absent Jennifer Smith’s union and protected activity, and OHL has shown that it had a lawful, sufficient business justification for its discipline of Jennifer Smith. In disciplining Jennifer Smith, OHL did not violate either Section 8(a)(3) or (4) of the Act.

Paragraphs 11(c) and (d) of the complaint collectively allege that on about March 2, 2010, Respondent discharged its employee Glorina Kurtycz because she joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

Counsel for General Counsel on brief contends that the timing of Kurtycz’ discharge, which followed OHL’s first knowledge of her union sympathies and occurred only 2 weeks prior to the union election, supports an inference of animus; that Kurtycz engaged in protected activity, OHL knew, OHL manifested animus toward the activity, and an inference is warranted that Kurtycz’ protected activity was a motivating factor in her discharge; that no other employee had ever received discipline for violating the solicitation policy; that Kurtycz did not engage in any union solicitation activity on March 1, 2010, but even if she did, OHL “has declined to terminate employees who are on ‘final warning’ status and commit an additional related infraction (Tr. 1038–1042; GC Exh. 33)”;²⁰ that Respondent failed to conduct a valid investigation in that Kurtycz was never given an opportunity to provide a written statement or to meaningfully challenge the accusations against her; that the testimony of Moore and Crawford was not consistent with their written statements or the supervisor’s documentation of the initial reports of these employees; that alleged additional employee witnesses were never interviewed by any supervisor; that Hill testified that she was standing next to Moore when Kurtycz approached both of them with union cards; that Moore denied that she was ever approached by Kurtycz and Moore never identified Hill being present during the incident she reported to Washington; that Tidwell was not troubled by the fact that the information sent to him failed to provide any information whatsoever concerning Kurtycz’ version of the events in question; and that OHL

disparately enforced its solicitation policy against Kurtycz in that it failed to enforce its solicitation policy over an extended period before and after the union organizing campaign.

OHL on brief argues that Kurtycz was aware of OHL’s prohibition of solicitation on working time; that Kurtycz denies that any solicitation occurred; that none of the individuals who allegedly sold various products had been repeatedly warned to stop; that the vast majority of the testimony regarding solicitation occurred before White’s late summer 2009 decision that there would be no more selling of anything on campus; that there is no indication that supervisors and managers were aware of the solicitation after the policy change; that Kurtycz, who had repeatedly been warned to stop soliciting, was on notice that with her final warning she was subject to termination before OHL ever knew of her union sympathies; that Eason was shown leniency because he was using a cell phone to check on his father’s failing health; that under *Wright Line*, supra, General Counsel has not made a prima facie case in that engaging in union solicitation in violation of an employer’s lawful solicitation policy is not a protected activity; that Lowery was not involved in Kurtycz’ discharge; that there is no evidence that Tidwell was aware of Kurtycz’ handbilling outside OHL on March 1, 2010; that there is no evidence of a motivational link or nexus between any protected activity by Kurtycz and the adverse employment action; that OHL has also proven that it would have terminated Kurtycz despite her union activity in that Kurtycz willfully violated a policy after being warned that further violations could result in termination; that Kurtycz is the only employee who solicited in a manner that triggered employee complaints to management; and that the distinction between the other employees who received nondisciplinary reminder letters when they solicited for the Union and Kurtycz was that Kurtycz had repeatedly been warned and continued to violate the policy and, therefore, the level of discipline was related to the willful disobedience, rather than the nature of the solicitation.

In my opinion, Tidwell could not have been acting in good faith when he gave his approval of the termination of Kurtycz since what he allegedly relied on (R. Exh. 19) raises a number of questions which should have been resolved before proceeding if OHL was really relying on anything other than its knowledge, gained by Lowery, of Kurtycz’ support of the Union. General Counsel points out that this package does not include a statement from Kurtycz. It is worse than that in that the package does not indicate whether Kurtycz admitted or denied the allegations. It is as if it did not matter whether she admitted or denied the charges.²¹ In reading the statements of

¹⁹ Both Watkins and Jennifer Smith testified that Smith did not call in on February 27, 2010. The fact that Jennifer Smith did not showup for work on February 27, 2010, is not challenged. OHL’s policy in such instances, as set forth above, is unequivocal.

²⁰ The transcript and exhibit refers to one employee, Eason.

²¹ It is noted that Young’s cover memorandum to Tidwell indicates that Kurtycz denied that she sold anything out on campus. Also, in the final warning, which was included in the package of documents sent to Tidwell, it is indicated that Kurtycz claimed no knowledge of any cooler. This is not a substitute, however, for knowing whether Kurtycz denied or admitted the allegations of what allegedly occurred on March 1, 2010. Indeed, it highlights the fact that in those two instances it was indicated whether Kurtycz admitted the charges and, with respect to the alleged soliciting for the Union, it was not necessary for Tidwell, for some unexplained reason, to know whether Kurtycz admitted the allegations. It is noted that Washington testified that while Kurtycz, at

manager Washington and supervisor Pope and the two employees' statements one is struck by the shortcomings of the statements. Washington indicates that she met with Kurtycz regarding the alleged solicitation for the Union. Washington's statement goes to great lengths to indicate what she and Cousino told Kurtycz during their meeting with her in March 1, 2010, but indicates nothing regarding what Kurtycz told them about her guilt or innocence. While Washington's statement indicates that Moore told her that Kurtycz asked employees for their phone number and address, Moore's statement does not even mention this. [Indeed, although obviously Tidwell could not have known this in March 2010, when she subsequently testified at the trial herein, Moore was asked by one of OHL's attorneys whether Kurtycz was asking for addresses or anything like that, and Moore testified that Kurtycz "told us the Union card had all the information that they needed for the name, the address, and phone number. She said fill that out and vote for the Union," (Tr. 593). Kurtycz allegedly asking several employees "for their phone number and address so that a USW rep could contact them" (Washington's "3/2/2010" statement included in the package to Tidwell, R. Exh. 19) appears to be at best a figment of Washington's imagination or at worst a fabrication.] While Moore thought it was important enough to indicate in her statement that Kurtycz tried to get employees to go to Union meetings, there is no mention of this in Washington's statement regarding what Moore told her about what Kurtycz did. Additionally, while Moore's statement indicates "Every day Mrs. Kurtycz would talk to the employees about voting for the Union. She would have the Union cards in her pocket trying to get people to fill them out and also get them to go to the Union meeting" Washington's statement appears to refer to only what allegedly occurred on March 1, 2010. The same is true of the statements of supervisor Pope and employee Crawford regarding what allegedly occurred and what Crawford allegedly told Pope. According to Pope's statement, Crawford told him that she "had observed . . . [Kurtycz] talking to several employees at the table where . . . [Kurtycz] was stuffing the cards into envelopes. [Kurtycz] . . . was telling them about the Union and trying to get them to sign cards. [Crawford] . . . stated that she was not in the group but was close enough to hear what was being said." Contrast this with Crawford's statement, which reads as follows:

& other OHL Employees @ 2:15 p [m] today (03-01-2010) & asked i[f] we were voting for the union, did we read the material she had given out the day before. We replied 'no.'

the March 1, 2010 meeting with Washington and Cousino, denied harassing employees on the floor, Kurtycz did not deny asking people for names and addresses and to sign union cards; that Cousino testified that Kurtycz did not deny the allegations at the March 1, 2010 meeting and Kurtycz thought it was okay to engage in that activity; and that Kurtycz testified that when Washington told her at the March 1, 2010 meeting that two people gave management statements that she was soliciting on the floor, forcing people to sign a union card, she told Washington that it never happened. It would have been out of character for Kurtycz not to deny the March 1, 2010 allegations. As Washington advised Tidwell, Kurtycz denied selling food, and until she was presented with the cooler full of food she did not own up to doing this.

She then asked if we woul[d] like to give our address and n[?] for the union to contact us.

We replied 'no' and walked aw[ay]. [R. Exh. 19 with emphasis added]

Crawford does not, in her statement, indicate that she was not in the group but was close enough to hear what was being said. According to Crawford's statement, it is just the opposite. With her use of the word "we," Crawford was including herself in the group. Also, while Crawford indicates that Kurtycz gave the employees material to read about the Union the day before March 1, 2010 (that would have been on Sunday, February 28, 2010), Pope's statement does not mention the materials. While Crawford's statement alleges that Kurtycz asked Crawford and others for their address and "n[umber]" for the Union to contact them, Pope's statement does not mention this either. As noted, Pope's statement indicates that Crawford observed Kurtycz talking to several employees at the table where Kurtycz was stuffing the cards into envelopes. Crawford's statement does not mention the table and the stuffing. Crawford testified at the trial herein that when Kurtycz approached her she was in the middle of the floor preparing her cart to go pick and she was not where there is a table (of course Tidwell, on March 2, 2010, was not in a position to know how Crawford testified at the trial herein months later). Tidwell testified that when Young sent him a final warning with details about a following incident, termination was being considered; that Young, in sending R. Exh. 19 to him, was implicitly recommending that he approve Kurtycz' termination; and that, as Tidwell testified, "I rely on my local HR professional staff to conduct the investigation and make the recommendation" (Tr. 1089). According to Tidwell, he was approving Young's implicit recommendation to terminate Kurtycz. According to Young, she was not consulted nor did she make any recommendation as to what discipline should be imposed on Kurtycz in March 2010.

Regarding Moore's testimony, as noted above, it conflicts with the statement of Washington. Also, it conflicts with the testimony of Washington with respect to the same point, namely, whether Kurtycz asked employees for their phone number and address. Additionally, there is a conflict with respect to whether Moore told Washington who Kurtycz gave the card to on March 1, 2010, with Moore testifying that she told Washington the employee was Evette and Washington testifying that Moore did not mention Evette Gonzalez' name. While Moore's statement reads in part "Everyday Mrs. Kurts would talk to the employees about voting for the Union. She would have the union cards in her pocket trying to get people to fill them out . . .," Moore testified at the trial herein that she did not see Kurtycz with a union card before March 1, 2010. Then there are the major conflicts between Moore's testimony and the testimony of Lashunda Hill, as set forth above and below.

With respect to the testimony of Lashunda Hill, as noted above, she testified that on one occasion when she was with Moore she saw Kurtycz hand union cards out in the cluster in that Kurtycz "walked up to both of us and handed—gave us union cards and asked us to sign them" (Tr. 638); that this occurred on a Monday and it was "the last time she [Kurtycz] did it" (ibid.); that "the last time was the same week maybe

within . . . [7] days of it [when Kurtycz was no longer at Ozburn]" (id. at 639). Moore's testimony contradicts Hill's testimony in that Moore testified that the *only* employee she saw Kurtycz give a union card to was Evette. Moore never even mentioned Kurtycz offering her a union card or Kurtycz offering Hill a union card in her, Moore's, presence. As noted above, on cross-examination Lashunda Hill testified that Kurtycz tried to get her and Moore, when they were together, to sign union authorization cards around March 1, 2009, shortly before Kurtycz was terminated; that March 1, 2010, which was Kurtycz' last day on the clock working in the HP department, was the day Kurtycz tried to get her and Moore to sign a union card; that on March 1, 2010, she, Kurtycz, and Moore could have been within an arm's length of each other; that she has never taken a union card from Kurtycz; and that she did not observe Kurtycz approaching Moore and offering her a card prior to March 1, 2010. Moore did not corroborate any of Hill's testimony. Indeed, Moore's testimony contradicts all of Hill's testimony set forth above in this paragraph.

Regarding the testimony of Crawford, in addition to the conflicts in her statement and Pope's statement, as described above, Crawford's testimony does not corroborate Pope's statement in that, as noted above, when Crawford took the stand at the trial herein she testified that when Kurtycz approached her she was in the middle of the floor preparing her cart to go pick and she was not where there is a table. Crawford did testify that when she first came to work she saw Kurtycz over in the corner in the cluster area talking to other employees about the Union. However, Crawford did not testify that Kurtycz was at a table where she was stuffing cards into envelopes. Finally, while Crawford testified that there was nothing in the original statement, except the word "Me" that does not appear on the document received in evidence at the trial herein as Respondent Exhibit 10, this is not the case.²²

Under 9(c)(1)(A) of the Act a labor organization acting in employees' behalf may file a representation petition if it is shown that a "substantial number" of employees wish to be represented for collective bargaining purposes. If such a showing is made, a Board election will be held. The Board has adopted an administrative rule that 30 percent of the employees in the involved unit constitute a "substantial number."

The Union's Petition for Certification, which was filed "9/25/2009," indicates that the petition (GC Exh. 1(f)), is supported by 30 percent or more of the employees in the unit.

By Regional Director's Decision in Case 26-RC-8596, dated October 28, 2009 (GC Exh. 1(g)), the holding of an election was directed on a date and at a time and place to be specified in a subsequent notice. The Regional Director's Decision and Direction of Election also directed that within 7 days of October 28, 2009, OHL must submit to the Regional Office an election eligibility list containing the full names and addresses of the eligible voters which may be used to

²² As noted above, this cannot be correct in that even with "Me" added the first sentence is not complete. Also, it appears that four of the words at the end of lines (identified in the above quote with brackets) were not copied fully so that whatever appears at the end of those four lines are not complete words.

communicate with them to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote. The Decision went on to indicate that the Regional Director would make the list available to all parties to the election and failure to comply with this requirement would be grounds for setting aside the election whenever proper objections are filed.

To get a decision directing an election, the Union would have had to make its showing that 30 percent or more of the employees in the involved unit indicated that they wished to be represented by the Union. Normally this is done with union authorization cards signed by employees in the involved unit.

There is no showing that OHL did not provide the list of employees and their addresses within 7 days of October 28, 2009.

It is understandable that on March 1, 2010, supporters of the Union like Jerry Smith (and Kurtycz after she was sent home on March 1, 2010) would be handbilling and encouraging employees to vote in the upcoming election on March 16, 2010. It is not readily understandable why Kurtycz would be seeking signed union authorization cards on March 1, 2010, when the Union had already made the requisite showing to the Board's Regional Director before October 28, 2009, that 30 percent or more of the employees in the involved unit wished to be represented by the Union. It is not readily understandable why Kurtycz would be asking employees for information on March 1, 2010, so that the Union could contact the employees when the Union would have already had this information approximately a week after October 28, 2009.²³

Normally one can expect some minor inconsistencies in the testimony and evidence of multiple witnesses regarding an occurrence(s). Here, however, the contradictions are numerous and they involve material issues of fact. In view of this, it is my opinion that the evidence alleging that Kurtycz was soliciting for the Union on March 1, 2010, before she was sent home is a fabrication.²⁴ I credit the testimony of Kurtycz. I do not credit the testimony or the documentary evidence which was given and introduced, respectively, by OHL and its witnesses on this matter. Early on March 1, 2010, Lowery, during his interrogation of her, determined that Kurtycz supported the Union. Hours later OHL took advantage of the fact that Kurtycz had previously received a final warning. OHL kept Kurtycz from voting for the Union in the upcoming Board election.

Kurtycz supported the Union. OHL through Lowery knew this. A fabrication was utilized to justify the termination of

²³ To one who might argue that perhaps Kurtycz was attempting to obtain contact information for those recently hired employees who might not be on the employee list turned over to the Union, it need only be noted that Moore, who testified that she had been working for OHL for about 1 year before she testified on July 16, 2010, at the trial herein, and Lashunda Hill, who testified that she had been working for OHL for 16 months when she testified at the trial herein on July 16, 2010, should have been on the list which was turned over to the Union. Crawford did not testify regarding how long she had been working for OHL, and Johnson and Gonzalez did not testify at the trial herein.

²⁴ As noted above, Kurtycz did handbill on March 1, 2010, outside OHL's facility for the Union after she was sent home by Washington and Cousino.

Kurtycz. Evidence of anti-union animus is abundant throughout the record made in this case. And a nexus has been shown between the discovery by Lowery of Kurtycz' support of the Union, and her unjustified termination just hours after the discovery.

OHL has not shown that it had a substantial business justification for Kurtycz' termination. Indeed, it relied on a fabrication. Consequently, OHL has not rebutted the prima facie showing of General Counsel. OHL has not met its burden of showing that it would have terminated Kurtycz absent her support of the Union. And, as concluded above, in my opinion, Tidwell was not acting in good faith when he approved the (implicit?) recommendation (As noted above, Young denies that she made this recommendation.) to terminate Kurtycz.

OHL violated the Act as alleged in paragraphs 11(c) and (d) of the complaint.

III. THE OBJECTIONS

As noted above, the Union has withdrawn a number of its objections. Those which remain read as follows:

The Employer engaged in the following acts of misconduct for which the election should be set aside:

1. Engaged in surveillance of union activities and meetings;
2. Interrogated employees concerning their activities on behalf of the Union;
3. Requesting that employees form a grievance committee in order to convince them to discontinue their support for the union;
4. Issuing written warnings and suspensions to employees in retaliation for their union activities;
5. Conducted captive audience meetings in small groups within the 24-hour period prior to the election;
8. Forbidding employees from maintaining union literature in the employees' breakroom, and destroying union literature;
9. Solicited grievances from employees and impliedly promising to remedy them;
10. Enforced plant rules more stringently against union supporters;
11. Formed and assisted employee opposition to the Union;
12. Threatened and coerced employees because of their union activities and the threat of dire consequences if the employees selected the Union;
13. Created the impression of futility of selecting the Union;
14. Threatened employees with plant closure, reduction of work or relocation if the Union won the election;
15. Promise of improved conditions if the Union is rejected;
16. Promulgated, modified, and disparately enforced a no-solicitation rule and placed unlawful limitations on the no-solicitation rule;
19. The Employer by its agents, officers, and representatives terminated union supporter Glorina Kurtycz;

20. Disciplined employees who participated and gave testimony in proceedings covered by the NLRA;

21. Offered to establish an in-plant committee as an alternative to the Union;

24. The Employer used agents, officers, and representatives as an observer in a board election which clearly is a violation of the NLRA;

25. The Employer station[ed] agents, officers, and representatives in the parking lot and the door entrance to the polling area and engaged with the employees prior to voting;

26. The Employer by its agents, officers, and representatives offered inducements to employees to persuade them to vote against the Union;

27. The use of supervisor(s) as election observer;

28. Prohibiting employees from distributing union literature in nonworking areas outside the Employer's facility;

30. Soliciting union supporters to quit their employment;

31. Electioneering at and near the polling places;

32. Advised employees that they would be permanently and forever replaced and will not be eligible for food stamps when the union calls them out on strike;

33. Making benefits and policy changes during the critical period;

34. Employer by its agents, officers, and representatives held one-on-one meetings behind closed doors interrogating employees about their union sympathies and support;

36. Employer by its agents, officers, and representatives calling employees at home interrogating and threatening job loss and retaliation because of their union activities or support;

37. Employer by its agents, officers, and representatives telling employees they couldn't wear union buttons or shirts in their department.

The Union filed a brief in support of its objections. In its entirety it reads as follows:

United Steelworkers (USW) Petitioner and Charging Party herein files this limited Brief in support of the Objections filed in this matter.

The undersigned filed 39 objections to the March 16, 2010, election. Objections 6, 7, 17, 18, 22, 23, 29, 35, 38, and 39 were withdrawn. Fifteen have substantially been sustained by ALJ George Carson II's May 20, 2010 decision ALJD (ATL-12-10) or will be sustained should the General Counsel prevail on its ULPs alleged in the instant matter. Proven ULPs sustain the USW's objections and warrant the direction of a new election.

As a brief sample of the strength of the complaint allegations, please review the evidence in Union Exhibit 22, where it was proven the OHL Manager Roy Ewing, contrary to his testimony, admitted in an email to an OHL Vice President

that he met with employees and confirmed his illegal surveillance, interrogation and threats (Union Exhibit 22).

USW submits that the evidence is overwhelming as to the numerous ULP violations that warrant setting aside and directing a new election.

Additionally and importantly, the Employer's use of Dani Bowers, HR Coordinator as an Election Observer, warrants setting aside the election, *First Student, Inc.*, 355 NLRB No. 78 (August 9, 2010). USW established by its exhibits 1 thru 22 that Bowers was a 'Manager,' 'supervisor' directly engaged in hiring, I-9s, orientation, discipline, drug testing, employee testing, and monetary job offers. Bowers signed in the approval box, which is reserve for managers and supervisors for all job changes, leaves of absence, FMLA, rate of pay increases, I-9 forms, participates in disciplinary meetings, and also enforces the policy of OHL (Union Exhibits 1-22). OHL Hierarchy Chart, memo directing 'Managers' to attend a Union avoidance meeting, lists Bowers as 'Manager,' [Union Exhibits 1(a)-1(d)]. Bowers was even involved in employment termination [Union Exhibit 2(a)]; Bowers has an office next to the Vice President of OHL, with her own direct telephone line.

Bowers is clearly a 'Manager,' 'supervisor,' 'Personnel Officer' so closely aligned with Management . . . that her presence alone interferes with the laboratory conditions and constitutes objectionable conduct, and [is] in violation of the NLRA, thereby warranting setting aside the election.

Objection 1

The Union called Carlos Shipp to testify about objection 1, which as noted above, reads as follows: "[e]ngaged in surveillance of Union activities and meetings." Shipp testified that during the critical period between when the petition for an election was filed and the March 16, 2010 election he had a meeting with Ewing, who had called him into his office; that Ewing asked him if he was for the company or for the Union; that his meeting with the manager of Remington occurred at the end of September; that he told Ewing that he was with the company; that Ewing then showed him three or four pictures of the union hall and asked him if he knew where this place was; that he told Ewing no, and when Ewing asked "are you sure" (Tr. 1215) he said no; that Ewing then said "[w]ell we're just trying to find out when this voting comes up, we wanted to know what side you was on" (ibid.); that he was still on probation so he told Ewing he was for the company; that Ewing said "[w]ell, okay, little brother, that's all I wanted to know. You can go back out on the floor" (ibid.); that the pictures were of the exterior of the building which shows a sign which indicates that it is the union hall; that one of the pictures showed a street sign; and that he had been to the union hall prior to Ewing showing him the pictures and so he knew what Ewing was talking about.

On cross-examination, Shipp testified that he gave an affidavit to the Board on March 12, 2010; that in his affidavit he indicates "[m]y meeting with Ewing happened either one or two weeks after I attended my first union meeting on September 1st" (Tr. 1218); that in his affidavit he did not indicate that Ewing asked him if he was with the Union or with

the Company; that he indicated in his affidavit that Ewing asked him if he was involved with any union activity and he told Ewing no; that when he testified earlier in this proceeding he did not testify about his conversation with Ewing; that when he met with Ewing no one else was present; and that the color photos were rectangular, something like 4 inches by 8 inches.

On redirect, Shipp testified that around the time of his meeting with Ewing other employees had daily one-on-one meetings with Ewing; that he had never met with Ewing before this; and that he was sure that his meeting with Ewing occurred at the end of September because he had been told they had filed a petition to go to election.

Ewing testified that he was a manager at the Remington account; that Shipp was in his group; that "no" (Tr. 1305) in September 2009 he did not call Shipp into the office and ask him if he was for the Union or for the Company; that he did not show Shipp any pictures of the union hall; and that he has never had any pictures of the union hall. Ewing then answered "No, sir" to the following question of one of the OHL attorneys: "Did you ever call him into an office for any reason to talk about the Union." (Id. at 1306.)

On cross-examination, Ewing gave the following testimony:

Q. Did you have a meeting with Mr. Shipp at your facility?

A. No, sir.

Q. Have you met with any of your employees individually about the Union campaign?

A. No, sir. [Tr. 1307]

During the subsequent cross-examination of White, Union Exhibit 22 was received. It reads as follows:

From: Ewing, Roy
Sent: Wednesday, October 21, 2009 9:24 AM
To: White, Karen
Subject: RE: Remington

The three individuals are: Vanessa Elis, Carlos Shipp and probably Joe Taylor Vanessa Ellis husband is Jeff (over at St. Jude—questionable vote)

Carlos Ship has 4 months with us (previous job was Union – Still unsure about OHL as a whole)

Joe Taylor (states will not vote for OHL or Union)

I will personally continue to meet with these individuals daily to filter any or all concerns as we approach a voting date.

Standby for follow ups:

.....
Roy Ewing

OHL's only objection to the introduction of this document was that it was outside the scope of the direct of White. On the face of the document it shows that it was also General Counsel Exhibit 85 in Case 26-CA-023497 and 26-CA-023539, which, as noted above, are cases decided by Judge Carson, General Counsel Exhibit 2 herein. White did not testify that she never received this email, and Ewing was not recalled by OHL, subsequent to the receipt of this exhibit, to deny that he sent this email.

OHL on brief contends that Shipp's testimony contradicts his affidavit to the Board with respect to when his alleged conversation with Shipp happened; that if the alleged conversation with Ewing happened in the first 2 weeks of September 2009, it would not have been within the critical period; that Ewing's alleged inquiry namely was Shipp with the Union or with the Company is not in his Board affidavit; that Ewing denied that this conversation took place; and that even if the alleged conversation took place, it occurred outside the critical period, and it is hardly a basis on its own and even cumulatively with other incidents to overturn the election.

Ewing is not a credible witness. His testimony is not credited. The testimony of Shipp is credited. On redirect, Shipp testified that he was sure that his one-on-one meeting with Ewing occurred in late September 2009 because he had been told that the Union had filed a petition to go to election. Ewing's above-described October 21, 2009 email to White indicates that he was meeting with named individuals, including Shipp, daily and he would continue to meet with them as they approached a voting date. It is not clear to me why the Union indicated that Shipp's testimony was offered in support of objection 1. None of Shipp's testimony supports the allegation that OHL "[e]ngaged in surveillance of Union activities and meetings." Pictures of the outside of a union hall, with nothing else, do not prove this. Shipp's testimony should have been offered in support of objection 34, namely, "[e]mployer by its agents, officers and representatives held one on one meetings behind closed doors interrogation employees about their union sympathies and support." Objection 1 is overruled.

Objection 2

As noted above, Objection 2 alleges that OHL "[i]nterrogated employees concerning their activities on behalf of the Union." No evidence was introduced in this proceeding about any interrogation of an employee "concerning their activities on behalf of the Union." (Emphasis added.)²⁵ As concluded above, employees were unlawfully interrogated about their support and another employee's support of the Union, but this is not an interrogation about their activities on behalf of the Union. Objection 2 is overruled.

Objections 3, 15, and 21

The Union indicated that it called Sandra Hayes to testify regarding Objections 3, 15, and 21. As noted above, objection 3

²⁵ Evidence was introduced in Judge Carson's consolidated proceeding on this issue, but exceptions have been filed to Judge Carson's decision and it is presently pending before the Board. As here pertinent, an exhibit from Judge Carson's consolidated proceedings was received in the proceeding at hand, GC Exh. 32. It relates to the September 25, 2009, Ewing/Carolyn Jones confrontation and its aftermath. The exhibit does not itself speak to that alleged unlawful interrogation on September 25, 2009, which Ewing denied. Notwithstanding the fact that I do not believe that Ewing is a credible witness, Judge Carson's findings regarding that alleged unlawful interrogation are now pending on exceptions before the Board. Also, as noted above, in my opinion, on November 17, 2009, Ewing interrogated Rayford about her union sympathies and not activities on behalf of the Union.

reads as follows: "[r]equesting that employees form a grievance committee in order to convince them to discontinue their support for the Union." Objection 15 reads "[p]romise of improved conditions if the Union is rejected," and Objection 21 reads as follows: "[o]ffered to establish an in-plant committee as an alternative for the Union." OHL employee Hayes testified that prior to the March 16, 2010 Board election, she attended a round table meeting; that after a meeting in Water Pik about the Union in which she was "kind of outspoken" (Tr. 1284), a man, she could not remember his name, but he allegedly was from Nashville, asked her "what is the problem and why would we want a meeting for somebody to speak for us" (ibid.); that she told the man "because they don't listen when we speak" (ibid.); that the man then "suggested that maybe after the Union, after all this, why don't I try to get together a committee that we can sit down once a month and let them know our grievances, our problems, or issues on that sort" (ibid.); that the unidentified man allegedly from Nashville came back to Memphis and spoke to her, asking her how it was since Dye had been transferred to another account; that she told the man that the employees had other issues; that she has participated in quite a few round table meetings and White and Young were there every time; and that Bowers was there also.

On cross-examination, Hayes testified that she attended three round table meetings before they were stopped in 2009; that she talked to the guy allegedly from Nashville around the time of the election; that the guy did not say "why don't we have a committee" but rather the guy said "why didn't I, Sandra Hayes, why don't I get a committee together and once a month we meet and address our issues and concerns with management" (Tr. 1290); that she never formed a committee to do that; that she did not know why Dye transferred; that at the round table meetings Bowers explained the "things we can do and what we couldn't do, the reason why we were having the roundtable meeting" (id. at 1291); that it has been too long to quote what Bowers said; that she could not "quote exactly what she [Bowers] said. I'm not a tape recorder" (id. at 1292); that with respect to when she started attending the round table meetings, "I cannot give you the date. All I know is I attended three of them and it was within that year and that's that" (ibid.); that she was only aware of three round table meetings; that the roundtable meetings were not held quarterly but rather once a month; that her manager would tell her when she was supposed to go to the round table meetings; that the topics discussed at the round table meetings had to do with how the company was doing and what accounts were being opened up; that the round table meetings were about business issues rather than talking about her concerns; that topics discussed at the round table meetings included where did they want to have a picnic if they wanted to have the picnic, where did they want to have the Christmas dinner, and where were they going to have their Thanksgiving dinner; that she was supposed to go back to her work group and get this information from them; and that this was done to give the employees input.

On redirect, Hayes testified that another issue that came up at a round table meeting was PTO (paid time off) and Young told Rivers that she would look into it; that when the Union came up at these meetings the company would shut the discussion off

real quick and move on to another subject; that the unidentified man allegedly from Nashville²⁶ did not speak to her after a round table meeting, but rather after a meeting in Water Pik about the Union where the company distributed literature, she asked supervisor Phillips if she had to keep attending these meetings when it was not fair that the company was getting its point across and she could not get her points across. Randall told her she did because he said so, and she told him that was very unprofessional; and that during a round table meeting Young said that “some of our contractors or whatever will pull out because they’re not going to accept a Union being in the building” (Tr. 1298).

On recross, Hayes testified that White and Phil Smith also said that our customers would pull out because they did not want to work with the Union; that she could not give the month that White made this statement at one of the meetings about the Union that the Company held; that she did not tell the union representative about the statements regarding the loss of customers; that she did not remember the day or month of Young’s or Phil Smith’s statement regarding the loss of customers and she would not give an approximation; and that some lady, she did not know the lady’s name, said “like HP, Fed Ex will pull out.” (Tr. 1304.) Since it was not established that the unidentified lady was a supervisor or manager, this testimony is hearsay and could be nothing more than speculation on the part of another employee. Although not specifically indicated by the Union when it called Hayes to testify at the trial herein, it appears that the alleged statements regarding customers could be included in the “dire consequences” and “reduction of work” language in Objections 12 and 14, respectively.

Young testified that the roundtable meetings were created 4 to 5 years ago as a way for the employees to have a voice in how OHL does different things like creating different training programs; that the meetings are held once a quarter and different employees are rotated so that OHL gets different ideas; and that she never, nor has she witnessed any other member of management announce to employees that customers would leave if the Union came in.

Phil Smith testified that he never, nor has he witnessed any other member of management announce to employees that customers would leave if the Union came in.

White testified that she has never announced to employees that OHL customers would leave if the Union came in; that she has never heard any member of management make any type of similar comment; and that she has never made any type of similar comment.

OHL on brief contends no unfair labor practice charge was ever filed alleging a request for the forming of a grievance committee; and that based on Hayes’ testimony, there is no basis that any “grievance committee” was ever suggested, formed or utilized.

²⁶ The Union did not lay a foundation as to why Hayes believed that the unidentified man was from Nashville. Also, there is no evidence with respect to what position this unidentified man allegedly from Nashville holds if indeed he even works for OHL.

The Union made no attempt on the record made herein to prove exactly who the unidentified man who allegedly was from Nashville is. This is a threshold issue. Without knowing who the individual is, how can the issue of OHL’s role be resolved? The Union has the burden of proof. It has not met that burden. Objection 3 is overruled. Hayes offered no testimony about a “[p]romise of improved conditions if the Union is rejected” or “[o]ffered to establish an in-plant committee as an alternative to the Union.” No evidence was introduced in this proceeding regarding these allegations. Accordingly, objections 15 and 21 are overruled. As noted above, albeit the Union does not allege that Hayes’ testimony is offered in support of objections 12 and 14, namely threats of “dire consequences,” and “reduction of work,” respectively, it would appear that Hayes’ allegations that named members of management told employees that customers would pull out because they did not want to work with a union might be considered with respect to these objections. However, only Hayes testified about this. And Hayes did not impress me as being a credible witness. Her attitude was that of a witness who makes statements and does not believe that she should be subject to cross-examination to test the accuracy and veracity of those statements. To the extent that Hayes’ testimony might refer to Objections 12 and 14, those objections are overruled.

Objection 4

Objection 4, as noted above, reads “[i]ssuing written warnings and suspensions to employees in retaliation for their union activities.” Also as noted above, the complaint allegation regarding Jennifer Smith is being dismissed. Accordingly, Objection 4 is overruled.

Objection 5

Objection 5, as noted above, reads as follows: “[c]onducted captive audience meetings in small group within the 24-hours period prior to the election.” OHL employee Anita Wells testified that on March 16, 2010, she was getting off the clock about 4:15 or 4:20 p.m.; that as she went to her car she noticed Young and Tidwell with a group of people sitting outside at a table talking; that it was March 15, 2010; that it was the day prior to the election; that it was March 15, 2010; that she got in her car and as she left they were still talking; that she had wondered whether they were going to go up the stairs and enter the building; that the group of about 10 that Young and Tidwell were talking to were employees that she knew; that she did not know the last names of the employees; that Amad, Chris, Mary, Peggy, Christine, and Earl were the names she could remember of the employees who were in this group; and that “[a]ctually I didn’t hear anything. . . .” (Tr. 1197) regarding what the group was talking about.

On cross-examination, Wells testified that she worked in the HP account on March 15, 2010; that she worked the first shift, normally from 8 a.m. to 4:45 p.m.; that she knew Tidwell because earlier on March 15, 2010, he came around and introduced himself to her; that on March 15, 2010, some of the employees were sitting down on the bench at the picnic table and some were standing; that she came down the stairs and passed the group; that when she passed the group she was 7 or

8 inches from them; that what the group was talking about “was just a lot of conversation, asking questions, she was asking them if they had any questions and they were just blurting out questions” (Tr. 1202); that on direct she testified that “[i]t was just a lot of conversation” (ibid.); and that she came in at 7 a.m. on March 15, 2010.

Young testified that she and Tidwell were not speaking to a group of about 10 employees on picnic tables outside the HP account at about 4:15 p.m. the afternoon before the election; that she was informed about the 24-hour rule; that she followed that 24-hour rule; and that she had absolutely no communication at all with employees in the last 24 hours.

OHL on brief argues that the Union did not produce any of the 10 employees at this alleged captive audience meeting to corroborate Wells’ testimony; that Wells purports to be a member of the Union’s plant organizing committee (GC Exh. 23); and that the vague testimony of Wells, and her admission that she did not know what was being discussed at this alleged meeting leads to the conclusion that this unproven allegation is meritless.

The burden of proof is on the Union. As noted above, Wells testified on direct that “[a]ctually I didn’t hear anything. . . .” (Tr. 1197) regarding what the group was talking about. Then on cross Wells testified that on direct she testified that “[i]t was just a lot of conversation” (Id. at 1202) When the sole witness called by the Union to testify about an alleged occurrence testifies on direct that she did not hear anything, then on cross testifies that she testified on direct that it was just a lot of conversation (which is not what she testified on direct), and during her cross testifies that “she (apparently Young) was asking them if they had any questions and they were just blurting out questions” (Tr. 1202), it is obvious that the witness has changed her testimony on cross-examination and is saying that she said something on direct, which she did not, to accommodate her change in testimony on cross. Wells is not a reliable witness. Her testimony is not credited. Objection 5 is overruled.

Objection 13

Objection 13, as noted above, reads “[c]reated the impression of futility of selecting the Union.” On March 1, 2010, as concluded above, Lowery did just that during his unlawful interrogation of Kurtycz. Objection 13 is sustained. It is noted that it has not been shown that any employee other than Kurtycz, who did not work at OHL’s facility after March 1, 2010, and did not vote in the election, heard Lowery’s statement regarding the futility of selecting the Union.

Objection 16

Objection 16, as noted above, reads “[p]romulgated, modified and disparately enforced a no-solicitation rule and placed unlawful limitations on the no-solicitation rule.”

OHL on brief argues, with respect to Kurtycz’ termination, that the majority of testimony regarding solicitation occurred before White’s late August or early September 2009 decision that there would be no more selling of anything on campus, and there is no indication that supervisors and managers were aware of the solicitation after the policy change; that the policy was changed because an employee became ill after purchasing food

from Kurtycz; that the ban on selling all products anywhere on campus was more restrictive than the normal solicitation policy, which applies only to working hours and areas; and that this ban was conveyed to all employees in preshift meetings.

It is noted that there is no specific unfair labor practice complaint allegation regarding OHL’s distribution/solicitation policy and any changes to this policy. With respect to any argument that Kurtycz’ termination demonstrates the disparate treatment with respect to this policy, as noted above, in my opinion Kurtycz’ termination had nothing to do with the alleged disparate enforcement of OHL’s distribution/solicitation policy on March 1, 2010. It has not been demonstrated that OHL “[p]romulgated, modified and disparately enforced a no-solicitation rule and placed unlawful limitations on the no-solicitation rule.” Objection 16 is overruled.

Objection 19

Objection 19, as noted above, reads “[t]he Employer by its agents, officers and representatives terminated union supporter Glorina Kurtycz.” Also, as concluded above, OHL violated the Act when it unlawfully terminated Kurtycz. Accordingly, objection 19 is sustained.

Objection 20

Objection 20, as noted above, reads “[d]iscipline employees who participated and gave testimony in proceedings covered by the NLRA.” Also, as noted above, the complaint allegation regarding Jennifer Smith is being dismissed. Accordingly, objection 20 is overruled.

Objections 24 and 27

Objection 24, as noted above, reads “[t]he employer used agents, officers, representatives as an observer in a board election which is clearly a violation of the NLRA.” And Objection 27 reads: “[t]he use of supervisor(s) as election observer.” During the unfair labor practice portion of the trial herein, Rayford testified that while she had not been called to Young’s office since November 10, 2009, she went, without being called, to HR, namely to Dani Bowers’ office to replace the broken clip for her I.D. badge.; that Bowers is a HR coordinator; and that Bowers is in an office right across from Young. When called by Petitioner during the objections portion of the trial herein, Rayford gave the following testimony:

Q. (BY MR. BRANDON): Do you know Dani Bowers?

A. Yes

Q. Did she happen to be at that table observing when you went in?

A. Oh yes, when we went to vote, she was sitting at the table with Nichole Nesso.

Q. Did you associate her more or less you have the ILO employees or management team?

A. Management. [Tr. 1140–1141.]

When called by the Union, Bowers testified that she was an observer for OHL at the March 16, 2001 Board election; that at the time of the election, and shortly before, her title was HR coordinator, and her job duties were hire orientation, processing

the paperwork, explaining policies, processing other paperwork, being available when her boss needed her, and working in the safety areas; that she does not have authority to hire or fire,²⁷ she does not hire or fire, she does not participate in discipline, she does not approve leave or terminations, employees do not think of her as the boss, she is paid hourly and she is not salaried, she punches a timeclock, her immediate supervisor is Young, she has an office phone, she gets an hour for lunch since she works from 8 a.m. to 5 p.m., which is 15 minutes more than the workers on the floor who work from 8 a.m. to 4:45 p.m.; that she has the ability to go into Unitime; that she only makes job offers at Young's direction; that she sometimes schedules meetings in that she switches off with others and each person organizes meetings; that each building has their own safety committee and as part of the safety committee they arrange meetings; that the round table meetings are held with employees out of each account, and the employees relay information from other employees to White and Young; that she does not head the roundtable meetings but rather she facilitates the meeting; that she facilitated the meeting mentioned in Union Exhibit 1(A) and Young was the head spokesperson at that meeting;²⁸ that workers in the facility do not attend monthly HR coordinator meetings; that she is the only HR coordinator for OHL's Memphis operation; that the coordinator meetings are held by teleconference call and on the computer, and she has not met the coordinators who apparently are listed on Union Exhibit 1(B) in person; that she does not attend mandatory management meetings, and her name appears on Union Exhibit 1(C) only because she is on the "Cc" general distribution list; that OHL has contests among all HR coordinators and production workers or hourly workers in the warehouse do not participate in it, Union Exhibit 1(D); that she processes all of the paperwork for new hire orientation and she conducts the orientation training; that as of July 2009 she initiates drug testing, and she "as well as several other managers and supervisors" (Tr. 1245) is certified to do drug screening; that she did the training for Unitime so that she can help the new managers and supervisors navigate through Unitime; that if somebody is short hours, she has to get with the supervisor or manager and get them to send an email to payroll requesting it; that she creates all of the job postings; that normally Young makes pay offers and job offers and if she does it, it's by the directive of Young only; that she, like all the employees, supervisors, and managers gets paid for mileage when they have to travel some distance; that as HR coordinator she can request checks only if there is a discrepancy in the employee's pay and the manager and the supervisors have done all their due diligence to prove it; that she can submit a check request to pay for vendors and things like that during OHL employee functions; that if an employee asks her to check the record to see whether they received a shift differential, she can

²⁷ The Union introduced U. Exh. 2(A) apparently to show that Bowers hires or approves terminations. A careful reading of this series of emails shows just the opposite; Bowers was directed by director of field services Jamie Logel to, as the HR coordinator, do the paperwork terminating the involved employee and forward the paperwork.

²⁸ It is noted that this September 22, 2009 email from Bowers went to supervisors and managers and not to employees on the floor.

pull up a copy of their pay stub and show them if they've gotten it, tell them to go to their manager or supervisor to get the problem resolved if they did not get it, and she is part of the request process in that she is the person that the check would be coming to and she is responsible for making sure it gets to the employee;²⁹ that she cannot correct it once she pulls it up if it is wrong, she cannot make any changes to it in that it is a PDF document; that new hires are given a profile test, the test is scored through a website, and she does not score the test;³⁰ that she is part of the recruiting team and she does whatever she is told to do as part of the HR team; and that her role in the review process is to process the paperwork after the manager conducts the review, the employee signs it, and it is turned into HR.

The Union introduced a number of exhibits which demonstrate that Bowers was not exercising independent judgment, but rather was following which OHL dictates, i.e., Union Exhibit 2I dealing with felony charges ending assignments. These exhibits, many of which were stipulated in, have been reviewed. It is not necessary to describe them in detail. See Union Exhibits 3(A) (pay for time spent in orientation), 4 (almost all of which are OHL personnel change forms Bowers signed on the "FIELD HR" line and not the "MANAGER" line, and the remainder were not signed by Bowers as a manager or a supervisor), 5 (a series of emails dealing with postings none of which documents show that Bowers was acting as a supervisor or manager), 6 (a number of "Form I-9 Employment Eligibility Verification" forms signed by Bowers as "HR Coordinator" and an IRS Form 8850 signed by Bowers as "HR"), 7 (various documents signed by Bowers as HR coordinator, none of which are signed by Bowers as a manager or supervisor, and none of which contain any indication that Bowers was acting as a manager or supervisor), 10 (emails dealing with the severe weather policy, none of which indicate that Bowers was a manager or supervisor or acting as either), 11 (an email from Bowers to whoever is in charge of the involved account relaying an emergency telephone message for a named individual), 14 (an email from White to a number of people including Young and Bowers, both of whom are in HR, indicating, inter alia, that White wanted to hire about 15 people from the Vietnamese and Hispanic population), 15 (a number of emails indicating when meetings are going to be held, none of which emails indicate that Bowers is a manager or supervisor or she was acting as either), 16 (emails dealing with receipts, none of which emails indicate that Bowers is a manager or supervisor or she was acting as either), 17 (an email from Washington with Bowers cc'ed, which email deals with an argument between two

²⁹ In a January 8, 2010 email (U. Exh. 12), Bowers advised Darron Savage as follows:

I have another employee, Stacy Swan . . . , who did not get her shift diff on her pay checks. I've pulled up her pay stubs in Ceridian and she is correct. I pulled her up in Unitime and saw she wasn't set for 2nd shift, I corrected this. She has 307.01 on reg hours and 85.20 OT hrs. Can we get this added to her next check please?

³⁰ In a January 21, 2010 email (U. Exh. 13), Bowers advised Young and White as follows: "I scored Mr. Soni's profile on an Ops Mgr level. He did not do well."

employees, and which email does not indicate that Bowers is a manager or supervisor or she was acting as either), 18 (a series of emails about various topics, none of which emails indicate that Bowers is a manager or supervisor or she was acting as either), 20 (an "OHL Memphis Organizational Chart, OHL Memphis Campus 8/19/2009" which lists "Dani Bowers, HR Coordinator" under "Van Young HR Manager" and which indicates that everyone else on the chart is a manager or supervisor), and 21 (a 5510 "Cell Phone List" which list 24 "Manager's" telephone numbers, including that of Bowers, and the telephone numbers of the "GUARDSHACK" and "SECURITY"). Bowers did sign a document on the line designated "Signature of Manager" but she qualified her signature with "HR," the document is a "PERSONAL LEAVE OF ABSENCE REQUEST FORM" which indicates that the involved employee had not received a medical release for full duty yet, and the following is printed at the bottom of the document: "Upon completion of this form [by the employee], submit it to your local HR or the Corporate Benefits Department." (U. Exh. 3.)

When questioned by one of OHL's attorneys, Bowers testified that in conducting orientation she does what Young does when Young conducts orientations; that she does not have the ability to change what's contained in that orientation presentation, and she was told that she should follow the presentation that Young gave when she watched her; that 80 percent of her time is spent processing paperwork; that since she is an hourly employee she receives overtime pay sometimes; that she punches a timeclock and her hours go into the same Unitime system that all other employees' time goes into; that supervisors and managers do not punch a timeclock; that customer service representatives also have office phones that they use and they are part of the unit that voted in the Board election; that she has received attendance points and two verbal warnings over the years; that attendance points are not given to managers and supervisors; that she makes job offers only if Young cannot make the call herself or if a hiring manager cannot make the call, she is directed to make the call, in which case she is conveying the offer; that she schedules round table and safety meetings after ascertaining from managers and supervisors when is the best time so as to minimize the effect on the involved accounts of some of the employees having to attend the meetings; that she takes minutes at these meetings; that Young tells her when to schedule a round table meeting; that she does not attend management meetings and she has never been to White's staff meetings; that other types of employees have contests, i.e., the forklift operators; that OHL has a policy that it does not hire anyone who has any felony conviction in the last 7 years; that she has no discretion regarding employing an individual whose social security number comes back as a no match; that the "I scored . . . profile" in Union Exhibit 13 refers to putting his position in so that the individual would receive a score; that regarding Union Exhibit 12, Darren Savage works in payroll, she changed it from first to second shift in the Unitime system because the individual was a new hire, she enters the new hires information into the Unitime system, and she originally made a data entry mistake; that regarding Union Exhibit 18 she did not have the

ability to decide whether the involved individuals would receive attendance points or be excused absences; that regarding Union Exhibit 7 she use to fill out employment verifications as a HR representative, but now the corporate office handles it all; that Young tells her to prepare job postings and Young sends her the job descriptions; that internal employment applications are submitted to her as a HR representative, but it is the hiring manager who decides who gets the job; that regarding Union Exhibit 4, she signs personnel change forms to indicate that it has been received by HR and placed in the personnel file, and that while she signs on a line designated "FIELD HR" in an area of the form designated as "APPROVAL SIGNATURES" she does not sign on the "SUPERVISOR" or "MANAGER" lines, she does not approve personnel change decisions, and her signature signifies only that HR has processed the document; that regarding Union Exhibit 3, her signature notes that HR was signing off on it rather than a manager, the employee was out on FMLA, he was very sick, he ran out of FMLA so Young instructed him to submit the application for personal leave of absence so he wouldn't have a gap in time and, in turn, get occurrence points; that she received specific instructions from Young with respect to the employee, Rory Martin on how to submit this paperwork; that regarding Union Exhibit 2(D), Young, who was out of town, called and instructed her to go sit in on a meeting only to inform the others about their benefits; that everyone hired at OHL Memphis has to be interviewed by a manager three times; and that she never (a) lays off employees, (b) recalls them, (c) assigns employees to do particular tasks, or (d) direct any other employees.

On further questioning by the union representative, Bowers testified that regarding Union Exhibit 2I she is required to let Young know about incidents like this, a felony, and Young directed her to contact Katrina and advise her that the individual's assignment was over; that regarding Union Exhibit 3, she did not approve it, but she signed the application for it, it is sent up to the corporate office, and a board approves whether or not he is granted the leave; that regarding Union Exhibit 4, she processes the paperwork and she does not make the decision; that Union Exhibit 21, the "5510 Cell Phone List," is not posted for all employees, but rather it is a list that one of the managers sent out to all the managers and supervisors so they would have phone numbers for contact; that she is not sure when this list went out, but her name is on it because managers and supervisors have her cell number so that they can reach her when she is not at her desk; and that she has never had any training in union avoidance.

Hayes testified that Bowers attended round table meetings along with White and Young; and that she was surprised to see Bowers sitting in the voting area at the March 16, 2010 Board election because "[s]he's part of management." (Tr. 1289) Other than seeing Bowers at round table meetings, Hayes did not provide any basis for her testimony that Bowers is part of management.

Young testified that Bowers does not have the authority to terminate anyone on her own; and that Bowers cannot and she does not ever make an effective recommendation to terminate an employee.

As noted above, the Union on brief contends, as here pertinent, as follows:

Additionally and importantly, the Employer's use of Dani Bowers, HR Coordinator as an Election Observer, warrants setting aside the election, *First Student, Inc.*, 355 NLRB No. 78 (August 9, 2010). . . .

Bowers is clearly a 'Manager,' 'supervisor,' 'Personnel Officer' so closely aligned with Management . . . that her presence alone interferes with the laboratory conditions and constitutes objectionable conduct, and [is] in violation of the NLRA, thereby warranting setting aside the election.

OHL on brief argues that a couple of the union witnesses made self-serving remarks that they associated Bowers with "management" but their self-serving assertions belie all of the evidence taken in connection with Bowers duties; that as shown by the testimony and exhibits received in this proceeding, Bowers does not possess nor does she show indicia of possessing any management or supervisory authority; that Bowers is an hourly employee who processes paperwork and acts at the direction of the HR manager or other supervisors or managers; that Bowers is not a supervisory employee; that there are vast differences between the election observer involved in *First Student, Inc.*, supra and Bowers; that the Board in *First Student, Inc.*, emphasized the fact that the trainer in that case was "the only representative of the employer with whom applicants deal during the application and training process, and therefore they could reasonably believe that she plays a role in deciding whether they are ultimately hired as drivers after they complete the CDL [commercial driver's license] Program"; that here the HR preliminary phone interview is only the first step in the hiring process in that a prospective employee is interviewed by a hiring manager who then recommends, if OHL wants to continue the process, that the applicant interview with an area manager, White, or someone else at that level; that all applicants are interviewed three times, with two of the interviews occurring at the management level; that with respect to duties, the trainer in *First Student, Inc.* (a) worked at a company where drivers had to comply with stringent Federal requirements for CDLs, and (b) administered the CDL testing on behalf of the state, and completed the statutorily required assessments of employees' driving performance and records; that, therefore, the trainer in *First Student, Inc.*, was integral in judging job performance of employees; that the trainer in *First Student, Inc.*, sat in an enclosed office that she shared with a supervisor; that, therefore, understandably, the trainer in *First Student, Inc.*, actually had the indicia of supervision, as employees knew that the trainer's assessment of their driving performance and records could cost them their job; that Bowers has no similar indicia of supervision or power over hiring or firing; that, therefore, Bowers is not a supervisor and was not disqualified as serving as an observer; and that her presence as an observer is not a basis to overturn an election of this magnitude of loss by the Union (180 votes against the Union and 119 votes for the Union).

The burden of proof regarding the assertion that Bowers is a supervisor is on the Union. The Union did not meet its burden. All of the evidence of record points to the fact that (a) Bowers

is not a supervisor, and (b) as far as employees are concerned, especially those who testified for the Union, there is no showing on this record that the employees were aware of any indicia of supervisory power on the part of Bowers. Indeed, all of the evidence received in this proceeding demonstrates that there was no indication to employees that Bowers possessed any supervisory power whatsoever. For the above-described reasons given by OHL on brief, *First Student, Inc.*, is distinguishable from the situation at hand. It has not been shown that Bowers could reasonably be viewed by employees as closely identified with management. In *First Student, Inc.*, the majority of the three-member panel of the Board indicated that "[w]e note particularly that . . . [the trainer] is in some instances the only representative of the Employer with whom applicants deal during the application and training process and, therefore, they could reasonably believe that she plays a role in deciding whether they are ultimately hired as drivers after they complete the CDL program. Bowers is not the only representative of OHL with whom applicants deal during the application and training process. Indeed, she plays a minor HR coordinator role and, in my opinion, there would be no reason whatsoever for employees to reasonably believe that she plays a role in deciding whether they will be hired. Consequently, Objections 24 and 27 are overruled.

Objections 25 and 31

Rayford testified about Objection 25, which—as noted above—alleges that "[t]he Employer station[ed] agents, officers and representatives in the parking lot and the door entrance to the polling area and engaged with the employees prior to voting." Objection 31, as noted above, reads: "[e]lectioneering at and near the polling places." Rayford testified that on March 16, 2010, she and some other employees were in the waiting room of the 5510 Building and some employees went out the door to go vote; that when the door was opened she saw "White standing out there talking to [employees] Alesha [Northly], Samantha, and James" (Tr. 1138); that she did not know the last names of Samantha and James, but both work in Fiskars; that she estimated that this conversation between White and the named employees occurred about 25 to 30 feet from the entrance door to the building in which the voting was taking place; that Cunningham, Herron, Julie Willow, and Carol Serrel were sitting in the breakroom (described above as the waiting room) with her at the time; that it was her understanding that no supervisor was supposed to be around that day; that supervisors Dye and Phillips were on the floor in Water Pik before the employees went out on break; that "they" (Tr. 1140) came around with a sign that told the employees that it was time to go and vote; and that no supervisor or manager told her that it was time to go vote.

On cross-examination, Rayford testified that when she saw White outside she and the other named employees were sitting in the waiting room downstairs in the back of Building 5510 and not in the upstairs breakroom; that she was standing in the doorway when she saw White talking to the three employees in the parking lot; that she told the other employees in the room with her "Carol White is standing out there talking to Alesha and sitting out there with James" (Tr. 1142 with emphasis

added); that she had the door open and she was not in a waiting room, but it is where the truck drivers “come in and sign in at the CSRs at the window” (id. at 1143); that the three employees were going to the poll and White, who was walking toward Alesha with a folder in her hand, said something to them in the parking lot and they stopped; that she could not hear what was said; that her break was ending, she left to go to work, and she did not know where White was going; that the entrance to the door to the polling place was about *100 feet* from the doorway she was standing in; that the polling place was in Building 5540 and the three employees had to walk through the parking lot to get to Building 5540; that she did not speak with Northly, Samantha, or James about this conversation or whether they were going to vote that day; that the Fiskars group that was following the three employees said they were going to the voting poll and she assumed that the whole department was going to vote; that this occurred about 10 a.m.; that White has an office in the 5510 Building, and she normally parks her car in the involved parking lot; that it was her understanding that no supervisor or manager should have been anywhere on campus that day; that Dye had already transferred out of Water Pik as of the day of the election; and that all of the employees with her in the room in the 5510 Building when she saw White in the parking were in Water Pik and at that time they had not voted yet.

Cunningham testified that on March 16, 2010, she witnessed White talking to three employees, Alesha, James, and Samantha, near where they were going to vote; that Rayford and Herron were with her when she saw this; that Rayford was standing in the door and she called her and Herron to the door; that the employees were from Fiskars; that at the time White was talking to the three employees they were 20 feet from where they had to go for the polling; that the door to the outside from the room they were in was open; and that she and the others in the room had not voted yet.

On cross-examination, Cunningham testified that she stopped being employed by OHL about August 18, 2010; that to get to the polling place in Building 5540 the employees had to go up some outside steps and then they went into the back entrance of the building which faced the involved parking lot; that the employees then went into a breakroom in Building 5540; that the distance between Building 5510 and Building 5540 is about the width of 20 cars; that she had no idea what White was saying; that she did not know whether White approached the employees or the employees approached White; that there were no other employees walking around where the three employees were in the parking lot with White; that she did not see a whole group of employees walking toward the polling place; that employees and sometimes managers and supervisors use that parking lot; that trucks come through that parking lot because there is a loading dock on the back of Building 5510; and that White was closer to Building 5540 than Building 5510.

OHL employee Denise Martin testified that she works in the Fiskars account; and that on March 16, 2010, when she went to vote around 11:30 a.m. or 12 noon and was returning from voting the following occurred:

Q. (BY MR. BRANDON) Can you tell us what else you observed on that particular day?

A. Yes, when we was [sic] leaving out from voting, I seen [sic] Karen White riding in the parking lot as we exit the building that we had to vote from.

Q. Did you see Karen White with anybody engaged with voters in the parking lot?

A. Yes. Some of the other coworkers from the Fiskars Department was [sic] walking to vote and they proceeded toward her car, a Durango, and they was [sic]—she was talking to them. It was Jerry Smith. The young lady, she don’t [sic]—Samantha Ridgport and it [sic] was another young lady.

....

A. I can’t think of her name.

Q. That wouldn’t happen to be Alesha, would it?

(BY MR. BODZY): Objection, leading.

ADMIN. JUDGE WEST: Overruled. Did you answer that?

....

A. Yes it was her. [Tr. 1171–1172.]

Martin also testified that when she was on her way to vote with some other employees she saw Jim Steele on a ride 3 to 4 feet from the door to the building they were entering to vote and they had to pass him to get to the door.

On cross-examination, Martin testified that Steele was on a ride, something you pick orders with; that Steele did not say anything; that Steele works in Building 5540; that the equipment that Steele had was sometimes used to move things between buildings; that they were approximately 18 to 20 feet from Steele when he first pulled up; that when she first saw White’s red Durango White was driving very slow in the parking lot; that some of her coworkers who were going to vote talked with White; that White was still in her car when she was talking to the employees; that White was closer to Building 5540 than Building 5510; that White’s car was not in a parking space and the employees were gathered at her door while she was in the car; and that she did not hear any of the conversation.

On redirect, Martin testified that her supervisor, Jim Windish, told the employees that it was time for them to go and vote; and that they also came around with a sign that it was time to go and vote. On recross, Martin testified that Windish told them before the sign came around; and that in the morning meeting on March 16, 2010, Windish told them what time they could go and vote and make sure you all go and vote.

OHL employee Linda Cotton testified that on March 16, 2010, while she was walking across the parking lot to go to Building 5540 she saw Steele and White in different areas of the parking lot; that she did not see Steele with any employees; that White was talking with Samantha Bridgeport, James Griffin, and Alesha Northly; that at the time she worked in Fiskars and her supervisor, Windish, walked through the work area and he released her to vote; and that the workers with signs

indicating that it was time to go vote came through her area just before Windish.

On cross-examination Cotton testified that it was between 11 a.m. and 12 noon when she was crossing the parking lot to go and vote; that she estimated that it is about 50 yards from the 5510 Building to the 5540 Building; that Steele was on a pack mule 20 feet from her when she first saw him; that Steele had parked the pack mule and he was getting off; that she did not see him talk to anybody and he did not say anything to her; that in Building 5540 there is an office door for management and another door for employees and they are pretty close together; that she saw White driving her truck, a red Durango, in the parking lot; that she was about 20 feet from White; that Bridgeport, Griffin, and Northly were at White's vehicle; that she did not see White get out of her vehicle; that she could not hear anything White and the three employees were saying; that she did not know who approached whom as between the three employees and White; that when she returned from voting, White's vehicle was not there; that she was in Building 5540 for no longer than 10 minutes; that when she was going to vote Denise and Carolyn Jones were walking with her; and that she never saw White get out of her vehicle.

Herron testified that on March 16, 2010, she saw "White standing on the parking lot talking to some workers" (Tr. 1207); that she could not hear what was said; that the workers who White was talking with were James, Alesha, and Samantha; that "[y]es to the question "[h]ad you guys [Herron had testified that she was with Rayford and Cunningham.] voted yet at that particular time"; that she did not remember the exact time she was released to go vote; and that when she saw White in the parking lot she was on a 15-minute break and at the end of the break White was still out there.

On cross-examination, Herron testified that when she saw White she was in the doorway of the entrance the truckers come through in the 5510 Building; that at the time she was on the morning break, which is from 10 a.m. to 10:15 a.m.; that Rayford called her attention to White in the parking lot; that she did not see White's red Dodge Durango; that White was on her feet; that she was about 25 feet from White; that White and the three employees were closer than 25 feet to the 5540 Building where the voting occurred; that she did not know if the employees approached White or White approached the three employees; and that at the end of her break White and the three employees were still out there.

Steele testified that he is the operations supervisor for two accounts in the 5540 Building; that he did not park equipment on the day of the Board election near the employee entrance to Building 5540; and that he did not think he was at that location at that time, and he was not there, namely the location where the employees were walking in.

Phil Smith testified that the distance between the backdoor of the 5510 Building and the backdoor of the 5540 Building where employees were walking to vote is *540 feet*; and that he knows this because it has been measured a time or two in that OHL has a lot of trucks staging in that area.

White testified that on the day of the election she did not approach nor did she have any conversations with employees in the parking lot between the 5510 and the 5540 Buildings; that

one employee stopped her and asked her if she could vote early and she told the employee to go ahead and vote; that one employee stopped her in the middle of the road; that that was the only one; that she thought it was one of the leads but she could not remember the individual's name; that on the day of the election she did not have any conversations with Alesha, Northly, James, or Samantha from the Fiskars department in the parking lot; that on the day of the election she was in the conference room all day; and that when she had the conversation with this one employee she was walking to the conference room, she thought with Young.

OHL on brief argues that the Union's witnesses could not testify as to the circumstances of this alleged conversation, or what was said, or what type of conduct was involved; that the Union did not call any of the three employees who allegedly had a conversation with White in the parking lot between Buildings 5510 and 5540 on March 16, 2010; that these two buildings are 540 feet apart; that the Union's witnesses gave conflicting testimony regarding the time, the distance, and whether White was standing in the parking lot or sitting in her vehicle in the parking lot; that none of the Union's witnesses claimed (a) to have heard what was allegedly said, or (b) to know whom initiated the alleged conversation; that the testimony concerning Steele was unpersuasive and contradictory; and that it is not alleged that White or Steele were near the people waiting in line to vote in Building 5540 nor near the breakroom which had been secured by Board personnel.

With respect to Objections 25 and 31, at least one of the Union's witnesses testified that it was her understanding that managers and supervisors were not supposed to be anywhere on campus (on OHL's property) on March 16, 2010. If that were the law, then one might not wonder about the approach taken here regarding Objections 25 and 31. That is not the law. The testimony of the Union's witnesses is contradictory. Even if it is assumed *arguendo* that White was in the parking lot the same time as some employees on March 16, 2010, no offering is made with respect to who initiated the alleged conversation and what was allegedly said. If the Union wanted to prove more than the alleged presence of White in the parking lot on March 16, 2010, at the time employees were voting in Building 5540, then it could have called, subpoenaing them if necessary, the three named employees who allegedly had a conversation with White. The Union did not. Contrary to the allegation in Objection 25, the Union's witnesses do not allege that Steele "engaged with the employees prior to voting." No witness called by the Union testified that Steele said anything to the employees prior to voting. Regarding Objection 31, without knowing what White allegedly said, it is not clear how one could determine, even if the testimony is credited, that she or Steele, who is not alleged to have said anything, could be electioneering. It is not alleged that either one of them engaged in nonverbal conduct, i.e. carrying a sign which might constitute electioneering. Objections 25 and 31 are overruled.

Objection 33

Objection 33, as noted above, reads: "[m]aking benefits and policy changes during the critical period." Wells testified that

she has worked at OHL for 12 years; that the open enrollment period for signing up for health care has always been in October and November as far as she could remember; that 2 or 3 years ago they changed it to June and it has been in June ever since then; and that in November 2009 it was changed back to January.

On cross-examination, Wells testified that when she gets materials which describe benefits the materials just indicate OHL and they are not limited to OHL Memphis; and that she has no knowledge about whether or not the benefits are specific to OHL Memphis or whether they are companywide.

Young testified that she does not decide when open enrollment occurs, but rather this is a decision made at corporate level and it applies companywide for all 5000 employees.

OHL on brief argues that it is not clear what point the Union is trying to make with this objection; that any decisions about the open enrollment period are not made by Memphis management; that it is a decision at the corporate level for the 5000 employees of OHL companywide; and that, therefore, whatever point the Union was trying to make, there was no showing that any change in the open enrollment period had any connection with union activity in Memphis.

The Union has not shown that OHL made benefits and policy changes during the critical period in response to the union campaign. Accordingly, Objection 33 is overruled.

Objection 34

Although not specifically cited by the Union when it called Shipp to testify, it is noted that Objection 34 reads as follows: “[e]mployer by its agents, officers and representatives held one on one meetings behind closed doors interrogating employees about their union sympathies and support.” As noted above, Union Exhibit 22 reads as follows:

From: Ewing, Roy
Sent: Wednesday, October 21, 2009 9:24 AM
To: White, Karen
Subject: RE: Remington

The three individuals are: Vanessa Elis, Carlos Shipp and probably Joe Taylor
Vanessa Ellis husband is Jeff (over at St. Jude—questionable vote)

Carlos Ship has 4 months with us (previous job was Union—Still unsure about OHL as a whole)
Joe Taylor (states will not vote for OHL or Union)
I will personally continue to meet with these individuals daily to filter any or all concerns as we approach a voting date.

Standby for follow ups:

.....

Roy Ewing

Shipp’s testimony about his one on one meeting with Ewing is set forth above. It is credited. As concluded above, Ewing is not a credible witness and his testimony is not credited. Objection 34 is sustained.

Objection 36

Objection 36, as noted above, reads “[e]mployer by its agents, officers and representatives calling employees at home interrogating and threatening jobs loss and retaliation because of their union activities or support.”

As noted above, OHL violated the Act as alleged in paragraph 9 of the complaint when Ewing, on November 17, 2009, interrogated Rayford about her union sympathies, told her that he did not want her to work in Remington anymore, and threatened her if she discussed their conversation with other employees. Objection 36 is sustained.

Toward the end of the last day of the trial herein the following occurred:

MR. BRANDON: Judge, some of my objections are based on an ALJ decision as well as some ULPs that are still outstanding.

ADMIN. JUDGE WEST: I’m sorry, you want to repeat that?

MR. BRANDON: Some of my objections, some have already been decided by the ALJ Carson.

ADMIN. JUDGE WEST: So some of your objections refer to some—

MR. BRANDON: Yes, sir.

ADMIN. JUDGE WEST: by Judge Carson?

MR. BRANDON: If I’m all over the place that’s why because there’s no need to discuss it if Judge Carson already did. [Tr. 1227–1228]

On brief, OHL that Judge Carson’s recommended findings in Cases 26–CA–023497, 023539, and 023576 are presently pending review by the Board pursuant to OHL’s exceptions, and thus are not final findings by the Board; that reliance on them would be improper in deciding to use them as a basis to overturn the election; that none of the alleged violations of discrimination under Section 8(a)(3) in the prior case occurred during the critical period (from September 25, 2009, when the petition for an election was filed to March 16, 2010, when the election was held); that the only violations found by Judge Carson during the critical period were 8(a)(1) violations based on (a) Phil Smith on October 15 and 16, 2009, removing union literature from a breakroom prior to the end of the break periods of the employees, (b) Young at an October 9, 2009 meeting with employees at Remington, threatening that employees would be replaced in the event of a strike and that negotiations for a contract would take 10 years, and (c) Ewing, on September 25, 2009, interrogating employees about their union activities and interfering with the distribution of literature at the Remington Warehouse; that the September 25, 2009 allegation of an unfair labor practice should not be considered within the critical period because OHL would not have had notice of the petition until sometime after September 25, 2009; that the unfair labor practice charges found by Judge Carson to have occurred during the critical period were stale by the time of the election in that the last 8(a)(1) violation found by Judge Carson was in mid-October 2009, approximately 5 months

before the election; that following the unfair labor practice charges filed in the fall of 2009, the Board's Regional Director postponed the election, only to have the Union request in February 2010 that it proceed, presumably because alleged violations in September and October 2009 would no longer "taint" the election; that the Board has overruled objections that are based upon relatively minor allegations that affect a small number of employees in a large bargaining unit and are remote in time to the election, as is the case with the instant proceeding, *PPG Aerospace Industries*, 355 NLRB 103 (2010); *Bally's Park Place, Inc.*, 352 NLRB 316 (2008); and *Bon Appetit Management Co.*, 334 NLRB 1042, 1043 (2001); and that here given the overwhelming margin of the vote, the alleged violations involving a handful of employees, many of which were 5 months before the election, could not have affected the outcome of the election or reasonably tended to interfere with free choice in the election.

Objections 8, 9, 10, 11, 26, 28, 30, 32, and 37

No evidence was introduced in this proceeding regarding these nine above-described objections. The parties were advised that (a) the CD with the transcript and exhibits (GC Exh. 3), for Judge Carson's decision was received in this proceeding as just that, and (b) if they wanted me to consider any exhibits from Judge Carson's consolidated proceeding, they would have to mark the exhibit for identification at the trial herein and I would rule on it. (Tr. 21 and 403-404.) This procedure was followed. As pointed out by OHL on brief, exceptions have been filed to Judge Carson's decision. Findings in that proceeding will not be final until the Board rules on the exceptions. Objections 8, 9, 10, 11, 26, 28, 30, 32, and 37 are overruled.

Analysis of the Sustained Objections

As pointed out by the Board in *Trump Plaza Hotel & Casino*, 352 NLRB 628, 628-629 (2008), "[i]t is well settled that '[r]epresentation elections are not lightly set aside.' *Safeway, Inc.*, 338 NLRB 525 (2002)" and

The Board's longstanding rule in assessing election objections is that the objecting party must show not only that prohibited conduct occurred but also that, viewed objectively, it interfered with voters' exercise of free choice. See, e.g., *Frito Lay, Inc.*, 341 NLRB 515, 515 (2004); *Picoma Industries*, 269 NLRB 498, 499 (1989). The party seeking to set aside an election also bears a heavier burden where the vote margin is large. *Avis Rent-A-Car System*, 280 NLRB 580, 581-582 (1986).

And as pointed out by the Board in *PPG Aerospace Industries*, supra at 106,

Under established precedent, the Board sets aside an election and directs a new one when unfair labor practice violations have occurred during the critical period, unless the violations are de minimis. In determining whether misconduct is de minimis, the Board considers such factors as the number of violations, their severity, the extent of their dissemination, the number of employees affected, the size of the bargaining unit, the closeness of

the election, and the violations' proximity to the election. *Bon Appetit Mgt. Co.*, supra.

As noted above, four of the Union's objections have been sustained. Taking the last objection sustained first, objection 36, it is noted that Rayford, as directed by Ewing, did not discuss their November 17, 2009 conversation with any other employee. Should OHL benefit from Rayford's adherence to Ewing's unlawful dictate? That is not the issue at hand. Rather, the issue is whether this unlawful conduct affected the outcome of the election. Since Rayford did not discuss this matter with other employees, the unlawful activity could only have affected one vote, namely Rayford's. With 119 employees voting for the Union, 180 employees voting against the Union, and 11 challenged ballots, Rayford's one vote would not affect the outcome of the election.

Objection 34 also involves Ewing. As pointed out in Union Exhibit 22, there were three employees involved in the meetings with Ewing. Others may have had meetings with Ewing, but that was not made a matter of record. Only one of the employees testified, namely Shipp. His meeting with Ewing occurred in Ewing's office. Ewing is the manager of Remington. At the time, Shipp was a probationary employee.

As concluded above, Ewing engaged in unlawful conduct during his meeting with Shipp, but there is no showing that Shipp told other OHL employees before the election of Ewing's unlawful conduct. Additionally, the other two employees named in Union Exhibit 22, Vanessa Ellis and Joe Taylor, were not called as witnesses at the trial in this proceeding, so there is no specific showing that Ewing also engaged in unlawful conduct in his meetings with them. It is noted that Union Exhibit 22, Ewing's October 21, 2009 email to White, does indicate in part "Joe Taylor (states will not vote for OHL or Union)." Whether this information was obtained by Ewing through an unlawful interrogation or Taylor volunteered it to Ewing or a third party who then told Ewing was not made a matter of the record herein. In view of the vote in the election, as described above, the Shipp ballot would not affect the outcome of the election. If Ewing engaged in unlawful conduct with Ellis and Taylor, which was not established on the record made herein, their two votes would not affect the outcome of the election.

With respect to Objection 13, Kurtycz was the only OHL employee who heard Manager Lowery on the work floor create the impression of futility of selecting the Union. Hours later she was removed from OHL's work floor, never to return to the work floor again before the election. Kurtycz did not testify that she discussed Lowery's statement with any other OHL employee before the election. Kurtycz did not vote in the election since she was terminated on March 2, 2010. If she had voted in the Board election, Kurtycz' vote would not have affected the outcome of the election.

In my opinion, sustained Objection 19, the unlawful termination of Kurtycz, warrants setting aside the election. The election was held on March 16, 2010. Kurtycz, who worked in HP, was terminated on March 2, 2010. During the intervening 2-week period between Kurtycz' unlawful termination and the election, OHL' management used Kurtycz' unlawful

termination to obfuscate to employees, in at least one account other than the one Kurtycz worked in, what was permissible with respect to soliciting in support of the Union on OHL's property. The termination itself was a serious violation, especially when one considers that it was a total fabrication. OHL added insult to injury by using the unlawful termination to undermine employee support of the Union. As noted above, Hayes testified that she works in the Water Pik department; that she is familiar with Ozburn's policy on soliciting or sales activity by employees because in a company meeting which was held about February or March 2010 (it would have been held on or after March 2, 2010) about the Union, Ozburn Area Manager Phillip Smith told the employees that an employee was terminated for selling; that employees are not supposed to sell, solicit, or do anything on Company property; that she attended a meeting of Water Pik employees at which Phillip Smith said that employees could not sell or solicit on Company property, and there would be no soliciting on worktime on the property; that Smith cited the termination of a lady who worked in HP and who sold food; that Ozburn Vice President White and Young were at this meeting; and that Ozburn's policy is that the employees cannot distribute or solicit anywhere on OHL property. Hayes impressed me as being a credible witness. I credit her testimony. OHL itself made sure that news of Kurtycz' termination was spread among employees within the 2 weeks before the election.³¹ While the other sustained objections could be describe as de minimis, Objection 19, which involves a violation of Section 8(a)(3) and (1) of the Act within 2 weeks of the election, is not de minimis.³² Since OHL destroyed the laboratory conditions of the March 16, 2010 Board election, the election will be set aside.

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. By interrogating employees about the union activities and sympathies of other employees, by soliciting an employee to persuade another employee to abandon the employee's support for the union, by interrogating an employee about the employee's union sympathies, by telling an employee that she

³¹ It is noted that on cross-examination by OHL Jennifer Smith testified that she guessed that employees are not supposed to be selling things on the floor; that she did not recall a meeting where the supervisors or managers explained that employees are not to be selling things on the floor; that she does not know anything about the solicitation policy at Ozburn; that she did not recall the solicitation policy being covered in any meetings with employees that she attended; and that she did not know whether Ozburn has a solicitation policy which prohibits people from selling things on the floor. While Jennifer Smith worked in HP between 2006 and 2007, she was working in the Brown Halco department of OHL between March 2 and 16, 2010. Her testimony on cross-examination demonstrates only that Phil Smith, White, and Young may not have made their Kurtycz termination presentation to the Brown Halco employees or that when they did Jennifer Smith was not present for some reason.

³² Although not specifically alleged as an objection by the Union, refusing to allow Rayford to work overtime in the Remington department during the critical period is also a violation of Sec. 8(a)(1) and (3) of the Act.

would not work overtime in a specific account because of her union activities, and by threatening an employee with unspecified reprisal if the employee discussed with other employees the conversation between the employee and an OHL manager, Ozburn-Hessey Logistics, LLC has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By unlawfully terminating Glorina Kurtycz and by refusing to allow Rayford to work overtime in the Remington department, Ozburn-Hessey Logistics, LLC violated Section 8(a) (1) and (3) of the Act.

3. Respondent has not violated the Act in any other manner.

4. By the conduct cited by the Petitioner in its Objections, the Respondent has prevented the holding of a fair election, and such conduct warrants setting aside the election conducted on March 16, 2010, in Case 26-RC-008596.

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 Glorina Kurtycz, it must offer her reinstatement, and it must make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of a 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*, 283 NLRB 1173 (1987). Interest on amounts due to Glorina Kurtycz shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent having discriminatorily denied Glenora Rayford overtime in the Rayford department, it must offer her overtime in the Remington department as it did before November 17, 2009, and it must make her whole for any loss of earnings and other benefits, computed on a quarterly basis from November 17, 2009, to date of a proper offer of overtime, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons*, supra. Interest on amounts due to Glenora Rayford shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, supra.

I shall order the Respondent to remove from its records any reference to the unlawful termination of Glorina Kurtycz, and in writing notify her that the unlawful termination will not be used as a basis for further personnel action.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³³

ORDER

The Respondent, Ozburn-Hessey Logistics, LLC of Memphis, Tennessee, its officers, agents, successors, and assigns, shall

³³ 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.

1. Cease and desist from
 - (a) Discharging or otherwise discriminating against any employee for supporting United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC or any other union.
 - (b) Coercively interrogating any employee about union support or union activities.
 - (c) Soliciting an employee to persuade another employee to abandon the employee's support for the Union.
 - (d) Unlawfully telling an employee that she would not work overtime in a specific account because of her union activities.
 - (e) Threatening an employee with unspecified reprisal if the employee discussed with other employees the conversation between the employee and an OHL manager
 - (f) 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 Glorina Kurtycz 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.
 - (b) Make Glorina Kurtycz 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) Within 14 days from the date of the Board's Order, offer Glenora Rayford overtime in the Remington department to the extent that overtime is available for employees who are assigned to accounts other than the Remington department.
 - (e) Make Glenora Rayford 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.
 - (f) 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.

(g) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee, copies of the attached notice marked "Appendix."³⁴ Copies of the notice, on forms provided by the Regional Director for Region 26, 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 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 November 8, 2009.

(h) 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 RECOMMENDED that Petitioner's Objections 13, 19, 34, and 36 to the election held by the Board in Case 26-RC-008596 be sustained; that the results of said election be set aside; and that said case be remanded to the Regional Director for Region 26 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining representative and with a notice of election consistent with the findings herein.

³⁴ 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."