

NTA Graphics, Inc. and Graphic Communications International Union, Detroit-Toledo Local 289 AFL-CIO-CLC. Cases 8-CA-20167, 8-CA-20458, 8-CA-20732, and 8-RC-13648

July 21, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On October 31, 1989, Administrative Law Judge Hubert E. Lott issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a supporting brief. Both the Charging Party and the Respondent filed answering briefs.

On April 4, 1990, the National Labor Relations Board remanded these proceedings to the judge for additional credibility determinations and factual findings. On July 5, 1990, the judge issued the attached supplemental decision, containing his additional credibility determinations, findings, and conclusions. All parties filed additional exceptions and supporting briefs.

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

The Board has considered the decision, supplemental decision, and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent violated Section 8(a)(1) of the Act in numerous respects detailed in his two decisions. We adopt the judge's findings² except as follows.

a. The Respondent promulgated an employee handbook that contained the following provisions:

(1) Employees are not permitted to distribute advertising material, handbooks, or printed or written material of any kind in production and working areas of the plant during working hours or when not working.

(2) Employees are not permitted access to the interior of NTA facilities or other internal or outside work areas during off duty hours. This includes the parking lot.

The judge found that those provisions did not prohibit the distribution of union literature in nonworking areas such as lunchrooms or rest areas. However, because he found that the Respondent's operations manager, David Tremonti, had orally promulgated a rule forbidding the distribution of union literature anywhere on the Respondent's property, the judge found the quoted rules to be overly broad, and that they violated Section 8(a)(1). The Respondent excepts to the judge's finding.

Although we agree with the judge that Tremonti's orally promulgated no-distribution rule was unlawfully broad, we do not find, as the judge did, that the first paragraph of the rule as stated in the handbook was rendered unlawful by Tremonti's statement. That paragraph, standing alone, is in conformity with established Board law that employers may lawfully prohibit the distribution of union literature in working areas of the plant.³ Although, as the judge found, Tremonti's statement may have confused employees regarding the sweep of the Respondent's policy concerning union solicitation and distribution of union literature, the notice we are requiring the Respondent to post will make clear that employees are not precluded from engaging in all such solicitation and distribution.

Like the judge, we find that the second paragraph quoted above is unlawful, but we do so for a different reason. The Respondent's barring of off-duty employees from its parking lot, with no adequate explanation, is unlawful on its face.⁴ Accordingly, we shall require the Respondent to rescind the second paragraph set forth above insofar as it denies access to the parking lot on the part of off-duty employees.

b. The second amended complaint alleges that about October 13, 1987,⁵ Tremonti threatened an employee (Phillip Rogers) that if the Union was voted in, his progress toward becoming an apprentice and a journeyman printer would be slowed, and that Tremonti threatened an employee with unspecified reprisals on that same date. Rogers testified that on October 13, Tremonti told him that if the Union came in, he could demote Rogers to apprentice and that it would take Rogers 4 to 8 years to get a journeyman's card. Rogers also testified that Tremonti said that he could make

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

²In adopting the judge's finding that the Respondent's operations manager, David Tremonti, threatened employees with a loss of benefits if they chose union representation, we note that many of the credited witnesses testified that Tremonti spoke of specific existing benefits, such as work boots, uniforms, and insurance that would be lost. We also note that the threat was made in an atmosphere pervaded with other violations. See *Kenrich Petrochemicals*, 294 NLRB 519 (1989), enfd. in relevant part 893 F.2d 1468, 907 F.2d 400, en banc (3d Cir. 1990), cert. denied 111 S.Ct. 509 (1990).

The judge found that numerous violations had been committed by Supervisors Scott and Hollis Shaffer. The Respondent argues that the judge failed to identify with sufficient clarity the Shaffer brother who committed each violation. We find this contention without merit. A comparison of the violations found with the judge's recital of the underlying facts reveals that it was Scott Shaffer who threatened cancellation of employees' health insurance and threatened employees with lower wages and harsher discipline in the event of a union victory; and that it was Hollis Shaffer who threatened that the plant would close if the Union prevailed, indicated the futility of selecting union representation by telling employees that the Union would be kept out for 6 years, and threatened an employee that he would be fired if he attended a union meeting. (Several other violations were committed by the Shaffer brothers, but no exceptions were filed concerning those violations.)

³See, e.g., *Our Way, Inc.*, 268 NLRB 394, 411 (1983).

⁴*Tri-County Medical Center*, 222 NLRB 1089 (1976).

⁵All dates are in 1987.

Rogers quit by demoting him to jogger at \$4 an hour. Tremonti testified that, apparently in the same conversation, he told Rogers that under the Union's labor agreement, Rogers would have to enter an apprenticeship program that could take up to 4 years, and that it would take up to 8 years for Rogers to become a journeyman. Tremonti did not deny having threatened to demote Rogers to jogger at \$4 an hour.

The judge found that Tremonti did not act unlawfully by telling Rogers that he could be demoted to apprentice if the Union came in, because Tremonti was discussing what could happen under a union contract. We adopt that finding. However, the judge made no specific finding concerning Tremonti's alleged threat to make Rogers quit by demoting him to jogger at \$4 an hour. On the basis of Rogers' un rebutted testimony and the judge's general crediting of Rogers' version of the October 13 conversation, we find that Tremonti did make the threat as Rogers testified, and thereby violated Section 8(a)(1).⁶

c. The judge found that Tremonti threatened to discipline any employee who violated the Respondent's unlawfully broad no-distribution/no-solicitation rule, but he inadvertently omitted a cease-and-desist provision in the Order or the notice concerning this violation of Section 8(a)(1). We shall amend the Order and the notice to add such provisions.

2. The complaint alleges that about June 6, the Respondent unlawfully discharged or otherwise terminated 16 named employees because of their union-related activities and because they engaged in other protected concerted activities. The judge dismissed this allegation, and the General Counsel and the Union except. We reverse.

The pertinent facts are set forth fully in the judge's decision. On May 28, Tremonti called meetings of all employees at which he distributed the Respondent's newly promulgated employee handbooks. The handbooks contained provisions stating that the relationship between the Respondent and its employees was one of employment at will (which the judge found to be consistent with Ohio law). They also contained an agreement stating that the employees have read, understand, and will abide by company rules. Tremonti instructed the employees to read the handbooks and to sign them before returning to work the following week.⁷ According to the credited testimony, however, Tremonti did not mention any penalty for failing to sign the handbooks.

On May 30, some 30 to 35 employees attended a union organizing meeting, at which many employees expressed dissatisfaction with certain portions of the

handbook, including the at-will provision and certain provisions concerning safety, and indicated that they were unwilling to sign the handbooks. It also became reasonably clear at the meeting which employees in attendance supported the Union and which did not.⁸ Both the employees' opposition to signing the handbooks and the identities of many of the prouion employees were revealed to the Respondent at the meeting because, as the judge found, two of the Respondent's supervisors engaged in unlawful surveillance of the meeting. On June 1, after the employees on the first shift reported to work, they were told by Supervisor Scott Shaffer that they would have to sign the handbooks if they wanted to work. When three of the employees answered that they were still reviewing the language of the handbooks and were unwilling to sign, Shaffer sent them home, saying that if they did not sign the handbooks they could be terminated. That evening, 10 third-shift employees reported for work without having signed the handbooks. They were told by Tremonti that they could work if they signed the handbooks, but the employees refused and left the premises.

On June 2, six of the first-shift employees reported for work but refused to sign the handbooks. When Scott Shaffer told them to leave, they refused, stating that they wished to obtain written statements of discharge. They remained on the premises for about 2 hours, until they were escorted out by the police.

On June 4 and 6, all 16 of the employees who had refused to sign their handbooks were sent letters from the Respondent stating that they had voluntarily quit their jobs. The six first-shift employees who had refused to leave on June 2 also were informed in their letters that their refusal to leave was an additional ground for discharge. Fifteen of the 16 employees had attended the May 30 union meeting and signed authorization cards on that date. The 16th signed a card on June 2.

All other employees signed the handbooks and were allowed to work.

Contrary to the judge, we find that the 16 employees who refused to sign the handbook were discharged in violation of Section 8(a)(3). In this regard, we find, first, that the General Counsel has established a prima facie case that the Respondent's actions were unlawfully motivated. Thus, there can be no doubt, on this record, that the Respondent harbored animus against the Union. We also have found that the Respondent had, by reason of its illegal surveillance of the union meeting, become aware of the identities of many of the prouion employees and of the employees' opposition to signing the handbooks. Finally, the timing of the discharges—only a few days after the union meeting—in-

⁶We find that the threat was closely related to the subject matter of the complaint, and that the issue was fully and fairly litigated.

⁷There is no allegation that either the promulgation of the handbook or the requirement that employees sign it violated the Act.

⁸These findings are based on the testimony of the General Counsel's witnesses, whom the judge broadly credited concerning the meeting.

dicates that the Respondent acted in retaliation against the employees' demonstrated support of the Union.

We further find that the Respondent's reliance on the employees' refusal to sign the handbooks was merely a pretext for ridding itself of a group of known or suspected union supporters. We base our finding on several factors. First, and most critical, is that the Respondent did not inform the employees that failure to sign the handbooks would result in discharge until after it had learned that a large number of prounion employees were opposed to signing. The significance of this intelligence could not have been lost on Tremonti and his fellow managers: all the Respondent had to do was to announce a new rule that probably would not be obeyed by numerous union supporters, and then to rely on those employees' refusal to obey that rule as the stated reason for discharging them (or, which is the same thing, treating them as though they had resigned). Nor would it have mattered under the Respondent's plan whether it had actual knowledge of the nonsigners' union sympathies. Their refusal to sign would suffice to identify them in the mind of the Respondent as likely union supporters.

The Respondent's unlawful intentions are further disclosed by two statements made by Scott Shaffer on the morning of June 1. Union supporter Joe Freeze testified that when he arrived for work that day, Shaffer greeted him by saying, "Good morning, Mr. Freeze, I hope you can find a new job."⁹ Later that morning, Shaffer told Scott Baker that the employees would be sent home early (at noon) that day. When Baker asked why, Shaffer said, "You guys should know why. You went to the Union meeting."

Finally, we observe that the Respondent did not have a practice of disciplining employees who refused to sign disciplinary warning notices. However, after the employees' union sympathies became known, it imposed the requirement that employees sign the handbooks as a condition of continued employment.¹⁰

The judge also found that the Respondent would have been justified in denying reinstatement to the six first-shift employees who refused to leave the premises on June 2. Again, we reverse.

⁹Freeze had attended and been an active participant at the May 30 meeting.

Shaffer denied making the statement attributed to him by Freeze. The judge, however, broadly credited the General Counsel's witnesses, including Freeze, and broadly discredited both the Shaffer brothers. We find that Freeze's testimony on this point was implicitly credited.

¹⁰In finding the discharges to be unlawful, we do not rely on the fact, as found above, that the Respondent's handbook contained an unlawful no-access rule. There is no evidence that the employees' refusal to sign the handbooks was based in any way on the inclusion of the unlawful provision.

Because we have found that the Respondent discharged the 16 employees in retaliation for their union activities, in violation of Sec. 8(a)(3) and (1), we find it unnecessary to decide whether the employees' refusal to sign the handbooks was protected concerted activity, and thus whether the Respondent's termination of those employees for refusing to sign constituted an independent violation of Sec. 8(a)(1). The finding of such a violation would not affect the remedy.

As we have seen, the Respondent promulgated the penalty of discharge for failure to sign the handbooks in an unlawful attempt to get rid of the union adherents. The first-shift employees' refusal to leave the plant, after being directed to leave when they refused to sign the handbook, was a direct result of the implementation of the Respondent's unlawful scheme. The employees' peaceful refusal to leave the plant thus was provoked by the unlawful actions of the Respondent. In these circumstances, we find that the employees did not lose the protection of the Act by refusing to leave the plant for about 2 hours on June 2.¹¹

Having found that the 16 employees who refused to sign the handbooks were unlawfully discharged, we shall order that they be offered reinstatement and be made whole for any loss of earnings and other benefits, as set forth in the remedy section of the judge's decision, and that all references to their unlawful discharges be expunged from the Respondent's records.

3. An election was held on September 25 in the unit found appropriate,¹² and the Respondent filed four objections. Two of the objections were overruled by the Regional Director, and the other two were overruled by the judge. The Respondent excepts only to the judge's overruling of its Objection 1, which alleges that the Union impaired the employees' free choice in the election by paying money to current and former employees. We find no merit to that exception.

The payments in question, styled "sacrifice benefits," were paid to employees who had joined the Union and who had been unlawfully terminated by the Respondent.¹³ As the judge found, sacrifice benefits have been provided for in the International Union's constitution "as long as anyone could remember." The benefits are intended to compensate members who have been discharged for union activities. The payments here were not gifts, but instead were a normal incident of union membership.¹⁴ The record does not

¹¹See *Cone Mills Corp.*, 298 NLRB 661 (1990).

¹²The Respondent has excepted to the judge's finding that the unit found appropriate by the Regional Director is, in fact, an appropriate unit for bargaining. We find no merit to this exception. The unit issue has been fully litigated, and the Board has previously denied the Respondent's request for review. We shall not revisit this issue in this proceeding.

¹³Employee Phillip Rogers also received sacrifice benefits. Rogers was not among the employees who were unlawfully discharged, but was suspended (initially indefinitely) for his involvement in an argument with an employee who did not support the Union. Because no action was taken against the other employee, the Union treated Rogers' suspension (which it erroneously believed was a discharge) as a retaliation against his union sympathies, and accordingly authorized the payment of sacrifice benefits. The payments ceased when Rogers returned to work a few days later.

¹⁴*Dart Container*, 277 NLRB 1369 (1985). Thus, this case is distinguishable from *Mailing Services*, 293 NLRB 565 (1989), in which benefits apparently were made available to employees regardless of whether they were union members. Nor were employees here required to join the Union before the election in order to qualify for sacrifice benefits. Cf. *Wagner Electric Corp.*, 167 NLRB 532 (1967).

Nothing in *Mailing Services* should be interpreted as indicating that a union will be found to have interfered with an election merely by providing to its

Continued

indicate that the size of the benefits paid was greater than the income the employees would have received had their employment with the Respondent continued.¹⁵ Sacrifice benefits were paid not only before the critical period that began with the filing of the election petition, but also were paid after the election in the case of Michael Rogers and Robert Miller. Under all of these circumstances, we agree with the judge that the payment of sacrifice benefits did not interfere with the conduct of the election.¹⁶

4. The General Counsel has excepted to the judge's failure to impose a bargaining order based on the Union's having obtained authorization cards from a majority of the unit employees¹⁷ and on the Respondent's pervasive unfair labor practices.¹⁸ We find no merit to that exception.

The Board, under appropriate circumstances, will afford bargaining relief even to a union that has lost an election. It will do so, however, only if the election is set aside on the basis of meritorious objections. *Irving Air Chute Co.*, 149 NLRB 627, 629–630 (1964), enf. 350 F.2d 176 (1965).¹⁹ In this case, the Union filed no objections to the election, and all the Respondent's objections have been overruled. There is, therefore, no basis for issuing a *Gissel* order. *Irving Air Chute* stands for the proposition that a party that does not object to an election has implicitly agreed to be bound

new members, even during the critical period, benefits to which they would normally be entitled by virtue of their union membership.

¹⁵In this regard, the sacrifice benefits paid here are analogous to the insurance premiums paid by the union in *Turnberry Isle Country Club*, 253 NLRB 416 (1980), in which the employer ceased to make the contractually required premium payments on behalf of the employees. The Board found that the union had not enhanced the employees' benefits, but had merely enabled the employees to maintain the status quo. Here, the sacrifice benefits, paid in lieu of the discharged and suspended employees' lost earnings, did not even restore the status quo, and thus clearly were not unreasonable. To similar effect, see *Kux Mfg. Co. v. NLRB*, 890 F.2d 804 (6th Cir. 1989) (reasonable union payments to election observers not objectionable).

¹⁶The Respondent argues that one of the recipients of the sacrifice benefits claimed, in a conversation in a bar, that employees had been paid money to help "get the Union involved in the Company," or "for being with the Union." Those statements, if there were such, were made on or about June 5, before the critical period began on June 12, and are therefore unobjectionable.

In agreeing with the judge that the Respondent's Objection 1 should be overruled, we do not rely, as the judge did, on the fact that the sacrifice benefit payments were not made with the intent of inducing employees to vote for the Union. See *Easco Tools*, 248 NLRB 700 (1980).

¹⁷The Union requested recognition on June 11. On the basis of a payroll list dated June 10, the judge found that there were 18 employees in the unit at the time of the Union's recognition request, of whom only 6 had signed cards. However, because we have found that the 16 employees who refused to sign the employee handbook were unlawfully discharged, and because those 16 were unit members who had signed authorization cards, there were 34 employees in the unit when the Union requested recognition, of whom 22—a clear majority—were card signers.

¹⁸See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

¹⁹In subsequent cases, the phrase "meritorious objection" has been broadly defined. See the summary of the case law in *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). However, in *White Plains* and in each of the decisions cited in relevant part therein, *id.* at 1136–1139, the union had challenged the validity of the election by filing objections. In this case the Union filed no objections.

by its result.²⁰ We see no reason why the Union should not be bound by the result of the election in this case, if it does not receive a majority of the valid votes cast.²¹

5. In November, after the election, the Respondent unilaterally, and without bargaining with the Union, changed the shift hours of the unit employees. Because he found no basis for imposing a bargaining order, the judge recommended dismissal of the allegation that the Respondent's unilateral change was unlawful. In reaching this result, the judge overlooked the possibility that the Union may have won the election. If it did, the Respondent's unilateral change, made during the pendency of election objections, was unlawful.²² Until the

²⁰We are aware of only one instance in which the Board issued a bargaining order despite the union's having filed no election objections. In *Peoples Gas System*, 238 NLRB 1008, 1010–1011 (1978), enf. denied on other grounds 629 F.2d 35 (D.C. Cir. 1980), the employer initially had been found to have lawfully withdrawn recognition from the union. Subsequently, however, the Board reversed itself and found the withdrawal of recognition unlawful. In an election held in the interim, the union failed to file objections. The Board nevertheless imposed a bargaining order. It reasoned that the union was not seeking initial recognition, but instead was trying to recover the recognition that had unlawfully been withdrawn from it. Moreover, in view of the Board's original finding, it would have been futile for the union to have objected to the election on the basis of the employer's withdrawal of recognition. Those reasons for distinguishing *Peoples Gas* from *Irving Air Chute* do not exist here.

We disagree with Member Cracraft that a bargaining order would be appropriate if the Union proves to have won the election. The decisions she relies on all involved unions that had filed meritorious election objections, and therefore do not control this case. Contrary to her contention, we do not believe that the judge's brief transitional language in *Pope Maintenance Corp.*, 228 NLRB 326, 343 (1977), in which the issue now before us did not arise, is a compelling basis for concluding that the Board in that case would have imposed a bargaining order had the union not filed election objections. Nor do we see anything anomalous (or onerous) about requiring unions to file election objections if they wish to preserve the possibility of obtaining bargaining orders. Indeed, Member Cracraft's proposed treatment of nonobjecting unions would have the anomalous effect of giving bargaining relief, not to unions whose organizing efforts had been irreparably damaged by employers' unfair labor practices, but only to those who did not need such relief because their efforts had succeeded in spite of employers' unlawful actions in the election.

²¹Member Cracraft would retain jurisdiction over the case in order to determine whether a *Gissel* bargaining order is warranted. While she agrees with her colleagues that the Union is not entitled to a *Gissel* bargaining order in the event that it has lost the election, this conclusion is premised on well-established precedent providing that "[i]n the absence of meritorious objections, an election is deemed valid; and the union, having failed to demonstrate its majority status, is obviously not entitled to a Board order compelling the employer to bargain with it." *Bandag, Inc.*, 225 NLRB 72 (1976), citing *Irving Air Chute*, 149 NLRB at 629–630. On the other hand, if the Union has won the election, under Board precedent it may be entitled to a bargaining order in addition to a certification of representative. See *Regency Manor Nursing Home*, 275 NLRB 1261 fn. 5 (1985); *Gordonville Industries*, 252 NLRB 563, 604 (1980), and the cases cited therein. The distinction her colleagues draw between these cases and the instant case, *i.e.*, that the unions in *Regency Manor* and *Gordonville Industries* had filed meritorious objections, is a distinction without meaning. If the union wins the election, there is no certification of results to bar the issuance of a bargaining order. Her colleagues' position leads to the anomalous result of requiring a union to file objections to an election it knows it has won in order to receive a *Gissel* bargaining order that it is otherwise entitled to. There is no basis in logic or law for imposing such a requirement. The Board recognized as much in *Pope Maintenance Corp.*, 228 NLRB 326, 343 (1977), when it adopted the judge's decision finding that it was necessary to consider the union's objections only "[i]n the event the revised amended tally of ballots shows that the Union did not get a majority of votes cast."

²²*Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

determinative challenged ballots²³ have been counted, we shall not know whether the Union received a majority of the votes cast, and thus we cannot rule on whether the unilateral change was lawful or unlawful. We shall, therefore, hold that portion of the case in abeyance, and retain jurisdiction over it, until the Regional Director has counted the challenged ballots and issued the appropriate certification. When we are informed of the outcome of the election, we shall issue a supplemental decision on the issue of the unilateral change in hours.

ORDER

The Respondent, NTA Graphics, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating an invalid no-access rule in the employees' handbook.

(b) Announcing an invalid no-solicitation/no-distribution rule to employees.

(c) Threatening to discipline any employee who violates an invalid no-solicitation/no-distribution rule.

(d) Threatening to keep the union from representing the employees for 6 years.

(e) Threatening employees with loss of benefits if they choose a union.

(f) Creating the impression among employees that their union activities are under surveillance.

(g) Telling employees that it delayed an NLRB election.

(h) Soliciting employees to engage in employee surveillance.

(i) Interrogating employees about their union activity and that of other employees.

(j) Threatening employees with cancellation of their health insurance if they select union representation.

(k) Engaging in surveillance of a union meeting.

(l) Threatening employees with lower wages, plant closure, and harsher disciplinary policy if a union represented them.

(m) Threatening employees with discharge if they attend a union meeting.

(n) Indicating the futility of selecting a union.

(o) Coercively informing employees that their pronoun sympathies are traitorous.

(p) Vilifying and coercing an employee by throwing a union leaflet at him and telling him to stick it up his ass.

(q) Threatening to cause an employee to quit, by demoting him and reducing his wages, if the union is selected as the employees' bargaining representative.

(r) Discharging or otherwise discriminating against any employee supporting Graphic Communications

International Union, Detroit-Toledo Local 289, AFL-CIO-CLC.

(s) 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) Remove from its employee handbook the provision denying off-duty employees access to its parking lot.

(b) Offer Bernard Buhr, Neal Davis, Nathan Elfring, Douglas Filas, David Rarick, Steven Reed, Gerald Rose, Clayton Russell, John Schultz, James Szachta, Scott Baker, Steven Lonchyna, Joseph Freeze, Kenneth Arnold, Michael Coleman, Robert Emerson, and Michael Rogers immediate and 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 and privileges previously enjoyed.

(c) Make each of the above-named employees whole for the loss of any pay and any other benefits he may have suffered as set forth in the remedy section of the judge's decision.

(d) Remove from its files any references to the unlawful discharges, and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the challenges to the ballots of the above-named employees are overruled.

IT IS FURTHER ORDERED that Case 8-RC-13648 is severed from these proceedings and remanded to the

²³Including, of course, the ballots of the employees who were unlawfully discharged for failing to sign the employee handbooks.

²⁴If 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."

Regional Director for the purpose of opening and counting the ballots of the above-named employees, as well as that of John Jackson, preparing a revised tally of ballots, and issuing the appropriate certification.

IT IS FURTHER ORDERED that the allegation that the Respondent unlawfully changed the shift hours of unit employees is held in abeyance, and jurisdiction of that issue is retained, pending the Regional Director's actions in the representation case.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT forbid all solicitation or distribution of materials for the Union.

WE WILL NOT threaten to discipline employees who do not comply with an unlawful no-solicitation/no-distribution rule.

WE WILL NOT deny off-duty employees access to our parking lot.

WE WILL NOT threaten to keep the union from representing employees for 6 years.

WE WILL NOT threaten employees with loss of benefits if they choose a union.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT tell employees that we delayed an NLRB election.

WE WILL NOT solicit employees to engage in employee surveillance.

WE WILL NOT interrogate employees about their and others' union activity.

WE WILL NOT threaten employees with cancellation of their health insurance if they select union representation.

WE WILL NOT engage in surveillance of a union meeting.

WE WILL NOT threaten employees with lower wages, plant closure, and harsher disciplinary policy if a union represents them.

WE WILL NOT threaten employees with discharge if they attend a union meeting.

WE WILL NOT indicate the futility of selecting a union.

WE WILL NOT coercively inform employees that their prounion sympathies are traitorous.

WE WILL NOT throw union leaflets at employees and tell them to stick them up their ass.

WE WILL NOT threaten to cause an employee to quit, by demoting him and reducing his wages, if a union is selected as the employees' bargaining representative.

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

WE WILL delete from our employee handbook the provision denying off-duty employees access to our parking lot.

WE WILL offer Kenneth Arnold, Michael Baker, Bernard Buhr, Michael Coleman, Neal Davis, Nathan Elfring, Robert Emerson, Douglas Filas, Joseph Freeze, Steven Lonchyna, David Rarick, Steven Reed, Gerald Rose, Clayton Russell, John Schultz, James Szachta, and Michael Rogers immediate and 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 and privileges previously enjoyed.

WE WILL make the above-named employees whole, with interest, for any loss of pay and benefits they may have suffered as a result of their discriminatory discharges.

WE WILL remove from our files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL allow employees to distribute union materials and solicit for the union in nonwork areas when employees are on nonwork time.

NTA GRAPHICS, INC.

Nancy Recko, Esq., for the General Counsel.

Timothy McCarthy and *Patricia Spengler, Esqs. (Shoemaker, Loop & Kendrick)*, of Toledo, Ohio, for the Respondent.

Samuel McKnight, Esq. (Klimist, McKnight, Sale & McCloud), of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. The consolidated cases were heard in Toledo, Ohio, on August 22, 23, 24, and 25, 1988. Unfair labor practice charges were filed by Graphic Communications International Union, Detroit-Toledo Local 289, AFL-CIO-CLC (the Union) against NTA Graphics, Inc. (the Respondent) on June 12 and October 9, 1987, and February 9, 1988. Supplemental decision and order directing hearing on objections and challenges issued October 22, 1987, and final order consolidating cases and amended complaint issued March 31, 1988.

The complaint alleges multiple independent 8(a)(1) violations. It also alleges 18 discriminatory discharges in violation of Section 8(a)(3). The complaint charges the Respondent with violations of Section 8(a)(5) of the Act for refusing to recognize and bargain with the Union as exclusive bargaining representative of all the employees in a unit found appro-

priate and for unilaterally changing hours of employment. Also at issue are 2 employer objections and 18 challenged ballots emanating from the Board conducted election on September 25, 1987.

The parties were afforded an opportunity to be heard, to call, to examine and cross examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the parties.

On the entire record and based on my observation of the witnesses, and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent NTA Graphics, Inc. is an Ohio corporation with an office and place of business in Toledo, Ohio. Annually, Respondent, in the course and conduct of its business operations sells and ships from its Toledo, Ohio facility products, goods and materials valued in excess of \$50,000 directly to points outside the State of Ohio.

The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *The 8(a)(1) Violations Attributed to David Tremonti*

David Tremonti is operations manager of NTA and an admitted supervisor.

Several witnesses for counsel for the General Counsel, namely Neal Davis, Steve Lonchyna, Michael Baker, Gerald Rose, Joseph Freeze, and James Szachta testified that they attended a company sponsored meeting of all employees in the lunch room on May 28,¹ where David Tremonti distributed an employee handbook telling the employees to read and sign it if they agreed with the contents. According to these witnesses, Tremonti also said that the employees had many benefits such as safety shoes, uniforms, and health insurance which were given to them by the Company but if the union got in, the Company would start negotiations from zero. He further stated that he knew who the union ringleaders were, but he did not care; he just did not want employees talking about the union or distributing union literature on company property. Neal testified Tremonti said that if he found out who was distributing union material, action would be taken. Baker testified that Tremonti said if he found out who the union ringleaders were, they would be terminated. Szachta testified that Tremonti said, as he held a union leaflet in his hand; if he found out who distributed another union leaflet, he would reprimand or discharge him.

Kenneth Arnold testified that on June 11 when he and other discharged employees returned to the plant to clean out their lockers, he overheard Tremonti tell Rick and David Mossing that before he would allow the discharged employees to return to work, he would close the plant. Arnold was standing in line outside the plant gate about a foot from Tremonti when he heard the remark. Rick Mossing is a maintenance man and his brother David Mossing operates a

steel shop on NTA property. Tremonti and the Mossings were inside the fence on company property. William Ruckreigle testified that on or about September 11, 2 weeks before the Board election, Tremonti held a meeting of all employees and told them that he could keep the union out of the plant for 6 years. He further told employees not to vote for the union out of sympathy for the discharged employees because they would not be coming back unless by court order and if they did come back, they would be laid off because the Company lost the Foodland account.

Phillip Rogers testified that on October 13, when he received a warning from Tremonti for excessive absenteeism, Tremonti told him that if the union came in, he could demote Rogers to apprentice and it would take him 4 to 6 years to get a journeyman's card. That he could make Rogers quit by demoting him to jogger at \$4 an hour. Tremonti further told Rogers that he could delay the union coming in for 2 to 4 years and by that time all the employees would have other jobs and Rogers would be alone with the union. Tremonti told him he got the NLRB election delayed until 1988 and that he knew how all the employees voted, that Rogers, Rogers' brother, Jim Danford, Dave Cortez, Tracy Davis, Bob Miller, and Bill Ruckreigle voted for the union. He felt that Tracy Davis had stabbed him in the back.

Rogers finally testified that the Union was holding weekly meetings after the election and on October 20 Tremonti asked him if he had gone to the union meetings. Then asked him if he would report to him what was happening at those meetings.

Respondent's Evidence

David Tremonti testified that he held meetings for all employees on May 28, at which time he explained the contents of the employee handbook which had been ordered on February 25 and delivered on May 22. He asked the employees to review it, sign the agreements² in the back, and return them to the Company the following week. He specifically denied telling employees that they only had to sign the agreements if they agreed with them. He testified that he read some of the contents of a company letter to employees dated May 26, which set forth various company benefits that the employees receive and how the cost of doing business, including benefits, has increased. The letter also explains in detail the disadvantages of joining a union. He told employees that he did not know who was involved with the union, did not want to know and did not care. He held up a union leaflet and said he found it in a working area and if he found anymore in working areas and who was responsible, he would reprimand that person. He also told employees that if the union came in, the Company would start negotiations at zero. Tremonti testified that the above is all he told the employees.

Tremonti testified that on June 11 when he was standing out in front of the plant, he did not say that he would close the plant before the discharged employees would return to

¹ All dates refer to 1987 unless otherwise indicated.

² There are several agreements in the back of the employee handbook, i.e., *uniform agreement, tool agreement, hearing aide agreement, shoe agreement*, and also an agreement that the employees have read, understand, and will abide by the company rules. This agreement also contains an "at will" clause stating, inter alia, that the booklet is not a binding employment contract and that employees may be terminated at any time.

work. This denial was supported by employee Rick Mossing who was standing with him on that day.

Tremonti recalled having a conversation with Phillip Rogers in mid-October when he issued him a written warning for absenteeism. He was holding a labor agreement in his hand, and told Rogers that under the labor agreement he would have to enter an apprentice program which could take up to 4 years to complete and that it would take up to 8 years to become a journeyman pressman. Tremonti stated that he never told anyone that he got an NLRB trial postponed. He merely told enquiring employees that the trial date had been postponed. He did predict in a note to Supervisor Hollis Shaffer that when Phillip Rogers was discharged, the trial would be postponed because another unfair labor practice charge would be filed.

Rick Mossing and employees Ricky Carter, Paul Cortez, and John Jackson testified that at the May 28 meeting Tremonti asked all employees to sign the handbook agreements and turn them in the following week. Mossing stated that Tremonti told employees that if the union came in benefits and everything would start at zero and be negotiated and they possibly could lose some benefits. Mossing testified that Tremonti told employees he did not want union literature distributed on company time in the press room and he did not hear anything about discharging union leaders.

Employee David Gates testified that Tremonti told employees they could distribute union leaflets in the parking lot or breakroom but not on work time. He heard nothing about union ringleaders. However, Tremonti mentioned that if the union came in, the Company would bargain from scratch. Ricky Carter, Paul Cortez, and John Jackson testified that Tremonti said he did not want the union but he did not want to know who was involved. He did not say employees would lose benefits or that union sympathizers would be disciplined.

B. The 8(a)(1) Violations Attributed to Scott Shaffer and Hollis Shaffer

Steve Lonchyna testified that on May 26 and May 27, Scott Shaffer approached him in the pressroom and said he heard that Lonchyna was the union ring-leader. Lonchyna denied it. Shaffer then wanted to know if Scott Baker and Joe Freeze were the ringleaders on the day shift. Lonchyna said he did not know. Shaffer then told him that he knew who the ringleaders were on midnight shift. Lonchyna further testified that on May 29 Shaffer told Scott Baker, Joe Freeze, and himself that their health insurance was expiring and if the Union prevailed, it would be canceled and used by the Company as a bargaining tool. This testimony was supported by the testimony of Scott Baker and Joe Freeze.

On May 30, the Union held a meeting for all employees at Comfort Inn. Both Scott and Hollis Shaffer attended the meeting. Scott Shaffer was asked to leave by regional organizer Thelma McConnell, which he did. As he was leaving, Scott Baker heard him tell employees that they better know what they are doing. Supervisors Randy Purdue and Hollis Shaffer remained in the meeting up until the time union authorization cards were about to be signed.

On Monday, June 1, which was maintenance day, Scott Baker testified that Scott Shaffer told the employees they would be sent home at noon. When they asked why, Shaffer said, "You went to the union meeting." Baker asked what

that had to do with anything and Shaffer replied, "You're fucking with the family." On that same day, Shaffer asked Baker twice who the union ringleaders were.

Joseph Freeze testified that on May 26 Scott Shaffer asked him if he was going to the union meeting. Shaffer told him that if the union got in, they would get lower wages and he, Shaffer would really be a prick and send Freeze home for more reasons such as web break (paper breaks and press is down). Freeze testified that on Friday, May 29, Shaffer asked him if he knew who the union ringleaders were. He accused Freeze of being a ring leader because Shaffer saw him talking to Jerry Rose and David Rarick, who were trouble makers.

Nathan Elfring testified that on May 28 at 8 a.m. Scott Shaffer said to Hollis Shaffer, "There's one of the ringleaders." He asked Hollis what Scott meant and Hollis said, "You don't know anything about the union?" Elfring said no. Hollis Shaffer then said that if the union got in, they would just close the doors and move the plant elsewhere.

John Schultz testified that on May 28 Scott Shaffer threw a union leaflet at him and told him to stick it up his ass.

Robert Miller testified that on September 27 he was in the locker room with Phillip Rogers when Scott Shaffer entered and said he heard Miller voted yes and that he had a Benedict Arnold on his hands.

Gerald Rose testified that on May 26 Hollis Shaffer asked him if he was going to the union meeting. Rose said yes and Shaffer replied, "Well, you know, if you go David Tremonti will fire you." Then Shaffer asked him who the ringleaders were.

William Ruckreigle testified that he and press operator John Jackson had a conversation with Hollis Shaffer on about October 15, wherein Shaffer told them that the union would be kept out for 6 years.

Respondent's Evidence

Scott Shaffer admitted interrogating Joe Freeze about who started the union. During the week of May 25 he told Freeze that if he kept coming in 10 minutes late, he would have to give him written warnings instead of verbal warnings. After he found out about the Union, he told Freeze that if they worked under union rules he would have to be stricter.

Shaffer testified that on May 28, he did not talk to Nathan Elfring and he did not tell John Schultz to stick a union leaflet up his ass. He had no conversation with him. In the conversation with Freeze, Lonchyna, and Baker, on June 1, Shaffer told them that the medical insurance had expired and a new policy was under negotiation between Tremonti and the insurance company. David Tremonti also testified that the Company's health insurance contract expired on May 31 and the company had a 30-day grace period in which to negotiate a new service agreement with the Toledo health plan. Scott Shaffer denied ever saying that health insurance was canceled because of the Union. He further denied telling Freeze that he hoped he could find a new job. He stated that he had no conversation with Robert Miller on September 27.

Hollis Shaffer testified that he had a conversation with Gerald Rose on May 26 wherein Rose asked him if he knew anything about the Union. Shaffer replied that he was going to ask Rose the same question. Shaffer told Rose they were going about it the wrong way and they were just trying to shove it up his ass and then said he did not want to talk

about it anymore. Shaffer admitted talking to Nathan Elfring on May 28, telling Elfring that it would not surprise him if Tremonti closed the plant if the Union got in. Shaffer further admitted to a conversation with William Ruckreigle in mid-October wherein he told Ruckreigle that it would not surprise him if the Union would be kept out (of the plant) for 6 years and benefits would be reduced.

Both Scott Shaffer and his brother Hollis admit attending the union meeting on May 30 with another supervisor, Randy Purdue. The events took place as described by General Counsel's witnesses.

Analysis and Conclusions

I find, based on the demeanor of the witnesses, that David Tremonti did announce an invalid no-distribution rule at the May 28 employee meeting. I further find that Tremonti threatened to discipline any employee who violated the invalid no distribution rule. I further find that because many rank-and-file employees corroborated Tremonti's denial, that General Counsel did not prove by a preponderance of the evidence that Tremonti said he knew who the union ring-leaders were or that he would discharge them.

I further discredit the uncorroborated testimony of Kenneth Arnold that Tremonti threatened to close the plant. Tremonti's denial was supported by a rank-and-file employee. I credit the testimony of William Ruckreigle because he was still employed when he testified and it is supported by admissions of other supervisors. Accordingly, I find that Tremonti threatened to keep the union out of the plant for 6 years. However, I do not find a violation in Tremonti's statement that discharged employees would only be re-admitted by court order or that they would be laid off because he lost the Foodland account. I further find that Tremonti threatened employees with loss of benefits because there was simply no general discussion of the negotiating process and it was stated in the context of other violations.

I credit David Tremonti's testimony over that of Phillip Rogers' testimony with respect to demoting Rogers to apprentice if the Union came in, because I find that Tremonti was discussing what could occur under a union contract. However, I will credit the balance of Rogers' testimony relating to delaying the Union's representation in the NLRB election and knowing who voted for the Union. I also credit Rogers' testimony relating to the October 20 conversation wherein Tremonti questioned him about the union meeting and solicited him to engage in surveillance. Rogers' testimony relating to these allegations is not denied.

Scott Shaffer, Hollis Shaffer and Randy Purdue are admitted supervisors. I have credited all the testimony of General Counsel's witnesses relating to these supervisors because it was more believable than the denial's of the Shaffer brothers. Moreover, much of General Counsel's testimony was corroborated and undenied or admitted by the Shaffers. Accordingly, I find that the Shaffers:

- (1) Created the impression that employees were under surveillance.
- (2) Interrogated employees concerning their and other employees' union activities.
- (3) Threatened employees with cancellation of their health insurance.
- (4) Engaged in surveillance of a union meeting.

(5) Threatened employees with lower wages and harsher disciplinary policy if the union prevailed.

(6) Threatened employees with plant closure if the union prevailed.

(7) Indicated the futility of selecting a union.

(8) Coercively informed employees that their pro-union sympathies were traitorous.

(9) Threatened employees with discharge if he attended a union meeting.

(10) Vilified and coerced an employee by throwing a union leaflet at him and telling him to stick it up his ass.

C. No-Distribution Rule in Employee Handbook

The employee handbook contains the following rules:

(1) Employees are not permitted to distribute advertising material, handbooks, or printed or written material of any kind in production and working areas of the plant during working hours or when not working.

(2) Employees are not permitted access to the interior of NTA facilities or other internal or outside work areas during off duty hours, this includes the parking lot.

General Counsel contends that these two rules, in conjunction, effectively prohibited the employees from distributing any union information and such prohibition is a violation of Section 8(a)(1) of the Act.

It should be noted that the above rules do not prohibit distribution of union literature in nonworking areas such as the lunchroom, the locker room or rest areas. However, these rules are virtually impossible to interpret given what Tremonti stated at the May 28 meetings, i.e., that he did not want employees distributing union literature on company property. In light of this admonition, I find that the above rules are overly broad and violate Section 8(a)(1) of the Act.

D. Discharge of 16 Employees for Failure to Sign Employee Handbook

For several months an employee handbook was being formulated by David Tremonti. The booklet was ordered in February and because it was being constructed and printed by in-house employees in their spare time, it was not delivered until May 22. The handbook was presented to employees at the May 28 meetings. At this time Tremonti explained the contents and called their attention to certain agreements in the book which are explained above in footnote 2. The "At Will" provision, which is part of one agreement, states that employees are terminable, at will, which is the law in Ohio. Tremonti testified that he instructed employees to sign the handbook agreements before returning to work the following week. All the company witnesses testified that they were instructed to sign the agreements. All General Counsel's witnesses testified that they were requested to sign the agreements only if they agreed with them. Three employees Scott Baker, Steve Lonchyna, and Joe Freeze reported to work on a skeleton maintenance crew on Monday, June 1, without signing the agreements. Shift Supervisor Scott Shaffer told them they would have to sign the agreements or they could not work. They responded that they were still reviewing the language and would not sign. Scott Shaffer sent

the employees home with instructions to sign the agreements or their employment would be terminated. John Wilhelm and Timothy Brewer signed the agreements and remained at work. After this incident Tremonti instructed his secretary to call all employees and remind them to have the signed agreements when they came to work beginning with the midnight shift that evening. She testified that she did this.

When the midnight shift reported, 10 employees had not signed the agreements. Hollis Shaffer asked them if they were going to sign the agreements and Rose testified that he said no, they wanted to talk about what they did not agree with, but nothing specific was mentioned. Hollis Shaffer testified that all Rose and the other employees complained about was the "At Will" provision. Tremonti, who was present, told the employees that all they had to do was sign the agreements and they could go to work. Gerald Rose and the others refused to sign and Rose wanted to know whether he was being fired. If so, he wanted it in writing. Ten employees, Bernard Buhr, Neal Davis, Nathan Elfring, Douglas Filas, David Rarick, Steven Reed, Gerald Rose, Clayton Russell, John Schultz, and James Szachta left the company premises.

The first shift reported to work on Tuesday, June 2. Baker, Freeze, Lonchyna, Kenneth Arnold, Michael Coleman, and Robert Emerson refused to sign the agreements after Scott Shaffer asked them to. Scott Shaffer instructed the employees to leave. They refused, stating that they wanted their discharge in writing. Finally, the police were called and escorted the employees off company property. Two hours elapsed from the time the employees were instructed to leave until they finally departed.

Gerald Rose testified that the discharged employees went to the plant at midnight on June 2, but the gate was closed. He asked if he had been discharged and the security guard said they would be notified of their status by mail.

An emergency union meeting was held at 10 a.m. on June 2, and the employees were advised by the union to sign the handbook agreements under protest. On June 3, Joe Freeze, and several employees went to the company gate where Freeze said they were there to sign the agreements. According to these employees, plant superintendent Frank Skwiera told them they were on a restricted list and would not be allowed in. Frank Skwiera denied hearing any employees say they would sign the agreements on June 3.

On June 4 and 6 all the above discharged employees received a letter from the Company stating that they had voluntarily quit their jobs.

Tremonti testified that the Company had between 50 and 55 employees at the time of this incident and all but the 16 discharged employees signed the handbook agreements and were allowed to work.

Fifteen of the sixteen discharged employees had attended the May 30 union meeting and signed union authorization cards on that date. Robert Emerson signed a union authorization card after his discharge on June 2. Between 30 and 35 employees attended the May 30 union meeting.

Gerald Rose was the union's employee contact and was very active in the union movement both inside and outside the plant.

Analysis and Conclusions

General Counsel asserts that the 16 employees were discharged for engaging in protected concerted conduct. Respondent, because of its surveillance of the union meeting on May 30 knew the employees had concerns over signing the agreements and based on this knowledge, abruptly switched its position making the signing a condition of employment, thus trapping the employees into either signing the agreements or being discharged. She cites no cases in support of her concerted activity theory. Counsel for Respondent argues that the employees knew they had to sign the agreements before the May 30 union meeting and simply refused to do so because of the "At Will" clause. He further argues that the employees' concerted activity was not protected because their action constituted a refusal to observe the employer's right to set work rules and, in effect, insisted that they be permitted to work on their own terms citing *inter alia*, *Bird Engineering*, 270 NLRB 1415 (1984), and *Inner Link Cable Systems*, 285 NLRB 304 (1987).

It must be noted at the outset that there are no allegations that the issuance of the handbook or the insistence that the employees sign the agreements violated the Act. There is also no evidence of disparate treatment since the signing condition applied to all employees. All but 16 of the 55 employees signed the agreements and were allowed to work. This includes over half the employees who attended the May 30 union meeting and since there were 27 union card signers; this also includes 9 card signers who signed the agreements and were allowed to work.

I credit Respondent's witnesses when they testified that on May 28 they were told by Tremonti that they must sign the agreements, each of which had an employee signature line. It just does not make any sense to have agreements with employee signature lines and then make signing voluntary, or only if the employees agreed with the contents of the employee handbook. Therefore, I conclude and find, based on *Inner Link Cable Systems* and *Bird Engineering* that the employees, in refusing to sign the agreements while at the same time insisting that they had not quit their employment were not engaged in protected activity. They instead were attempting to set their own terms of employment and were defying the employer's right to operate his business. Moreover, I find that the employees did not inform the Respondent that it was willing to sign the agreements after the fact since this testimony only came to light on rebuttal and was denied. However, I am not persuaded that it would make any difference. Respondent would be justified in refusing reinstatement since many employees refused to leave the company premises after being discharged and required a police escort to remove them hours later.

Accordingly, since Respondent satisfied its *Wright Line*, 251 NLRB 1083 (1980), burden of proof and General Counsel did not meet its *Wright Line* burden, I will recommend that the allegations pertaining to these 16 employees be dismissed.

E. Discharge of Michael Rogers on September 10

Michael Rogers began work for the Company in November 1986. Rogers had first worked in the maintenance area for a few weeks, then served as a jogger in the pressroom until the spring of 1987. At that time Rogers asked Tremonti

if he could go to part-time status because he had obtained a job on a construction project. Tremonti agreed as long as he worked 15 to 20 hours per week. Rogers was employed as a part-time janitorial employee. In this capacity he was permitted to work his own schedule, and had little direct supervision. Rogers was never counseled or reprimanded when he failed to work 15 hours per week. Rogers attended the May 30 union meeting and signed a union authorization card. From April 12 to August 16 he worked 15 hours or more seven times. His last week he worked 5-3/4 hours. At that time plant superintendent Frank Skwiera discharged Rogers because his work was substandard and because the Company was eliminating part-time help.

In early September, Tremonti rehired Rogers as a full-time employee on third shift. He worked a full week his first week back and during this time he told Hollis Shaffer that the employees needed a union in order to correct the inequities that existed. Hollis told him that unions were no good and all they wanted was his money. On Tuesday, September 8, Rogers took sick at work and told Scott Shaffer that he could not continue working. Shaffer gave him permission to leave. On Thursday, September 10, Rogers came to work and handed Scott Shaffer a doctor's excuse. Shaffer told him it was no good and fired him. Rogers went to see Tremonti, who said the same thing. The note Rogers brought Shaffer is mostly illegible but appears to be notes written on a patient's chart. Part of the note reads, "Need work slip—dizzy—diarrhea, nauseated started Tuesday."

According to Shaffer, Rogers was discharged because of his poor attendance, because he left work on September 9 and because of the fake doctor's excuse. Scott Shaffer admitted that he never undertook any investigation of Rogers' doctor's excuse. He also admitted not looking at Rogers' personnel file before discharging him, nor was he aware that Rogers had only one warning dated February 23, in his personnel file. Shaffer further admitted that employees routinely do not provide doctor's slips when they are sick and that the Company has no policy with regard to doctor's excuses.

David Tremonti admitted that several employees had more warnings for absenteeism but were not discharged because they were pressmen and he needed them more than Rogers. He also stated that he believes in progressive discipline and that the company written warning notice has space for three warnings before discharge.

Analysis and Conclusion

I find that Rogers had some union activity and the Respondent was aware of it and that the crucial factor was Rogers' conversation with Hollis Shaffer after his return to full-time work in September, just before the NLRB election. I further find that General Counsel established a prima facie case and Respondent failed to meet its *Wright Line* burden because their whole defense collapsed by their own admissions.

Accordingly, I find that Michael Rogers was discharged because of his union activities.

F. Discharge of Robert Miller on November 12

When Robert Miller was first employed in November 1986, he informed Respondent that he attended school during the day. Miller was assigned third shift, which at that time

ran from midnight to 8:30 a.m. Consequently, his work schedule did not interfere with school. In the early spring, Miller was transferred to first shift because Hollis Shaffer said he needed experienced joggers on that shift. When Miller was transferred to first shift Scott Shaffer was his supervisor and at that time Miller told Shaffer he would not be able to work first shift because it was interfering with his attendance at school. After 1 week, Miller was transferred to another shift. Miller attended the May 30 union meeting and signed a union authorization card. He also attended the union meeting held on June 2. Miller testified that he and employee Phil Rogers were frequent companions who rode to work together. Prior to the September 25 NLRB election, Miller was given a bumper sticker reading, "I Believe Union" which he put on the rear bumper of his car. He parked his car near the entrance to the plant. Phil Rogers testified that the bumper sticker was on Miller's car shortly before the election and that Scott Shaffer asked him what he was doing with that shit on his car. Rogers explained that his father had given the bumper sticker to Miller. Rogers also testified that Hollis Shaffer observed the bumper sticker on Miller's car. According to Rogers, Tremonti frequently called Robert Miller, Phil's "little union buddy." This started shortly before the election. Shortly after the election, Scott Shaffer approached Miller and Phil Rogers and said he heard Miller voted yes and that he had a Benedict Arnold on his hands.

During the week of November 9, Miller was scheduled to take midterm exams on Thursday and Friday which were scheduled to start at 8 a.m. During this period, Miller's shift hours were from 7 p.m. to 7 a.m.. On Tuesday Miller reported to work at 7 p.m. and was informed by Shaffer that there had been a shift change and the hours had been changed to 8 p.m to 8 a.m.. Miller told Shaffer that he could not work until 8 a.m. because he had exams on Thursday and Friday. Scott Shaffer said he would talk to Tremonti and get back to him. Shaffer later told Miller that he could leave early that day but in the future he had to make other plans because of the shift change. According to Miller when he left work on November 11 he told Scott that he would not be able to work until 8 a.m. the rest of the week. Scott said he would talk to Tremonti and get back to him. On Thursday, November 12, Miller left work at 7 a.m. He stated that he presumed it was alright because Scott never got back to him. Miller reported to work at 8 p.m. on November 12 and Tremonti confronted him saying that if he ever walked out again without permission he would be considered a voluntary quit. Miller said he would not work until 8 a.m because exams were more important. Later that evening, Miller was told by a supervisor named Dale, in the presence of Hollis Shaffer, that he would have to work until 8 a.m. and Miller flatly refused. His timecard was punched out and Miller left.

Analysis and Conclusions

I find that Miller was a known union adherent and that Respondent committed an 8(a)(1) violation against him. However, I also find that there is no evidence that Respondent changed its work schedule to create a constructive discharge. I find that although Respondent accommodated Miller by changing his shift, in the spring, and again in November for the 1 day so he could attend school, Miller received several written warnings for missing work and being late. These written warnings began long before any union activity.

On February 23, Rogers received a warning for being absent. Miller received another written warning on March 24 when he was absent although he said he would report to work. Miller received another written warning on April 6 for being absent. On October 9, he received a written warning because he said he would be late and never showed. He received another written warning on October 20 when he came to work 2-1/2 hours late. On November 13, Miller flatly refused to work the scheduled hours.

Although General Counsel made a strong prima facie case, I find that Respondent satisfied its *Wright Line* burden with evidence that it would have discharged Miller, notwithstanding his union activities. Respondent's evidence consisted of several written warnings which were caused by school conflicts and Miller's flat refusal to work the scheduled hours.

Accordingly, I recommend dismissing the allegation relating to Robert Miller.

G. The Alleged 8(a)(5) Violations

1. Bargaining unit

Although Respondent denied the appropriateness of the bargaining unit, no evidence was presented in support of its denial. The unit was fully litigated and a Decision and Direction of Election was issued by the Regional Director on August 19. Respondent's request for review on the unit issue was denied by the Board on September 25.

Therefore, I find that the unit set forth below is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time pressroom employees employed by the employer at its Toledo, Ohio facility, excluding all office clerical employees and professional employees, guards and supervisors as defined in the act and all other employees.

2. Authorization cards and demand

The Union made a demand for recognition in a letter to Respondent dated June 11. The demand was received and denied by Respondent's letter dated June 15. No one disputes that a proper demand was made.

Twenty-three union authorization cards were signed, dated and witnessed at the May 30 union meeting. Two union authorization cards were signed, dated, and witnessed on June 2 and 5. Two more union authorization cards were signed dated and witnessed on June 11 for a total of 27 signed union authorization cards whose validity and authenticity were not at issue.

3. Union's majority status

The Respondent furnished a payroll list, dated June 10, containing 18 employee names in the appropriate unit. I deleted the names of Hollis and Scott Shaffer because of their supervisory status and added the names of Robert Miller, jogger in the press department and Michael Rogers who was a janitor in the press department. Both had signed union authorization cards and were discharged long after the demand. Thus, there were 18 employees in the unit, 6 of which had signed union authorization cards. Accordingly, on the date of the demand and thereafter the union represented 6 of 18 unit

employees and did not represent a majority either then or any other time material herein.

4. Applicability of a bargaining order

Having found that at no time material herein, did the Union represent a majority of Respondent's employees in the unit found appropriate, I will not recommend the imposition of a bargaining order and will recommend dismissing this refusal to bargain allegation.

5. Respondent's unilateral change in working hours

Respondent admits that it changed the shift hours of the unit employees in November and the evidence is clear that it did not notify and bargain with the union over this change. However, since I found that the union did not represent the employees in the appropriate bargaining unit; I find that Respondent was under no obligation to notify and bargain with the Union over this change. Accordingly, I recommend dismissing this 8(a)(5) allegation.

H. Employer's Objections to the Election

A petition for election was filed by the Union on June 12 and an election was conducted on September 25. After the election, the employer filed four objections to the election. Two objections were overruled by the Regional Director and evidence was taken on the remaining two objections.

Objection 1 alleges that petitioner paid sums of money to current and former employees which impaired the employees free choice in the election.

The evidence established that when the 16 employees were discharged on June 1 and June 2, the union paid each discharged employee who had become members of the union a sacrifice benefit of \$100 per week. For the first 2 weeks after their discharge the local paid them an additional \$50 per week until they received their back wages. Again, before the employees received their unemployment checks the local paid the employees an additional \$50 per week for 4 weeks. After that the employees received \$100 per week from the International Union. Sacrifice benefits are authorized in the International's constitution, article 27, section C, and have been in existence as long as anyone could remember. Payment of the sacrifice benefits was also authorized by the President of the International Union by telegram dated July 1 and a followup letter dated July 15. There was no evidence that employees were paid any money to induce them to vote for the union. Accordingly, I shall recommend overruling Objection 1. Objection 3 asserts that petitioner and his agents made threats of physical harm to employees who did not favor unionization.

The evidence offered established that on June 4 employees David Gates and Gerald Rose got into a fist fight at a local gas station. Since this employee conduct occurred outside the critical period, I will recommend overruling this objection.

I. Challenges

A tally of ballots issued after the election shows that approximately 14 voters were listed as eligible. Thirty-one cast ballots, of which seven were cast for and five against the petitioner. There were 19 challenge ballots.

The challenge ballot of John Jackson was withdrawn by the employer. The challenge to Hollis Shaffer will be sus-

tained since he is an admitted supervisor. The challenge ballots of Michael Rogers will be overruled because I have found him to be discriminatorily discharged. The challenges to the 16 employees discharged on June 1 and 2 namely, Kenneth Arnold, Michael Baker, Bernard Buhr, Michael Coleman, Neal Davis, Nathan Elfring, Robert Emerson, Douglas Filas, Joseph Freeze, Steven Lochyna, David Rarick, Steven Reed, Gerald Rose, Clayton Russell, John Schultz, and James Szachta should be sustained because they were not employed on the date of the election and were not discharged in violation of the Act.

CONCLUSIONS OF LAW

1. Respondent NTA Graphics, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Graphic Communications International Union, Detroit-Toledo Local 289, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time pressroom employees employed by the employer at its Toledo, Ohio facility, excluding all office clerical employees and professional employees, guards and supervisors, as defined in the Act, and all other employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

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

(a) Promulgating an invalid no-distribution rule in the employee's handbook.

(b) By announcing an invalid no-distribution rule to employees.

(c) By threatening to keep the union from representing the employees for 6 years.

(d) Threatening employees with loss of benefits if they chose a union.

(e) Creating the impression, among employees, that their union activities are under surveillance.

(f) Telling employees that it delayed an NLRB election.

(g) Soliciting employees to engage in employee surveillance.

(h) Interrogating employees about their and other's union activity.

(i) Threatening employees with cancellation of their health insurance.

(j) Engaging in surveillance of a union meeting.

(k) Threatening employees with lower wages, plant closure and harsher disciplinary policy if the union represented them.

(l) Threatening employees with discharge if they attended a union meeting.

(m) Indicating the futility of selecting a union.

(n) Coercively informing employees that their prouion sympathies are traitorous.

(o) Vilifying and coercing an employee by throwing a union leaflet at him and telling him to stick it up his ass.

5. Respondent violated Section 8(a)(3) of the Act by discharging Michael Rogers.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. All other allegations not mentioned above were not found to be violations 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 having discriminatorily discharged an employee, it must offer reinstatement and make whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and to remove from his files any and all reference to the discharge and warnings given to him.

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION

On October 31, 1989, I issued a decision entitled NTA Graphics, Inc., JD- 264-89. On April 4, 1990, the Board remanded the case to me for further findings of fact and credibility resolutions.

Paragraph 1 Findings and Conclusions

I find based on the evidence that two issues are involved in resolving credibility. The first issue is whether as not Tremonti told employees on May 28 that they must sign the handbook agreements before returning to work. I resolved that issue by crediting Respondent's witnesses for reasons stated in my decision. The second issue is whether or not Tremonti on May 28 made signing the agreements a condition of further employment. A review of the testimony of all the witnesses including Ricky Carter indicates that notwithstanding Carter's testimony, Tremonti did not mention any penalty on May 28 for failing to sign the agreements. The evidence supports a finding that employees were first told of the consequences of not signing on Monday June 1, 1987. However, the credibility resolution does not change my decision since establishing a penalty for not signing the agreements is consistent with Respondent's prior insistence that they sign, which predated the union meeting. The evidence indicates and I find that the penalty was triggered when employees showed up for work on June 1 and told Scott Shaffer they had not signed or were not going to sign the agreements.

There is in my opinion insufficient evidence to establish that Respondent promulgated the penalty to force a constructive discharge because the penalty was to be applied evenly to all employees and, in fact, was. Half the employees (approximately 17) who attended the May 30 union meeting signed the handbook agreements and were not discharged. Moreover, there is no direct evidence of a causal relationship between events transpiring at the May 30 union meeting and Respondent's decision to discharge any employee who refused to sign the agreements. Other evidentiary findings referred to in the remand do not change the burden of proof or alter the weight of evidence.

Paragraph 2 Findings and Conclusions

With respect to Tremonti's 8(a)(1) violations on May 28, I credited the testimony of all General Counsel witnesses listed on page 2 of my decision except where indicated on

page 6. I credited the testimony of all the page 2 witnesses and summarized their testimony regarding loss of benefits because they said essentially the same thing.

Paragraph 3 Findings and Conclusions

Several witnesses namely Lonchyna, Baker, Rose, and Freeze testified that on May 28 Tremonti told employees that

he wanted no discussion of the union on company property. Respondent did not specifically contradict this testimony. Accordingly, I find that Respondent on May 28 promulgated an unlawful no solicitation rule in violation of Section 8(a)(1) of the Act.