

L & W Engineering Company and James Ogden.
Case 7-CA-18921

26 August 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND ZIMMERMAN**

On 18 January 1983 Administrative Law Judge Burton S. Kolko issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified and set forth in full below.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, L & W Engineering Company, Belleville, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees that the plant will be closed and/or relocated because they engage in union or other protected concerted activities.

(b) Threatening employees with the loss of benefits because they engage in union or other related concerted activities.

(c) Conveying to employees the futility of their engaging in union or other protected concerted activities.

(d) Coercively interrogating employees about their union or other protected concerted activities.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the absence of exceptions, Chairman Dotson adopts *pro forma* the Administrative Law Judge's findings that Respondent violated Sec. 8(a)(1) of the Act.

² The Administrative Law Judge failed to include in his recommended Order a provision remedying the violation of Sec. 8(a)(1) with regard to Respondent's unlawful no-solicitation rule. We will modify the recommended Order to provide for such a remedy. Moreover, as the Administrative Law Judge failed to provide for any injunctive language in his recommended Order, we shall further modify the recommended Order to include the narrow injunctive language "in any like or related manner."

(e) Maintaining an invalid no-solicitation rule in its employee handbook.

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

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

(a) Rescind the invalid no-solicitation rule in its employee handbook and notify its employees in writing of such rescission.

(b) Post at its Belleville, Michigan, facility copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

³ In the event that 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."

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT threaten our employees with closure and/or relocation of all or part of our facilities because of their union or other protected concerted activities.

WE WILL NOT threaten our employees with the loss of benefits because they engage in union or other protected concerted activities.

WE WILL NOT convey to employees the futility of their engaging in union or other protected concerted activities.

WE WILL NOT coercively interrogate employees about their union or other protected concerted activities.

WE WILL NOT maintain an invalid no-solicitation rule in our employee handbook.

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

WE WILL rescind the invalid no-solicitation rule in our employee handbook and notify our employees in writing of its rescission.

L & W ENGINEERING COMPANY

DECISION

STATEMENT OF THE CASE

BURTON S. KOLKO, Administrative Law Judge: The General Counsel's complaint alleges that L & W Engineering Company (herein L & W or Respondent) discharged James Ogden because of his union activities and engaged in coercive speech and interrogations to and of its employees. I dismiss the complaint on the discharge issue, and order Respondent to cease and desist on the speech and interrogation issues.

A. *The Discharge of James Ogden*

James Ogden had been employed by L & W since 1978. On February 13, 1981, he was assigned by his supervisor, Plant Foreman Joe Sikes, to run a spot welding machine. Previously, Ogden had been a quality control inspector, but had been reassigned out of quality control the month before. As part of his new duties he ran a spot welder or a washer. After being assigned to a spot welder on February 13, Ogden commenced working on the machine and continued to run it for about 2-1/2 to 3 hours. At that point Supervisor Margaret Gamache came through the shop passing out paychecks. As was the practice, Ogden stopped working to look at his paycheck, noticing that his hourly rate was down \$1.25. He mentioned that to Gamache as she returned to Ogden to inquire why he had not resumed welding, and told her that he wanted to see Joe Sikes about it. Sikes arrived shortly thereafter, whereupon Ogden stated: "Joe, I just received a dollar-and-a-quarter pay cut." Sikes then directed Ogden to run the machine, adding "if you don't like it quit." Sikes then left, but returned after Gamache and Jerry Gibson, a coworker with Ogden, respectively,

reported to Sikes that Ogden was not working his machine and that Ogden wanted to talk with Sikes again.¹ In the second meeting Sikes again told Ogden to run his machine. Ogden protested that he could not because, as he showed Sikes, the welding sparks had penetrated his shirt and were causing pinpoint burns on his chest.² Ogden insisted on receiving the protective clothing that he had been with out all morning, but was told by Sikes to shut up and run the machine or quit. Ogden, still not running the machine, responded that he could not afford to quit, whereupon Sikes told Ogden to follow him, and the two proceeded to the timeclock. Once there, Sikes pulled Ogden's timecard and punched it out, stating "you just quit." Ogden and Sikes then argued over whether Ogden had quit or was fired, with Sikes then sending Ogden back to his machine, only to join him there and announce "you are no longer employed here." Sikes then walked Ogden back to the timeclock and then obtained a separation slip that he asked Ogden to sign. Ogden refused, saying that the slip was inaccurate because it stated that he had quit.³ With Gamache witnessing, Sikes wrote in "refused to sign," and Ogden was escorted to the door to leave. Later that day some employees saw Ogden passing out union authorization cards at a nearby bank.

From this the General Counsel infers that Ogden was fired for one or both of these reasons: union organizing activity in which Ogden had been engaged or for his insistence on safe working conditions. Respondent denies both, asserting that Ogden quit or, in the alternative, that Respondent was unaware of any unionizing by Ogden and that his "Safety" concerns were not concerted activity that is protected by Section 7 of the Act.

B. *The Union Organizing Activities*

Respondent was generally aware of discussions among employees about contacting and organizing a union. The key questions are: did Respondent know about Ogden's role and, if so, was that the actual reason for his discharge?⁴ I find "no" to both questions.

The employee discussions started in late January 1981. Ogden and another employee, Dan Mullins, began talking to many of Respondent's employees in the plant cafeteria during breaktime or lunch and continued on a daily basis for about 2 weeks. Also in late January Ogden contacted the region 1E offices of the United Auto Workers.

¹ In the meantime, Sikes had informed Larry Gillespie, the plant manager, that Ogden was not running his machine because of the pay cut. Gillespie advised Sikes that Ogden should be told that a further refusal to run his machine would be considered quitting.

² While there is testimony that Ogden was not wearing a protective apron (Ogden testified that he had looked in vain for one), I credit the testimony of Gamache and former employee Daniel Mullins that Ogden did have on an apron. But it is clear from them that the low cut of the apron did not absorb sparks chest high. I credit Ogden over Sikes that Ogden showed Sikes the burn holes in his shirt.

³ The paper, titled "Separation Notice" read under Ogden's name, "reason for Separation, Misconduct--refused to operate assigned machine--quit without notice." (G.C. Exh. 3.)

⁴ I do not view this as a "mixed motive" situation. Either Respondent fired Ogden for union reasons in which case the defense of "quit" or "refusal to work" is a pretext, or the defense of "quit" or "refusal to work" is valid. Either way, a *Wright Line* analysis is unnecessary (251 NLRB 1083 (1980)); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

An organizing meeting was scheduled for the following week, but was canceled by the Union because of bad weather. Ogden picked up a batch of union authorization cards on February 12 and took them to work the next day, February 13, the date of his discharge.

During this time Ogden tried to conceal from Respondent his attempts to arrange an organizing meeting, but management became aware that there was "strong talk" about organizing a union. Foreman Margaret Gamache overheard employees in the cafeteria discussing unionization, and she heard rumors that employees were trying to get a union into the plant. In the week before Ogden's discharge she asked several employees whether they knew anything about what was going on with the Union, and informed Sikes of what she had learned, which was that there was some general employee discussion.

One such interrogation was recalled by former employee Dan Mullins as involving himself and two fellow employees on the day before the monthly safety meeting. At the February 3, 1981, meeting, the union question was raised, with Jones, Respondent's president, and various employees making remarks about firms that had unions and what things might be like at L & W if a union came in. Ogden testified that, shortly after the 10 minutes of safety discussion that opened the meeting, Jones started talking about the Union by stating that he had heard that some employees wanted to start a union because they were having to take a pay cut, and that Jones was looking right at Ogden when he said this.⁵ Since he had earlier been told that his transfer to another department would entail a cut in pay, he felt that Jones' remarks referred to him. The meeting went on in this vein, as is described below.

The next pertinent occurrence involving Jones and Ogden allegedly occurred 10 days later, the date of Ogden's discharge. Having picked up union authorization cards the night before (because the previously scheduled organizing meeting had been canceled) Ogden took them to work. Ogden testified that the cards were in his shirt pocket, but were not visible because his jacket was on. Ogden testified that after punching in, he passed by Larry Jones who, according to Ogden, asked him, "Good morning, how did the meeting go, do you think you will get very many people to sign up?" Ogden testified that he responded by denying that he knew what Jones was talking about, although it was clear in his own mind that Jones, not knowing about the cancellation of the union organizing meeting, was referring to that meeting.

Larry Jones flatly denied that this conversation took place or that he had any knowledge of Ogden's union activities until he heard that Ogden was seen passing out cards at the bank on the day he left Respondent's employ.

The existence *vel non* of this alleged Ogden-Jones conversation is crucial, for without it there is little evidence to support an inference, let alone a finding, that Re-

⁵ While I credit Ogden's testimony over Jones' denial that he said these things, I do not rely on Ogden's perception of whether Jones was looking right at him. The room was not small, there were 45 people in there, and Ogden was sitting at the rear of the room.

spondent knew about Ogden's union activities. And without such knowledge, there is no basis for concluding that Ogden's discharge was discriminatory and violated that Act. *Causley Pontiac v. NLRB*, 620 F.2d 122 (6th Cir. 1980).

So we focus on the alleged conversation between Ogden and Jones as Ogden was on his way from the timeclock to report to Sikes on what turned out to be Ogden's last day at L & W, February 13, 1981. According to Ogden, Jones asked Ogden two questions, the first was "How did the meeting go?" in reference to the union meeting that Ogden had scheduled with region 1E of the UAW. Ogden had arranged this meeting "right around the end of January" to be held on a Thursday or Friday thereafter. On a still later Thursday, February 12, Ogden picked up the cards at the Union's office, since the scheduled meeting had been canceled. So it follows that the meeting had been scheduled for late January, January 29 or 30, or the following week of February 5 or 6. Yet, Ogden testified it was not until February 13 that Jones asked him how the meeting went. I find it incredible that in a small shop, where no more than 45 employees were currently employed, Jones (a) would not have seen Ogden earlier and interrogated him and (b) would not have been aware that the meeting had been canceled.⁶ My incredulity heightens when consideration is given to the likelihood that the union organizing meeting was to have been held around January 29 or 30, for then (a) the meeting that Jones had with Ogden on February 3 about his transfer out of quality control,⁷ (b) the safety meeting later that same day, and (c) a subsequent conversation Ogden had with Jones about problems Ogden was having on the floor would have given Jones ample opportunity to interrogate or "needle" Ogden about his union activities.

Moreover, Jones' supposed second question to Ogden was if Ogden thought that he would get many people to sign up. Ogden had kept the union cards out of sight, with his jacket covering the shirt pocket containing the cards, so there is no basis to know or infer that Jones saw the cards and that he knew what they were. Therefore, Jones' question to Ogden, like the one that preceded it, strikes me as coming at a time that is implausible, given the earlier opportunities that Jones had to ask it.

In sum, my observation of Jones and Ogden through out their testimonies causes me to find that this conversation did not take place. On this question, Jones' denials about this conversation strike me as being more convincing than Ogden's testimony about the conversation. This is not to say that in general Jones was the more convincing witness than Ogden. Jones clearly had animus

⁶ See *Galar Industries*, 239 NLRB 28, 30 (1978), for the statement of the Board's presumption that a small firm is presumed to know of the union activities of its employees. Under this presumption, Jones' knowledge of the meeting having been both scheduled and canceled is equally likely.

⁷ On February 3 Ogden had a meeting with Respondent's president, Larry Jones, in which Jones told Ogden that the reassignment, which had been done at Ogden's request, would result in a pay cut. When Ogden had first broached the subject of leaving quality control the previous fall he was told it would mean a cut in pay, so he had decided to stick it out there longer.

toward any attempts at unionization of L & W employees, and the transparent failure of his memory on matters relating to that animus do not stand him in good stead on the general question of his attitude. But I do not find any record basis for finding that he interrogated Ogden or knew specifically that Ogden was the union organizer. Thus, I do not find that Jones engineered Ogden's discharge. Rather, that came impulsively from Foreman Sikes, whose generally crabby disposition and his specific dislike of Ogden⁸ caused him to "see red" when Ogden complained about his pay and to fire him on the spot.

This leaves us with only what Gamache gleaned from the employees as a basis for inferring that Respondent knew of Ogden's union activities. But nowhere is the knowledge of strong union talk that Gamache imparted to Sikes linked to Ogden. The best the General Counsel can show is that Ogden was in the cafeteria at those times that Gamache was there and overheard employees talking about the possibility of bringing a union in. Who those employees were that so talked, or who imparted the rumors of employee interest in unions, is not in the record. And while I share the General Counsel's observation that Gamache, as a witness, "was not at all inclined to be sincerely responsive to questions asked of her," the persistent cross-examination of Gamache revealed the limited information that Gamache's eavesdropping and interrogations provided, which while doubtless frustrating to her does little for the General Counsel's case.

Finally, the General Counsel relies on the safety meeting of February 3, 1981, to indicate Respondent's knowledge of union activities in general and Ogden's role in particular, as evidenced by Jones' statements during that meeting.

Many statements are attributed to Jones following his introductory reference to interest in unions by employees who were having to take pay cuts. Ogden and fellow, former employee Mullins both testified that Jones said the following during the "union discussion" that followed the brief safety meeting: 1. If a union did get into the plant, Respondent could always, or would, relocate the plant down South in Georgia where wages were lower and interest rates better; 2. Employees at Master Products Company (another family-owned company of Jones') made less money than did Respondent's, which Jones attributed to the fact that Master Products was unionized; 3. If the Union got in at Respondent's plant wages would be much less than what they are now, the Respondent could not afford to pay any more in wages even if the Union came in and outside sources had advised him to let the Union come in so that Respondent could make or save more money; 4. The union at Master Products either caused or could do nothing about employees having to operate their machines with frost on them; 5. The employees did not need a union, the relationship between Respondent and its employees would

drastically change if a union came in, he would not cooperate with it in any event, the employees should stop and think before going ahead with a union because the Respondent and the employees would become "enemies" once the Union came in, and there would be arguing back and forth; 6. Why should the employees pay union dues and let a union do all their talking and bargaining when Jones and his brother Wayne could be their committeemen; and 7. If the Union came in he would not try to help the employees out but would stand off to the side and let the Union take care of it.

As a witness Jones either denied making most of these statements or could not recall doing so. He did admit to telling employees at the meeting that Respondent had an "open door policy." In his affidavit taken before the complaint was issued, he went further, stating that the employees would have to deal through the Union with the Company if they were unionized, and the Company in turn would have to hire an attorney to deal with the Union.

From the Respondent's point of view, many of the comments attributed to Jones were made by employees during the give-and-take of the meeting. Larry Gillespie, the former plant manager, recalled a comment made by employee Cook regarding the recent closing of the nearby Burroughs plant to which Jones replied "You read it in the paper, it does happen." Gillespie remembered a general discussion about the depressed state of industry in the Detroit area, to which Jones responded that he had heard of businesses that had gone out of business because of unions. Gamache recalled a statement by Jones that Respondent "should be lucky that we held on as long as we were holding on.

As for references to Master Products, Jones testified that it was employees, not he, who made reference to lower wages there, to which he made no response. But in his affidavit he admitted that he did agree with the employees' comments by adding his own observation that "yeah, on the average they made considerable [sic] less there than the employees down here." Another employee, Everett Gary, testified that he recalled Jones only talking a "few minutes" during the whole safety meeting. He believed that most of the comments attributed to Jones by Ogden and Mullins were made by employees in the general discussion and were not answered by Jones.

More on this meeting later, when we will discuss whether the statements were coercive. For the moment, no matter who said what it is clear that unionization was clearly in the air, and was aired at that meeting. Clearly Respondent knew that some of its employees were thinking union. But nothing in that meeting links Respondent's general knowledge to Ogden, save for Ogden's feeling that Jones looked right at him, which I have already discredited as a basis for finding that Jones was referring to Ogden. The net result is that there is an absence of credible evidence from which to infer or find directly that Respondent knew of Ogden's union activities when it fired him. Absent such knowledge, it follows that Ogden was discharged for reasons that are not protected by the Act, i.e., Respondent's perception, albeit hasty

⁸ As Gillespie testified, there were "problems" between Sikes and Ogden that would have to be resolved or one of them would have to go. When Gillespie had told Ogden this, Ogden's sardonic response was that he probably would be the one let go since Sikes was so inadequate that he would not be able to hold down another job. Sikes was present at this meeting, which occurred the day before Sikes discharged Ogden.

and influenced by the personal ill will between Ogden and Supervisor Sikes, that Ogden was refusing to work. Doubtless, as Gillespie put it, had he been directly on the scene he would have adopted a more conciliatory approach. But Sikes is not Gillespie (either as a foreman or a witness) and fired Ogden when others would not have. For good or ill, Section 7 does not protect a worker from the likes of Sikes.

Be that as it may, says the General Counsel, Ogden was discharged for indicating his reluctance to use the machine without protection from the sparks that were flying off the machine, citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), for the proposition "that the discharge of an employee for protesting or refusing to operate a machine perceived to be unsafe is unlawful. . . ."

While correctly stated, the argument as made here is a red herring. For Ogden did not stop working because the spot welder was unsafe. He stopped working because he was put out at his pay cut. His retort to Sikes about the sparks burning his shirt, made after Sikes had for the second time told him to resume working, was but an afterthought. Granted that he showed Sikes his shirt, which did have burn holes in it, that episode never rose to the "dignity" of an outright protest and refusal to work because of the sparks. Had no paychecks been issued, who knows whether Ogden would have worked through the day with just the low cut apron and endured the sparks further, or would have stopped working when the sparks became too bothersome? There is no answer to that question, since on this record all that can be found is that Ogden was not making a safety protest, but a pay protest.

C. Jones' Comments at the February 3 Safety Meeting

As noted earlier in the discussion of Ogden's discharge, the comments of Jones at the safety meeting held on February 3, 1981, are in dispute. The complaint alleges that Jones threatened the employees with plant closure and other reprisals if they selected the Union as their bargaining representative, and similarly conveyed to the employees the futility of their support for the Union by stating that they would be paid less if the Union represented them, working conditions would be worse, and they would be enemies if the Union were voted in.

Respondent's defense is that many of the alleged remarks were made by employees, and whatever Jones did say was permitted speech under Section 8(c). I agree with the General Counsel in most, but not all, respects.

Probably the most egregious alleged statement by Jones was that if a union did get into the plant Respondent could always relocate the plant down South in Georgia where wages were lower and interest rates better. Jones flatly denied saying that. No other witness could recall if that was said, although Gillespie, overall the most credible witness, recalled general reference by Jones to the tight economic conditions they were facing

and that in such times companies that were union had gone out of business.⁹

Given Jones' clear animus to unions, he restrained his comments only because he had been through a prior Board proceeding and did not want to say too much again. But this restraint worked well only when the words "union" or "union cards" were mentioned. Amidst all the back and forth talk about the tight economic situation, Respondent's own losses, and the other plant closings, I credit Ogden and Mullins that Jones' mentioned moving to Georgia. While he may not have stressed the point, the impact of so fundamental a remark could not have been lost on the listening employees. The Board looks upon such impact as the most effective in dissuading employees from selecting a bargaining representative.¹⁰ Therefore, I find that threat a violation of Section 8(a)(1).

The remainder of Jones' remarks are alleged by the General Counsel as meant to convey to the employees the futility of any support they might give a union. This was the main thrust of Jones' references to poorer wages and working conditions, that their union dues would be wasted, and that once the Union came in the employees and Respondent would become enemies and Respondent would not cooperate with the Union. I credit Ogden's and Mullins' testimonies on these matters, with the exception of Jones' alleged references to the Master Product situation. On that, I credit Jones' testimony, corroborated by Gary, that the actual references to Master Products came from Respondent's truckdrivers, who regularly called there. Jones' only role in the Master Products discussion was to observe that Respondent's employees made more money. Since the General Counsel does not allege that this was not a fact, I find the statement harmless. As for the references to the union dues and the "enemies," I share the General Counsel's perception of the Board's law and find the statements in violation of Section 8(a)(1). See *Trailways, Inc.*, 237 NLRB 654 (1978).

The more difficult question concerns Jones' statements about his "open door policy" through which employees could seek his redress of their grievances. The General Counsel alleges that Respondent violated Section 8(a)(1) when Jones told employees that they would have to deal with management and, thus, lose direct access to management. In Respondent's view this was permissible speech since it expressed an opinion on the consequences of unionization that had a reasonable basis in fact. *Hecla Mining Co. v. NLRB*, 564 F.2d 309, 314 (9th Cir. 1977).

There are three faults in Respondent's argument. The first is that there was no open-door policy, as evidenced by Gillespie's admonition to Ogden on February 12, 1981, to follow the chain of command.¹¹ Secondly, if

⁹ The specific reference to the closing of the Burroughs plant was made by an employee, probably Bobbie Cook, with Jones only acknowledging that "it does happen" and that Respondent "should be lucky that we held on as long as we were holding on."

¹⁰ *General Stencils*, 195 NLRB 1109 (1972).

¹¹ On February 12, in the same meeting in which Gillespie told Sikes and Ogden to resolve their differences, Gillespie also admonished Ogden for not following the chain of command when Ogden, subsequent to the safety meeting, went directly to Jones about problems he was having.

Jones were promising an open-door policy he would be out of line, since such a promise to remedy certain grievances would constitute interference, restraint, and coercion under Section 8(a)(1).¹² *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974). Thirdly, Jones' message that all direct dealings between Respondent and the employees would be foreclosed with the presence of a union is an erroneous statement of the law¹³ and is unlawful because it portends the loss of benefits; i.e., employees being able to communicate directly with management. *Joe and Dodie's Tavern*, 254 NLRB 401, 411 (1981). Therefore, I find a violation of Section 8(a)(1).

D. Interrogations

The General Counsel alleges that two unlawful interrogation episodes occurred, one being Gamache's questions to employees about union activity, the other being Jones' alleged questioning of Ogden as to how the union meeting went. I have found that the latter episode did not occur, that leaves the Gamache interrogations.

The fact of the interrogations is clear, Gamache having admitted her questioning; the characterization—whether innocent or coercive—is to be decided.

Respondent argues that Gamache's interrogation was not coercive if evaluated by criteria set forth in court decisions in the Second Circuit.¹⁴ Those criteria consist of (1) the background of employer hostility, if any; (2) nature of information sought; (3) identity of the questioner, i.e., his rank in the managerial/supervisory hierarchy; (4) place and method of interrogation, i.e., at the situs of supervisory authority or in the formal atmosphere; and (5) the truthfulness of the reply. To these criteria the Fifth Circuit Court of Appeals has also added the following: (6) the existence of a valid purpose of the questioning; (7) whether that valid purpose was communicated to employees; and (8) whether assurances against reprisals were given.¹⁵ Furthermore, the Fifth Circuit and the Board have held that even if all such criteria favor Respondent it may still be found that coercion has occurred.¹⁶

The essence of Respondent's argument is that since Gamache did not learn any specific information other than that union talk was in the air, her questions were casual questions that do not rise to the level of coercive interrogation. The Board has held that where interrogation is isolated and the atmosphere is free of coercive

conduct, such questions as those posed by Gamache are not *per se* unlawful.¹⁷

Nevertheless, I conclude that Gamache's questions violated the Act. Gamache did not articulate any legitimate reasons for the questions, and the fact that she asked "four to five people" on February 3, and then advised Sikes of her findings vitiates Respondent's argument that the questioning was isolated and to satisfy Gamache's curiosity. Gamache had been asked by company officials if she "had heard anything" and since she had not, she undertook to find out "who was against the Union or who didn't want a union or who did want one." With the possibility of "union talk" ripening into an organizing campaign, and with Respondent's known concern about the effects of a union, it is hardly to be believed that Gamache, a first-line supervisor, was wandering around accosting employees merely to satisfy her own curiosity. Rather, she knew that whatever she learned would be of interest and useful to Respondent. In these circumstances her questioning was coercive and in violation of Section 8(a)(1).

E. No-Solicitation Policy

Contained in Respondent's "employee handbook" under the heading "NO SOLICITATION POLICY" is the following language (G.C. Exh. 2):

In order to preserve production efficiency and safety in the Plant, L & W Engineering has a policy of prohibiting solicitation on working time or in working areas.

More specifically, this policy means that employees are prohibited from soliciting, campaigning, [sic] or seeking donations on behalf of any organization, or for any other purpose, during work time. Further, employees are prohibited from distributing written material on behalf of any organization or for any other purpose at any time in working areas or during working time in non-work areas.

What this means that if you wish to collect donations, or speak to someone about membership in a civic organization, for example, you must be sure that both you and the employee that you are talking with are on non-work time in a non-work area.

Of course, persons who are not employed by L & W Engineering are prohibited from soliciting for any purpose on Company property unless prior approval has been obtained from one of the officers.

The handbook had been distributed to employees sometime in 1980 and the no-solicitation policy remained in full force and effect up through the date of the hearing.

Under the Board's holding in *T.R.W. Bearings*, 257 NLRB 442 (1981), there is little room to question that Respondent's no-solicitation policy is unlawfully broad. A prohibition against solicitation or distribution during "working time" is presumptively invalid unless by clear language or conduct it is communicated to employees that the prohibition does not apply to breaktime, lunchtime, or other periods when employees are not actually

While Jones testified that Gillespie erred in admonishing Ogden, I give that testimony little weight in overcoming the inference that I draw from Gillespie's conduct that he was following company policy.

¹² I do not find that Jones was promising a new policy; he was purporting to outline the current policy, which I do find did not exist. While employees could pursue grievances, the process, as stated by Gillespie to Ogden, was through the chain of command.

¹³ Sec. 9(a) of the Act preserves the right of individual or groups of employees to approach management about grievances without intervention of the bargaining representative, so long as any adjustment of the grievance is not inconsistent with the collective-bargaining agreement, and provided that the bargaining representative is given an opportunity to be present.

¹⁴ *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *NLRB v. General Stencils*, 438 F.2d 894 (2d Cir. 1971); *NLRB v. M. H. Brown Co.*, 441 F.2d 839 (2d Cir. 1971).

¹⁵ *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 (5th Cir. 1965), cert. denied 382 U.S. 926.

¹⁶ *NLRB v. Camco, supra: Paceco*, 247 NLRB 1403 (1980).

¹⁷ *Mark I Tune-Up Centers*, 256 NLRB 898, 905 (1981).

working. In the instant case, although the complaint was amended at the opening of the hearing to allege that unlawfulness of the policy, Respondent did not seek to introduce any evidence to rebut the presumption of invalidity.

In the face of this Respondent gamely argues that there was no intention of prohibiting employees from engaging in solicitation and distribution of literature when not actually engaged in work, it being "amply clear that 'work time' includes only the time when the individual employees involved are not working." (Br. p. 2.) There being no evidence of such "clarity" the presumption stands, and a violation of Section 8(a)(1) is found.

F. Miscellaneous

The General Counsel alleges on brief two violations not found in the complaint. Invoking the spirit of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), the General Counsel wonders if Respondent provided adequate assurance to its employees whom it solicited to testify to assure that such testimony was free of coercion. As it arises here, I find the matter to affect the witnesses' credibility rather than rise to the level of a separate violation, and I have considered this factor with the others that go to witness credibility.

That leaves Jones' statement to Larry Mullins, in October 1981, that the recent closing of its Master Products Company was because of the Union. While not alleged in the complaint it was testified to by Mullins and not contradicted by Jones. Since it comes well in time after the February 1981 incidents that occupy this Decision, I

find the occurrence too remote from the inchoate union organizing activities of February. There is no record evidence on what activities were occurring in the fall of 1981 that would form a context in which to evaluate Jones' remarks, in contrast to the case cited by the General Counsel, *General Dynamics Corp.*, 250 NLRB 719 (1980), where the context was clear. Therefore, I do not find a violation.

CONCLUSIONS OF LAW

1. Respondent has violated Section 8(a)(1) of the Act by:

(a) Threatening to close and relocate its plant.
 (b) Conveying to its employees the futility of their support for the Union by telling them they would be paid less if the Union represented them, that working conditions would be worse, that Respondent and they would be enemies, and that their union dues would be wasted.

(c) Threatening the loss of a benefit; i.e., the ability of employees to communicate directly with management.

(d) Coercively interrogating employees about their union activities.

2. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.¹⁸

[Recommended Order omitted from publication.]

¹⁸ Respondent is located in Belleville, Michigan, where it manufactures, sells, and distributes automotive metal stampings and related products which in 1980 were valued at over \$500,000, of which over \$50,000 worth were shipped directly to points located outside of Michigan.