

**Midland Transportation Company, Inc. and Chauffeurs, Teamsters and Helpers Local Union No. 238, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.**<sup>1</sup> Cases 18-CA-11218 and 18-RC-14755

August 12, 1991

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

On April 3, 1991, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Midland Transportation Company, Inc., Marshalltown and Spencer, Iowa, and other terminal locations in Iowa, Minnesota, and Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(e) and reletter the subsequent paragraphs.

“(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.”

IT IS FURTHER ORDERED that the election conducted on April 3 and 4, 1990, in Case 18-RC-14755 is set aside and that this case be remanded to the Regional Director for Region 18 for the purpose of scheduling and conducting a second election at such time as he deems the circumstances permit a free choice on the issue of representation.

<sup>1</sup>On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

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

<sup>3</sup>The judge's Order is modified to require the Respondent to preserve and make available to the Board all records necessary to compute the backpay owed discriminatees Mark Phillips and Lyndon Walter.

[Direction of Second Election omitted from publication.]

A. Marie Simpson, Esq., for the General Counsel.

John B. Grier and John F. Veldey, Esqs. (*Cartwright, Druker & Ryden*), of Marshalltown, Iowa, for the Employer.

Neil A. Barrick, Esq., of Des Moines, Iowa, for the Union.

DECISION AND REPORT ON OBJECTIONS

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This consolidated matter was tried before me in Marshalltown, Iowa, on June 21, 1990.

The complaint in Case 18-CA-11218, based on a charge filed by Chauffeurs, Teamsters and Helpers Local Union No. 238, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) issued on April 17, 1990.<sup>1</sup>

The complaint alleges that Midland Transportation Company, Inc. (Employer) has violated Section 8(a)(1) of the National Labor Relations Act (Act) since August 1989 by maintaining an overly broad no-solicitation rule, and that it further violated that section in January and February 1990 by employees about their and their coworkers' union activities, by imparting the impression that said activities were under surveillance, by threatening employees with job loss because of said activities, and by soliciting employees to report on the union activities of their coworkers thenceforth.

The complaint also alleges that the Employer violated Section 8(a)(3) and (1) by discharging employee Mark Phillips on February 13, 1990, and by suspending employee Lyndon Walter on February 23, 1990.

An election in Case 18-RC-14755 was held on April 3 and 4, 1990, among the truckdrivers and dock freight handlers employed by the Employer at its several terminals in Iowa, Minnesota, and Nebraska. It derived from a petition filed by the Union on February 23, 1990, and a Stipulated Election Agreement approved by the Acting Regional Director on March 26. The tally was 53 votes for the Union and 79 against, with 9 challenged ballots.

The Union filed objections to conduct affecting outcome of election on April 12, then withdrew certain of the objections by letter dated April 13. The Regional Director issued his report on objections, order directing hearing, order consolidating cases, and notice of hearing on April 19. In it, noting that the remaining objections correspond with certain of the allegations of misconduct set forth in the complaint in Case 18-CA-11218, he concluded that they “raise substantial and material issues of fact which can best be resolved by a hearing in connection with the pending unfair labor practice proceeding.” He therefore ordered that the two matters be “consolidated for purposes of hearing, ruling and decision by an Administrative Law Judge.”

The Union thereafter requested the withdrawal of one of its remaining objections, and that another be withdrawn as concerns conduct predating February 23. The Regional Director accordingly issued an order dated April 26, in which he approved the Union's request and amended his April 19 report, order, and notice “to limit the taking of evidence re-

<sup>1</sup>The charge was filed on February 22, 1990, and amended on April 12.

lating to the objections only . . . [to] . . . conduct [that] occurred on or after February 23, 1990.’

#### I. JURISDICTION/LABOR ORGANIZATION

The Employer, an Iowa corporation headquartered in Marshalltown, is engaged in the interstate transportation of freight. The complaint alleges, the answer admits, and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The pleadings also establish and I find that the Union is a labor organization as defined in Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Complaint Paragraph 5(a)

###### 1. The allegation

Paragraph 5(a) of the complaint alleges that, since about August 23, 1989, the Employer “has maintained in its employee handbook a rule which prohibits employees from engaging in solicitation of any sort during working hours.” Paragraph 7 alleges that the Employer thereby violated Section 8(a)(1).

###### 2. The evidence

On taking charge of the Marshalltown terminal in 1989, David Mattox, the Employer’s vice president, “developed” an employee handbook, as it is titled, and caused it to be distributed to the employees systemwide in November of that year. Among the handbook entries, under the heading “Company Policy” and the subheading “Solicitations,” is this: “Employees shall refrain from solicitations of any sort during working hours.”

On February 26, 1990, in response to word of the Union’s election petition, Mattox prepared and saw to the distribution of an all-employee memorandum which stated, among other things:

5. If anyone causes you any trouble at your work, or puts you under any pressure to join a union, do not hesitate to contact myself. Every legal means will be taken to see that such activity is stopped.

6. No person will be allowed to carry on union organizational activity during actual working time. Anyone who does so in other than nonworking mealtimes or breaktimes will be subject to discipline.

Mattox testified that he issued the February 26 memorandum because he felt a need “to clarify some of the rules in the Employee Handbook.” The memorandum nowhere mentions the handbook, however; nor does it otherwise intimate that this was its purpose.

###### 3. Conclusion

I conclude that the no-solicitation rule contained in the employee handbook is overly broad, and so violates Section 8(a)(1) as alleged. Quoting from *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983);

[R]ules using “working hours” are presumptively invalid because the term connotes periods from the begin-

ning to the end of workshifts, periods that include the employees’ own time.

The Employer has proffered no evidence to offset the adverse presumption—that is, that the rule is necessary for the maintenance of production or discipline, or serves some other compelling, legitimate interest. See *Brigadier Industries*, 271 NLRB 656, 657 (1984).

The above-quoted passages from the February 26 memorandum, far from working to exculpate, compound the initial illegality. Item 5 is but a blatantly antiunion version of the overly broad handbook rule, while Item 6 is unlawfully discriminatory on its face. As stated in *Montgomery Ward*, 269 NLRB 598, 599 (1984):

[A]n employer may prohibit employees from engaging in activities not associated or connected with their work during working time however, such a prohibition may not single out union activities.

Items 5 and 6 are improper for the additional reason that their issuance was triggered by the election petition; thus, even if facially valid, they plainly were intended to discourage union activities rather than serve a valid management concern. *Montgomery Ward*, supra at 599; *Ramada Inn of Fremont*, 221 NLRB 331, 331 (1975); *Ward Mfg.*, 152 NLRB 1270, 1271 (1965).

##### B. Complaint Paragraph 5(b)

###### 1. The allegation

Paragraph 5(b) of the complaint alleges that, on or about January 7, 1990, David Stellingwerf, night operations manager at the Marshalltown terminal, “interrogated an employee concerning the employee’s union activities and created the impression that employees’ union activities were being surveilled.” Paragraph 7 alleges that the Employer thereby violated Section 8(a)(1).<sup>2</sup>

###### 2. The evidence

Alan Maxfield, who worked nights in the office at the Marshalltown terminal, testified that, as he and Stellingwerf were walking down a hallway at the terminal on January 7, Stellingwerf asked him if he had “attended” a union meeting the night before; and that, upon his replying that he had, Stellingwerf asked, “Who was there?” or “something in this order.” Maxfield demurred that he could not discuss it “on company time,” as he recalled, and Stellingwerf, saying he understood, dropped the subject.

Apparently addressing the same incident, Stellingwerf testified:

I had heard [a] rumor that Al was involved with the Union and I asked him about it, I think it was relative to some meeting or something. And when I asked him he replied, “Yes, I’m involved with it.” . . . I conveyed to Al my disappointment that he was involved with it and I thought it was wrong and I thought there was other methods to get done what he and the other employees were trying to get done.

<sup>2</sup>The Employer admits in its answer that Stellingwerf was a supervisor and its agent at relevant times.

The Employer, in its brief, “does not challenge the fact that Maxfield was questioned concerning his union activities on the 7th.”

Stellingwerf testified, in answer to a leading question from the Employer’s attorney, that he “considered” Maxfield to be “part of [the] management team.” Asked his reasons for so thinking, he testified that Maxfield’s “primary function was to route our delivery,” that he “had to schedule the routes” to coordinate “with the committed daily pickups,” and that he was “responsible for the revenues on those routes.” Asked if Maxfield had ever fired anyone, Stellingwerf recounted the time a driver refused a certain run. Maxfield told the driver, according to Stellingwerf:

Well, then, don’t punch in, you might as well go home because I have nothing else for you, and if you don’t take that route, I guess you don’t want a job.

Maxfield testified that he “went into the office as a clerk” in April 1989, previously having been on the dock crew and then a truckdriver for the Employer; that he remained a clerk until March 1990; that his duties included organizing the various daily deliveries into routes and figuring the daily revenues per truck; and that, four nights each week, after completing those tasks, he drove a truck to Keystone or Cedar Rapids and back.

### 3. Conclusions

While not disputing Maxfield’s rendition of the incident in question, the Employer argues that Stellingwerf’s conduct was privileged because of Maxfield’s “status” as a supervisor or a managerial employee.

The party urging the existence of such status bears the burden of proof. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). The weight of evidence indicates that Maxfield exercised minimal independent discretion in the discharge of his duties, seldom if ever deviating from settled guidelines and procedures and the counsel of his superiors.<sup>3</sup> I conclude, therefore, even if Maxfield was not deemed part of the election unit ultimately to emerge, that the Employer has not met its burden. *NLRB v. Textron*, 416 U.S. 267, 288 (1974); *Arizona Electric Power Cooperative*, 250 NLRB 1132, 1132 fn. 1 (1980); *Southwest Airlines*, 239 NLRB 1253, 1253–1254 (1978); *Raytee Co.*, 228 NLRB 646, 646–647 (1977).

I also conclude, in the circumstances, that Stellingwerf violated Section 8(a)(1) by asking Maxfield if he had attended the previous night’s union meeting and who else was there. Maxfield was not then openly prouning, and the questions neither served a legitimate purpose nor were accompanied by assurances against reprisal. They thus reasonably tended to interfere with, restrain, or coerce Maxfield in the exercise of his Section 7 rights. See generally, *Pennsy Supply*, 295 NLRB 324, 325 (1989); *UARCO*, 286 NLRB 55, 55–56 (1987); *Meda-Care Ambulance*, 285 NLRB 471, 472 (1987); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217 (1985).

Moreover, extracting from *Liquitane Corp.*, 298 NLRB 292, 293 fn. 4 (1990):

<sup>3</sup> Stellingwerf’s testimony that Maxfield told a driver he “might as well go home,” etc., when the driver refused a run, suggests the unavailability of alternative runs rather than the existence of discharge authority.

[P]robing attempts by a supervisor to find out from employees about the specific union activities of other employees, who had not disclosed their attitudes toward the union, had a reasonable tendency, under the circumstances, to interfere with, restrain, and coerce those employees in the exercise of their rights.

See also *Salvation Army Residence*, 293 NLRB 944, 973 fn. 107 (1989); *Raytheon Co.*, 279 NLRB 245, 246 (1986).

I find no merit, however, in the allegation that Stellingwerf’s comments unlawfully imparted an impression that the employees’ union activities were under surveillance. *Yolo Transport*, 286 NLRB 1087, 1094 fn. 20 (1987); *Gemco*, 279 NLRB 1138, (1986).

### C. Complaint Paragraph 5(c)

#### 1. The allegation

Paragraph 5(c) of the complaint alleges that, on or about January 8, 1990, Stellingwerf “threatened” an employee that the Employer “would close the terminal and reopen under a different name and that employees would lose jobs because of their activities for and on behalf of the Union.” Paragraph 7 alleges that the Employer thereby violated Section 8(a)(1).

#### 2. The evidence

Maxfield testified that, on January 8, Stellingwerf called him to the backroom at the Marshalltown terminal, then related a telephone conversation he assertedly had had with the Employer’s president (and David’s father), Gerald Mattox. Stellingwerf said, by Maxfield’s account, that Mattox had asked if he “knew anything about” the Union, and he said he did not “know anything about it.” Stellingwerf then stated, according to Maxfield, that David Mattox called him soon after, “wanting to know why” Stellingwerf had called his father, and he replied that the senior Mattox had called him. David then remarked, per Stellingwerf as averred by Maxfield, “That’s all right, because if they try to get the Union in, we’ll just shut the thing down, we’ll just open under another name.”

Stellingwerf described a union-related conversation he assertedly had had with Maxfield. It bore no resemblance to that detailed by Maxfield. He denied ever being told “by any of the managers . . . that if the plant was unionized, it would be shut down or the name changed.” He also denied relaying “such information” to Maxfield; and, when the Employer’s attorney then asked, “And I take it, if you ever told Mr. Maxfield that, that would not be based on anything that any of the Mattoxes ever said to you?” he answered, “That’s correct.”

#### 3. Conclusion

I credit Maxfield that Stellingwerf made the shutdown/new-name remark, attributing it to David Mattox. Maxfield displayed convincing testimonial demeanor, his recital contained a number of details seemingly at odds with fabrication, and he held up well under cross-examination. Stellingwerf was less impressive both in demeanor and content, and his testimony that, if he made the remark, it did not originate with one of the Mattoxes, came across as a virtual admission.

I conclude that this remark, whatever its provenance, violated Section 8(a)(1) as alleged. As stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969), the projection to employees of the adverse effects of unionization,

must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . [A]n employer is free only to tell "what he reasonably believes will be the likely consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition."<sup>4</sup>

See also *Bert Wolfe Ford*, 239 NLRB 555, 564 (1978); *Sturgis-Newport Business Forms*, 227 NLRB 1426, 1426 (1977).

#### D. Complaint Paragraph 5(d)

##### 1. The allegation

Paragraph 5(d) of the complaint alleges that, on or about January 13, 1990, Vice President David Mattox "interrogated an employee concerning, and otherwise solicited information regarding, employees' union activities, and requested [that] an employee attend union meetings and report to him who attended and the events that transpired." Paragraph 7 alleges that the Employer thereby violated Section 8(a)(1).

##### 2. The evidence

Maxfield testified that Mattox called him at home on a Saturday morning in early January 1990, asking that he come to the terminal; and that, in the resulting meeting in Mattox's office, this occurred:

[Mattox] wanted to know if I had attended the union meetings, and I said I had, and he wanted to know who was all there. I told him I couldn't tell him who was all there because there was so many people. He said, could I give him names? I said, no, I would not give him names. He then asked me who was the organizer of this and I told him, being as he had me in his office, it must be me. And then he told me, "Well, I don't know how much toilet paper I can use at home to even take—" [and] I said, Well, I think what you should do is contact your attorney, what you can and cannot do.

Maxfield added: "He asked me . . . if I could attend any of the meetings and come back and give him names, and I said, 'No, I would not.'" Maxfield testified that, when Mattox announced the meeting's end, he rejoined, "Fine, it was still [a] violation of law to have this meeting."

Mattox testified that the meeting occurred on either January 6 or 13, after he had summoned Maxfield to the terminal; and that, considering Maxfield to be "part of the management team," he asked Maxfield if he had heard "the grumblings and rumors" about union activity. Mattox continued: "[T]o my surprise, he said not only had he heard rumors about it, but in fact there had been a meeting and in fact he was the contact person for Marshalltown." Maxfield further disclosed, according to Mattox, that he had attended

<sup>4</sup>The quotations within the quotation are from *NLRB v. River Togs*, 382 F.2d 198, 202 (2d Cir. 1967).

the meeting, as did "a large majority of" the Marshalltown drivers and dockmen.

With that, Mattox recounted, he persuaded Maxfield that he "was not a driver or a dockman, that he was indeed a [sic] office personnel, and that he would quit all of his activities representing the Union."

The Employer, in its brief, does not dispute that Maxfield "was questioned concerning his union activities on the . . . 13th of January 1990."

#### 3. Conclusion

I credit Maxfield's substantially uncontradicted testimony that Mattox questioned him about his and others' union activities, and asked that he thenceforth report on the activities of others.

I conclude in the circumstances that this conduct reasonably tended to interfere with, restrain, or coerce Maxfield and other employees, violating Section 8(a)(1) as alleged. Among the inculcating circumstances: Mattox was the ranking management official at Marshalltown; he specially summoned Maxfield on his day off; the questions were propounded in his office, the seat of management power; the questioning was insistent, served no valid purpose, and was not accompanied by assurances against reprisal; and Maxfield as yet was not openly pronounion. See generally, *Liquitane Corp.* supra; *Pennsy Supply*, supra; *UARCO*, supra; *Meda-Care Ambulance*, supra; *Sunnyvale Medical Clinic*, supra.

#### E. Paragraph 5(e)

##### 1. The allegation

Paragraph 5(e) of the complaint alleges that, on or about February 13, 1990, Terry Jespersen, the manager of the Employer's Spencer, Iowa, terminal, "threatened an employee with loss of jobs because of employees' activities for and on behalf of the Union." Paragraph 7 alleges that the Employer thereby violated Section 8(a)(1).<sup>5</sup>

##### 2. The Evidence

Mark Phillips, a truckdriver at the Employer's Spencer terminal until discharged on February 13, 1990, testified that, in the midst of a conversation with Jespersen on February 12 regarding the length of Phillips' hair, Jespersen exclaimed:

Well, you guys think you're so smart, trying to organize this union stuff, this union bull. . . . I worked for All-American Freight, and those guys over there . . . wanted to go union, too, and I told them, I said, that that's a bad deal, . . . trying to go union, . . . and they had their union vote, and they went union. Fourteen guys lost their jobs. Now they are driving around in old cars trying to find a job.

Phillips responded, so he testified, "Well, I think the Union might be closer than you think," whereupon Jespersen offered to bet \$1000 to Phillips' \$100 that the terminal would not be union by year's end. Phillips declined, but repeated that "the Union might be closer than what you

<sup>5</sup>The Employer admits in its answer that Jespersen was a supervisor and its agent at relevant times.

think.” The conversation then returned, as Phillips recalled, to the subject of his hair.<sup>6</sup>

Jespersen denied that he ever had a conversation with Phillips “involving union activities.” And, while he once worked for All-American, he testified that it was “always unionized” and that he was never with a company when it “went from a nonunion status to a union status.”

### 3. Conclusion

Phillips’ account was detailed and cogently delivered, whereas Jespersen’s blanket denial that he ever talked with Phillips about union activities was lamely wrought and generally unconvincing.<sup>7</sup> I therefore credit Phillips that Jespersen made the remarks attributed to him

Given Jespersen’s testimony that All-American was “always unionized” while he was there, and did not go “from a nonunion status to a union status,” one can only infer that the remarks in question were not based on personal knowledge, but rather were fabricated solely to raise the specter of job loss should the employees bring in the Union.

I conclude that this exceeded the bounds of permissible projection, violating Section 8(a)(1) as alleged. *NLRB v. Gissel Packing Co.*, supra.

#### F. Complaint Paragraph 5(f)

##### 1. The allegation

Paragraph 5(f) of the complaint alleges that, on or about February 22, 1990, Gregg Mattox, the Employer’s general manager, “interrogated an employee concerning the employee’s union sentiments.” Paragraph 7 alleges that the Employer thereby violated Section 8(a)(1).

##### 2. The evidence

Lyndon Walter, a dockman at the Marshalltown terminal, testified that Gregg Mattox (Jerry’s son, David’s brother) called him to the office on February 22, then said that two employees had reported that Walter had “threatened” them. Mattox elaborated, according to Walter, that Walter had told the two they “would be fired if the Union came in.” Walters’ recital proceeded that he denied saying such a thing, then remarked to Mattox that he “understood . . . the company’s concern about the Union.”

Walter testified that Mattox presently asked how he was “going to vote,” and he answered that he would vote “with the majority”; that is, “yes.” Mattox rejoined, per Walter, that the employees “really ought to think about what they were doing,” and admonished Walter to “play fair.” Walters took this last as an allusion to his alleged threats to coworkers. Mattox “emphasized,” according to Walters, “that he wanted to make sure that both sides played fair and that there weren’t threats.”

Walter at times had worn a union hat at work before February 22.

Gregg Mattox generally officed at the Employer’s Cedar Rapids terminal. He did not testify.

<sup>6</sup>This conversation in toto, as described by Phillips and Jespersen, appears below in the discussion of Phillips’ discharge.

<sup>7</sup>More on Jespersen’s credibility appears below in the discussion of Phillips’ discharge.

### 3. Conclusion

Crediting Walter’s uncontradicted testimony that Gregg asked him how he was going to vote.<sup>8</sup> I conclude that the Employer violated Section 8(a)(1) as alleged. The circumstances underlying this conclusion: Gregg, as general manager, was the Employer’s second in command; he called Walter in; the incident took place in the office, the core of management authority; the question was part of a larger presentation in which Gregg admonished Walter about threatening coworkers in the context of the union campaign; the question served no proper purpose; and, unless Gregg’s comments about playing fair can be so deemed (I think not), the question was not accompanied by assurances against reprisal. See, in addition to the cases previously cited regarding interrogation, *Structural Finishing*, 284 NLRB 981, 981 (1987); *United Artists Communications*, 280 NLRB 1056, 1056–1057 (1986); *Noral Color Corp.*, 276 NLRB 567, 572 (1985).<sup>9</sup>

#### G. Complaint Paragraph 5(g)

##### 1. The allegation

Paragraph 5(g) of the complaint alleges that, on or about February 22, 1990, David Marks, a supervisor at the Spencer terminal, “interrogated an employee and otherwise solicited information regarding employees’ union activities.” Paragraph 7 alleges that the Employer thereby violated Section 8(a)(1).<sup>10</sup>

##### 2. The evidence

Phillips testified that he had a telephone conversation with Marks on February 22—that is several days after Phillips’ discharge—in which Marks asked, “Well, who’s in the Union, what’s going on with the Union?” Phillips then “named off some names,” as he recalled.

Marks testified, “I just asked him if he heard anything [about the Union], and he said he had heard rumors around about it, too.” That, Marks continued, “was the extent of the conversation.” Marks did not expressly deny that he asked who was in the Union. He denied, however, that Phillips gave him any names.<sup>11</sup>

Phillips and Marks agree that the conversation dealt with other, unrelated matters at the outset.

##### 3. Conclusion

I credit Phillips that Marks asked who was in the Union, and that Phillips obligingly “named off some names.” Phillips was a generally believable witness; and Marks admittedly asked Phillips about the union situation, did not specifi-

<sup>8</sup>Although Gregg did not testify, let alone refute Walter, the Employer suggests in its brief that Walter should not be credited. Noting that Walter by then had worn a union hat to work several times, the brief asks, “Does it make any sense that Gregg Mattox would inquire of such an employee how he was going to vote?” Perhaps, under the guise of seeking information, Gregg had other things in mind.

<sup>9</sup>That Walter, by wearing a union hat, had “gone public” with his union sympathies does not override the array of convervailing circumstances. See *United Artists Communications*, supra.

<sup>10</sup>The Employer admitted on the record that Marks was a supervisor and its agent at relevant times.

<sup>11</sup>Marks’ testimony in this regard was weak, however. He first testified, “Not that I remember,” then, “I’m sure that he didn’t.” Later, asked if contrary testimony “would not be true,” he testified: “I couldn’t tell you. I don’t recall him giving me any names over the phone that evening.”

cally deny that he asked the subject question, and was notably tentative when asked if Phillips gave him names.<sup>12</sup>

I conclude that Marks' inquiry into the union activities of employees other than Phillips reasonably tended to interfere with, restrain, or coerce those employees, violating Section 8(a)(1) as alleged. *Liquitane Corp.*, supra; *Salvation Army*, supra; *Raytheon*, supra.

#### H. The Allegedly Unlawful Discharge of Mark Phillips on February 13, 1990

##### 1. The evidence

Phillips, as previously mentioned, was a driver at the Employer's Spencer terminal until discharged on February 13. He was hired on March 27, 1989.

On February 12, Phillips testified, Jespersen, the Spencer terminal manager, remarked to him that he was "looking pretty shaggy" and asked when he was "planning on getting a haircut." Phillips replied, "Spring's coming, I will get it cut then," and Jespersen rejoined, "Well, that really isn't soon enough." Phillips began to comment on the appearance of "the guys at Marshalltown." Jespersen interrupted that he did not "care about the guys at Marshalltown," that he wanted "it done" his way at Spencer. Phillips grumbled, "Well, bullshit, I work for Midland Transportation," and the conversation ended.

Jespersen's less detailed account initially differed from Phillips' in two significant respects. He testified that he directed Phillips, firmly and without equivocation, "Mark, get your hair cut," and that Phillips brought the exchange to an abrupt end by storming out and slamming the door. Later, however, confronted with a statement he had prepared that day or the next, Jespersen amended that he said to Phillips, "Mark, I'd appreciate you getting your hair cut in the next several days," and that Phillips left when Jespersen answered the telephone, "shut[ting] the door, hard."

Jespersen testified that he then discussed the incident with David Marks, telling Marks:

What I plan to do, Dave, what I'm going to do, I'm going to let him stew for a day, and he's a good kid. If he's got any common courtesy at all, he'll apologize the next day.

Marks failed to corroborate Jespersen in this particular. Asked by the Employer's counsel if Jespersen "ever discussed with [him] what he should do because of" the incident on the 12th, Marks testified, "No, sir."

Phillips testified that, when he arrived at work the next morning, February 13, one of the night-shift drivers, Paul

<sup>12</sup>The Employer argues in its brief that resolution of the testimonial conflicts between Phillips and Marks "is of no consequence" inasmuch as Phillips "was no longer an employee" of the Employer and the "interrogation of former employees . . . cannot form the basis for a violation of Section 8(a)(1)." The Employer's premise is thrice flawed. First, as I conclude below, Phillips' discharge was unlawful, and Section 2(3) of the Act defines the term "employee" to include "any individual whose work has ceased . . . because of any unfair labor practice." Second, even if not an employee of the Employer, he was a statutory "employee." *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). Third, as revealed by the earlier-quoted language from *Liquitane Corp.*, the mischief in questioning an individual about the union activities of employee/others rests as much on its tendency to impinge upon the statutory rights of those employee others as upon the rights of the individual questioned.

Treweiler, asked him and Barry Anderson, a night-shift driver, if they wanted "to sign a union petition." Phillips, but not Anderson, answered that he did, and he proceeded to Treweiler's car in the parking lot, where he volunteered to solicit the signatures of coworkers and Treweiler gave him a petition for that purpose. Treweiler advised him to do this "after work," so Phillips took the petition inside, put it on his clipboard, and joined others loading and unloading cargo.

Later that same morning, Jespersen called a meeting of the Spencer employees. He explained:

I had planned to conduct this meeting. We had just moved into our new terminal facilities in January, brought the guys all together, and we had started that operation a year and a half ago, just two of us, and now I really wanted to say, "Hey, we are up to 11 employees, guys, we've got a brand-new freight facility here, with a heated dock . . . we've got uniforms for you guys, we've got new equipment, you're doing one heck of a bang-up job out there in the industry."

[I]t was a meeting of praise and kind of sales-type, let's-go-out-and-get-the-competition type thing. Let's turn any energies, if we have any bad feelings towards one another, because there's been—when you get that many drivers together, once in a while they are rubbing up against one another and people get mad. We have a good group of guys, and [I] primarily said, "Let's turn those energies towards acquiring more business and making Midland something to be proud of, which we are."

Phillips recalled Jespersen's giving a "brief history" of the company; describing the chain of command; saying he wanted the employees to come directly to him if they had "something to say," rather than have "that kind of stuff floating around out there on [the] dock"; and discussing the employees' appearance. Jespersen elaborated as concerns appearance, according to Phillips, that "a couple of" the employees were "looking kind of shaggy" and "needed to get trimmed up a little bit"; that he would "pay for it" if the employees "couldn't afford it"; and that all the employees should wear their company-provided uniforms inasmuch as they "look[ed] good in them," the wives thought they should wear them, and they "were out there representing Midland Transportation."

One of the employees commented, per Phillips, that "a guy in Omaha had a Mohawk and a long earring," and Jespersen shot back that he did not care about Omaha, but wanted the Spencer terminal to "put out a good image." Jespersen added that anyone ignoring his wishes in this regard "didn't need to be working there"; that he had borrowed \$60,000 to build the Spencer terminal, which he then leased to the Employer, and he did not "want one guy out there screwing the whole thing up and having it go down the drain."

Phillips testified that, after this meeting, in the yard, a coworker, Larry Kramer, asked him what the petition was "all about"; that another employee, Steve Daley, entered in while he "was telling Larry about the petition"; and that, after Kramer and Daley left, he told another coworker, Dennis Wisebrose, to "contact" him after work if he wished to sign "a union petition going around."

Phillips recounted that he then returned inside, where he sought out Jespersen to talk about “this problem that I have with my hair.” He found Jespersen in conversation with the aforementioned Barry Anderson.<sup>13</sup> When Anderson left, Phillips engaged Jespersen in an extended discussion. Phillips described it this way:

I walked in and I said, “Terry, we’ve got a problem here with my hair.” And he says, “We don’t have a problem, you’ve got a problem.” And . . . he wanted to know why I didn’t get it cut, and I said, “Well, why do I have to get my hair cut when there are guys running around in Marshalltown and Omaha with longer hair than I’ve got?”

And he said, “Well, that’s the way we want it.” I said, “Well, why am I being singled out as an employee?” And he says, “Well, we’ll just get the handbook here and we will see what it says about it.”

So he ran in and grabbed the handbook and came out and read the section on personal care and personal looks. or whatever . . . [A]nd when he got done, I says, “Where does it say anything about it in there?” And he said, “You know, Dave Marks told me this when I hired you, he said that he’d be like a tiger,” and I said, “What does that mean?” He said, “Well, you’d work like a trooper for about a year, and then you’d turn on me.” And I said, “Turn on you?” He goes, “Yeah, you’d turn on the company.”

And I said, “Well, I don’t know what you mean by that.” And so, anyway, I said, “Well, all I want to know is why I need to get my hair cut when other Midland employees have longer hair than mine.” He said, “Well, you guys think you’re so smart, trying to organize this union stuff, this union bull,” and he says: “I worked All-American Freight and those guys over there, they wanted to go union, too, and I told them, I said, that that’s a bad deal. you know, trying to go union, and they said, well they—I talked to them about it and they didn’t give a fuck, you know, and they had their union vote and they went union. Fourteen guys lost jobs, now they are driving around in old cars trying to find a job.”<sup>14</sup>

I replied . . . “Well, I think the Union might be closer than you think.” He says: “I’ll tell you what, I bet you \$1,000 to \$100 . . . . At the end of one year, I’ll bet you that this terminal is not union.” And I said, “Well, I don’t want to bet you, but I think the Union might be closer than what you think.”

So that ended that talk there, and then he just asked me why I was fighting him on this [haircut] deal, why I wouldn’t meet him half-way, you know, just get it cut a little, you know, meet him half-way. And I said: “Why? Are you going to fire me because I’ve got long hair?” And he said, “No, I wouldn’t do that, I’d fire you for insubordination.” I said, “What’s that?” He said, “Well, that’s what you’re doing right now, you’re not following orders.” He said, “I don’t want to fire you, I don’t want to have you quit, you do a good job

for us, you could work here for a long time, but just think about it and meet me half-way on this hair deal, think about it today when you run your route and come back in tonight and tell me what you’ve decided to do.

I said, “Okay,” and I left.

Jespersen, apart from his previously discredited denial that he ever had a conversation with Phillips “involving union activities,” did not dispute Phillips’ account of this conversation. He admittedly told Phillips that, while he “would appreciate it if [Phillips] would cut his hair to the length it was when he started,” he “didn’t want to nor did [he] have any intentions to fire him”; that Phillips did “a very good job for” the Employer; and that he urged Phillips to “just meet him half-way on this.”

Phillips testified that, when he returned to the terminal that evening after finishing his route, Marks told him that Jespersen wanted to see him. He and Marks went to Jespersen’s office. The resulting conversation went like this, as Phillips recalled:

Terry says, “As of this moment, you’re terminated, you no longer work for Midland Transportation.” . . . I said, “Well, I thought we were going to talk about this a little bit,” and he said, “I’m done messing with this.” . . . I started to walk out, and I said, “Well, that’s great, a guy gets fired because he won’t cut his hair.” He says, “That’s not it and you know it.” I said, “What is it?” He says, “It’s being insubordinate for getting into my face and saying ‘bullshit.’” And I said: “Well, I didn’t get into your face and say ‘bullshit.’ All I did was use ‘bullshit’ in a sentence and said, ‘Bullshit,’ I work for Midland Transportation.”

And Terry says: “Well, it don’t matter, you did a good job for us, you’re a hell of a man, you worked here a long time.<sup>15</sup> Dave [Marks] will pay you any vacation you’ve got coming, Dave will help you clean out your truck. Sorry.” And he left.

Jespersen’s version of this final exchange was more abbreviated than, but did not materially conflict with, Phillips’. His account:

[W]e sat there for what seemed like a long period of time without saying a word, and I said, “Mark, as of this moment, you are terminated.” And he said, “Was it because of my hair?” And I said, “It wasn’t because of your hair, Mark, it was because of what you said to me and the manner in which you said it.”

He said, “Well, I thought it over, I’m going to get my hair cut now.” I said, “It’s too late, you’ve had two days in which to react.”

Jespersen testified that he terminated Phillips not because of his hair length or because he had used profanity (“bullshit”), but because of “the manner” in which he “directed” that profanity, which struck Jespersen as insubordinate, and “because he never apologized for his ‘bullshit’ remark in [Jespersen’s] face.” He added that Phillips had had “all kinds of opportunity” earlier the day of the discharge

<sup>13</sup>The record does not divulge what transpired between Anderson and Jespersen.

<sup>14</sup>I previously credited Phillips that Jespersen made these remarks, and concluded that they violated Sec. 8(a)(1).

<sup>15</sup>Phillips later testified that he could not remember “for sure” if Jespersen spoke favorably of his performance at this time.

“to apologize for the outburst,” and that he called Phillips in because he had failed to do so.

Jespersen denied having “any information that [Phillips] was involved in union activities” when he terminated him. Similarly, Marks denied having “any information that led [him] to believe that union activities were underway at Spencer.” Phillips testified, during cross-examination, that he had no reason to believe either Jespersen or Marks knew of his union activities before his discharge; and that it did not occur to him, at that time, that those activities had anything to do with it.

Jespersen and David Mattox interviewed Phillips before his hire. Phillips estimated that his hair fell 3 to 4 inches below his collar at that time. The interviewers commented, he testified, that he had “kinda long hair” and that they did not want “any employees working here that’s got more hair than” they. Phillips assertedly took this “as kinda a joke” and did not respond. Jespersen recounted, on the other hand, that he and Mattox specifically asked Phillips “if he would please get his hair trimmed up above his collar.”

Regardless, Phillips did get a haircut (and remove his beard) before reporting for work,<sup>16</sup> and the subject went dormant for 6 or 7 months. Jespersen revived it in October, telling Phillips that his hair looked “bad” or was “getting pretty long,” and gently asking that he get it cut.<sup>17</sup> Phillips said little if anything in response, and the subject was dropped. Jespersen next raised the matter in December, observing that Phillips was “looking really long haired” and “should get it cut.” Phillips, by his own admission, did not “even acknowledge” Jespersen this time.

Phillips admittedly “had the most hair of anybody” at the Spencer terminal, and “kinda got razzed about it a little bit.” He estimated that it was about the same length in February 1990 as it had been when he was interviewed for the job. He got only the one haircut in the interim.

## 2. Conclusions

In *Wright Line*, 251 NLRB 1083 (1980), the Board stated at 1089:

[W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.<sup>18</sup>

I conclude that the General Counsel has made the requisite prima facie showing that Phillips’ protected union sympathies and activities were a motivating factor in the Employer’s decision to discharge him. The circumstances underlying this conclusion are:

<sup>16</sup> Phillips would have it that he did this not to appease the Employer, but to qualify for a job with Wonder Bread, to whom he also had applied. Wonder Bread, he testified, “required short hair and no beard.”

<sup>17</sup> Jespersen’s account: “I said, ‘Mark, it looks bad, can you get it cut?’ I’d appreciate it if you would.”

<sup>18</sup> This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

(a) By Jespersen’s admission, Phillips was an effective employee.

(b) The discharge occurred later the very day that Phillips became overtly prouion. That morning, he variously told a coworker that he wanted to sign a petition for the Union, volunteered to solicit the signatures of others, explained the petition to another employee, and told yet another to contact him after work if he wished to sign.<sup>19</sup>

(c) Jespersen’s denial notwithstanding, the weight of evidence leaves no doubt that he knew of Phillips’ union involvement. He gratuitously mentioned, in their conversation the morning of the 13th, that “you guys think you’re so smart, trying to organize this union stuff,” he unlawfully raised the specter of job loss should the employees bring in the Union, and he cited Marks’ supposed prophecy that Phillips would “work like a trooper for about a year, and then [would] . . . turn on the company”—a manifest allusion to Phillips’ union sympathies.<sup>20</sup>

(d) Jespersen clearly was distraught at the possibility of unionization. Not only did he unlawfully threaten Phillips by lying that “fourteen guys lost their jobs” after they “went union” when he was with All-American, and charge Phillips with “turning on” the company, but he convened an employee meeting that same morning, during which he beseeched them to bury their “bad feelings” and to come to him if they had “something to say,” rather than have “that kind of stuff floating around out there on [the] dock.” He proclaimed, moreover, that he had borrowed a substantial sum of money to build the Spencer terminal and did not “want one guy out there screwing the whole thing up and having it go down the drain.” The timing of this meeting,<sup>21</sup> the nature of these remarks, and the absence of evident provocation for it and them otherwise, betray a pronounced antiunion bias.

(e) Jespersen’s antiunion bias mirrored that of the Employer generally, as revealed by the sundry instances of misconduct herein.

I further conclude that the Employer has not overcome the General Counsel’s prima facie showing. Jespersen’s stated reason for Phillips’ discharge—Phillips’ failure to apologize for his alleged February 12 insubordination—is unpersuasive for several reasons:

(a) Jespersen’s testimonial demeanor, when professing that the discharge was for want of an apology, did not evince sincerity.

(b) Although Phillips’ supposed insubordination occurred on February 12, Jespersen did not discharge him until the evening of the 13th—after he had become actively prouion. This further suggests that the business about the apology was of after-the-fact contrivance, to elude the otherwise compelling inference that the discharge was triggered by Phillips’ intervening union activities.

<sup>19</sup> I credit Phillips that these events occurred as he described them.

<sup>20</sup> To the extent that I have not already done so, I credit Phillips that Jespersen made these remarks. I do not deem especially probative Phillips’ testimony, during cross-examination, that he had no reason to believe either Jespersen or Marks knew of his union activities before the discharge. Lay people commonly are unable to integrate bits and pieces of information that, to the trained observer, bespeak vivid inference, particularly under the stress of cross-examination.

<sup>21</sup> I am unpersuaded by Jespersen’s uncorroborated testimony that he “had planned to conduct this meeting” for some time.

(c) In the rough-and-tumble of the trucking industry, one must question that a failure to apologize, rather than the conduct underlying the perceived need to apologize, would prompt the discharge of a valued employee. This likewise suggests post hoc invention to escape the otherwise unavoidable inference.

(d) As against Jespersen's testimony that he told Marks on the 12th of his decision to discharge Phillips absent an apology, Marks denied that Jespersen "ever discussed with [him] what he should do." Marks thus effectively impeached Jespersen that the apologize-or-be-gone scenario was in place before Phillips became actively prouion.

(e) In their conversation the morning of the 13th, Jespersen expressly eschewed the idea of firing Phillips, declaring that Phillips did "a very good job," that he had no intention and did not want to fire him, and that he did not want him to quit. This, too, indicates that the decision was made not on the 12th, but sometime after this conversation on the 13th.

(f) While Jespersen urged Phillips, the morning of the 13th, to meet him "half-way" on the hair issue, and to tell him that evening what he had "decided to do," he announced Phillips' discharge that night without inviting him to speak. This reveals not only that the decision was reached on the 13th, but that it hinged upon neither Phillips' apologizing nor his consenting to get a haircut.<sup>22</sup>

(g) Finally, Jespersen's overall credibility suffered major enfeeblement. As I have found, he falsely denied that the subject of union activity came up with Phillips the morning of the 13th; as noted above, Marks impeached him on a critical point; and, until confronted with and impeached by his contemporaneous statement, he resorted to self-serving hyperbole when describing the way he asked Phillips to get a haircut on February 12 and Phillips' manner upon leaving that encounter. That Jespersen perceived this need to fabricate exposes his awareness that the Employer's cause herein could not withstand an undoctored presentation of the evidence.

The General Counsel's prima facie showing having withstood the challenge, I conclude that the Employer violated 8(a)(3) and (1) as alleged by discharging Phillips.

### *I. The Allegedly Unlawful Suspension of Lyndon Walter on February 23, 1990*

#### 1. The evidence

On February 21, 1990, David Mattox directed the dispatcher at the Marshalltown terminal, Cindy Klosterman, to circulate a notice among the drivers and dockmen informing them of a mandatory meeting to be held February 24. Beyond setting forth the date, time, and place of the meeting, the notice stated, "If you have received Union Representation Cards, Please take No action until after the meeting."

Klosterman, who worked days, was unable to reach all the incoming night-shift employees before the end of her shift. She consequently left copies of the notice on a table in the drivers' room, and, encountering Walter on the dock, asked that he "make sure" each of the night-shift dockmen got a copy. Walter worked nights.

<sup>22</sup>As mentioned, Phillips told Jespersen the night of the 13th that he had decided to get a haircut, only to be told, "It's too late."

By Walter's account, he responded to Klosterman that he did not think he should do it, that he "didn't believe" the employees would attend the meeting, and that "they might as well stick this [the notice] up *their* ass." [Emphasis added.] Walter testified that he and Klosterman were "real good friends" at the time, that he "was joking with" her when he made these remarks, and that "she didn't seem to take any offense." He later distributed the notices as requested.

Klosterman first testified that Walter said to her, "Well, none of my employees are going to show up and . . . you can take the letter and shove it up *your* ass." [Emphasis added.] She relented on cross-examination, however, that he might have said, "They can shove this up *their* ass." Klosterman conceded that she had heard variations on this theme "in occasions" at the Marshalltown terminal, plus "a great deal of other profanity from various people."

The next day, February 22, without checking whether Walter had complied with her request, Klosterman reported the incident just described to Gerald Mattox. Also on the 22d, Gregg Mattox called Walter to the office as previously described, among other things asking him how he was "going to vote."<sup>23</sup> Walter answered that he would vote "with the majority"; that is, "yes." The record contains no evidence that Gregg mentioned Walter's exchange with Klosterman during this encounter.

The afternoon of the 23d, Klosterman called Walter at home, advising him to call David Mattox at 5 p.m. This was Walter's day off. He called David as instructed. David read a letter informing him that he was suspended for 3 days, and told him to come in and sign it. The letter stated:

Effective immediately, you are suspended for 3 days, pending review, for insubordination. This suspension will be without pay. It has been reported to me that on Wednesday, February 21, you were asked by our dispatcher if you would see that all dock personnel were given notices of an employee meeting. You refused to do so and told the dispatcher to "shove them up her ass." We consider this insubordination and it will not be tolerated. If any further breach of company rules occurs, termination will result.

Walter told David he disputed the letter's accuracy, and would "get a lawyer." He nevertheless went to the terminal that evening, where he signed and obtained a copy of the letter, repeated to David his quarrel with its accuracy, and again vowed to "contact an attorney."

David testified that he learned about the subject incident from Gerald, who had related Klosterman's report to him. David continued that, while he thought Walter had committed "a terminal offense,"<sup>24</sup> he "contacted" a Des Moines attorney because of the union activity and Walter's known union sympathies "to get professional advice on whether we should proceed with discipline and to what extent"; and that, "taking into consideration . . . Walter's obvious union involvement, we decided it would be prudent if we suspended him . . . instead of terminating him."

As earlier mentioned, the Union filed its election petition with the NLRB on February 23. Asked if he was aware of

<sup>23</sup>I concluded above that this interrogation violated Sec. 8(a)(1).

<sup>24</sup>No pun intended, so far as I can ascertain.

that when he Walter was disciplined, David testified that the decision was made before he learned of the petition, but that the suspension was imposed after. David further testified, led by the Employer's counsel, that "the only effect" Walter's union activities had on the discipline was to make it "less severe."

On the 23d, as well, the Union attempted to send a package to the Employer, at the Marshalltown terminal, via United Parcel Service (UPS). Its contents included a letter demanding recognition and bargaining. David Mattox refused delivery "under instructions from the attorney."

Prompted by the Employer's counsel, David testified that he considered Klosterman to be Walter's supervisor because, as dispatcher, "she frequently instructed through either oral or in a written log daily instructions . . . that should be carried out by the night crew that evening." Walter's offense, he continued, thus was "more than just swearing[,] . . . it was swearing to a superior."

David later acknowledged, during cross-examination, that Klosterman was not Walter's supervisor; that Walter's immediate supervisor was Terry Cullor; that any messages from Klosterman to the night dock crew went through Cullor; that he, David, could not recall ever telling dock personnel that Klosterman was their superior;<sup>25</sup> and that he could not recall any prior instance in which Klosterman had gone "to dock people . . . with a direct order regarding anything except what was going on trucks."

Walter testified that he did not consider Klosterman his supervisor; further, that he never understood she could assign him work. Klosterman, called by the Employer, did not address this issue.

## 2. Conclusions

Again applying the *Wright Line* formulation, I conclude that the General Counsel has made a prima facie showing that Walter's suspension was improperly motivated. Thus:

(a) The Employer knew that Walter was actively prounion; indeed, David Mattox conferred with a Des Moines attorney before imposing the suspension because of that knowledge.

(b) Although Klosterman reported the ostensible underlying incident to Gerald Mattox on the 22d, the suspension was not imposed until the evening of the 23d—after Walter had stated to Gregg on the 22d his intention to vote for the Union, after David had refused delivery of the Union's UPS package on the 23d, and after the Employer had learned on the 23d of the Union's election petition.

(c) The Employer, as demonstrated by its assorted other unfair labor practices herein, and by its paranoiac refusal of the UPS package, was resolutely antiunion.

I also conclude that the Employer has failed to override the General Counsel's prima facie showing. The pretextuousness of its stated reason for suspending Walter—insubordination on the 21st—is shown by this aggregate of considerations:

(a) Its contention that Klosterman was Walter's superior was palpably deceitful. David's attorney-led testimony on the point was labored and implausible, and was thoroughly

<sup>25</sup> David testified that the dock employees nevertheless should have known Klosterman to be their superior "because she frequently instructed—from the day-to-day operations, she became aware of many, many particular details that needed to be taken care of by the dock personnel, and she was constantly notating and verbally instructing the second-shift people what to do."

shredded during cross-examination. Further, the Employer's counsel did not invite Klosterman's testimony on the subject.

(b) Gregg Mattox, in the course of calling Walter to the office on the 22d and unlawfully asking him how he was going to vote, did not so much as mention the Klosterman incident.

(c) The Employer did not give Walter a chance to tell his side of the story before imposing the suspension; moreover, he had complied with Klosterman's request.

(d) The Employer asserts in its brief that, aside from Walter's insubordination, "its female dispatcher should not be required to put up with this type of offensive and abusive language." Its posttrial injection of this new element is tacit acknowledgement of the infirmities in its earlier-taken position.

(e) The Employer's chief witness on this issue, David Mattox, imparted the impression, by both the content of his testimony and his demeanor in its delivery, that he was more beholden to strategic and tactical considerations than to the oath

Apart from all of the above, even if the Employer truly did suspend Walter for refusing to distribute the meeting notices, the suspension still would be unlawful. The notices, by urging the employees to "take no action" regarding union cards, constituted antiunion proselytizing. Walter's stated refusal to handle them therefore was an activity protected by Section 7 of the Act.<sup>26</sup>

In light of the foregoing, the Employer's suspension of Walter violated Section 8(a)(3) and (1) as alleged.

## III. CONCLUSIONS OF LAW IN CASE 18-CA-11218

The Employer violated Section 8(a)(1) of the Act in each of these instances:

(a) By distributing an overly broad no-solicitation rule in the November 1989, and thereafter maintaining that rule.

(b) By distributing overly broad and discriminatory rules against union activity on and after February 26, 1990, and thereafter maintaining those rules.

(c) By David Stellingwerf's interrogation of employee Alan Maxfield on January 7, 1990, about his and others' union activities.

(d) By Stellingwerf's remark to Maxfield on January 8, 1990, that David Mattox had said, "[I]f they try to get the Union in, we'll just shut the thing down, we'll just open under another name."

(e) By David Mattox's interrogation of Maxfield on January 13, 1990, about his and others' union activities, and by his asking Maxfield to report back on future union activities.

(f) By Terry Jespersen's threatening employee Mark Phillips on February 13, 1990, by implication, that the employees faced the loss of jobs should they bring in the Union.

(g) By Gregg Mattox's asking employee Lyndon Walter on February 22, 1990, how he was "going to vote."

(h) By David Marks' asking Phillips on February 22, 1990, "Who's in the Union, what's going on with the Union?"

<sup>26</sup> The manner in which Walter expressed himself to Klosterman was not so abusive or disruptive as to defeat this protection. E.g., *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724-731 (5th Cir. 1970); *Acme-Arsena Co.*, 276 NLRB 1291, 1295 (1985); *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978).

The Employer violated Section 8(a)(3) and (1) of the Act in each of these instances:

- (a) By discharging Mark Phillips on February 13, 1990.
- (b) By suspending Lyndon Walter on February 23, 1990.

The allegation is without merit that the Employer violated Section 8(a)(1) on or about January 7, 1990, by “creat[ing] the impression that employees’ union activities were being surveilled.”

#### IV. REPORT ON OBJECTIONS IN CASE 18–RC–14755

By its unlawful conduct during the pendency of the election in Case 18–RC–14755—that is, its ongoing maintenance of the overly broad handbook rule against solicitation, its February 23 suspension of Walter, and its February 26 dissemination of improper restrictions against union activity—the Employer interfered with free voter choice in the election held on April 3 and 4, 1990. The election therefore should be set aside and a new election conducted.<sup>27</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>28</sup>

#### ORDER

The Employer, Midland Transportation Company, Inc., Marshalltown and Spencer, Iowa, and other terminal locations in Iowa, Minnesota, and Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, or enforcing any rule which restricts employee union activities during the employees’ free time, or which discriminates against union activities.

(b) Coercively interrogating employees concerning their union activities or those of other employees, or how they intend to vote in a union election.

(c) Asking employees to report back on the future union activities of other employees.

(d) Threatening employees that, if they try to get a union in, it will shut down and reopen under another name.

(e) Threatening employees, directly or by implication, that they face a loss of jobs should they bring in a union.

(f) Discharging, suspending, or otherwise discriminating against employees because of their union sympathies or activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by the Act.

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

<sup>27</sup> “Our normal policy is to direct a new election whenever an unfair labor practice occurs during the critical period since ‘conduct violative of Section 8(a)(1) [and 8(a)(3)] is, a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election.’ *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962). The only recognized exception to this policy is where the violations are such that it is virtually impossible to conclude that they could have affected the results of the election.” *Super Thrift Markets*, 233 NLRB 409, 409 (1977). See also *Madison Industries*, 290 NLRB 1226, 1230 (1988); *Baton Rouge Hospital*, 283 NLRB 192 fn. 5 (1987). The exception clearly does not obtain in the present case.

<sup>28</sup> Any outstanding motions inconsistent with this recommended Order hereby are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Rescind the no-solicitation rule contained in the employee handbook distributed in November 1989, as well as the rules embodied in Items 5 and 6 of the memorandum dated February 26, 1990, and advise the employees in writing that this has been done.

(b) Offer Mark Phillips immediate and full reinstatement to his former job, or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges; and make him whole for any loss of earnings and benefits suffered as a result of the discrimination against him.<sup>29</sup>

(c) Make Lyndon Walter whole for any loss of earnings and benefits suffered as a result of the discrimination against him.<sup>30</sup>

(d) Remove from its files and destroy Walter’s suspension notice of February 23, 1990, as well as any other references to that unlawful suspension or Phillips’ unlawful discharge; and notify them in writing that this has been done and that those unlawful actions will in no way serve as a ground for future personnel or disciplinary action against them.

(e) Post copies of the attached notice marked “Appendix.”<sup>31</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Employer’s authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees customarily are posted. The Employer shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(f) 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 RECOMMENDED that the allegation that the Employer violated Section 8(a)(1) on or about January 7, 1990, by “creat[ing] the impression that employees’ union activities were being surveilled” be dismissed.

IT IS FURTHER RECOMMENDED that the election conducted April 3 and 4, 1990, be set aside, and that that case be remanded to the Regional Director to hold a new election when he deems it appropriate.

<sup>29</sup> Phillips’ backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *New Horizons*, interest is computed at the “short-term Federal rate” for underpayment of taxes as provided in the 1986 amendment to 26 U.S.C. § 6621.

<sup>30</sup> Interest on Walter’s entitlement shall be computed in accordance with *New Horizons for the Retarded*, supra.

<sup>31</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

#### 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate, maintain, or enforce any rule which restricts employee union activities during the employees' free time, or which discriminates against union activities.

WE WILL NOT coercively interrogate employees concerning their union activities or those of other employees, or how they intend to vote in a union election.

WE WILL NOT ask employees to report back on the future union activities of other employees.

WE WILL NOT threaten employees that, if they try to get a union in, we will shut down and reopen under another name.

WE WILL NOT threaten employees, directly or by implication, that they face a loss of jobs should they bring in a union.

WE WILL NOT discharge, suspend, or otherwise discriminate against employees because of their union sympathies or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by the Act.

WE WILL rescind the no-solicitation rule contained in the Employee Handbook we distributed in November 1989, as well as the rules embodied in Items 5 and 6 of the memorandum dated February 26, 1990, and WE WILL advise our employees in writing that this has been done.

WE WILL offer Mark Phillips immediate and full reinstatement to his former job, or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, and WE WILL make him whole for any loss of earnings and benefits suffered as a result of the discrimination against him.

WE WILL make Lyndon Walter whole for any loss of earnings and benefits suffered as a result of the discrimination against him.

WE WILL remove from our files and destroy Walter's suspension notice of February 23, 1990, as well as any other references to that unlawful suspension or Phillips' unlawful discharge; and WE WILL notify them in writing that this has been done and that those unlawful actions will in no way serve as a ground for future personnel or disciplinary action against them.

MIDLAND TRANSPORTATION COMPANY