

**Ozburn-Hessey Logistics, LLC and United Steelworkers Union.** Cases 26–CA–023497, 26–CA–023539, and 26–CA–023576

December 9, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On May 20, 2010, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, to modify his remedy,<sup>2</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

In May 2009, the Union began organizing employees at the Respondent's three Memphis, Tennessee facilities. The complaint at issue involves unfair labor practice allegations arising from the Respondent's response to the organizational activity from June 2009 to October 2009. The judge found that the Respondent committed numerous violations of the Act.<sup>4</sup> The Respondent excepts to each of the judge's unfair labor practice findings. Subject to the minor clarifications below, we agree with the judge's findings.

1. We adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act in numerous respects.<sup>5</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

<sup>3</sup> We shall modify the judge's recommended Order to conform to the Board's standard remedial language and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We shall also substitute a new notice to conform to the modified Order.

<sup>4</sup> The judge also dismissed a number of alleged violations. No party excepts to the dismissals.

<sup>5</sup> In finding that the Respondent violated Sec. 8(a)(1) by interrogating employee Udenise Martin about her union activities and by contacting the police to have union agents removed from public property, the judge relied on cases decided when the Board had only two sitting members. We adopt the judge's findings of those violations, but rely on *Webo Industries*, 334 NLRB 608, 608 fn. 2, 618 (2001), enf. 90

Regarding the findings that the Respondent violated Section 8(a)(1) by threatening employees with loss of certain benefits if they voted in the Union, the credited evidence is that, in July and August 2009, Manager Smith told employees that they would lose their gain share bonuses and other benefits if they were to vote in the Union. It is well established that such statements are unlawful. See, e.g., *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 466 (2001).<sup>6</sup>

As to the finding that the Respondent violated Section 8(a)(1) by threatening employees with job loss if they voted in the Union, we agree with the judge that employees would reasonably view Manager Young's statements as representing that, in the event of an economic strike, striking employees would be permanently replaced by temporary employees and would lose their jobs. Applying the Board's standard for determining the lawfulness of an employer's predictions regarding the consequences of an economic strike set forth in *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982), we agree with the judge that Young's statements constituted an unlawful threat. See *Wild Oats Market, Inc.*, 344 NLRB 717, 740–741 (2005); and *Baddour, Inc.*, 303 NLRB 275 (1991).

Regarding the findings that the Respondent violated Section 8(a)(1) by ordering offsite employees to leave the Remington facility premises on September 18 and September 25, we note that the applicable legal standard is set forth in *Hillhaven Highland House*, 336 NLRB 646 (2001), enf. 344 F.3d 523 (6th Cir. 2003). Applying that standard, we find that the offsite employees were

Fed. Appx. 276 (10th Cir. 2003) (interrogation); and *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191–1192 (2007) (police contact). Member Hayes agrees that the Respondent violated Sec. 8(a)(1) by interrogating Martin. He thus finds it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(1) by Manager Roy Ewing's questioning of a group of employees on September 25 as such a finding would be cumulative and not affect the remedy.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by Manager Smith's suggestion that Renal Dotson find another job, Member Hayes notes that Smith's statement was made in the context of Dotson's union activity. In addition, in adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by confiscating pronoun literature, Member Hayes relies on the October 16 incident during which Manager Phil Smith tore up union fliers while yelling, "Not in my warehouse," and then threw the fliers away. In doing so, Member Hayes disavows the judge's statements that an employer may maintain a housekeeping rule permitting it to remove "pronoun literature from nonworking areas left behind following break periods[.]" but that an "employer may not remove or destroy pronoun literature from nonworking locations on employees' nonworking time."

<sup>6</sup> In adopting the judge's finding of a violation, we do not rely on *Wal-Mart Stores*, 352 NLRB 815 (2009), a case decided when the Board had only two sitting members. Further, Member Hayes does not rely on the judge's discussion of Manager Smith's admitted, but apparently uncredited, statement that the gain share payouts would not apply to employees in a collective-bargaining unit.

seeking to organize fellow employees and thus had Section 7 rights to access the Remington property. In addition, we find that the Respondent offered no credible business justification for excluding the offsite employees from the premises. See *ITT Industries*, 341 NLRB 937 (2004), *enfd.* 413 F.3d 64 (D.C. Cir. 2005). Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) on September 18 and 25 by ordering offsite employees engaged in the distribution of union literature to leave the Remington premises.<sup>7</sup>

2. We also adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by disciplining and discharging Renal Dotson, disciplining and suspending Carolyn Jones, and discharging Jerry Smith.<sup>8</sup> Specifically regarding Jones' suspension, we find that the judge applied *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1992), and we agree with his application of that standard to find that the Respondent violated Section 8(a)(3) and (1). As to the Respondent's rebuttal burden, we find the unprecedented length of the 5-day suspension to be additional evidence that the Respondent would not have taken the same disciplinary action against Jones absent her union activities.

#### ORDER

The National Labor Relations Board orders that the Respondent, Ozburn-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their union activities and the union activities of other employees.

<sup>7</sup> Member Hayes joins his colleagues in adopting the judge's finding of a violation as to the September 25 incident, as the Respondent's exceptions on that issue are limited to credibility matters. He thus finds it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(1) on September 18. Further, he notes that he did not participate in *Hillhaven* or *ITT Industries* and takes no position on whether those cases were correctly decided.

<sup>8</sup> Member Hayes joins his colleagues in adopting the judge's findings of the 8(a)(3) violations. As to the verbal discipline of Renal Dotson and the written warning discipline of Carolyn Jones, Member Hayes would find that the Respondent's asserted reasons for these actions were either false or not in fact relied upon by the Respondent. He would thus conclude that the Respondent necessarily failed to show that it would have taken the same action against the employees absent their union activities. See *Golden State Foods Corp.*, 340 NLRB 382, 382 (2003). As to the 5-day suspension of Carolyn Jones and discharges of Renal Dotson and Jerry Smith, Member Hayes would find that the Respondent failed to meet its *Wright Line* rebuttal burden based on the evidence of disparate treatment identified by the judge in his analysis of those issues.

(b) Threatening employees with loss of the gain share program and other benefits if they select the Union as their collective-bargaining representative.

(c) Telling employees who support the Union that they should find another job.

(d) Confiscating prounion literature from breakrooms prior to the ending of breaks.

(e) Threatening employees with job loss if they participate in an economic strike.

(f) Threatening employees that selecting a union representative would be futile.

(g) Contacting the police to have union agents removed from public property.

(h) Ordering offsite employees engaged in the distribution of union literature for organizational purposes to leave the premises.

(i) Warning, suspending, and discharging employees because of their union activities in support of United Steelworkers of America or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, rescind the discriminatory disciplines issued to Renal Dotson and Carolyn Jones.

(b) Within 14 days from the date of this Order, offer Renal Dotson and Jerry Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make whole Renal Dotson, Carolyn Jones, and Jerry Smith for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning and discharge of Renal Dotson, the unlawful warning and suspension of Carolyn Jones, and the unlawful discharge of Jerry Smith, and within 3 days thereafter, notify Renal Dotson, Carolyn Jones, and Jerry Smith in writing that this has been done and that the disciplines, suspension, and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an elec-

tronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Memphis, Tennessee, copies of the attached notice marked "Appendix."<sup>9</sup> 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 an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities 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 June 2009.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 26 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.

#### 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 coercively question you regarding your union activities or the union activities of other employees.

WE WILL NOT threaten you with loss of the gain share program and other benefits if you select the Union as your bargaining representative.

WE WILL NOT tell those of you who support the Union that you should find another job.

WE WILL NOT confiscate pronoun literature from breakrooms prior to the ending of breaks.

WE WILL NOT threaten you with job loss if you participate in an economic strike.

WE WILL NOT threaten you that selecting a union representative would be futile.

WE WILL NOT contact the police to have union agents removed from public property.

WE WILL NOT order offsite employees engaged in the distribution of union literature for organizational purposes to leave the premises.

WE WILL NOT warn, suspend, or discharge you because of your union activities in support of United Steelworkers of America or any other labor organization.

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, rescind the discriminatory disciplines issued to Renal Dotson and Carolyn Jones.

WE WILL, within 14 days from the date of the Board's Order, offer Renal Dotson and Jerry Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Renal Dotson, Carolyn Jones, and Jerry Smith for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful warning and discharge of Renal Dotson, the unlawful warning and suspension of Carolyn Jones, and the unlawful discharge of Jerry Smith, and within 3 days thereafter, notify Renal Dotson, Carolyn Jones, and Jerry Smith in writing that this has been done and that the disciplines, suspension, and discharges will not be used against them in any way.

OZBURN-HESSEY LOGISTICS, LLC

<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

*Christopher J. Roy and William T. Hearne, Esqs.*, for the General Counsel.

*Ben H. Bodzy and Stephen D. Goodwin, Esqs.*, for the Respondent.

*Mr. Benjamin Brandon*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Memphis, Tennessee, on February 16, 17, 18, and 19 and March 3 and 4, 2010, pursuant to an amended consolidated complaint that issued on January 27, 2010.<sup>1</sup> The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) in various respects including coercively interrogating employees, threatening employees, and interfering with the distribution of union literature, and that the Respondent violated Section 8(a)(3) of the Act by warning, suspending, and discharging union adherents. The Respondent's answer denies any violation of the Act. I find that certain actions and statements of the Respondent violated Section 8(a)(1) of the Act and that various warnings, the suspension, and two of the discharges violated Section 8(a)(3) of the Act.

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

### FINDINGS OF FACT

#### I. JURISDICTION

Ozburn-Hessey Logistics, LLC, the Company or OHL, is a Tennessee corporation engaged in the business of transportation, warehousing, and logistic services for various businesses. It annually performs services valued in excess of \$50,000 for businesses located outside the State of Tennessee and annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of Tennessee. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Steelworkers Union, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Overview

This case arises from the Company's reaction to organizational activity by its employees. The Company's associate handbook, states:

<sup>1</sup> The spelling of the name of the Respondent in the caption has been corrected from that shown on the consolidated complaint which spelled Hessey as "Hessesey." All dates are in 2009, unless otherwise indicated. The charge in Case 26-CA-023497 was filed on August 28. The charge in Case 26-CA-023539 was filed on October 2. The charge in Case 26-CA-023576 was filed on November 10, and was amended on January 27, 2010.

OHL does not believe that union representation would be in the best interest of OHL associates or the Company itself. . . . OHL believes that a union can only disrupt the relationship between the Company and its associates. This type of disruption could interfere with our growth and the progress and future job security of associates.

The issues herein relate to whether the Company, in an effort to keep itself union free, violated the Act.

The Company operates three warehouses in Memphis from which it provides logistical support to multiple national retailers. Employees package and ship various products to the respective retailers. One of the warehouses, referred to as Remington, is located on Global Drive, about 2 miles from the main company complex on Holmes Road. The Holmes Road complex consists of two warehouses, one with the address of 5510, and the other with the address of 5540. Union activity began at the 5510 warehouse. That warehouse serves several different customer accounts. The respective accounts are referred to by shortened names that relate to the product being packaged and shipped including Waterpik, Fiskars, and HP, which handles Hewlett Packard products.

The supervisors and employees servicing the various customer accounts are overseen by area managers. The area managers relevant to this proceeding are Phil Smith, who oversaw the Fiskars account, Kelvin Davis, who oversaw various accounts including accounts at the Remington warehouse, and Linda Sones, who oversaw the HP account.<sup>2</sup> Personnel and disciplinary matters are overseen by Human Resources Manager Evangelia (Van) Young. Manager Van Young would consult with the corporate office and "get their advisement" with regard to serious disciplinary matters. At the relevant times herein, Laura Reed was the corporate employee relations manager. Reed did not testify.

Union organizational activity began in early May. After beginning his employment with the Company, Charles Tate, who had previously worked at an organized facility, contacted the president of the local union at that facility. Thereafter, in the first or second week of May, Tate and employee Carolyn Jones met with the president of the local and an International representative. Thereafter they began speaking in favor of the Union and distributing prounion literature to their fellow employees. Various company emails and reports establish that the Company was aware of the union activities of Jones, Jerry Smith, who is the boyfriend of Jones, and Renal Dotson no later than mid-August.

##### B. The 8(a)(1) Allegations

###### 1. Area Manager Phil Smith

Paragraph 7 of the complaint, in 15 subparagraphs, alleges multiple violations of Section 8(a)(1) of the Act by Area Manager Phil Smith.

Subparagraphs 7(a) and (b) allege creation of an impression of surveillance and interrogation arising from comments by Smith to employees in the Fiskars account. The employees who work in the Fiskars account gather together each morning for a

<sup>2</sup> The position titles used herein are as they appear on R. Exh. 9.

brief preshift meeting in which they are informed of the work that needs to be performed that day. At the outset of the organizational effort, union meetings were announced by party invitations that Jones prepared. The invitations mentioned nothing about the Union or a union meeting. According to employee Charles Tate, the location of the party was stated as “Contractors Place,” but the address of the location was not given. No invitation was offered into evidence. Employee Jones distributed these party invitations prior to the first union meeting which was to be held on June 18. At the June 18 Fiskars preshift meeting, Jones recalled that Smith commented that he had heard that some employees were trying to get a Union started. In the same meeting he mentioned that he had a party invitation but that he “wasn’t invited to it.” On June 21, at the preshift meeting, Smith asked, “How was the party?” No one responded. Smith denied making the foregoing comments. There is no evidence that Smith was aware that the party was actually a union meeting. Thus, even if I were to credit Jones, there is no basis for finding that the comments related to union activity rather than a party. Notwithstanding the presence of the Fiskars account employees at those two preshift meetings, the General Counsel presented no witness who corroborated Jones’ testimony regarding Smith’s alleged comments. I credit Smith, and I shall recommend that these allegations be dismissed.

Subparagraphs 7(c) and (i) allege a threat of loss of benefits. In both instances, the threat included loss of a bonus referred to as “gain shares.” The gain share program includes a bonus awarded in different amounts depending upon performance and seniority. Area Manager Smith identified a document describing the gain share program which states that employees “under a collective-bargaining agreement are not eligible for this plan.”

With regard to subparagraph 7(c), on a day in July when employee Jerry Smith was labeling product, Area Manager Phil Smith walked by him on his way to the Fiskars account. Area Manager Smith commented, as he passed Jerry Smith without stopping, that Jerry Smith “didn’t know what . . . [he] was risking,” that he “could lose his gain shares . . . if a union” came in. Area Manager Smith denied having any conversation with Jerry Smith regarding gain shares in June. The comment was made in July. There was no conversation. I credit Jerry Smith.

Subparagraph 7(i) relates to a meeting regarding benefits in August in which Area Manager Smith spoke with the employees in the Fiskars account regarding the gain share program. Leadman John Puckett asked whether employees would still be eligible for the gain share program if the employees got “a union in here.” Employee Carolyn Jones recalled that Smith answered “Absolutely not, you will not be eligible for . . . [gain share].” I am mindful, as pointed out in the brief of the Respondent, that Jones referred to the program as “team share.” That misappellation has no bearing upon her credible recollection of Smith’s “[a]bsolutely not” statement. Employee Linda Cotton recalled that, after stating that the employees would lose “gain shares,” Smith also stated that they would also lose other incentives, “the dinners, the cups, T-shirts.” Employee Udenise Martin confirmed that Smith said the employees would not get “T-shirts and lunches.” Employee Athena Cartwright recalled that Smith told the employees that, if there were a union, employees would lose gain shares, cups, and T-shirts.

Area Manager Smith admitted informing the employees in the August meeting that “under the current gain share program with OHL if there is a collective bargaining unit in place the gain share pay-out will not apply to that group.” He denied referring to any other benefit that would be lost. Smith’s admitted statement regarding the gain share program confused the language of the program, which excludes employees covered by a collective-bargaining agreement, with employees represented by a union in an appropriate unit. In *Niagara Wires, Inc.*, 240 NLRB 1326 (1979), the Board held that “an employee benefit plan which restricts coverage to unrepresented employees is per se violative of Section 8(a)(1) of the Act, regardless of whether the employer adds to the misconduct by implementing the restriction or *exploiting it during an organizing campaign.*” *Id.* at 1328. [Emphasis added.] Even if Smith had correctly reported the exclusionary language of the gain share program, the Respondent should have made clear that benefits “would be subject to good-faith negotiations or that the . . . plan would not cover the employees because collective bargaining had provided them with other benefit programs.” *Wal-Mart Stores*, 352 NLRB 815, 849 (2008). I credit the mutually corroborative testimony of the employees and find that, in addition to referring to loss of the gain share program, Smith also stated that the employees would lose the incentives of dinners, cups, and T-shirts. The Respondent, by informing employees that they would lose the gain share program and other benefits if they selected the Union as their collective-bargaining representative, violated Section 8(a)(1) of the Act.

Subparagraph 7(d), like subparagraphs 7(a) and (b), relates to comments by Area Manager Smith regarding party invitations. Employee Linda Cotton recalled that Smith, in an informal conversation in August, asked whether she was going to a party that night. Cotton answered, “What party? Unless you’re having one, I don’t know anything about a party.” Smith did not reply. Cotton testified that she did not know what party Smith was referring to. Counsel for the General Counsel then asked Cotton whether there was to be a union meeting that day, and she responded affirmatively. Even if Smith, who denies the interrogation, was obliquely inquiring about the union meeting, Cotton did not make the connection between the party and the union meeting. Thus the interrogation was not coercive. I shall recommend that this allegation be dismissed.

Subparagraph 7(e) alleges that Smith promulgated a rule prohibiting employees from soliciting on company time. Carolyn Jones testified that, on August 5, at a preshift meeting in Fiskars, Smith stated that he had heard that some employees were soliciting and that “we were not to solicit anything at any time on OHL premises.” Smith denied making the foregoing comment, and the General Counsel presented no witness corroborating Jones. I credit Smith, and I shall recommend that this allegation be dismissed.

Subparagraph 7(f) alleges interrogation and creation of an impression of surveillance of union activities. The allegation is predicated upon the testimony of employee Udenise Martin who recalled that Area Manager Smith asked a group of employees that included Operations Supervisor Barbara Oyugi and employees Tasha Blevins and Athena Cartwright whether they were “going to the party.” Oyugi and Blevins asked, “What

party?” Smith replied, “[O]h, you all know about the party. Udenise, you know what I’m talking about, don’t you?” Martin did not answer. She testified that, at the time, she was unaware that there was a union meeting scheduled for that night and “didn’t know what he [Smith] was talking about.” As with subparagraph 7(d), I do not find that a conversation that an employee does not understand because the employee “didn’t know what he was talking about” and that related to a party rather than a union meeting is coercive or creates an impression of surveillance. Employee Cartwright, called as a witness by the General Counsel, was not asked about the foregoing conversation. Smith credibly denied the conversation. I shall recommend that this allegation be dismissed.

Subparagraph 7(g) alleges that Smith, on August 7, interrogated employees. A union meeting had been scheduled for August 6, but there had been a violent storm and the meeting was not held. Employee Renal Dotson recalled that, at the Fiskars preshift meeting on August 7, Smith asked the employees whether they had gotten home safely and then asked whether they had made it to the party. No employee corroborated the foregoing testimony, and Smith denied making any such inquiry. I shall recommend that this allegation be dismissed.

Subparagraph 7(h) alleges that Smith promulgated a rule prohibiting employees from soliciting on company time.<sup>3</sup> On August 11, Carolyn Jones was called to the office in the back of the Fiskars account area by her supervisor, Barbara Oyugi, to meet with her and Area Manager Smith. Smith presented Jones with a letter noting that it had been reported that she had engaged in distribution in a work area. It then sets out the Company’s valid solicitation and distribution rule. The letter closes stating that it is a reminder of the policy, not discipline. Jones recalled that, after she read the letter, Smith commented that there had been complaints that Jones had distributed literature to employees who were working. Jones denied doing so.

According to Jones, Smith stated that “soliciting, you know, it’s not permitted on company grounds.” Jones pointed out that other employees were selling “Avon, T-shirts, and food.” Smith replied that he was not talking about other employees, he was talking about her, and that he would “handle them.” Smith recalled only that he gave the letter to Jones and that she had no questions. Oyugi recalls that Jones asked whether she was the only employee receiving the letter, and Smith stated that she was not, that “everybody who was found doing it,” would be given one. Smith then told Jones that, if she was going to “pass out anything this had to be on your breaks and . . . not disturbing anybody else from doing their work.”

Jones admitted that she “took a few minutes and read it [the letter].” The policy clearly states that “[w]orking time does not include free time such as break periods and meal time.” If Smith had thereafter stated a restriction inconsistent with the policy, I am satisfied that Jones would have brought the inconsistency to his attention. I credit Oyugi’s recollection of the conversation. I shall recommend that this allegation be dismissed.

<sup>3</sup> The General Counsel, in its brief, withdrew an allegation of interrogation included in subpar. 7(h).

Subparagraph 7(j) alleges the promulgation of a rule prohibiting solicitation on company property. In this instance, on August 25, employee James Bailey, who works in the HP account, was called to the office of his supervisor, Vania Washington, where he met with Area Manager Smith and Washington. Smith handed him a letter similar to that given to Jones and read the letter to him as Bailey followed along. On cross-examination, Bailey initially agreed that he and Smith read the letter together, but then testified that he read it. Smith told Bailey that it had been reported that he had “been passing out petitions in the work area.” Bailey denied doing so. Bailey recalled that Smith told him that, “if I pass out any more—solicit any more people,” the Company would “take further action,” that he could not “pass out any more petitions in the parking lot, work area, nowhere on the premises.” On cross-examination, Bailey stated that he was told that he “couldn’t solicit, pass out any kind of paperwork on the premises.”

Both Washington and Smith recall that, after Smith read the letter with Bailey following along, Smith asked if he had any questions. Bailey stated that he did not and asked for a copy of the letter. Smith told him to keep the copy he had been given.

I credit Smith and Washington. Bailey’s testimony is consistent with him hearing Smith speaking as he read the letter that referred to solicitation and distribution. It would appear that Bailey misunderstood what was being said and failed to realize the exception for nonworking time and nonworking areas. If, contrary to the foregoing, there was no misunderstanding and Smith stated a restriction greater than that set out in the letter, I am satisfied that Bailey would have sought clarification. I shall recommend that this allegation be dismissed.

I shall deal with subparagraph 7(k) in my discussion of the discharge of Renal Dotson.

The evidence establishes that Human Resources Manager Young, not Smith, contacted the police on August 31. Thus, I shall recommend that subparagraph 7(l) be dismissed.

Subparagraphs 7(m) and (n) of the complaint relate to confiscation of union literature from employee breakrooms, once on October 15 and twice on October 16.

On October 15, employee Jennifer Smith went to the breakroom in building 5540 for her 11 a.m. break with employee Shelia Childress. In the breakroom they found prounion literature on each of the four break tables. They sat together at one table and picked up and began reading the literature. Area Manager Phil Smith came into the breakroom, spoke, saying “how you doing,” and proceeded to take the union literature off of the other three tables and “balling the papers up.” As he was leaving, Jennifer Smith asked if he was going to take the one she was reading, and he answered, “No, you can keep yours.” Employee Jennifer Smith recalled that this occurred about 11:10 a.m., 5 minutes before the 15 minute break ended. Jennifer Smith explained that, at the time, only she and Childress were present because “most of them [the other employees on break] are smokers.” Those who smoke go outside.

On October 16, employee Mark Yelverton arrived at building 5540 prior to the 8 a.m. start of his shift. He went to the breakroom, ate breakfast, and placed prounion literature printed on blue paper on the tables in the breakroom. He then left to begin work. After walking about 60 yards from the breakroom,

Yelverton heard his name called. He turned and saw Area Manager Phil Smith. Smith was holding blue papers. He raised the papers over his head, tore them, and “hollered out, ‘Not in my warehouse.’” He then threw the papers into a garbage can. On cross-examination, Yelverton explained that Smith, who had “hollered out” to him was not screaming because there was no equipment running. I do not credit Smith’s denial of the foregoing interaction with Yelverton. Yelverton’s credible testimony regarding Smith’s spontaneous reaction to finding prounion literature and tearing it up is consistent with his balling up union literature in the presence of Jennifer Smith and Shelia Childress.

Later that day, October 16, employee K. C. Foster observed Area Manager Smith pick up prounion literature from the four break tables in building 5540. Foster’s break was from 10 until 10:15 a.m. Other employees were with Foster in the breakroom and were presumably still there when he left. He left the breakroom at 10:13 a.m. As he was leaving, Smith entered the breakroom and stated, “It’s time to clean up.” Through the window of the breakroom he saw Smith picking up the prounion literature. Foster had never previously observed Smith cleaning up in the breakroom.

Area Manager Smith testified that he would clean up trash, including newspapers, magazines, and food, left in breakrooms “[o]n a daily basis multiple times.” He explained that employees were expected to clean up after themselves, but, if they did not, “we go behind them.” On cross examination Smith admitted that “[t]here are custodians who clean the breakrooms.” In response to further questions on cross examination, Smith testified, “If break is over and there’s no one in there, then all materials are thrown away.”

Although Smith testified that he threw away trash when “break is over and there’s no one in there,” that was not the case on October 15 when Jennifer Smith and Shelia Childress were present throughout Smith’s cleaning which occurred some 5 minutes before the end of break. The “smokers” who first went outside, might well have returned through the breakroom. If they had done so, no prounion literature would have been on the tables because Smith had removed it. Similarly, he began removing literature 2 minutes before the end of the break from which employee Foster left at 10:13 a.m. The testimony of Foster establishes that he left alone, and there is no evidence that the employees with whom he was on break left before him.

The brief of the General Counsel argues that Smith’s assertion that “he routinely cleaned the breakroom should be rejected as it defies logic that . . . [an Area Manager] would regularly perform such menial duties.” Smith’s admission that “custodians clean the breakrooms” is consistent with that argument, as is the testimony of employee Foster that he had never previously observed Smith cleaning the breakroom. Whether Smith performed such duties regularly is immaterial. On October 15 and 16, he confiscated prounion literature prior to the ending of the break periods of the employees.

An employer may maintain and enforce housekeeping rules that result in the confiscation of prounion literature from nonworking areas “left behind following break periods.” *North American Refractories Co.*, 331 NLRB 1640, 1643 (2000); *Page Avjet, Inc.*, 278 NLRB 444, 450 (1986). An employer

may not remove or destroy prounion literature from nonworking locations on employees’ nonworking time. *Jennie-O Foods*, 301 NLRB 305, 338 (1991). Smith removed prounion literature from nonworking areas during breaktime in the presence of employees. His “[n]ot in my warehouse” reaction to the prounion literature left by Yelverton confirms that his purpose was confiscation, not cleaning. The Respondent, by confiscating prounion literature from breakrooms prior to the ending of breaks, violated the Act.

Subparagraph 7(o) alleges interrogation and a threat of unspecified reprisals. After lunch on the day that Area Manager Smith had shouted “[n]ot in my warehouse” to Yelverton, they engaged in a short conversation. Yelverton, whose support for the Union was well known, recalled that Smith asked him what he thought the Union could do for him. Yelverton stated his belief that the Union could provide better wages and benefits. Smith noted that the Union might not be able to do the things that Smith had done for Yelverton, referring to time off that had been granted to him following an accident that had injured his wife. Yelverton disputed that, stating, “You didn’t do it. . . . [M]y FMLA provided for me to take off that amount of time.” Yelverton thought that Smith was claiming that he was out of FMLA leave, but Yelverton knew he was not and asked Smith “show me the amount of FMLA that I had taken off.” When it appeared to Yelverton that the conversation “was going in the wrong direction” he ended it by stating, “[Y]ou stay on your side of the fence, and I’ll stay on mine.”

Smith acknowledges the substance of the foregoing conversation, but denies that he asked Yelverton what he thought the Union could do for him. He contends that he explained to Yelverton that OHL had granted him time off for a week prior to his receipt of FMLA leave.

Even if Smith did ask Yelverton what he thought the Union could do for him, asking that question of a known active union adherent was not coercive. Yelverton did not believe what he recalls Smith was telling him regarding FMLA leave, and he testified to no threat. Smith’s argument that the Respondent had granted him leave prior to the FMLA leave contained no threat not to do so in the future. I shall recommend that this allegation be dismissed.

## 2. Human Resources Manager Van Young

Paragraph 8 of the complaint alleges four instances upon which Human Resources Manager Young violated Section 8(a)(1) of the Act.

Subparagraph 8(a) alleges that Young interrogated an employee about the union activity of other employees.<sup>4</sup> Employee Udenise Martin, on an unspecified date in June, was out of work 1 day taking care of her daughter. She received a telephone call from Human Resources Manager Young asking how she was doing. In the course of their conversation, Young asked whether Martin had “heard anything about the union activities.” Martin replied that she “didn’t know anything that was going on,” but that she had heard “some talk.” Young asked why would “they want to organize the Union?” Martin replied that

<sup>4</sup> The General Counsel, in its brief, withdrew an allegation of solicitation of grievances included in subpar. 8(a).

employees working in the Fiskars account did not feel like they could “come to her and talk to her,” but she had not “heard anything at the time about the Union.”

Counsel for the Respondent asked Young, “Did you ever call her [Martin] at home and discuss Union activity in any way?” Young answered, “No.” Thereafter, with regard to a conversation that Young admitted having with Martin, she explained that she could not say when that discussion occurred because she had had “so many discussions with her [Martin].” I credit Martin who specifically recalled the circumstances of the telephone call from Young.

Young was seeking to obtain whatever information she could glean from Martin relating to union activity at the Company. Martin’s union sympathies were not known. Young was the highest ranking human resources manager at the warehouse and oversaw all serious disciplinary actions. After Martin denied knowing anything about any union activity, but admitted that she had heard “some talk,” Young began probing for more information, asking why “they,” an obvious reference to the employees responsible for the “talk” to which Martin referred, would “want to organize the Union.” The calling of an employee whose union sympathies are not known at her home and interrogating her regarding her knowledge of the union activities of other employees was coercive. See *Stevens Creek Chrysler Jeep*, 353 NLRB 1294, 1295 (2009). The Respondent, by coercively interrogating employees regarding the union activities of other employees, violated Section 8(a)(1) of the Act.

Subparagraph 8(b) alleges that Young created the impression that employees’ union activities were under surveillance and threatened to terminate employees if they selected the Union as their collective-bargaining representative.<sup>5</sup> On August 6, Young spoke with employee Underise Martin in her work area regarding a matter involving Operations Manager Jim Windisch. Young then asked, “was there a Union meeting going on.” Martin, in a somewhat confused sentence, testified that Young “was just asking if we had a Union to come into the plant that we wouldn’t have a job,” that Young said that “a lot of us [are] going to be on the other side of the fence.” Young noted that she knew who was “starting this Union thing,” and looked in the direction of Carolyn Jones who was standing immediately behind Martin. Young implicitly denied the foregoing conversation, explaining that it related to Windisch and communication in Fiskars, not the Union.

Martin phrased Young’s remark about whether there was a union meeting going on in the present tense. The employees were working, not attending a union meeting. Whether Young misstated the question she intended to ask or whether Martin misunderstood her is immaterial. Young’s “just asking” about a union coming into the plant is inconsistent with telling Martin that “we wouldn’t have a job.” It is unclear whether Young spoke those words or whether Martin was providing a context for Young’s “other side of the fence” remark. Martin did not specify whether the “other side of the fence” remark referred to a literal situation or was a figurative reference to people having different and opposing opinions. Jones’ support for the Union

was no secret. I shall recommend that this allegation be dismissed.

Subparagraph 8(c) alleges that Young, on August 31, contacted police to have union and employee handbillers removed from public property. On August 31, International Organizer Benjamin Brandon and retired International Organizer Curtis Hawkins came to the Holmes Road warehouses to distribute union literature to employees as they went to lunch. Hawkins arrived shortly after Brandon. Employee Carolyn Jones, who had been suspended on August 28, and Jerry Smith, who had been discharged on August 28, arrived a few minutes later.

At the point where the access road to the warehouses intersects with Holmes Road, there is a wide white line adjacent to a stop sign. The distance from that point to the warehouse fence and gate is approximately 100 feet. Area Manager Phil Smith admitted that he believed that the current property line was the wide white line adjacent to the stop sign.

On August 31, the security guard called Smith, stating that “there was someone in the road blocking traffic . . . and he didn’t know what *they* were doing.” [Emphasis added.] Smith called Human Resources Manager Young and told her that the security guard had reported “some gentlemen [were] out there and they were stopping the employees going in and out. . . .”

Area Manager Smith went to investigate. He testified that, when he arrived, only Hawkins was present and that he was about 40 feet onto company property. He informed Hawkins that he could not handbill on company property. Hawkins replied that he had been “doing this for 30 years” and knew what he could do. Van Young arrived and called to Smith, asking if he had called the police. He answered that he had not, and she replied, “I’ll do it.” As Young was calling, she claims that another individual arrived. Smith says that Hawkins was backing up and, about the time they reached the wide white line, Brandon drove up. According to Smith, he spoke with Brandon, and Brandon agreed to stay beyond the white line. Smith called to Young to cancel the police. She unsuccessfully tried to cancel her initial request. Shortly thereafter two officers arrived.

International Organizer Brandon disputes Smith’s testimony, claiming that he arrived first and that both he and Hawkins stationed themselves outside the white line and remained on the Holmes Road side of the wide white line. He recalled that Area Manager Smith, after observing Hawkins and him for several minutes, approached them with the security guard and Young following. Smith asked the group to leave, stating that they were trespassing. Brandon replied that they were not on company property, “that it was public property and we had a legal right to handbill there.” Smith directed Brandon to “go across the street,” referring to Holmes Road. Brandon refused. Smith accused Brandon of crossing the wide white line, and Brandon denied that he had done so. Human Resources Manager Young called to Smith, asking if he had called the police. Brandon incorrectly recalled that, at that point, Smith called the police.

Carolyn Jones and Jerry Smith arrived as Area Manager Phil Smith approached Brandon and Hawkins. Jerry Smith heard Phil Smith tell Brandon that “he could not do that here, and he needed to go across the street,” to which Brandon responded that he “had the right to be here to do what he was doing.” At that point, Jerry Smith heard Young call to Phil Smith, asking

<sup>5</sup> The General Counsel, in its brief, withdrew an allegation of creation of an impression of surveillance included in subpar. 8(b).

whether he had called the police. When Smith answered that he had not, Young stated that she was “doing it.”

A transcript of Young’s telephone call to the police reflects that she reported that there were “some members . . . some guys out here that are harassing our employees.” If, as Phil Smith testified, only one individual was present, “some guys” could not have been involved in any alleged harassment. Young never reported that the individuals were on company property. She stated that “they are arguing with my mgr [manager] because he asked them to get off of our property.” When attempting to cancel her request that officers come, she stated that “we pretty much told them where they got to stand and not come on our property.”

As pointed out in the brief of the General Counsel, when the telephone call was made, even the Respondent does not contend that anyone was on company property. If, as Smith testified, Brandon arrived after he had walked Hawkins to the wide white line, there were, as Young reported, two individuals present “arguing with” Smith. Both were outside the white line.

Contrary to the testimony of Smith, the security guard, who did not testify, reported that more than one person was present, using the pronoun “they.” Consistent to that report, Smith told Young that there were “some gentlemen out there.” I credit the testimony of Brandon that he arrived first, Hawkins arrived shortly thereafter, and neither crossed the wide white line.

Two officers arrived in one vehicle. They spoke first with Phil Smith. Thereafter, they spoke with Brandon, informing him that Phil Smith had said they had crossed the white line. Brandon denied that they had done so. The officers remained a few minutes and then left.

An employer violates the Act “[b]y claiming that union agents are trespassing on private property when in fact they are not, and calling the police to eject them.” *Walgreen Co.*, 352 NLRB 1188, 1193 (2008). By contacting the police to have union agents removed from public property, the Respondent violated Section 8(a)(1) of the Act.

Subparagraph 8(d) alleges that, in early October, Young threatened employees with discharge, informed employees that it would be futile to select the Union as their collective-bargaining representative, disparaged union supporters, and informed them that they could not work with prounion employees.

The foregoing allegation is predicated upon remarks made by Young at a meeting with 25 to 30 employees at the Remington warehouse on October 9. Employee Carlos Shipp recalled that Young was upset because she had learned of union activity at the Remington warehouse and noted that she had helped many of them through the “second chance program.” She stated that she did not want Operations Manager Roy Ewing to send employees to work at the HP account at Holmes Road because “they were so corrupt over there.” She said that, if there were a strike, employees “would be replaced by temps and a lot of you all will lose you all’s jobs.” She then referred to negotiations, pointing out that the Union would propose a contract, that if the Company stated they “can’t do that,” the Union would have to rewrite it, and “they’ll be doing that for the next 10 years before they get a contract.”

Employee Joe Taylor corroborated Shipp in part, recalling that Young commented upon learning of union activity at the Remington warehouse and referring to the second chance program. He did not mention not sending employees to work at the HP account or to strikes and hiring temporary employees. He did recall Young stating, “We could come in one morning and not have a job.” Regarding a contract, he recalled Young stating that “it could be three, six, 10 years. May not get a contract.” Taylor specifically denied that Young acknowledged that the bargaining process could “go quickly.”

The Respondent presented employee Leslie Almo, a customer service representative at Remington, who denied that Young made any comments regarding not sending employees to work at the HP account. She recalled that Young did mention strikes and hiring temporary employees. Almo also recalled that Young addressed bargaining, stating that “the Union can’t guarantee us anything, and she picked up a piece of paper and told us this is how it would go. They [the Union] would write down what they want and [the Company would] look at it like, [‘N]o. [‘] And then they were, [‘N]o. [‘] it goes back and forth . . . [S]he said it would take years.”

Young denied making any comment regarding the HP account. She admitted, in response to an employee’s question, addressing strikes, stating that, “[i]n a economical [sic] strike then, yes, OHL did have some leeway in saying whether or not they can come back.” Young admitted addressing bargaining, stating that the law required that the company bargain in good faith and “as long as they bargain in good faith, then they’ve satisfied the law. . . . You may get one [a contract] in a year; you may get one after 10 years.” Young did not deny stating that the Union would make a proposal and the Company would say they “can’t do that,” as Shipp testified, or “no,” as Almo testified.

Young gave no explanation of her admitted comment that, in the event of an economic strike, the Respondent would “have some leeway in saying whether or not they [the employees] can come back.” The absence of an explanation confirmed, as Shipp credibly testified, that strikers would be replaced by temporary employees and a lot of the striking employees would “lose you all’s jobs.” “Employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement.” *Baddour, Inc.*, 303 NLRB 275 (1991). Young gave no explanation of the “leeway” that the Respondent had in whether striking employees could return. By threatening employees with loss of their jobs if they participated in an economic strike, the Respondent violated Section 8(a)(1) of the Act.

Section 8(d) of the Act imposes the “mutual obligation” of the parties to “confer in good faith.” Giving an example in which only the union is making proposals which the employer is continuously rejecting misrepresents the bargaining process. Coupling that scenario with a reference to 10 years, as Young admitted, threatened that the employees’ organizational effort was futile. *Ring Can Corp.*, 303 NLRB 353, 358 (1991). I do not credit Young’s claim that she referred to “a year.” Shipp, Taylor, and Almo all agree that Young referred to “years,” and Shipp and Taylor specifically recall 10 years being stated. The Respondent, by threatening that it would be futile for employ-

ees to select the Union as their collective-bargaining representative, violated Section 8(a)(1) of the Act.

No witness corroborated Shipp's testimony regarding not sending employees to work on the HP account because the HP employees were "so corrupt." I do not credit that portion of his testimony and shall recommend that those aspects of the allegation be dismissed.

### 3. Remaining 8(a)(1) allegations

I shall deal with paragraph 9 of the complaint in my discussion of the discharge of Charles Tate.

Paragraph 10 of the complaint alleges interference with leafletting at the Remington warehouse on September 18. On that date, International Organizer Brandon, accompanied by former employee Jerry Smith and a group of employees whose workday had ended early: Carolyn Jones, Athena Cartwright, Undenise Martin, and James Bailey, went to the Remington warehouse on Global Drive to leaflet. A fence, with a gate that bears a no trespassing sign, surrounds the facility. Photographs received into evidence show that the gate is approximately 30 feet from Global Drive. A wide concrete driveway that can easily accommodate two lanes of vehicles provides access to the gate and a large paved area at the docks used by trucks for deliveries to and from the warehouse. Immediately inside the gate, to the right, is a one lane driveway to the employee parking lot. Brandon and Jerry Smith stationed themselves at the curb, the public right of way. The employees went onto company property outside the fence and gate. Jones went to the area immediately outside the gate on the right, outside the fence but near the no trespassing sign.

Soon after Jones did so, Operations Supervisor Greg Bradsher approached her stating, "You're going to have to leave OHL premises immediately. You're not allowed to be on OHL premises." Jones stated that she was an OHL employee and had the right to handbill "my coworkers." Bradsher asked whether she could handbill "on the street . . . where you had been" on previous occasions. The employees continued to handbill and Bradsher walked back towards the main entrance to the warehouse.

Bradsher claimed that when he observed Jones she was inside the fence, next to the one lane driveway leading to the employee parking lot. He admits telling her that she would have to move to the curb of Global Drive. Jones protested that she was an employee. Bradsher recalls that he then requested Jones to get out of the driveway so as not to get hit or cause an accident and that Jones did so.

International Organizer Brandon confirmed that Jones was outside the fence. When Bradsher spoke with Jones, she called to Brandon reporting that she had been told they could not handbill there. Brandon called to Bradsher stating that they were OHL employees and had the "right to handbill there to their coworkers." Bradsher replied that he did not care, he wanted them "off the property." Brandon replied that they were not leaving, they were OHL employees and "they got a right to handbill." Bradsher did not deny the foregoing interaction with Brandon.

When Operations Supervisor Bradsher returned to the warehouse he met Area Manager Kelvin Davis coming out of the warehouse. Davis began walking towards Jones.

Area Manager Davis, approached Jones stating, "You all going to have to leave the premises right now." Whether he mentioned calling law enforcement officers is immaterial insofar as there is no allegation in that regard. Davis then stated, "You're on company property and you're not allowed." Jones stated that she was an employee. Davis noted that she did not have a badge. Jones either retrieved her employee badge from her vehicle or had one of the other employees who were leafletting retrieve it. She showed it to Davis who stated, "Well, you're going to have to go to the street where you were . . . you're not allowed to do this on [company] property." Jones continued to leaflet.

Bradsher recalled that Davis told Jones that she "needed to move out of the drive, that she needed to move back behind the gate or outside the gate."

International Organizer Brandon overheard the conversation between Davis and Jones. When Davis approached Jones, he stated, "We want you guys off our property. You can't do that stuff here. You're trespassing." He called out to Davis, "These guys, they work there." Davis answered, "I don't care. I want them off my property. Can't do that here." Brandon replied, "Well, they got a legal right to do it."

Area Manager Davis testified to making only two statements, one to Jones and the other to Brandon and the other employees. He claims that he approached Jones and asked if she could "kindly just step back. . . . A lot of cars make their turn because I don't want anybody to get hurt." He acknowledged that the employees and a gentleman, Brandon, called out that Jones was an employee and allowed to be there. Davis claims that he replied that he was not asking her to leave. "I'm just asking her not to impede the traffic flow. I don't want anybody to get hurt on the property."

Jones acknowledged that occupants of vehicles who took the literature being passed out would stop to receive the literature, explaining on cross-examination that she did not stop the vehicles, that they would "only stop if they wanted to stop." She denied that either Bradsher or Davis said anything about blocking traffic, being injured, or causing an accident.

The Respondent, in its brief, argues that Davis did not tell the other employees to leave. Contrary to that argument, Davis, as Jones recalled, stated, "You all going to have to leave the premises," and, as Brandon recalled, said, "We want you guys off our property."

I credit Jones and Brandon. Bradsher claimed that Davis directed Jones "to move back behind the gate or outside the gate," but Jones was already outside the gate. On cross-examination, Davis acknowledged that Jones was not standing in front of vehicles thereby blocking them. He stated that Jones "was forcefully standing there handing out fliers. And she was slowing them down. There were cars that were backing up." Insofar as that is how he assessed the situation, I find it incredible that he would have simply asked Jones to "step back," the only direction to her that he claims to have given. Cars were backing up because employees were taking the union fliers being distributed and had to slow down to obtain the literature.

The Respondent did not want that to occur and directed the employees distributing that literature to get off of Company property.

Employees may engage in lawful solicitation and distribution at other facilities of their employer. *ITT Industries, Inc.*, 341 NLRB 937 (2004), *enfd.* 413 F.3d 64 (D.C. Cir. 2005). Davis directed employees to cease engaging in that protected activity when he stated, “[Y]ou’re not allowed to do this on [company] property,” after Jones had identified herself as an OHL employee. By doing so, the Respondent interfered with the employees’ right to distribute literature to their fellow employees in nonworking areas on nonworking time in violation of Section 8(a)(1) of the Act.

Paragraph 11 of the complaint alleges interference with the distribution of literature at the Remington warehouse on September 25 and interrogation of employees about their union activities. On that date, employees Carolyn Jones and Kamisha Watson went to the Remington warehouse. They went through the gate onto the parking area in front of the warehouse. When they observed employees coming out of the warehouse for their afternoon break, Watson went to the employees coming out near the loading dock. Jones approached the employees who had come outside the main entrance and were sitting on a bench near the entrance. As Jones approached them, a security guard came out of the building and told her that she was “going to have to leave the premises.” Jones responded that she had a right to be there. The security guard said that he was “just doing what they told me to do” and went back inside. Jones began talking to her coworkers about the Union. Operations Manager Roy Ewing, who knew that Jones was an employee, came out and told her, “You know you can’t be out here doing this stuff.” Jones, replied that she was trying to get her coworkers signed up and was “not doing anything wrong,” that “Federal law gives me that right to do that.” Ewing stated, “Well, you don’t work over here at Remington.” Jones replied that she did work for OHL. Ewing stated, “Yeah, but you don’t work in this building, so you going to have to leave the premises.” Jones said, “Okay.”

Employee David Freeman was in the group of employees to whom Jones was speaking. He corroborated Jones’ testimony that Ewing told her that she “can’t be doing it [soliciting] on the property.” Jones replied that she was an employee and that she could solicit as “long as it [was] on our break.” His incorrect recollection that another lady was present when Ewing spoke to Jones does not detract from his credible recollection of what Ewing said to Jones. Although Watson was not present at the time of the conversation, she was present on the premises.

Operations Manager Ewing claims that, when he went to find out what was occurring, Jones stated to him that she was “trying to get into the building.” He called her aside. According to Ewing, Jones asked whether he was “going to let me in the building.” He asked her to calm down, that he wanted to ask her a few questions. Jones asked for his name, to which Ewing replied that she knew his name. She then made a call on her cellular telephone and walked off, meeting another woman, Watson, and leaving the area.

Jones denies making any statement relative to getting into the building. She noted that Ewing asked her to come to his office. She refused, saying, “No, let’s just stay on the outside.”

I credit Jones. Jones was aware of the OHL solicitation policy as set out in the letter she had received on August 11. Employee Freeman heard Jones arguing that she had the right to solicit during the employees’ break. Ewing’s defensive demeanor was unimpressive. In an email he prepared after the events of August, he states that he “wanted to speak to Ms. Jones in private to see if there was a concern regarding Officer Shipp’s behavior and his actions,” a concern that he never claims communicating to Jones. Ewing admitted that he observed literature and the group of employees to whom Jones was speaking and that he knew “some solicitation [was] going on because of what I saw.”

When break was over and the employees had returned to inside the facility, Ewing waved for them to come together. Employee David Freeman recalls that Ewing questioned the employees, asking, “What did they say? What is [sic] the pamphlets about?” Freeman recalls answering, “They didn’t say nothing.” Jeovunte Gant confirms that Ewing asked what “the young ladies [were] talking about?” He recalls replying that they “were giving us some union literature.” Ewing asked, “Well, did you guys accept any of the literature? Do you understand what they’re talking about?”

Ewing denied asking the employees what Jones and Watson had talked about or mentioning union literature. He recalled stating that he did not know “what happened out front,” but there was “a lot of commotion,” and that he wanted to “make sure did anyone have any concerns.” He claims that Jeovunte Gant, stated that “we don’t want her here. We don’t understand why she was here.” No one else said anything and the employees returned to work.

I credit Freeman and Gant. Ewing had interrupted what he understood was Jones’ solicitation of the Remington employees to whom she had been speaking. Ewing claimed that he “didn’t know if she was violating company policy by handing out any types of literature.” He denied asking for any literature that had been distributed, but did not specifically deny asking what the literature was about.

Employees have the right to engage in lawful solicitation and distribution at other facilities of their employer. Ewing’s informing Jones that she could not be “doing this stuff” at the Remington facility, that she did not work “at Remington” and would have to “leave the premises,” unlawfully restricted her right to engage in lawful solicitation and distribution.

Ewing thereafter interrogated the employees with whom Jones had been speaking. Ewing knew “some solicitation [was] going on because of what I saw.” He sought to learn what had been said, whether the employees had accepted any literature, and if they understood what they had been told. There is no evidence that Ewing was aware of the union sympathies of the employees he was addressing. Ewing’s attempt to learn what the employees had been told, whether they understood, and whether they had accepted literature following the solicitation of Jones was a coercive inquiry regarding their union activities.

The Respondent, by prohibiting employees from engaging in lawful solicitation and distribution at a location of the Company

at which they did not work and coercively interrogating employees regarding their union activities, violated Section 8(a)(1) of the Act.

Paragraph 12 of the complaint alleges an early October interrogation of an employee by Operations Supervisor Alfreda Owens. Employee Jennifer Smith recalled that Owens approached her in a one-on-one conversation as she was distributing a handout prepared by the Company. She commented upon “stress” resulting from the organizational effort of the Union and then asked how Smith felt. Smith did not respond and Owens stated that she did not want to know how she felt. Owens denied having any one-on-one conversation with Smith due to previous misunderstanding that had occurred between them. Whether I credit that denial is irrelevant. Owens was aware of Smith’s support of the Union as established by an email she sent to Human Resource Manager Young on July 30. Young believed that Owens was aware of her support for the Union. Owens’ immediate retraction of her question precludes any finding of coercion. I shall recommend that this allegation be dismissed.

Paragraph 13 of the complaint alleges interrogation of an employee by Operations Supervisor William Pope on October 7. Employee Andrew Wardlow recalled that he saw that employee Malcolm Boyd in the HP account needed assistance and went to help. Operations Supervisor Pope approached, pointed to the “Union Yes” button that Wardlow was wearing, and stated that was “why people don’t have jobs, . . . because of you and this button.” Pope asked why Wardlow would want to join a union. Wardlow replied, “[B]enefits and job security.” Pope did not deny observing the “Union Yes” button, and admitted asking Wardlow, “What can Union do for you?” Pope was not Wardlow’s supervisor. The foregoing noncoercive exchange occurred on the warehouse floor. I shall recommend that this allegation be dismissed.

Paragraph 14 of the complaint alleges an implied threat of unspecified reprisals by Senior Vice President Randall Coleman. On October 17, after work, employee Andrew Wardlow, who works in the Waterpik account, went to the breakroom used by employees who work in the HP account and placed some union literature on the break tables. As he came downstairs from the breakroom, he encountered Senior Vice President Coleman who asked whether he knew what soliciting was. Wardlow initially testified that Coleman told him that he could get in trouble for soliciting, but on cross-examination agreed that Coleman said, “soliciting during working time.”

Coleman acknowledges that he had a conversation in which he asked whether Wardlow was aware of the Company’s no solicitation policy. When Wardlow stated that he did not know “what it is,” Coleman suggested he speak with Van Young regarding the policy. Wardlow admits that Coleman told him that he could talk with Van Young. I credit Coleman. Even if I were to credit Wardlow rather than Coleman, his admission on cross examination that he was asked whether he knew he could get in trouble for “soliciting during working time,” negates any unlawful threat. I shall recommend that the foregoing allegation be dismissed.

Paragraph 15 of the complaint alleges interrogation and a threat of unspecified reprisal by Area Manager Linda Sones. On

October 22, employee Anita Wells was approached by Sones who asked whether Wells was going to eat fried fish that day. Prior to October 22, employees who supported the Union announced on a flier an open house fish fry, sponsored by the “in plant organizing committee,” at the Steelworkers union hall. The flier listed the names of the members of the sponsoring committee, including Anita Wells. Wells answered that she was not going to eat fried fish, but that she did eat fish. Well recalls that the conversation continued, with Sones asking about her fiancé, a former employee working at another company. Wells replied that he was fine. Sones commented that it was “a good thing you guys don’t work for the same job any more.” Wells said, “Really.” Sones stated, “Yeah, both you all working here, anything could happen.” Sones admitted having seen the flier, asking about the fish fry, and inquiring about Wells fiancé. She did not deny the remark about it being a good thing that they were not both working the same job. The Union was not mentioned.

The General Counsel argues that inquiring whether Wells, named as a sponsor of the fish fry, was going to eat fried fish that evening constituted a coercive interrogation. I find no coercion in a casual exchange that referred to the fish fry that the employee was hosting. Sones comment regarding the same employer reflects her belief that not having both parties to a relationship dependent upon the same source of income was a “good thing.” The “anything could happen” comment following the recognition that Wells and her fiancé worked for different employers threatened nothing. I shall recommend that this allegation be dismissed.

### C. The 8(a)(3) Allegations

The complaint alleges the unlawful discharge of employee Charles Tate, the unlawful warning and discharge of employee Renal Dotson, the unlawful warning and suspension of employee Carolyn Jones, and the unlawful discharge of employee Jerry Smith. As hereinafter discussed, there is an issue regarding the Respondent’s knowledge of the union activity of Tate and the date that the Respondent became aware of the union activity of Dotson.

The Respondent was fully aware of the union activity of Dotson, Jones, and Smith as of mid-August. In a weekly report for the week ending August 17, Van Young refers to having spoken with Andrew Tidwell, Employee Relations Manager Laura Reed’s superior, regarding “presumed union activity in the Fiskars and Nat Geo accounts.” Young reported that Jones and Smith “are presumed the chairs of this drive.” An email dated August 27 reports that Dotson “is working hand in hand with the crew that is trying to drive a union into OHL Memphis.”

By midafternoon on August 28, none of the three were working. On August 28, Dotson and Smith were discharged and Jones was suspended for 5 days. With regard to the events of August 28, under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), there is no issue that Dotson, Jones, and Smith had engaged in and were engaging in union activity and that the Respondent was fully aware of that activity. The statements and conduct that I have found violated Section 8(a)(1) of the Act establish the Re-

spondent's animus towards that activity and employees who were engaging in that activity. The reference in Young's email regarding Dotson working "hand in hand with the crew that is trying to drive a union into OHL," a crew that included Jones and Smith, establishes a motivational link or nexus between the Respondent's animus and the adverse employment actions taken against Dotson, Jones, and Smith. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor in Respondent's actions against these employees on August 28. *Manno Electric*, 321 NLRB 278 (1996).

#### 1. Charles Tate

##### a. Facts

Tate began working for the Company on March 3. He worked in the Waterpik account. His employment ended on June 2. It was Tate who contacted the Union. Tate thereafter began speaking with his fellow employees regarding how having a union "would benefit them" and passing out union literature. Tate did this during break periods and after work in the parking lot.

Tate recalled one occasion upon which his supervisor, Willie Dye, observed him when he drove by with the window of his vehicle down, and an occasion upon which Area Manager Phil Smith observed him. Tate provided no description of the circumstances regarding Smith observing him. Smith denied having done so. Dye denies ever observing Tate passing anything out. Tate did not claim that either Dye or Smith were aware of what he was passing out.

As already discussed, union meetings were initially announced by party invitations that Carolyn Jones prepared. Tate confirmed that the party invitations were used "to cover up the fact" that the employees were discussing unionization.

On June 1, Tate recalled that, at the end of the workday, he "was entering his [Operations Supervisor Dye's] office." He did not specify why he did so. He recalled that Dye had one of the "party invites" in his hand. Tate testified that Dye stated, "Charles, me and you're cool. But you know a Union can't get in here in a recession. If I was you, I would put an end to it." Tate says he replied that he "didn't know what he [Dye] was talking about."

Dye denied the foregoing conversation. Dye stated that he became aware of the union organizational effort more than a month after Tate ceased working for OHL. He denied having any conversation with Tate relating to unions. He specifically denied making a comment regarding a union being unable to get in during a recession.

Tate did not state how he identified the "party invite." Tate does not claim that Dye questioned him about that document which made no reference to the Union. Carolyn Jones, who prepared the party invitations, testified that the first union meeting was on June 18. Insofar as the prounion employees were being circumspect regarding their activities, I find it unlikely that they were issuing party invitations more than 2 weeks before the first union meeting. No invitation was offered into evidence. I credit Dye's denial of the conversation in which Dye purportedly informed Tate that a union could not get into

the Company "in a recession," and that, "If I was you, I would put an end to it."

In order to prevent theft or otherwise compromise the services it provides to customers, the Company assures that all employees, when they enter and exit from their work areas, pass through a metal detector, which is monitored by a security guard.

On June 2, as Tate passed through the metal detector following his lunchbreak, the detector "beeped." Tate backed up and tried to enter a second time but the detector beeped again. Tate patted his pockets and realized that he had put his cellular telephone in his pocket. Employees may not bring cell phones onto the warehouse floor. The security guard asked him to go back through again, but Tate refused, saying that he had to put his cell phone up. He ran upstairs to the breakroom to do so. The security guard followed and asked his name, to which Tate replied, "Charles Tate." The security guard asked him where his badge was. Tate replied that he had a badge, "a temporary badge," that he had lost his real badge and that they were "making me another one." The security guard stated to Tate that he was "in trouble." Tate secured his cellular telephone in his locker and then went through the metal detector without incident. The security guard made no comment when he did so.

After Tate had been working for about 10 minutes, Operations Supervisor Dye called a meeting of the employees working in Waterpik. He told the employees that they "needed to obey the security guard," not to mess with him because "[h]e's with upper management." Dye then directed Tate to come into his office. Tate did so. In the office, Tate claims that Dye told him, "Let me have your badge." Tate asked, "For what?" Dye answered, "I told you, you can't mess with upper management. Ain't nothing I can do about it. . . . I'm fixing to walk you out."

Employee Helen Herron approached Dye as he and Tate left the office. She overheard Dye ask Tate for his badge. Tate threw his badge on the floor. Although Herron did not testify to any conversation with Dye, Tate confirmed that Dye "was talking to Helen [Herron]." As Dye was speaking to Herron, Tate felt he was "up there looking like a fool." He stated to Dye, "Hell with it, I'm fixing to go." As he walked off, Tate acknowledged that he "pushed a garbage can" into the wall. Dye asked what was wrong with him, that he knew he could not "push the garbage can." Tate recalls replying, "Man you done fired me anyway, it don't matter."

Employee Andrew Wardlow observed Dye and Tate together in the office. Although initially testifying that Dye was holding Tate's badge, he acknowledged that he could not see what Dye was holding. As Dye and Tate left the office, Wardlow recalled that Tate stated to him, "The fucker just fired me."

Dye recalled that, on June 2 as he was returning from lunch, the security guard, Randy Knott, informed him that there had been a problem with Tate not following his instructions. He explained that, after Tate had set off the metal detector alarm, he refused to make another attempt to pass through the detector and left. As Tate left, he did not respond to Knott's instruction to return. Dye stated that he would find Tate and bring him back to the security entrance and "we'll see what is going on." Upon locating Tate, Dye asked him what was going on, ex-

plaining that the security guard told him that Tate had refused to go back through the metal detector. Tate replied, "I ain't studdin' it," a slang expression meaning that he was not worried about that. Dye called the employees he supervised together and held a short meeting in which he stated to the employees, as he had on previous occasions, that they must adhere to safety and security policies. He then informed Tate that they "needed to go up here and find out what's going on," and that he needed to write all this down. Dye went into his office to get paper and pencil. As he was doing so, he heard Tate state, "I ain't studdin' this mother fucking company." Tate continued what Dye described as a rant, pushing a garbage can and throwing a clipboard with papers on it. Tate continued, stating "Fuck this job, I don't need this job. I'm fired anyway. I quit. You all gong to fire me anyway."

Dye sought to calm Tate down, telling him that he knew he could not do "this here," and stating, "Let's go on up here with Randy [Knott]," the security guard whose instruction Tate had not followed. Tate continued to use profanity. Dye asked Tate whether he was quitting, and Tate answered, "Yeah, fuck OHL. Yeah, I quit."

Tate admitted that he was never told that he was terminated or fired, that Dye only told him that he was going to walk him out.

At the Company, discharges are handled by human resources. Dye credibly testified that he does not have the authority, on his own, to fire an employee. The record does not establish whether Tate, a relatively new employee, was aware of that fact.

Carolyn Jones overheard her supervisor, Barbara Oyugi, speaking on the telephone and thereafter telling two employees that Tate was fired for "trying to bring a cell phone on the floor and he cursed security out."

Tate received a separation notice stating, "Resigned-no notice," in the mail. He did not call the Company to dispute the notice. Counsel for the General Counsel presented documents reflecting that Tate was granted unemployment compensation. Tate acknowledged that he was aware that the appeal of the Company was late; therefore, he never testified.

#### *b. Analysis and concluding findings*

The Respondent argues that it had no knowledge of Tate's union activity and that he quit. The General Counsel argues that the Respondent did have knowledge of Tate's union activity and that it discharged him, citing Operations Supervisor Oyugi's comments that were overheard by Carolyn Jones. The information Oyugi received, that Tate had tried to bring a cell phone onto the floor and that he had cursed security, was inaccurate. As hereinafter discussed, the information that Tate was fired was also inaccurate.

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the mutually corroborative testimony of Jones and Tate establish that Tate did engage in union activity. The 8(a)(1) violations found herein establish that the Respondent bore animus towards union activity and employees who engaged in that activity. I do not, however, find that the Respondent was aware of Tate's involvement in union activity. I further

find that Tate quit because he believed, erroneously, that he had been fired.

Although Tate testified that he was observed by Supervisor Dye and Area Manager Smith distributing union literature in the parking lot, both deny having done so. Even if they had observed Tate distributing something, there is no evidence that Dye or Smith was aware of what Tate was distributing. In view of the vigilance of the Respondent's supervisors with regard to union organizational activity, vigilance confirmed by Manager Young's interrogating employee Udenise Martin, emails describing conversations reported by employees, and memoranda reflecting observations made by management, I am satisfied that the presence of union literature in the parking lot would have been noted if it had come to management's attention. I credit Dye and Smith's denials that they ever observed Tate handing out anything.

The testimony regarding what occurred after Dye was informed of a problem regarding Tate by the security guard is conflicting and inconsistent. Tate recalls that, in the office, Dye asked for his badge and said he was "fixing to walk you out." Dye denied calling Tate into the office but recalled telling Tate that they "needed to go up here and find out what's going on." In context, "up here" was a reference to the location of the detector and security guard.

I find that Dye was mistaken regarding whether he called Tate into his office. The mutually corroborative testimony of Tate, Herron, and Wardlow confirm that Tate and Dye were both in the office for a brief period of time. Contrary to the testimony of Tate, Dye did not ask for his badge. If he had done so, Tate would have given it to him and would, therefore, have not had the badge outside of the office when Herron observed him throw it onto the floor.

I credit Dye's testimony that he told Tate that they "needed to go up here and find out what's going on." Tate, having been informed by the security guard that he was "in trouble," was distraught and assumed the worst. Dye had no authority to discharge employees. Although Tate may have interpreted Dye's statement that they "needed to go up here and find out what's going on" to have meant that Dye was "fixing to walk . . . [him] out," Dye did not say that.

Tate testified that, as they were leaving the office, they stopped and Dye engaged in conversation with Herron. Tate says that he felt that he was "up there looking like a fool," and that he stated to Dye, "Hell with it, I'm fixing to go." Dye heard Tate loudly stating, "Fuck this job, I don't need this job. I'm fired anyway. I quit. You all going to fire me anyway."

"Fixing" was a word used by Tate, not Dye. Employee Wardlow's testimony that Tate told him that the "fucker just fired me" suggests that Dye's version of what Tate said is more accurate. Whether Tate told Dye that he was "fixing to go," or, as Dye recalls, stated, "I'm fired anyway. I quit. You all going to fire me anyway" is immaterial. Regardless of the exact words used, in that situation Dye would certainly have asked Tate for his badge. Tate had, by that point, lost control as confirmed by his throwing his badge onto the floor and pushing a garbage can into the wall.

Tate acknowledged that he received paperwork from the Company stating that he had resigned but did not contact the

Company to protest that the paperwork was inaccurate, that he had been fired. Tate, being distraught following his encounter with the security guard, thought that he was going to be fired. He admitted that he was never told that he was terminated or fired. Tate, believing that he was going to be fired, quit.

Even if, contrary to the foregoing analysis and discussion, I were to have found that Tate was discharged, I would further find that the General Counsel failed to establish that the Respondent had knowledge of his union activity and would, therefore, recommend that the discharge allegation be dismissed.

Paragraph 9 of the complaint alleges a threat of discharge by Operations Supervisor Dye on June 1. As discussed above, I have credited Dye's denial of that conversation. I shall recommend that paragraph 9 of the complaint be dismissed. I shall also recommend that the allegation in subparagraph 16(a) of the complaint, that the Respondent discharged Tate because of his union activity, be dismissed.

## 2. Renal Dotson

### *a. Facts*

Dotson, who began working for the Company as a temporary employee referred by Staff Mart, was hired in March. Dotson worked in the Fiskars account as a "reach truck" driver. A reach truck is similar to a forklift except the driver stands when operating the vehicle. Dotson performed putaways, placing products that had been delivered into their appropriate locations, and replenishments, bringing products from their stored locations to employees who packed the product for shipment to the customer. The supervisor of the Fiskars account is Barbara Oyugi. She is overseen by Operations Manager Jim Windisch who reports to Area Manager Phil Smith.

Dotson was "recruited" into the organizational effort of the Union by Carolyn Jones. Thereafter he spoke with employees and distributed prounion literature. When on the job, he kept prounion literature in a blue folder that he placed in a pocket on his reach truck. On July 30, Dotson briefly left his reach truck. He observed Operations Manager Jim Windisch at his truck. He approached, asking what he was doing. Windisch did not respond and left. Dotson then observed that pieces of his prounion literature were on the floor of the reach truck.

On the morning of July 31, Dotson had been approved to work overtime by his supervisor, Barbara Oyugi. He reported to work in order to assist in placing special labels on a product for shipment to a customer. After doing so for some period of time, the employees were running out of product. Dotson was told by Brittany Newberry, who was "over special labeling," that he "needed to go and get my reach truck" to obtain additional product, a replenishment. He did so. As he was leaving, employee Tiffany Robertson requested a replenishment for the product that she was packing. When Dotson returned with the product that Newberry needed, he prepared to assist Robertson. Newberry asked where he was going, and Dotson responded that "Ms. Tiffany needed a replenishment." Newberry told him to "go ahead." Supervisor Oyugi confirmed that she had instructed the reach truckdrivers that "if a Picker comes and asks them for replenishing and they're doing replenishments they are supposed to . . . replen[ish] for the Picker." Newberry confirmed that, if Dotson had not complied with her request that

she would have been idle. She needed the product to continue to work. Dotson was told that the employees working on special labeling were almost finished, and began performing putaways.

Operations Manager Windisch, who came to work on July 31 at 6:15 a.m., observed Dotson performing the replenishments. He had no conversation with him. Windisch asked Oyugi about Dotson working overtime. Oyugi explained that she had him come in to assist in special labeling. Windisch told her that he had observed Dotson performing replenishments and stated, "We have to talk to him." Oyugi was unaware that disciplinary action was to be imposed. She understood that the meeting was to "talk to him."

Windisch claims that he informed Oyugi that he had observed Dotson performing replenishments and "we would issue a corrective action." I do not credit that testimony. Windisch initially claimed that Oyugi drafted the corrective action, but then retracted that testimony. I credit Oyugi and find that she was unaware that Windisch had decided to discipline Dotson before speaking with him.

On August 4, Dotson was called to Windisch's office. Oyugi was present but said nothing. Windisch told Dotson that he had been seen doing replenishments on the morning of July 31. Dotson explained that they had run "out of product and I had needed to do a replenishment." Windisch replied, "No, you supposed to have come in and did special labels instead of replenishing." Dotson replied that Oyugi had told the employees that if a picker needed help that we were supposed to "help them out." Windisch issued discipline to Dotson, an Employee Performance Report, referred to as an EPR, the disciplinary document used by the Company, dated August 2, reflecting that he had been issued a "verbal discussion."

On August 20, when Dotson arrived at work, he discovered that his reach truck, rather than being recharged, was sitting in the middle of the receiving floor. He took it to the charger and began assisting where needed, loading paper for Carolyn Jones and breaking down boxes in special labeling. At some point in the morning, Windisch came by and asked why he was not on the reach truck. Dotson explained that the battery was low, that the truck was on the charger. Windisch asked whether he could use another truck and Dotson replied, "No, not one that I'm comfortable with driving." Windisch gave no further direction. When the truck was charged, Dotson began doing putaways and replenishments. Windisch claims that he directed Dotson to get another reach truck, but that Dotson walked away saying, "Do not go there with me," and that later, when directed by Windisch to perform putaways instead of replenishments, stated that he wanted leadman Puckett "to tell me."

Windisch and Young claim that they issued an EPR, a final warning, to Dotson on August 20 for ignoring Windisch's order to obtain a different reach truck saying, "Do not go there with me," and stating that he wanted leadman Puckett "to tell me" to perform putaways. Dotson denied the foregoing comments as well as receipt of a final warning.

I credit the testimony of Dotson. On August 26, less than a week after Dotson had been purportedly issued a final warning, he met with Area Manager Smith and Windisch. Smith prepared a memorandum summarizing the meeting that states that

Windisch requested that Smith meet with him and Dotson relating to Dotson's engaging in conversation with another employee during a preshift meeting. The memorandum states that Windisch reported to Smith that Dotson had been "given a written warning" by him and Operations Supervisor Oyugi for "similar conduct in the recent past." There is no evidence of any such warning. The EPR dated August 2 related to his performing replenishments and was a verbal counseling. Smith's memorandum makes no mention of a final warning issued to Dotson on August 20.

On August 27, Van Young sent an email to Laura Reed relating to Dotson which attaches an email sent to Young by Windisch on August 26. Windisch's email states that he is attaching documentation relating to the discussion that he and Smith had with Dotson on August 26. It states, "I will do an EPR tomorrow as I do not have a copy at this time to type in." Young describes Dotson as a "real disruptive individual that is working hand in hand with the crew that is trying to drive a union into OHL Memphis." There is no mention that this "disruptive individual" was issued a final warning on August 20.

On August 26, Windisch called Dotson into a meeting with himself and Area Manager Smith in Windisch's office in Fiskars, the meeting to which Area Manager Smith's memorandum referred. Windisch claimed that the purpose of this meeting was to counsel Dotson regarding disrupting preshift meetings because Dotson had, that morning, engaged in conversation with Carolyn Jones during the preshift meeting. I do not credit the testimony of Windisch. No witness corroborated Windisch regarding a conversation or disruption, and Jones was not counseled.

Dotson, who did not know why he was being called to a meeting, brought his work folder with him. When asked why he brought it, he expressed concern that rules were being changed. Although Dotson cited no example to Smith and Windisch, I note that the protocol regarding passing through the metal detector changed between May and August. All participants in the meeting agree that Dotson asked whether OHL had any discount arrangements with national hotels or car rental companies. He was informed that the Company did not.

Area Manager Smith testified that he counseled Dotson regarding the importance of preshift meetings. Dotson recalls no such comments but does recall that Smith questioned him regarding why he was here at the Company, "Why am I working at this Company. Why don't I . . . find another job somewhere?" Dotson asked what was going on, and Smith repeated himself asking why he was working for this Company and asking, "Why don't you go down Holmes Road somewhere and find a new job?" Dotson replied that he was there because "I need to make money." He asked, "[W]hy you all coming at me like this?" Dotson recalled no response to that question.

Windisch confirmed that Smith asked Dotson whether he "want[ed] to work for OHL?" Dotson said, "Hey, I just want to go out and do my job. That's all I want to do."

Smith admitting reciting to Dotson an analogy relating to an uncomfortable mattress, explaining that if you hurt every morning you would get a new one, and applying that analogy to an employee's job, stating, "[I]f you're not happy with your job or your mattress, you need to look into getting a new one."

Smith's notes of the meeting do not reflect any comments in that regard. Whether Smith gave the foregoing analogy or not, I credit Dotson and find that Smith also asked, "Why don't you go down Holmes Road somewhere and find a new job?"

After being permitted to leave, Dotson returned to the task he had been performing, putaways. A picker asked for a replenishment, but Dotson refused, stating that he could not help because he didn't "want to get another write-up." As noted, Operations Supervisor Oyugi had told the reach truckdrivers that if "they're doing replenishments they are supposed to . . . replenish[ish] for the Picker." Dotson was performing putaways. Windisch overheard Dotson and directed him to "go to see Van Young." He did so. He and Young discussed a transfer "from Fiskars account to Public's." Young mentioned that Dotson "was going to be transferred within the next two weeks." Windisch arrived and stated that he wanted Dotson to be disciplined because he "wouldn't do what the Pickers wanted." Young asked Dotson what work he had been performing. Dotson relied "putaways." Young told him to go back downstairs to work, and he did so. Young did not deny the foregoing conversation.

Dotson was concerned regarding what had occurred on August 26. That evening he called the "Alertline," which he referred to as the "hotline," a toll free number employees could call to express job concerns. He expressed his concern that he had a "get-down-Holmes-Road meeting with Phil [Smith] and Jim [Windisch]." Dotson did not work the following day. He received a call from an unidentified employee that something was going to happen on the job. Dotson called the Alertline again and stated the he was "getting set up to get fired."

On the morning of August 28, Dotson arrived at work on time. Shortly after 8 a.m., he experienced severe intestinal issues that caused him to immediately go to the restroom. When he returned to the floor, the preshift meeting had already ended. It is undisputed that employees are not required to obtain permission before excusing themselves to the restroom. It is also undisputed that Dotson missed the preshift meeting.

Dotson began work. Thereafter, his supervisor, Barbara Oyugi, told him that he needed to report to Van Young's office. He did so. Young, Area Manager Smith, and Windisch were present. Dotson recalled that Smith informed him that he had "violated company policy and that was it." Smith stated to Dotson that he had been given "a few write-ups" and that he should get his paperwork and "[g]et down Holmes Road." Dotson was not given an EPR. The EPR relating to Dotson missing the meeting on August 28 (R. Exh. 7), bears no signatures of any management official. Dotson's Separation Notice had already been prepared. It states that Dotson was discharged for "violation of company policy failure to follow mgmt instructions." Dotson wrote on the form "for not showing up to a morning meeting."

Smith recalls that he began the meeting by asking Dotson what had been said that morning at the preshift meeting and that Dotson admitted that he did not know because he was not there. Smith claims that he asked why Dotson was not there and that he replied that he had been told that he was "distraction or disruption . . . so I just figured I wouldn't go."

Van Young recalled only that Smith asked Dotson, "Were you late?" Dotson replied, "No, I just didn't go." Smith then stated that "based on the numerous counselings and conversations that we've had with you regarding pre-shift meetings and other things, . . . we're at a point of termination." Young was asked whether Dotson offered an explanation for his absence and she responded that management had told him that he "was [a] distraction."

Dotson denied stating that he did not attend the meeting because he was a distraction.

The Company maintains an attendance policy pursuant to which employees who are tardy or absent are assessed points. The policy specifically provides: "Please keep in mind this policy also applies to overtime (mandatory and voluntary), scheduled meetings and scheduled training."

None of the management officials involved in the discharge of Dotson addressed the failure of the Respondent to treat his missed preshift meeting as an attendance violation.

Leadman John Puckett received an EPR, a verbal discussion, for failing to attend a meeting regarding an upcoming safety and sanitation audit. When informed of the meeting, Puckett stated that he would not be attending. The EPR notes that Puckett "must start taking his of position of Lead more serious[ly]."

#### *b. Analysis and concluding findings*

Dotson was named as a "one of the disruptive individual[s]" supporting the organizational effort of the Union in Young's email of August 27. Consistent with the testimony of Dotson, I find that the Respondent learned of his union sympathies on July 30 when Operation Manager Windisch discovered union literature on his reach truck. The record establishes the animus of the Respondent towards the Union and employees who engaged in union activity. The General Counsel established a prima facie case with regard to the discipline dated August 2, issued to Dotson on August 4, and his discharge on August 28.

The Respondent argues that Dotson, who was assisting in a special labeling project, improperly performed replenishments. The Respondent contends that Dotson, although obtaining product for Brittany Newberry so that the employees could continue the special labeling project, acted improperly by obtaining product for employee Tiffany Robertson because he had been authorized to work overtime for the special labeling project. It is undisputed that Dotson had previously been instructed by Operations Supervisor Oyugi that "if a Picker comes and asks . . . for replenishing and they're doing replenishments they are supposed to . . . replen[ish] for the Picker." Dotson performed a replenishment for the special labeling project. He was asked to perform a replenishment for Robertson. After receiving permission from Newberry, who was in charge of the special labeling project that was almost finished, he did so.

Windisch conducted no investigation. He did not speak to Newberry, who was in charge of the special labeling project, or to Dotson. He did not inform Dotson's supervisor, Barbara Oyugi, that he was going to issue a verbal counseling to Dotson. Supervisor Oyugi thought that the meeting was "to talk to him [Dotson]." "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investi-

gation] an opportunity to explain" are clear indicia of discriminatory intent." *Bantek West, Inc.*, 344 NLRB 886, 895 (2005), citing *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).

The Respondent does not explain how Dotson was expected to distinguish between obtaining product for the special labeling project and ordinary replenishments and, presumably, to refuse to replenish Robertson notwithstanding the standing instruction that, if performing replenishments, he should replenish a Picker when requested to do so. Newberry, who was in charge of the almost finished special labeling project, gave him permission to replenish Robertson. The Respondent presented no evidence of any other employee being disciplined for performing unauthorized work on overtime. The Respondent has not established that the discipline would have been issued in the absence of Dotson's union activity. I find that the verbal counseling prepared prior to meeting with Dotson and issued notwithstanding his explanation that if a Picker requested replenishment he was supposed to "help them out" was issued because of his union activity and violated Section 8(a)(3) of the Act.

As discussed above, I find that Dotson was issued no discipline on August 20. Area Manager Smith's memorandum reflects that Windisch informed him, incorrectly, that he and Oyugi had issued a written warning to Dotson relating to preshift meetings rather than a verbal counseling regarding replenishments. It mentions no final warning. Smith had not been present when the purported final warning was issued. He did not refer to any final warning in his testimony. When asked why he recommended that Dotson be terminated, Smith referred to "an employee not following the procedures that were set forth in front of him." Smith did not mention the issuance of a purported final warning 8 days earlier on August 20.

Young's email of August 27, attaching Windisch's email of August 26, makes no mention that Dotson had been issued a final warning. Windisch's email refers to an EPR that he was going to prepare. The email implies that the discipline related to the conversation that Windisch and Smith had with Dotson on August 26, but discipline was not mentioned in that meeting. Regardless of the reason for the EPR that Windisch was going to write, if Dotson had received a final warning and committed some further infraction that justified discipline, Windisch would not have simply been writing another EPR. He would have been consulting with Young and Smith regarding the level of discipline to be imposed.

I have credited the testimony of Dotson that Area Manager Smith, on August 26, asked, "Why don't you go down Holmes Road somewhere and find a new job?" Whether Smith also recited the mattress analogy is immaterial. Dotson got the message and reported to the Alertline that he had a "get-down-Holmes-Road meeting with Phil [Smith] and Jim.[Windisch]." An employer's suggestion to an employee that the employee could quit, in the context of the employee's union activity, violates the Act. *Roma Baking Co.*, 263 NLRB 24, 30 (1982). The Respondent, by suggesting that Dotson find another job, violated Section 8(a)(1) of the Act.

With regard to the discharge of Dotson, I agree with the argument in the brief of the Respondent that Dotson's testimony regarding whether he explained that he was in the restroom

during the preshift meeting is not credible. It also is not relevant. At the point that Dotson was called to the meeting, his Separation Notice had already been prepared. Dotson was told that he was being terminated for violation of company policy. Although Smith claims that he asked Dotson why he missed the meeting and received the response regarding Dotson not wanting to be a distraction, Young recalled that Smith asked only, "Were you late?" According to Young, Dotson replied, "I just didn't go." I credit the testimony of Dotson that he was not asked why he had missed the meeting. Smith told Dotson that he had "violated company policy and that was it."

Various witnesses testified to having missed preshift meetings for a variety of reasons, but were not disciplined. Leadman John Puckett received a verbal discussion dated August 2 for failing to attend a meeting regarding an upcoming safety and sanitation audit, not a daily preshift meeting. Puckett stated that he would not be attending. The EPR notes that Puckett "must start taking his of position of Lead more serious[ly]."

The Respondent established that preshift meetings were mandatory by placing into evidence its attendance policy which provides that the policy "also applies to overtime (mandatory and voluntary), scheduled meetings and scheduled training." The penalty for violation of the policy is assessment of attendance points. Neither Young, Smith, nor Windisch addressed why Dotson was not assessed attendance points pursuant to the policy.

Prior to August 28, there is no evidence that any employee had ever been disciplined, much less discharged, for missing a preshift meeting. As of August 28, the only discipline that had been issued to Dotson was a verbal counseling for replenishing. The Respondent has not established that Dotson would have been disciplined or discharged if he had not been working "hand in hand with the crew trying to drive a union into OHL." By discharging Renal Dotson because of his union activity, the Respondent violated Section 8(a)(3) of the Act.

### 3. Carolyn Jones

#### *a. Facts*

Jones was hired on August 7, 2007, and was an auditor in the Fiskars account. Her union activity is undisputed. On August 28, she was issued a verbal counseling for allegedly refusing to go to the back of the line at the metal detector on August 27. Later that day she was suspended for 5 days purportedly because of her conduct when being issued that discipline.

As already noted, all employees must pass through a metal detector when entering or leaving their work area. Although cellular telephones are not permitted on the warehouse floor, personal items such as keys may be brought onto the floor. These items, which would set off the detector, are passed through outside of the detector, similar to the protocol at airport security checkpoints. Area Manager Smith acknowledged that the procedure relating to passing through the detectors changed in the summer of 2009. In May, after employee Tate set off the alarm, the security guard directed him to try immediately to pass through. In August, when employee Carolyn Jones set off the alarm, she was directed to go to the back of the line.

On August 27, as Jones was passing through the metal detector to go on break, the detector beeped. Operations Manager

Jim Windisch, who was present, told Jones to "[g]o to the back of the line." She did so, stating that it would just make her break "a little bit longer." Employee Shelia Hicks recalled an occasion, during the week that Jones was suspended, upon which Operations Supervisor Windisch requested that Jones go to the back of the line, and that she did so. The log maintained by the security guard makes no mention of this incident, and no security incident report was made.

Operations Supervisor Windisch testified that, when the metal detector beeped the first time, he told Jones to go to the back of the line, that she ignored him and attempted to go through a second time. The metal detector beeped again and Jones ignored a second instruction to go to the back of the line. Then, "without saying a single word to me, [she] went back through the scanner" without setting it off. I find it incomprehensible that Windisch would not have immediately spoken to Jones if she had disobeyed his twice repeated instructions.

During the morning of August 28, Jones heard that Renal Dotson had been discharged.

Shortly before noon on August 28, Jones was called to the human resources office. Van Young and Windisch were present but said they needed to wait for Area Manager Phil Smith. Jones' supervisor, Barbara Oyugi, was not present. Smith arrived. Jones explained that she needed to get to her "son's school around 12:00." Smith stated that this "will only take a few minutes." He then informed Jones that security had reported that she had not gone "to the back of the line when I was supposed to." Jones replied that she had gone to the back of the line and did not know what security was talking about, that this was "a waste of time and she needed to be at the school." Jones requested that the security guard be brought "in here so he can tell me this in my face." Windisch interjected that the Company was "not going to bring up the security guard. We're not going to do it that way." Smith then stated that security also says that "you're always complaining. You always just have something to say every time he tells you something." Jones stated, "You all called me in here for this? . . . This just don't make any sense."

Jones then stated that Windisch was standing right behind her and knew what happened. Windisch shook his head and said, "[N]ope." Jones asked if he was "going to sit here and lie in my face and say that I did not go to the back of the line when you know I went to the back of the line?" Jones then accused Windisch of being a "habitual liar," referring to his agreement sometime in the past to obtain a fan for her work area. Smith pointed out that Windisch had submitted the request but it had not been approved. The conversation returned to whether Jones had returned to the back of the line. Windisch repeated that she had not, and Jones stated, "You know what? You are a lying sack of crap. . . . I did go to the back of the line. And I can't believe you're sitting here lying in my face."

Area Manager Smith then handed Jones an EPR, a written warning, which had already been prepared. Jones looked at it. Smith asked whether she was going to sign it, and she answered, "No, I'm not going to sign it . . . because this is—all this is false." She stated that she did have a comment to "put on there" and then wrote "10 witnesses." She asked whether she could "have a copy and leave?" Smith said, "You're not going

anywhere.” Jones turned to Young and said that “this is not procedure. You don’t . . . normally operate like this[. . .] you would have asked me my side of the story. You would have called me in here first before you all just ganged up on me like that. It’s just all three of you ganging up on me.” Jones stated that they were “trying to do to me the same thing you did to Dotson[.] . . . [b]ut it’s not going to work.”

Young made a copy of the EPR and Jones was permitted to leave. Because she had to return to her work area to obtain her keys, she was too late to make the appointment at her son’s school. I shall discuss what occurred after Jones retrieved her keys in my discussion of the discharge of Jerry Smith.

The testimony of Smith, Windisch, and Young regarding the foregoing disciplinary meeting is similar in most respects to that of Jones.

Although Windisch claimed that he provided Jones with a copy of her discipline at the beginning of the meeting, Area Manager Smith confirmed that Jones did not receive the EPR until after the acrimonious discussion, thus she was not aware that the meeting related to discipline rather than a reminder, similar to the discussion that had occurred on August 11 when he gave Jones the letter relating to solicitation. Windisch admitted telling Jones that the Company was “not going to bring up the security guard. We’re not going to do it that way.” He testified that, when he made that statement, there was “a sudden shift in attitude” by Jones.

Smith, Windisch, and Young all claim that Jones, rather than stating that Windisch was a lying “sack of crap,” stated that he was a “lying white crack,” but stopped herself before uttering the word “cracker.” Jones denied making that statement, explaining that that she considered the word “cracker” to be racist, thereby implying that she would not have made such a remark for that reason. I credit that testimony. The Respondent’s witnesses, at the hearing, agreed that the word “cracker” was never uttered. Laura Reed, to whom Young reported the foregoing meeting, did not state what she was told because she did not testify.

Shortly after Jones returned from her lunchbreak, having been unable to get to her son’s school, she was called to an office in the Fiskars account area. Area Manager Smith, Windisch, and Young were present. Corporate Employee Relations Manager Laura Reed was on a speaker telephone. Reed informed Jones that, “[u]pon doing an investigation and upon what management just told me, they said that you were being disrespectful.” Jones asked, “How is that.” Reed repeated that management said that she was disrespectful and “[s]o we’ve decided to put you on a five-day suspension.” Jones protested, “Ms. Reed, . . . how is it that you came up with this decision and you haven’t even gotten my side of the story yet? . . . Management just gang up on me. It was all three of them. . . . It was just me alone and they were attacking me. . . . [N]obody asked me my side of the story.” Reed replied, “Well, I’m going by what management said because they are management.”

Jones then asked whether “they” told her that “we were organizing a Union in this place?” Reed, although having received at least 2 weekly reports relating to organizational activity, untruthfully replied, “[N]o.” Jones asked whether “they” had told her that Renal Dotson was fired “for trying to organ-

ize?” Reed replied, “Well, I don’t know about that, Ms. Jones.” Jones stated that she was “not backing off.”

Smith addressed the foregoing meeting only in passing, noting that Jones asserted that she was a strong black woman and that he replied that he was a strong white man. Van Young testified that Smith informed Jones that she was being suspended for 5 days for her conduct in the morning meeting. Laura Reed did not testify. Van Young acknowledged that a 5-day suspension was unprecedented, but she did not bring that to Reed’s attention.

The Company admitted that, pursuant to subpoena, it had not provided any document relating to discipline imposed for incidents at the metal detectors, and the Company presented no evidence of discipline for any such incident ever having been issued. The security guards maintain daily logs that reflect incidents at the metal detector. An entry on July 25 reflects that new employees “protest[ed] concerning security procedures.” An entry on August 25 reports that Jones “became upset because she didn’t want to go to the end of line.” The accompanying August 25 incident report states that Jones became “upset and loud,” not that she refused to go to the end of the line. An incident report on September 11 reports that employee Andrew Marvine walked through the detector after being asked to step to the rear of line. He was not disciplined. The Company presented no daily log notation of any incident relating to Jones having occurred on August 27, and no incident report was prepared.

In August 2008, employee Dwight Beard called Area Manager Phil Smith a “damned liar.” When issued an EPR, he tore it up without reading it. The discipline was never reissued.

#### *b. Analysis and concluding findings*

Jones was singled out as one of the “presumed . . . chairs” of the union organizational effort in Manager Young’s weekly report of August 17. On August 28, Jones was issued an EPR, a written warning, for twice ignoring the direction of Operations Manager Windisch that she go to the back of the line at the metal detector. As already noted, I find it incomprehensible that Windisch would not have immediately spoken to Jones if she had disobeyed him twice. Jones denied that she refused to go to the back of the line. The security guard made no notation of the alleged incident on August 27, but did note the incident on August 25 and wrote an incident report on that date reflecting that Jones had become upset with the security procedure. During the week that Jones was suspended, Windisch mentioned no other occasion upon which he interacted with Jones at the metal detector. Employee Shelia Hicks, although not specifying a date, recalled the single incident upon which Windisch directed Jones to go to the back of the line and that Jones did so.

The General Counsel established a prima facie case that the warning issued to Jones on August 28 was motivated by her union activity. No employee except Jones has ever been disciplined for an incident at the metal detectors. The Respondent argues that Jones “refused to follow OHL’s security policies on two separate occasions;” however, the evidence establishes that there was no refusal on August 25, only an upset employee, and that the alleged incident on August 27 did not occur. Insofar as the *Wright Line* analysis is applicable in dual motive cases,

when the reason given for the action is either false or does not exist, the Respondent has not rebutted the General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). The Respondent, by issuing a warning to Jones because of her union activity, violated Section 8(a)(3) of the Act.

Jones was suspended, according to the Respondent, because of her remarks on August 28 when she was issued the warning. I have found that she did not commit the offense for which she was warned. The Respondent knew that she had not committed the offense. Jones' only accuser was Windisch who, purportedly, permitted Jones to leave on break after twice ignoring his instructions. Jones knew that she had obeyed the instruction and requested that the security guard be called. Windisch denied the request stating that the Respondent was "not going to bring up the security guard. We're not going to do it that way." He admitted, that when Jones was denied the security guard, who neither made a log entry nor wrote an incident report, that Jones exhibited "a sudden shift in attitude."

The General Counsel acknowledged that, insofar as Jones was not engaged in protected concerted activity or representation of a grievant, the license accorded to comments in those circumstances was not applicable in this case. *Atlantic Steel*, 245 NLRB 814 (1979). Nevertheless, the Board has long held that intemperate reactions, when provoked, do not justify discipline. See *Well Bred Loaf, Inc.*, 280 NLRB 306, 319 (1986). As explained by the Board in *E. I. Dupont de Nemours*, 263 NLRB 159, 160 (1982):

... [I]t is well settled that "[a]n employer cannot provoke an employee to the point where [the employee] commits . . . an indiscretion . . . and then rely on this to terminate [the] employment." *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965). Where the employer has provoked the employee, the onus for discharge should not be automatically transferred to the employee. To allow the employer to use the logical and intended result of its intensive harassment campaign to justify its discharge of the subject of that illegal harassment would be to reward the employer for its own wrongdoing. Bearing in mind that here Jones [the name of the employee] neither struck nor slapped his supervisor, we find that Jones' conduct was not so unreasonable in relation to Respondent's provocative harassment as to justify his discharge.

I find that Jones was provoked. Jones was called to the office in the presence of three of the highest ranking managers at the warehouse, and in the absence of her direct supervisor. Her request that the security guard, who the Respondent's managers knew was an eyewitness, be called was denied with Windisch telling her that the Respondent was "not going to do it that way." Windisch acknowledged that Jones exhibited a "shift in attitude" at that point. Insofar as it was apparent to Jones that she was going to have to rely upon the honesty of Windisch, her shift in attitude is understandable. The security guard, who made no log entry or incident report, would have exonerated Jones and established that Windisch's accusation was false. After Windisch twice denied to Jones that she had gone to the back of the line as he had instructed, she admits stating, "You know what? You are a lying sack of crap. . . . I did go to the

back of the line. And I can't believe you're sitting here lying in my face."

The Respondent's witnesses claimed that Jones, rather than stating that Jones said, "lying sack of crap," said that Windisch was a "lying white crack," but stopped before uttering the word "cracker." It is unknown what Young reported to Laura Reed, who did not testify. Reed did not mention either "crap" or "crack" in her conversation with Jones.

Jones considered "cracker" to be a pejorative term, but I note that the Atlanta Crackers were a minor league baseball team in Atlanta, Georgia, from 1901 until 1965. I have credited Jones regarding her admitted comment. Although justified insofar as it was provoked by an unjust accusation, I find the word "crap" to be at least as pejorative as the word "cracker," a word that the Respondent's witnesses agree that she did not actually say.

Jones, accused of an offense that she did not commit and denied the presence of the security guard who the Respondent knew was a witness, was provoked. Her only defense was to state that her accuser, Windisch, was a liar. She asserted that management had "ganged up on me . . . all three of you gang-ing up on me," an assertion fully confirmed by the record.

The Respondent tolerated situations in which distraught employees called supervisors liars as confirmed by the absence of any discipline imposed upon Dwight Beard when calling Area Manager Smith a "damned liar" with regard to a pay dispute.

Jones' indiscreet remark, provoked by the Respondent's accusation of an offense that she did not commit and denied an eyewitness, did not deprive Jones of the protection of the Act. Her reaction was not so unreasonable "in relation to Respondent's provocative" and untrue accusation as to justify suspension, an unprecedented suspension of 5 rather than 3 days. Jones, after being told that she was suspended, asked Reed whether "they" told her that "we were organizing a Union in this place?" Reed, notwithstanding having received various emails and weekly reports, untruthfully replied, "[N]o." The Respondent, by suspending Carolyn Jones for 5 days because of her union activities, violated Section 8(a)(3) of the Act.

#### 4. Jerry Smith

##### a. Facts

Jerry Smith, the boyfriend of Carolyn Jones, worked for the Respondent from October 15, 2007, until his discharge on August 28 purportedly for violating the Company's workplace violence policy. That policy prohibits various acts including causing physical injury, making threatening remarks, and "aggressive or hostile behavior that create a reasonable fear of injury to another person." The incident that precipitated his discharge occurred shortly after Jones received the warning for allegedly failing to return to the back of the line at the metal detector.

Jones, after being permitted to leave the human resources office, returned to her work area to obtain the keys to her vehicle. As she prepared to leave, Phil Smith and Windisch, who had entered the secure area, passed her. Phil Smith commented, "I thought you had something so important to do." Employee Athena Cartwright, who was leaving in order to obtain copies of a document, overheard Phil Smith ask Jones whether she was "late for her meeting," and that Jones replied, "You can't stop

this.” I do not credit Phil Smith’s claim that Jones asked, “How does it feel to do things dirty?” Jones began crying because she had missed the appointment at her son’s school, an appointment that was “very important” to her.

Both Cartwright and Jones walked past Phil Smith and Windisch on their way out of the secure work area. A photograph shows, and testimony establishes, that the secure work area is separated from the nonsecure area by a chain link fence. The metal detector provides an opening through the fence. The timeclock that employees punch is located on a wall approximately 12 feet from the metal detector outside of the secure area.

Jerry Smith, who worked in the Samys account, had come to the area outside of the fence to meet Jones. He was unaware that she had received a warning. He observed Phil Smith and Windisch pass Jones and appear to say something. He then saw that Jones had begun to cry. In order to be heard over the noise in the warehouse, he yelled out, “What’s the problem?” Phil Smith turned and “started walking fast toward where I [Jerry Smith] was standing” outside the fence.

I find that Jerry Smith’s testimony that he remained near the timeclock was mistaken. Employee Athena Cartwright confirms that Jerry Smith came up to the chain link fence. I find that he did so in order to be heard when asking, “What’s the problem?”

I do not credit the testimony of Phil Smith that Jerry Smith yelled out, “Do you have a problem?” or the testimony of Windisch that Smith said, “You got a problem?” No other witness corroborates that testimony. Carolyn Jones confirmed that Smith asked, “What’s the problem?” Athena Cartwright recalled that Jerry Smith asked, “Is everything okay? Is something wrong?” A security incident report states that Jerry Smith asked, “Is there a problem?”

Phil Smith asked Jerry Smith who he was talking to. Jerry Smith answered, “[T]o both of you.” Whether, as Jerry Smith recalled, Phil Smith replied, “You better be talking to her. Because if you’re talking to me, you’re going to have a problem,” is irrelevant. Phil Smith confirmed by he was aware that “both of you” referred to himself and Carolyn Jones insofar as he admits telling Jerry Smith that “any problem with Carolyn isn’t between you and I. You don’t have anything to do with this.”

I do not credit the uncorroborated testimony of Operations Manager Windisch that, when asked to whom he was talking, Jerry Smith replied that he was talking “to you guys, both of you.” I also do not credit the uncorroborated testimony of Windisch that Jerry Smith clenched his fists and that the security guard stood up. Cartwright confirmed that Jerry Smith did not clench his fists, explaining that his “fingers were in the barbed wire,” i.e., the chain link fence. Although the security incident report reflects that the security guard was Laura Corcoran, the report was prepared by Randy Knott. That report states that Jerry Smith asked, “Is there a problem?” When asked by Phil Smith who he was addressing, Jerry Smith stated that he was addressing both Phil Smith and Jones. The report does not mention any action by the security guard. Consistent with the testimony of Athena Cartwright, I find that the security guard remained seated in her chair at the table. Cartwright was asked,

“[D]id she [the guard] ever move or intervene? Cartwright answered, “No. There was nothing to intervene about.”

As soon as Carolyn Jones exited through the metal detector, she grabbed Jerry Smith’s arm and told him they should go “because you know what they’re trying to do.” They clocked out and left for lunch.

Phil Smith admitted that Jerry Smith used no profanity and made no threatening statement. He did not claim that Jerry Smith clenched his fists. Jerry Smith recalled that he and Phil Smith were 7 or 8 feet apart. Phil Smith recalled that they were 4 or 5 feet apart. They were separated by the chain link fence. Windisch acknowledged that Phil Smith’s tone, when speaking to Jerry Smith, was a “little stern.”

Cartwright later passed through the metal detector as she returned with the copies of the documents that she had made. As she passed through the metal detector, security guard Corcoran asked her, “What happened? What’s going on?” Cartwright answered, “Your guess is good as mine. I don’t know what occurred.” Cartwright testified that it did not seem like anything major to her, that Jerry Smith asked, “Is there a problem? Is something wrong?” That it “was blown out of proportion on [by] the management they have.”

When Jones and Jerry Smith returned from lunch, each went to their work area and began working. Jones was called to an office in Fiskars and suspended. Thereafter, Jerry Smith’s supervisor, Sandy Pugh, informed Smith that she had been told to bring him to human resources. She asked, “What’s going on Jerry?” He replied, “I don’t know, Sandy.”

When they arrived, Phil Smith, Windisch, and Van Young were present. Phil Smith handed Jerry Smith an EPR that reflected that he was terminated and asked him to read it. The document reports that Jerry Smith became confrontational with both Phil Smith and Windisch, stating, “Do you have a problem,” and that, when asked by Phil Smith who he was talking to answered, “I am talking to the both of you.” It reports that Jerry Smith “repeated ‘What’s the problem,’” and that Jones “pulled Jerry [Smith] away.” Although the Separation Notice reflects that Jerry Smith was terminated for “violation of company workplace violence policy,” the EPR reflects that he was discharged for “improper conduct,” not “violation of company policy.”

Jerry Smith began to write an employee comment, but then stopped. Phil Smith stated that “OHL has a zero tolerance stipulation in place that . . . no violence is accepted.” He then stated that he “felt threatened by what I said.” Jerry Smith asked, “You felt threatened by me saying, ‘What’s the problem?’” Phil Smith replied, “I felt very threatened.” Young interjected that Phil Smith was an area manager and could “say what he wants to say on the floor any time he wants to. And what business is it of yours anyway?” Jerry Smith explained, “Carolyn [Jones] is a close friend of mine. I just wanted to resolve the problem.”

Jerry Smith then addressed Phil Smith stating, “If you really felt threatened about what I said, then I [am] going to apologize to you.” Laura Reed, who was on a speaker phone, interrupted and said, “Oh, it’s a little too late for that.” Jerry Smith was then again informed that “since I violated the company’s policy that I was going to be terminated as of today.” Jerry Smith again addressed Phil Smith asking, “You really mean to tell me

I threatened you by saying, ‘What’s the problem?’” And he said, “[Y]es, I did.”

Van Young testified that Laura Reed made the decision to discharge Jerry Smith pursuant to what Young reported, verbally, to her. There is no record of what Young told Reed, and Reed did not testify. In testifying about her conversation with Reed, Young stated that Reed informed her that Jerry Smith should be discharged because “he threatened two managers.” How Reed reached that conclusion is not reflected on the record. Neither Van Young nor any other representative of the Company spoke with Carolyn Jones or Athena Cartwright, both of whom witnessed the incident. Jerry Smith was never asked for his version of what occurred. The EPR terminating Jerry Smith had been prepared before he was called to the office.

Approximately 1 year prior to the foregoing incident, well before any union organizational activity, employee Dwight Beard and Area Manager Phil Smith had engaged in an argument during a preshift meeting in Fiskars. Beard, who understood that he was to be paid \$10.25 an hour but was being paid only \$10 an hour, asked Smith what the Company was “going to do about their money they owe us pre-rate for hiring us.” Smith called Beard a “damned liar.” Beard, who had been about 12 feet from Smith, walked to about 12 inches from Smith and “called him a damned liar back.” Beard removed his glasses and stated that he “was going to get my money.” Phil Smith appeared angry. He responded, “You want to make me get ghetto with you. We can take this outside.” Windisch came up and pushed Beard back. Beard was sent to the human resources office, but then permitted to return to work. That afternoon, Beard was called to an office and given a warning by Smith and leadman John Puckett. Beard did not read the document. He stated that he was not signing it, “tore it up and set it down on the desk and walked back out.” The discipline was never reissued. At the preshift meeting the next day Smith stated that he “was sorry for . . . the incident we had” and shook Beard’s hand.

Phil Smith did not deny any aspect of the credible testimony of Beard, but asserted that he did not feel threatened.

#### *b. Analysis and concluding findings*

Jerry Smith, with his girlfriend Carolyn Jones, was singled out as one of the “presumed . . . chairs” of the union organizational effort in Manager Young’s weekly report of August 17. Jerry Smith, who had worked for the Respondent since October 15, 2007, had no prior discipline. The Respondent’s animus is well established. Jerry Smith was discharged purportedly because of the incident that occurred on August 28 and as a direct result of Phil Smith’s claim that he felt threatened.

Phil Smith was standing with Windisch near the security guard and was separated from Jerry Smith by a chain link fence. Phil Smith says he stopped “four or five feet” from the fence. Phil Smith, although claiming that he felt threatened, did not back up. Jerry Smith returned to work after lunch and performed his job duties until his supervisor was directed to bring him to the office where he was discharged. The Respondent, although attempting to issue discipline to Dwight Beard, did not reissue the discipline after Beard tore it up and walked out. Dwight Beard, 1 year previously and prior to any union activi-

ty, called Phil Smith a “damned liar” 12 inches from his face. I find that the General Counsel established a prima facie case.

Although Van Young claimed that she spoke with the security guard before terminating Jerry Smith, I find that doubtful insofar as she testified that, when doing so, “[S]he [the security guard] was writing the report up.” The security incident report, although naming Laura Corcoran, the female security guard, was not written by Corcoran; it was written by Randy Knott, who did not witness the exchange between Phil Smith and Jerry Smith. Young’s summary notes relating to the termination do not reflect that she spoke with the security guard or reviewed any security tapes. If she had read or discussed the report with the security guard she would have been aware that it reported that Jerry Smith asked, “Is there a problem?” not “Do you have a problem?” as claimed by Phil Smith. Young did not speak with Jerry Smith, Carolyn Jones, or Athena Cartwright. “The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain” are clear indicia of discriminatory intent.” *Bantek West, Inc.*, supra.

Van Young testified that Laura Reed, based upon the verbal report that she received from Young, stated that Jerry Smith had threatened “two managers” and that was workplace violence and that he should be terminated. Insofar as Laura Reed did not testify, how she formed the belief that Jerry Smith threatened two managers is not established. Windisch, although asserting that Jerry Smith’s “gestures” were threatening, never claimed that he felt threatened. No witness corroborated Windisch’s claim that Jerry Smith clenched his fists. Did Young report that uncorroborated claim, an action that could not have occurred because his hands were on the fence? Did she report the existence of the fence and that Phil Smith and Jerry Smith were on opposite sides of it? Did she report that the security incident report contradicted the claim of Phil Smith and Windisch that Jerry Smith asked, “Do *you* have a problem?” [Emphasis added.]

The EPR reflecting the discharge of Jerry Smith incorrectly states that Jerry Smith asked Phil Smith and Windisch, “Do you have a problem?” Phil Smith, in claiming that he felt threatened, asserted that Jerry Smith’s hollering “if I have a problem” was threatening. Notwithstanding that claim, Phil Smith asserted that he was not threatened when Dwight Beard, who had been standing 12 feet from him, came to within 12 inches of his face, called him a “damned liar,” took off his glasses, and stated that he was going to get his money. Phil Smith suggested that they “take this outside.” Windisch pushed Beard back. There was no need for intervention on August 28, and neither Windisch nor the security guard intervened.

Beard, Jerry Smith, and Phil Smith, all of whom I observed at the hearing, are approximately the same size, both Beard and Jerry Smith being slightly, but not significantly, larger. Neither would qualify for a guard or tackle position on the Tennessee Titans. I find it inconceivable that Phil Smith, who invited Dwight Beard to go “outside” when he got 12 inches from his face, could honestly assert that he felt threatened by Jerry Smith asking, “What is the problem?” from the opposite side of a chain link fence, and I do not credit that testimony.

The Respondent's policy relates to "behavior that create[s] a reasonable fear of injury." Even if I were to find that Phil Smith did feel threatened, that feeling was not reasonable given the fact that Jerry Smith used no profanity, made no threat, did not clench his fists, and was on the other side of the fence from Phil Smith, Windisch, and the security guard. If there had been a reasonable fear of injury, Jerry Smith would not have been permitted to return to the warehouse and go to work after lunch. Phil Smith's feeling of a threat related to the real threat perceived by the Respondent: a prounion employee "trying to drive a union into OHL."

Laura Reed, who Young claims made the termination decision, did not testify; thus, the record does not reflect what Young reported to her. Young's verbal report to Reed had to have been inaccurate and incomplete in order for Reed to have concluded that Jerry Smith had threatened two managers. Windisch did not claim that he felt threatened. Young's failure to conduct an investigation meant that she did not report that only Phil Smith claimed that Jerry Smith had yelled, "Do you have a problem?" (Windisch claimed that Smith yelled, "You got a problem?") No other witness, including the security incident report, places the word "you" in Jerry Smith's question. The record does not establish whether Young reported that there was a fence separating Phil Smith and Jerry Smith and that a security guard was present at the metal detector, the only opening through the fence. The record does not reflect whether Young reported that there was no physical altercation, that there was no claim than Jerry Smith uttered any threat, and that no profanity was spoken.

The Board, in *Golden Foundry & Machine Co.*, 340 NLRB 1176, 1177 (2003), restated longstanding precedent regarding false reports made by supervisors.

It is well established that if a supervisor provides a false report that leads to a discharge, that supervisor's unlawful motivation is imputable to the employer, even if the official who actually makes the discharge determination is unaware of the supervisor's animus. [Citations omitted.]

The 8(a)(1) violations committed by Young and Phil Smith establish their animus towards the Union, animus confirmed by Young's reports and Phil Smith's tearing up of the prounion literature left by Yelverton while stating, "Not in my warehouse." As cogently stated by employee Athena Cartwright, the security guard did not intervene because there "was nothing to intervene about." The situation was "blown out of proportion . . . [by] management."

Insofar as a *Wright Line* analysis is applicable in dual motive cases, when the reason given for the action is either false, or does not exist, Respondent has not rebutted the General Counsel's prima facie case. *Limestone Apparel Corp.*, supra. Even if a *Wright Line* analysis were applicable, in view of the absence of any discipline imposed upon employee Dwight Beard, I would find that the Respondent did not establish that it would

have discharged Jerry Smith in the absence of his union activities. By discharging Jerry Smith because of his union activity, the Respondent violated Section 8(a)(3) of the Act.

#### CONCLUSIONS OF LAW

1. By coercively interrogating employees regarding their union activities and the union activities of other employees, by threatening employees with loss of the gain share program and other benefits if they selected the Union as their collective-bargaining representative, by telling employees who support the Union that they should find another job, by confiscating prounion literature from breakrooms prior to the ending of breaks, by threatening employees with loss of their jobs if they participate in an economic strike, by threatening that it would be futile for employees to select the Union as their collective-bargaining representative, by contacting the police to have union agents removed from public property, by interfering with employees' right to distribute literature to their fellow employees in nonworking areas on nonworking time, and by prohibiting employees from engaging in lawful solicitation and distribution at a location of the Company at which they did not work, the Respondent 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 warning and discharging Renal Dotson, warning and suspending Carolyn Jones, and discharging Jerry Smith, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### REMEDY

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

The Respondent must rescind the unlawful discipline issued to Renal Dotson and Carolyn Jones, and must make Carolyn Jones whole for any loss of earnings and other benefits suffered as a result of her suspension.

The Respondent having unlawfully discharged Renal Dotson and Jerry Smith, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from August 28, 2009, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987).

The General Counsel requests compound interest upon any backpay due. Consistent with the decision of the Board in *Glen Rock Ham*, 352 NLRB 516 (2008), not to deviate from its current practice of awarding simple interest, I deny that request.

The Respondent will also be ordered to post an appropriate notice.

[Recommended Order omitted from publication.]