

MTD Products, Inc. and Penney Robertson and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW and David L. Reid. Cases 26-CA-12936, 26-CA-13124, and 26-CA-13157

March 18, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The issues addressed here are: whether the Respondent violated Section 8(a)(1) of the Act by making certain statements to employees and by maintaining an overly broad rule against solicitation and distribution; and whether the Respondent violated Section 8(a)(3) and (1) of the Act by separately warning, suspending, and/or discharging three employees.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, except as discussed below with respect to the Respondent's no-solicitation, no-distribution rule.

The judge found that Respondent's plant rule 27, prohibiting solicitation or distribution "[o]n Company premises . . . unless approved by the Company," was presumptively invalid under *Our Way, Inc.*, 268 NLRB 394 (1983). The judge went on to observe, however, that the rule's existence had no apparent restrictive impact on the wearing of union insignia, the distribution of union literature, and the solicitation of union authorization card signatures on the Respondent's premises during the Union's organizational efforts in 1987 and 1988. The judge therefore concluded that the Respondent did not violate Section 8(a)(1) because the rule was applied in such a way as to convey an intent to permit union solicitation or distribution during the employees' nonworking time. We disagree.

At the outset, we note that the rule, on its face, is overly broad, i.e., it is not restricted to working time. It is clear that the maintenance of a rule that is not so restricted is presumptively unlawful. See *Our Way*, supra. However, an employer can avoid the finding of a violation by showing through extrinsic evidence that its rule was communicated or applied in such a way

as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work. *Our Way*, 268 at 395 fn. 6, citing *Essex International*, 211 NLRB 749, 750 (1970). We find, however, that Respondent in this case failed to make that showing.

In this regard, we note that Respondent failed to adduce any evidence that it told employees that solicitation during nonworking time was permitted. Nor did Respondent show that it knowingly tolerated solicitation during nonworking time. Finally, the record shows that when Respondent invoked the rule, its invocation did not draw a distinction between working and nonworking time. In this latter respect, we note that the Respondent discharged employee Penney Robertson after she circulated a petition among working employees in a production area which she was forbidden to enter while serving a disciplinary suspension. Her discharge notice cited, inter alia: "Plant Rule #27—Unauthorized soliciting of written matter, pledges, petitions, without approval." The notice describes the offensive conduct as "soliciting an unauthorized petition." There is no reference in the notice to the timing or locus of the solicitation. The clear implication was that solicitation per se was prohibited absent approval.

Accordingly, we conclude that Respondent has failed to show that the rule meant anything other than what it said, viz all solicitation and distribution were prohibited. Therefore, we find that Respondent violated Section 8(a)(1) by maintaining an overly broad rule against solicitation and distribution.³

Although we have found that Respondent relied on an invalid rule as one reason for Robertson's discharge, this finding does not affect our decision to affirm the judge's conclusion that Respondent did not violate Section 8(a)(3) of the Act by discharging Robertson. The Respondent has met its burden of proving that it would have discharged Robertson, even in the absence of the unlawful rule and of her union activities, based on her unauthorized, insubordinate presence in a plant production area, with her child, and without required safety glasses.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's conclusions of law 3.

"3. By maintaining and enforcing an overly broad rule that prohibits unauthorized solicitation and distribution at all times, including employees' nonworking time, the Respondent has violated Section 8(a)(1) of the Act."

2. Insert the following as paragraphs 4 and 5.

³With respect to the "distribution" aspect, we note that the rule is not confined to work areas and that Respondent has not shown that it knowingly tolerated distribution in nonwork areas.

¹On June 22, 1992, Administrative Law Judge Russell M. King, Jr., issued the attached decision. The Charging Parties filed exceptions and a supporting brief. The Respondent filed an answering brief to the Charging Parties' exceptions.

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

²The Charging 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

“4. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
“5. The Respondent did not commit any other unfair labor practices.”

ORDER

The National Labor Relations Board orders that the Respondent, MTD Products, Inc., Martin, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing and maintaining an overly broad rule that prohibits unauthorized solicitation and distribution at all times, including employees’ nonworking time.

(b) 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) Rescind plant rule 27 which prohibits unauthorized solicitation and distribution at all times, including employees’ nonworking time.

(b) Post at its place of business in Martin, Tennessee, copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent 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.

(c) 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 amended consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁴If 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.

WE WILL NOT try to enforce and maintain a rule prohibiting unauthorized solicitation or distribution during employees’ nonworking time.

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 rescind plant rule 27 which prohibits unauthorized solicitation and distribution at all times, including employees’ nonworking time.

MTD PRODUCTS, INC.

William D. Levy, Esq., for the General Counsel.
Jay Kieseewetter, Esq. and *Debbi M. Cohen, Esq. (Young & Perl)*, of Memphis, Tennessee, for the Respondent.
Mark Allen, Esq. (Agee, Allen, Godwin & Morris), of Memphis, Tennessee, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING JR., Administrative Law Judge. These consolidated cases were heard by me in Dresden, Tennessee, on 14 various days between November 1, 1989, and May 22, 1990.¹ The charge in Case 26–CA–12936 was filed by the individual, Penny Robertson, on November 30 and alleged her unlawful suspension and discharge by the Respondent MTD Products, Inc. (MTD or the Company). Based on this charge, a complaint was issued on December 23 by the Regional Director for Region 26 of the National Labor Relations Board (the Board), on behalf of the Board’s General Counsel.² The complaint alleged the unlawful suspension (on November 2) and discharge (on November 4) of Robertson in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), and additionally two other violations involving threatening employees with discharge on October 21 because of their union activities, and the promulgating and maintaining of an invalid nonsolicitation rule on November 4, in violation of Section 8(a)(1) of the Act.³ The charge

¹Hereafter, all dates in May through December are in 1988, and all dates in January through April are in 1989, unless otherwise indicated.

²The term “General Counsel,” when used herein, will normally refer to attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

³These two additional allegations are found in pars. 9(d) and 12 of the amended consolidated complaint. The pertinent parts of the Act (29 U.S.C. § 151 et seq.), covering all alleged violations in these consolidated cases, read as follows:

Sec. 8(a). It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

in Case 26-CA-13124 was filed by the International Union, United Automobile, Aerospace & Agriculture Implement Workers of America, UAW (the Union) on April 11 and alleged the unlawful suspension and discharge of employee Joe Brasfield. Based on this charge, the Regional Director issued a second complaint on May 3, 1989, alleging Brasfield's unlawful suspension (on February 28) and discharge (on March 23) in violation of Section 8(a)(1) and (3) of the Act, and additionally four other violations of Section 8(a)(1) of the Act, including the threatening of an employee with unspecified reprisals by Plant Manager James Schuster on November 4, and the threatening of an employee with discharge by Schuster on February 9 and 28.⁴ The charge in Case 26-CA-13157 was filed by the individual, David Reid, on April 28 alleging only his unlawful discharge on March 23. As a result, the Regional Director, on June 6, 1989, issued an amended consolidated complaint which included all of the allegations contained in the two earlier complaints, Reid's unlawful discharge in violation of Section 8(a)(1) and (3) of the Act, and additionally some 11 other violations of Section 8(a)(1) of the Act ranging from May (1988) to February (1989).⁵ MTD filed timely answers in the cases, denies all the violations, and alleges that the disciplining and discharge of employees Robertson, Brasfield, and Reid were for good cause and unrelated to their union sympathies or activities.

During the hearing and on December 6, 1989, the General Counsel rested his case and the Union completed its evidence. On December 7, 1989, counsel for MTD made, inter alia, a motion to dismiss some of the 8(a)(1) allegations under *Nickles Bakery*, 296 NLRB 927 (1989), wherein the Board required a factual nexus between the charge and the complaint allegations, applying the "closely related" test. I granted the motion in part.⁶ After various motions and orders

⁴These two additional violations are found in pars. 10(a) and (d) of the amended consolidated complaint. The other two additional allegations involved unlawful interrogation and creating an impression of surveillance in December. These allegations appear in pars. 10(b) and (c) of the amended consolidated complaint, and were dismissed during the hearing without objection because of lack of evidence.

⁵These 11 additional violations, by paragraph and section number corresponding to the amended consolidated complaint, are summarized as follows: 7(a) in late May, Supervisor Lynn Payne interrogated an employee; 7(b) in late May, Payne threatened to discharge an employee; 8(a) in September, Pressroom Supervisor Ben Gregg interrogated an employee; 8(b) in September, Gregg threatened an employee with unspecified reprisals; 9(e) in January, Gregg interrogated employees; 9(f) in January, Gregg created the impression of surveillance among employees; 9(g) in January, Gregg threatened an employee with unspecified reprisals; 11(a) in February, Supervisor Robert Galey interrogated an employee; 11(b) in February, Galey created an impression of surveillance among employees and requested an employee to give written assurance not to engage in union activities in the future; 13 on November 4 and February 9, issuing written warning to employee Joe Brasfield. Pars. 9(a), (b), and (c) of the amended consolidated complaint were withdrawn by motion of the General Counsel during the hearing because they duplicated pars. 8(a), (b), and (c).

⁶For the purposes of this decision, those allegations in the amended consolidated complaint which were thus dismissed at the time are those found in the following pars.: 7(a) and (b); 8(a), (b), and (c); 9(d); 11(a) and (b); and 12. Also dismissed at the time were pars. 9(a), (b), and (c), and pars. 10(b) and (c), but these allegations were subsequently either withdrawn by the General Counsel or dismissed

in the case, the Board granted the General Counsel's special permission to appeal the dismissal of some of the 8(a)(1) allegations, reinstated the allegations, indicating that the "closely related" issue is more appropriately treated in the exceptions process rather than in the context of a interlocutory appeal. This issue will be treated in more detail later herein.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel, counsel for the Union, and counsel for the Respondent, I make the following

FINDINGS OF FACT⁷

I. JURISDICTION AND THE LABOR ORGANIZATION

The pleadings, admissions, and evidence in the cases establish the following jurisdictional facts. MTD is, and has been at all times material, a corporation with an office and place of business (plant) in Martin, Tennessee, where it has been engaged in the manufacture, sale and distribution of lawnmowers, automotive stampings, and parts. Annually, and in the course and conduct of said business operations, the Respondent has sold and shipped products and materials valued in excess of \$50,000 directly to points located outside the State of Tennessee. Likewise MTD, in the course and conduct of its business operations, has purchased and received at its Martin, Tennessee plant materials, goods, and products valued in excess of \$50,000 directly from points located outside the State of Tennessee. I find, as admitted, that MTD Products, Inc. is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Further, and as admitted herein, I find that the Union has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR PRACTICES

A. Brief History

MTD's Martin, Tennessee plant was built in 1984 and has two functions, the manufacture and assembly of riding mowers, and the manufacture of automobile stampings including bumpers for Chrysler and several key frame components for Ford at its plant in Hazelwood, Missouri. From its inception, the plant's general manager was John Rainone, who testified that the plant had a wide range of jobs including pressroom, mig and resistance welding, assembly, and related support

without objection because of lack of evidence, and are no longer involved in the case.

⁷The facts found herein are based on the record as a whole and on my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record. Certain more specific credibility rulings and findings will appear later in this decision.

activities including toolroom, tool and die makers, maintenance, quality control, shipping, receiving, and janitorial.

In 1987 the Union attempted to organize MTD's production and maintenance employees (approximately 250), and on June 5, 1987, it filed a representation petition (Case 26-RC-6952). On July 30, 1987, a Board-conducted election was held in which the Union lost 136 to 105. On July 27, 1988, the Union filed another representation petition (Case 26-RC-7070), and a Board-conducted election was held on October 21, 1988, which the Union again lost 139 to 122. No charges were filed after the second election, and although the Union filed objections to conduct affecting the results of the election, they were subsequently withdrawn by the Union. The three discharged employees in these cases supported the Union. Employee Joe Brasfield displayed his support on the day of the second election and employee David Reid, by his account, commenced his open support in August. Employee Penny Robertson commenced her open support for the Union prior to the first election of July 30, 1987, when she was an in-plant union organizer, and later an election observer for the Union. Robertson continued her support through the second election as a member or the Union's organizing committee and again as an election observer for the Union. Robertson's discharge came 2 weeks after the second election on October 21, 1988, but the discharges of Brasfield and Reid came some 5 months later (March 23, 1989). The various alleged 8(a)(1) violations span from 2 months prior to the second election (May 1988) to 6 months after the election (April 1989). As indicated earlier, no 8(a)(1) violations were alleged in the three separate charges alleging the three unlawful discharges. Several ways to organize this decision were considered. Since the "closely related" issue under the Board's decision in *Nickles Bakery*, supra, initially still exists, I shall discuss the some 20 remaining allegations approximately as they occurred in time, keeping in mind that the first election was held on July 30, 1987, and the second on October 21, 1988. Again, all dates in May through December will be in 1988 and all dates in January through April will be in 1989 unless otherwise indicated. For immediate clarity, on occasions full dates are used.

B. *The Late May Allegations Regarding Supervisor Payne*

Paragraphs 7(a) and (b) of the third or amended consolidated complaint (the complaint or the third complaint) allege that "in or about late May" Supervisor Lynn Payne interrogated an employee concerning his union membership, activities, and sympathies, and threatened to discharge an employee because the employee's union activities and sympathies, in violation of Section 8(a)(1) of the Act.⁸ These allegations apparently arose out of an alleged conversation between employee David Reid and Foreman Payne in the plant sometime in August (the "in or about late May" date was never changed by amendment or otherwise). Reid testified that "about the middle" of August he had put a union button on his cap for the first time, and during the first break in the morning, in the break room and in front of other employ-

⁸The third complaint, based in part on the last charge filed by David Reid regarding his discharge only, was issued June 6, 1989. Pars. 7(a) and (b) were among those allegations I had initially dismissed under *Nickles Bakery*, supra.

ees, Payne ask him if he thought it (the button) would do him any good, and to others present stated, "Hey, everybody look, David Reid has got him a union button on . . . he thinks that's going to help him." Reid added that later on that day or "for sure sometime that same week," and in his department, Payne again asked him what good he thought "the UAW" was going to do him, to which he replied, "It couldn't hurt nothing . . . Look where I'm at now," referring to his job as one of the "sorriest" in the plant, to which Payne replied, "Well, the next step up is out the door." According to Reid, employee Billy Cash was also present during this interchange, and also, he believed, Foreman J. R. Fletcher.⁹

Lynn Payne was a foreman in the assembly department and had worked for MTD for 5 years. Payne testified that he had supervised Reid for 3 months in 1988 and that they were "kind of fishing buddies, and discussed fishing a lot . . . and were pretty good friends inside and outside the plant." According to Payne, Reid was "very vocal" about his support for the Union, talking to other people and passing out union buttons, and the he and Reid discussed the Union several times when he supervised him. Payne conceded that he probably told Reid that he had one of the best jobs in the plant to try to pick up his morale after Reid had complained that he had one of the sorriest jobs in the plant. Payne denied that he ever had a conversation with Reid in the breakroom about the Union, that he ever ask Reid what he was doing with a union button on or joked about Reid's wearing of union buttons in front of other employees, and also denied ever telling Reid that the next step up was out the door. Billy Wayne Cash had worked in the assembly department at MTD for 4 years, knew Reid when he worked there and was also supervised for several months by Payne. Cash testified that the employees and Payne would discuss the Union, and that Payne "would give us a straight answer." Cash indicated that during the 1988 election campaign he never heard Payne and Reid talk about the Union in the breakroom, but that on occasion he overheard them discussing the Union in the assembly department, and he never heard Payne tell Reid that he could lose his job because of his union support, or that the next step up for him would be out the door. Cash added that other fellow employees had made such "out the door" remarks because Reid "had problems . . . had been moved from department to department, and we figured that that would be the next step, if he didn't change his attitude and straighten up."¹⁰

I credit the testimony of Payne and Cash over that of Reid and thus find no violations of the Act as alleged in paragraphs 7(a) and (b) of the complaint. After hours of observing Reid's testimonial demeanor, and considering other creditable testimony in the case, I concluded that all of Reid's key testimony was untruthful. Reid was a highly charged individual with a poor work attitude. He was also mean, obnoxious, rude, and a bully, facts which will emerge in later testimony. Early on, Reid sensed his possible demise at MTD and contrived an "its their fault" theory, which allowed him the defense of making things up, or indeed, being outright untruthful.

⁹Fletcher did not testify in the case.

¹⁰Reid's work situation will be discussed later in this decision and regarding his discharge, which occurred on March 23, 1989.

C. *The Allegations Involving Supervisor Ben Gregg in 1988*

Paragraphs 8(a), (b), and (c) of the complaint allege 8(a)(1) violations involving Pressroom Supervisor Ben Gregg and employee David Reid. It is charged that “in or about September 1988” Gregg, while traveling in an automobile, (a) interrogated Reid regarding his union membership, activities and sympathies; (b) threatened Reid with unspecified reprisals because of his union activities; and (c) threatened Reid with loss of jobs of MTD employees because of their union activities.¹¹ Reid testified that in September (before the October 1988 election) he cut his right arm at the plant and was taken by safety man Jack Bell to the Medical Center in Martin, where he received stitches, and that Ben Gregg picked him up and took him back to the plant. According to Reid, when they got back to the plant parking lot, Gregg started “talking” to him about the Union and ask him, “How he felt about the union” Reid indicated he told Gregg that the Union could help in a lot of things, after which Gregg asked him if he were “crazy,” and commenced to down the Union. Reid testified that Gregg then stated:

If the union did come in there, they would send their work up north . . . we'll send work back up there to keep from doing it down here . . . This is not going to be a union plant, and they're not going to do anything but what we say We're going to be the boss, whether we have a union or not.”

Reid related that the conversation lasted “approximately an hour and a half,” and at the time he wore a union button on his cap.

Ben Gregg was the superintendent of fabrication, over the welding department and pressroom. He had been with MTD 18 years, with the last 5-1/2 years at the Martin plant. Gregg testified that Reid had worked in his area of responsibility (the pressroom) for “about three or four months or so” and described Reid as an “average” press operator. While Gregg gave some testimony about Reid’s other problems in the plant, regarding the automobile incident, Gregg was only asked on direct examination, “Did you ever have a conversation with David Reid in a car about the union?” to which he responded, “No.” There apparently were no other witnesses to the alleged conversation and surprisingly there was no cross-examination of Gregg regarding the matter.

I credit the testimony of Gregg over that of Reid and thus find no violations of Section 8(a)(1) of the Act as alleged in paragraphs 8(a), (b), and (c) of the complaint. Further, and in my opinion, Reid’s testimony that he and Gregg, a major supervisor in the plant, sat talking in Gregg’s car for 1-1/2 hours, is itself incredible and unworthy of belief, regardless of what time of day it was.

D. *The 1988 Election Day Remark by Supervisor Gregg*

Paragraph 9(d) of the complaint alleges that on or about October 21, Gregg threatened employees with discharge be-

cause of their union activities and sympathies, in violation of Section 8(a)(1) of the Act.¹² Employee Phillip Wayne Davis was employed by MTD in December 1985. He was a quality control inspector in the press and welding departments. The second election was conducted at the plant on October 21. Davis testified that about 15 to 20 minutes after the election count had taken place he was in his “inspection cage” and Gregg, who was about 5 feet away, stated, “There were some people . . . that were for the union that would not be there next year . . . that he couldn’t do much about the rest of them, but the ones that worked under him, he could.” Davis indicated that Gregg made this remark to a group of supervisors which included Shift Supervisor George Wade, Supervisor Kevin Rogers, his supervisor, Robert Galey,¹³ and Supervisor Dwight Emerson. Davis testified that what Gregg said “shocked” him, indicating that he was not a part of the group of supervisors but “I was just standing in the wrong place at the wrong time, I guess.”¹⁴

Gregg denied that he meet with any group of supervisors after the election either in the welding department or anywhere on the production floor, denied that he ever made any remark about he or MTD getting rid of union supporters, and testified that shortly after the election he went home. Emerson testified that following the election he and Gregg went back to the pressroom and that there was never any meeting or gathering of supervisors in the welding department, adding that he never heard Gregg say anything about getting rid of union supporters. During his testimony, then Welding Department Supervisor Kevin Rogers was asked if he recalled whether there was a “gathering” of supervisors after the election on October 21 or if he recalled seeing Ben Gregg in the welding department talking to a number of supervisors after the election, to which he answered, “No.” Rogers was also asked whether, at that time or at any time, he heard Gregg make a statement about MTD getting rid of union supporters, or words to the effect that “A lot of union supporters will not be around here next year,” to which he also answered, “No.” Spot Welding Supervisor George Wade testified that 15 to 20 minutes after the vote count on October 21 (and between 2:30-3 p.m.) he was not with a group of about five supervisors in the welding department nor did he talk to Ben Gregg after the vote count. Wade added that he never heard Gregg say MTD would get rid of union supporters or that even though he could not do anything about the others, he could take care of the union supporters in his department. Quality Control Foreman Robert Galey testified that on October 21 the votes were counted between 5 and 5:30 p.m. and during the first 15 to 20 minutes following the vote count he was not with Ben Gregg and several other supervisors near the inspection cage in the welding department,

¹² This allegation appeared in the first complaint (Case 26-CA-12936) issued on December 23, 1988, as a result of Robertson’s charge (filed November 30) alleging only her unlawful suspension and discharge (on November 4). It was also an allegation I had dismissed under the *Nickles Bakery* motion.

¹³ Galey’s name is misspelled “Galley” in the complaint.

¹⁴ During his testimony, Personnel Director Schuster identified the timecards of Davis, “Ronald” Rogers, and Steve Melton, in connection with Davis’ testimony. Ronald Rogers was not a supervisor and Davis named Kevin Rogers (not Ronald Rogers), and did not mention Steve Melton. In my opinion, these timecards are useless in this case.

¹¹ These violations appeared for the first time in the third complaint (the amended consolidated complaint), which was issued after Reid filed his charge on April 28, 1989, alleging only his unlawful discharge (on March 23, 1989). These three allegations were also initially dismissed by me under MTD’s *Nickles Bakery* motion.

nor was he there between 2:30 and 3 p.m. that day. Galey added that following the election he never heard Gregg make any kind of statement about MTD getting rid of union supporters. In cross-examination, Galey further added that on October 21 and after the election he had no conversation with any supervisor, including Gregg, regarding the results of the election and saw no supervisors discussing the election in any part of the plant.

This 9(d) allegation poses a dilemma for me. The General Counsel relies solely on the testimony of Quality Control Inspector Davis, who I credit completely. According to Davis, Gregg made his alleged remarks to a gathering of Supervisors Wade, Rogers, Galey, and Emerson. Gregg denied the remarks and the gathering, as do the other four supervisors. I not only credit Gregg in this case, but three out of the four other supervisors (Wade, Rogers, and Emerson). I do have some doubts about Galey. All involved were current employees of MTD, and while it could be argued that the five supervisors had a common protective interest, I can not conclude that they all lied in this instance. Also, I can not disregard the preponderance of the evidence here. Perhaps Davis was mistaken about the date or time. In any case, I do not find a violation as alleged in paragraph 9(d) of the complaint.

E. *The Unauthorized Solicitation Rule*

Paragraph 12 of the complaint alleges that on or about November 4, 1988, MTD, in its Employee Handbook and in its General Plant Rules and Regulations, promulgated and, since said date, has maintained the following prohibition rule, in violation of Section 8(a)(1) of the Act:

Unauthorized soliciting of memberships, pledges, collecting money, distribution of literature, written or printed matter on Company premises or conducting any other outside business, unless approved by the Company.¹⁵

The Employee Handbook (handbook) and the General Plant Rules and Regulations (rules) were admitted into evidence through the initial testimony of MTD's personnel manager at the Martin plant, James E. Schuster.¹⁶ According to Schuster, the handbook became effective May 4, 1987,¹⁷ and remains in effect.¹⁸ The topic of solicitation appears on page

¹⁵ This allegation appeared in the first complaint issued on December 23, 1988, and resulting from the charge filed by Penny Robertson (Case 26-CA-12936) alleging only her unlawful suspension and discharge. It also was one of those allegations initially dismissed by me as a result of the *Nickles Bakery* motion.

¹⁶ Schuster remained in the hearing room and aided counsel throughout the entire case. He had served as personnel manager at Martin for 2 years, and reported directly to General Manager John Rainone.

¹⁷ The handbook itself bears this date.

¹⁸ It is notable that on p. 6 of the handbook, under "4. A WORD ABOUT UNIONS," it is stated in part that

We also feel that direct, face-to-face dealings with your co-workers and with any level of management are more beneficial than paying a union to speak for you . . . [f]or these reasons, we feel that a union is neither necessary nor desirable for our company.

12 of the handbook, and under the heading "Solicitation by Employees" appears the following:

During work time, we expect each employee to be occupied with his/her assigned responsibilities. Engaging in the distribution of literature during work time or in working areas, or soliciting interest or support of other employees in any group, cause or product on the work time of either employee is prohibited. It is of primary importance that no such activity interferes with our daily operations.

Schuster also identified the plant rules, dated March 12, 1985, and indicated they had been in effect since said date to the present time. Rule 27 (on p. 3) reads exactly as set out in paragraph 12 of the complaint.

There are initially two curious aspects regarding the paragraph 12 allegation. First, it is alleged that MTD promulgated the solicitation prohibitions in both the handbook and the rules "On or about November 4, 1988," when in fact there is absolutely no evidence to that effect. The documents themselves carry the dates of May 4, 1987, and March 12, 1985, and Schuster's un rebutted testimony as the General Counsel's witness reflects they became effective on those dates. Secondly, the language appearing in paragraph 12 of the complaint is only found in the rules, not in both the rules and handbook as alleged. It should be noted that originally, paragraph 12 alleged only the "Employees Handbook," but was amended by the General Counsel during the hearing to allege said language to be contained in both the handbook and the rules. The handbook predates the first charge filed by Robertson in these cases (November 30, 1988) by over 6 months and the rules (containing the actual language used in par. 12) predate the first charge by over 3-1/2 years. I note further that aside from the actual language of the rule, paragraph 12 of the complaint speaks only of the promulgation and maintaining the rule, and not of its enforcement, and in his brief the General Counsel addresses only the maintenance of the rule as being unlawful, although he does appear to link employee Joe Brasfield with improper enforcement of the rule through alleged disciplinary actions taken against Brasfield for distributing union T-shirts. Brasfield was later suspended and ultimately discharged in February and March 1989. The subject of Brasfield's rule violations will be considered later herein, when the lawfulness of his suspension and discharge are considered. For now, attention will be directed only to the existence or maintenance of the rule, as contemplated by the verbiage of paragraph 12 of the complaint.

In *Our Way, Inc.*, 268 NLRB 394 (1983), the Board reverted back to its holdings in *Essex International*, 211 NLRB 749 (1974), that rules using "working hours" are presumptively invalid because that term connotes periods from the beginning to the end of workshifts, periods that include the employees' own time, whereas rules using "working time" are presumptively valid because that term connotes periods when employees are performing actual job duties, periods which do not include the employees' own time such as lunch and break periods.¹⁹ As the Board indicated in *Our Way*,

¹⁹ In their brief, counsel for MTD mistakenly cited *T.R.W. Bearings*, 257 NLRB 442 (1981), as the prevailing authority on the subject. That case held that rules prohibiting employees from soliciting

Inc., supra, the governing principal is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). I find that the rule involved here, in MTD's plant rules,²⁰ is presumptively invalid as it prohibits soliciting and distribution "on Company premises . . . approved by the Company." Given MTD's open antiunion position, there is every reason for the employees to initially assume that "approval" for the solicitation of union support or the distribution of union material at any time and anywhere at the plant would be denied.

In considering whether or not the rule violated the Act, one more step must be taken. Under Board law as I understand it, although a rule may be presumptively or facially invalid, an employer may negate or cancel a violation by showing, through extrinsic evidence, that the rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation or distribution during breaktime or other periods when employees are not actively at work.²¹ In my opinion, this was done in this case. In general, judging from the entire record, it does not appear that employees were unduly restricted in their campaign for the Union. The subject just was not an issue, until of course it appeared in the first complaint. Promulgated in March 1985 as rule 27 of the plant rules, years later and during both union campaigns, the rule does not appear to have been the source of any controversy. The record reflects that union T-shirts, buttons, and pins were worn freely. Employee Penny Robertson, perhaps the most active union supporter, was instrumental in obtaining some 250 signed union authorization cards prior to the 1987 election. Some of those employees were asked to sign cards "at MTD." Employee Ronald Rogers testified he handed out union literature. Employee Joe Brasfield testified that he passed out T-shirts in the breakroom prior to the 1988 election, and David Reid testified that he passed out union literature twice outside the plant prior to the 1988 election. The rule was virtually a nonissue during the hearing, with few questions to witnesses regarding campaign restrictions, and absolutely no questions about the rule itself, or its existence. I find that the rule was applied at MTD in such

during "working time" are, together with rules prohibiting soliciting during "working hours," presumptively invalid. However, *Our Way, Inc.*, supra, specifically overruled *T.R.W. Bearings*, supra, in favor of *Essex International*, supra. In any event, counsel's reliance on *T.R.W. Bearings* does not detract from the legitimacy of their arguments because of the specific facts in this case. The bottom line is what the employees were allowed to do, or what they understood they could or could not do.

²⁰The solicitation rule set forth in the handbook is presumptively valid under *Our Way, Inc.*, supra, and *Essex International*, supra, and all counsel agree that it is not the subject of any alleged violation herein.

²¹See *Our Way, Inc.*, 268 NLRB at 395 fn. 6, quoting from *Essex International*, supra. I again note that par. 12 of the complaint does not allege the enforcement of the rule, only its promulgation and maintenance. In his brief the General Counsel states that MTD did not "clarify" the rule, and appears to argue that the rule was discriminatorily applied to employee Joe Brasfield. As indicated earlier, this subject will be discussed later herein when dealing with Brasfield's suspension and discharge. The fact remains that par. 12 of the complaint alleges that the promulgation and maintenance of the rule alone constitutes a separate violation of Sec. 8(a)(1) of the Act, and the matter has to be dealt with accordingly.

way as to convey an intent clearly to permit union solicitation or distribution during breaktime or lunchtime, and thus I find no violation of the Act as alleged in paragraph 12 of the complaint.

F. *The Alleged Threats by Personal Manager Schuster*

Paragraph 10(a) of the complaint alleges that Schuster, on or about November 4, 1988, threatened an employee with unspecified reprisals because of said employee's union activities, and paragraph 10(d) of the complaint charges that on or about February 9 and 28, 1989, Schuster threatened an employee with discharge because of said employee's union activities and sympathies.²² Employee Joe Brasfield was involved in both allegations. The November allegation initially began over a complaint of harassment and intimidation against Brasfield by employee Mike Jones. Brasfield testified that "around November, the latter part of November . . . 1988" he was called into Schuster's office about the complaint. Brasfield indicated that his Supervisor Ben Gregg was also present, and that Schuster stated he "had been caught passing union T-shirts out in the plant, and [he] had been harassing and intimidating Mike Jones, and that this was going in [his] record." Schuster testified that he met with Brasfield in his office on November 7 regarding the Mike Jones complaint, but denied that he said anything about reprisals to Brasfield because of his union activities. Schuster was not asked specifically about any "T-shirt" remark, but he did indicate that the subject of the Union came up because Jones' complaint dealt, in part, about the fact that Brasfield was "pressuring" Jones about the Union.²³ Brasfield's Supervisor Ben Gregg testified that Brasfield had earlier been "written up for . . . passing out T-shirts in a work area on worktime" on election day (October 21, 1988),²⁴ and that employee Mike Jones had initially made his complaint about Brasfield to him, and later on submitted his formal (written) complaint. Gregg added that he took the complaint to Schuster and told him what he knew of the matter. Gregg was asked if he was involved in anything else with regard to the Mike Jones matter, to which he responded, "No." Gregg was never specifically questioned about any meeting in Schuster's office on November 7. In his testimony, Schuster did not mention whether or not Gregg was present in his office on November 7 when he talked to Brasfield. The incident between Brasfield and Jones apparently occurred on November 4 and was a serious matter, as Jones actually quit MTD over the matter, walking off the job at the time of the incident. His written complaint to Gregg

²²These allegations first appeared in the second complaint issued May 3, 1989 (Case 26-CA-13124), which resulted from a charge filed by the Union on April 11, 1989, alleging only the unlawful suspension (on February 2, 1989) and discharge (on March 23, 1989) of employee Joe Brasfield. As indicated earlier, pars. 10(b) and (c) were dismissed during the hearing without objection for lack of evidence. Regarding pars. 10(a) and (d), I note that the General Counsel does not mention these allegations in his brief.

²³In evidence is a written warning to Brasfield for "threatening" and "intimidating" Jones. It is dated November 7, 1988, and signed by Schuster and Brasfield's Supervisor Ben Gregg. The warning does not mention T-shirts, and on the employee's signature line is written "refused to sign."

²⁴There is no other evidence in the case which reflects that Brasfield was given a written warning for passing out T-shirts.

was mailed in. Jones' subsequent request for his job back was denied because of MTD's policy of not rehiring employees that quit. I credit Schuster's testimony here over that of Brasfield, and find that the subject of union T-shirts never came up in the November 7 conversation with Brasfield about the Jones incident. Thus I find no threat of reprisals by Schuster as alleged in paragraph 10(a) of the complaint. Brasfield was cast in a similar mold as that of employee Reid. As a witness, Brasfield came off as a rough and tough individual, and the record reveals that he, as Reid, was a bully, although his actions were not quite as crass as those of Reid.²⁵ His testimony was, at times, evasive and defensive. His testimonial demeanor and his actions lead me to discredit most of his significant testimony in this case. I further note that the November 7 conversation between Brasfield and Schuster came some 16 days after the October 21 election and it seems highly unlikely that Personnel Manager Schuster would have brought up the subject of union T-shirts, especially considering the seriousness of the Jones incident, and its result.

The alleged threats of discharge by Schuster on February 9 involved another complaint about Brasfield by employee Mary Boyd regarding a soap dispenser in a restroom. Brasfield testified that "around January of 1989" he was called into Schuster's office "about harassing" Boyd, and Gregg was also present, and later Boyd herself. Regarding Schuster's remarks, Brasfield testified as follows:

[H]e found out I was telling the truth about it, but he still was going to put it in my record because Mary Boyd—he said that Mary Boyd and I had had problems before, and he told me the best thing for me to do was start looking for me another job, because I had been caught passing union T-shirts out, and I had harassed Mike Jones, and I had been in the office over production, and that my file was getting very thick and he was going to have to do something with me.

Brasfield's supervisor, Ben Gregg, testified that he was present at the time but was never asked specifically what Schuster said. The incident apparently occurred on February 9, 1989, and a written warning was issued to Brasfield at the time. The warning is signed by Gregg and Schuster, and above the employee's signature space is written "Refused to sign." The warning came as a result of a complaint of "harassment" by Mary Boyd, also involving employees Russell Busby and David Reid. Busby was also disciplined but according to Gregg, Reid was not because it was determined that he was not actually involved. The written warning does not mention union T-shirts, and under the "Comments" section, the following appears:

Any future violations of this plant rule or any other plant rules will be grounds for a (5) day out of plant suspension or dismissal from plant. This is your final warning. Employee refused to sign but does understand comments.

²⁵ A more expanded description of Brasfield's actions and his behavior appear later herein when his suspension and discharge are discussed.

Mary Boyd testified that she was called into Schuster's office to explain what had happened, which she did and then left. She was also not asked what Schuster said. During his testimony, Personnel Manager Schuster acknowledged the written warning given to Brasfield on February 9 in the personnel office, and was asked if he said anything to Brasfield to indicate that MTD intended to fire him because of his union activity, to which Schuster replied, "Absolutely Not." I credit Schuster over Brasfield and thus find that there was no threat of discharge on or about February 9, as alleged in paragraph 10(d) of the complaint.

Paragraph 10(d) also alleges a discharge threat by Schuster to an employee on or about February 29, 1989. The briefs filed herein make no reference to the allegation, or evidence pertaining to it. Brasfield was suspended by Schuster for 3 days on February 28, 1989, for leaving the plant without permission. This will be discussed later herein. Brasfield claimed that when Schuster suspended him, he told him that the next step was to "get him" for being late and told him to find another job. Schuster denied the remarks. Assuming this to be the alleged violation, I would of course credit Schuster over Brasfield, and thus find that the remark was not made. Thus, I shall recommend that paragraph 10(d) of the complaint be dismissed.

G. *The January (1989) Allegations Regarding Supervisor Gregg*

Paragraphs 9(e), (f), and (g) of the complaint involve alleged 8(a)(1) violations by Supervisor Gregg "in or about January 1989."²⁶ Paragraph 9(e) alleges the interrogation of an employee regarding his union activities and sympathies. Paragraph 9(f) alleges that Gregg created the impression among employees that their union activities were being kept under surveillance, and Paragraph 9(g) alleges threatening an employee with unspecified reprisals because of that employee's union activities and sympathies. The General Counsel relies solely on the testimony of employee Brasfield in support of the allegations. Brasfield had passed out union T-shirts in the breakroom on the day of the election (October 21) and had later taken the remaining T-shirts to his work station. During his testimony Brasfield was asked if Schuster or any other "company official" spoke to him about having passed out union T-shirts, and Brasfield replied that "around February" of 1989, Gregg approached him and said that he wanted to talk to him but that he "didn't want it to go any further." According to Brasfield, Gregg then stated that "he had heard that [employee] Ronald Rogers and I, was trying to organize a union." Brasfield testified he then asked Gregg who had told him that, and Gregg refused to tell him, but then stated, "I know you're for the union, because you wore a union T-shirt, and I know Ronald is for the union . . . [i]t just don't look too nice for you and Ronald Rogers sitting

²⁶ Pars. 9(a), (b), and (c) of the complaint were withdrawn by motion of the General Counsel during the hearing because they duplicated pars. 8(a), (b), and (c) of the complaint, which were dealt with earlier in this decision, together with par 9(d) of the complaint. Pars. 9(e), (f), and (g) appeared first in the second complaint and after the second charge (Case 26-CA-13124) filed by the Union, on behalf of Brasfield, on April 11, 1989, and alleging only his unlawful suspension and discharge.

around talking to each other.”²⁷ Brasfield indicated he then told Gregg, “Well, if it means . . . if that’s what it takes for me to keep my job, I won’t be hanging around Ronald Rogers or talking to him.” According to Brasfield, Gregg then “smiled and he let [him] go back to work.”

As indicated earlier, Ben Gregg had worked for MTD some 18 years, the last 5-1/2 years of which were at the Martin, Tennessee plant. Gregg was superintendent of fabrication, having direct responsibility over the welding department and the pressroom. He answered only to General Manager John Rainone and Factory Manager Dave Gido.²⁸ Gregg testified that the only union activity he ever observed by Brasfield was his wearing of a union T-shirt and passing them out on the day of the election. It was Gregg who claimed that Brasfield had passed out the T-shirts after lunch and in the pressroom during working time. Gregg reported this to Personnel Manager Schuster, who in turn verbally warned Brasfield.²⁹ Gregg testified that in January 1989 Brasfield came to him and indicated that there was a “rumor going around . . . that . . . he was trying to stir up the union.” According to Gregg, Brasfield wanted him to know the rumor was not true. Gregg testified that he told Brasfield he had not heard such a rumor, that it did not matter to him, adding, “Whatever you want to do, it’s your business.” According to Gregg, this was the sum and substance of the conversation, and Gregg denied that he mentioned Brasfield’s hanging around with Ronald Rogers or saying anything that would indicate that Brasfield’s job was in jeopardy because of his union support.

The complaint places the conversation between Brasfield and Gregg “in or about late January.” Brasfield places it “around February,” and Gregg places it “in January.” No matter when it took place, I credit Gregg’s version over that of Brasfield, and thus find no 8(a)(1) violations as alleged in paragraphs 9(e), (f), and (g) of the complaint.³⁰

H. *The February (1989) Allegations Regarding Supervisor Galey*³¹

The 8(a)(1) allegations regarding Supervisor Robert Galey appear in paragraph 11 of the complaint.³² Paragraph 11(a) alleges that Galey, “In or about February 1989,” interrogated an employee regarding his union membership, actives and sympathies. Paragraph 11(b) alleges that Galey, “In or

²⁷ In testimony, employee Rogers acknowledged that he supported the Union, was on the union organization committee, wore as many as five union buttons at a time, handed out union literature, and wore a union T-shirt on the day of the election.

²⁸ Supervisors or foremen under Gregg included Barry Wilson, Mitchell Whitney, Kevin Rogers, and George Wade.

²⁹ As indicated earlier, Brasfield denied that he passed out the T-shirts in the pressroom where he worked but conceded he had earlier passed them out in the breakroom and brought the remaining T-shirts to the pressroom. MTD’s Employee Handbook prohibited the “distribution of literature” in “working areas.”

³⁰ My reasons for generally discrediting Brasfield in this case appear earlier in this decision.

³¹ Galey’s name is misspelled “Galley” in the complaint.

³² The allegations in par. 11 first appeared in third (and last) complaint (the amended consolidated complaint) issued on June 6, 1989, resulting from the charge filed by employee David Reid on April 28 alleging only his unlawful discharge on March 23. These allegations were among those I had initially dismissed as a result of the motion by counsel for MTD under *Nickles Bakery*, 296 NLRB 927 (1989).

about February 1989,” created an impression among employees that their union activities were under surveillance, and unlawfully requested an employee to give written assurance that he would not engage in union activities in the future.

Employee Ronald Rogers came to work at MTD in October 1986. His present position was quality control inspector in the welding department, and his immediate supervisor was Dick Roll. He was a strong and outward union supporter until after the election (October 21, 1988), when he proclaimed that he would no longer support the Union.³³ Rogers testified that “right after the election . . . the week after the election,” Supervisor Robert Galey spoke to him about the Union in the “tear down room.” Rogers related that he, employee Steve Melton,³⁴ and Galey were discussing “job security,” and Galey “asked us, you know, about it [the Union],” to which they replied, “No, that we weren’t going to get involved in it [the Union] anymore.”³⁵ According to Rogers, Galey then stated that he could believe Melton but not him because he had been involved with the Union for 2 years, and Galey then asked him to put it in writing. Rogers testified that the following day Galey asked him if he had put it in writing, to which he replied, “Well, I will,” and he then and there wrote down “I [Ronald Rogers] guarantee that I will never be involved in the UAW election again in any form or in any fashion,” and gave it to Galey. According to Rogers, a short time later (the same day) Personnel Director Schuster came to him with the written statement and told him that he “didn’t have to do that, that [he] didn’t have to write that out,” and asked Rogers to take the statement back. Rogers related that he then refused to take the written statement back and asked Schuster to put it in his personnel file. According to Rogers, Schuster then left with the statement.

Robert Galey had been a quality control foreman at MTD for 4 years, where worked in the “welding tear down room.” He was Ronald Rogers’ supervisor and had known him for 3 years. Galey testified that prior to the October 21, 1988 election he knew Rogers to be for the Union from “buttons he wore on his hat, and conversations . . . [he] had with him in the past.” According to Galey, “About two days after [the election]” he walked in on a conversation between Rogers and one Steve Melton who then left, and thereafter he and Rogers continued the conversation. Galey testified that Rogers told him “he wouldn’t have anything else to do with the union again, because him and his wife had just about gone through a divorce over this, and over his activities.” Galey indicated he then just “sat there with a negative look on my face and I didn’t say anything,” whereupon Galey asked if he believed him, to which he (Galey) replied, “No.” According to Galey, Rogers then ask him what he could do to make him believe it, to which he replied, “In a joking manner,” “Put it in writing.” Galey denied that he initially asked Rogers to put it in writing, and denied ever

³³ In cross-examination, Rogers testified that he told “some people,” including Personnel Director Schuster, that he had become unhappy with the Union.

³⁴ The transcript, Vol. III, p. 324, recites the name “Miller,” which is incorrect, and the transcript is changed to reflect the name to be Steve Melton.

³⁵ At the end of his direct examination, Rogers was again asked when the conversation took place, and he again answered that it was “right after the election last year [1988].”

mentioning it to Rogers again, but related that the following day, Rogers proclaimed, "I've got something for you," and then handed him the written paper, which he put in his pocket and later gave to Personnel Director Schuster, explaining how the paper had come about. Although Schuster and employee Steve Melton testified in the case, neither were questioned about the incident.³⁶

I credit Rogers' version of the incident over that of Galey. Rogers' testimony appeared thoughtful and straight forward. His demeanor convinced me that he was telling the truth. Galey, on the other hand, appeared angry, and his rapid fire nonreflective answers and absolute air lead me to conclude that in significant areas of his testimony, he was unworthy of belief. I find that several days after the October 21 election, Galey, with full knowledge of Rogers' union support, approached Rogers and another employee and asked "about" the Union, and that it was Galey who initiated the request that Rogers put his antiunion turnabout in writing. The fact that Rogers had disavowed the Union is, in my opinion, of no consequence here as the test of a violation is not the subjective belief of the employee, but whether Galey's remarks could have reasonably been interpreted as creating an impression of surveillance. The complaint alleges the violations to have occurred "In or about February 1989," yet the testimony of Rogers and Galey clearly places the incident from 2 to 7 days after the October 21, 1988 election. There was no motion to amend the paragraph 11 allegations during the hearing, although at the end of the case the General Counsel did make the standard motion to "make the pleadings conform to the proof," which I granted but limited to "minor date variances, and where the testimony is explicit, [in] that it refers to a definite allegation in the Complaint." These allegations first appeared in the amended consolidated complaint issued on June 6, 1989, based upon employee Reid's charge of his unlawful discharge filed on April 28, 1989. Thus, it could be argued that the Act's 6-month limitation period in Section 10(b) requires dismissal of the allegations. This argument was in effect made by counsel for MTD in their *Nickles Bakery* motion during the hearing, and again in their posthearing brief. Section L of this decision deals with the *Nickles Bakery* issue, wherein the ultimate disposition of these Galley allegations (pars. 11(a) and (b) of the complaint) will be recommended dismissal.

I. *The Written Warnings, Suspension, and Discharge of Brasfield*

1. Testimony and evidence

Paragraph 13 of the complaint alleges that MTD issued written warnings to employee Joe Brasfield on November 4 and February 9 and 28, 1989, in violation of Section 8(1) and (3) of the Act. Paragraphs 14 and 15 of the complaint allege the suspension of Brasfield on February 28, 1989, and his discharge on March 23, 1989, in violation of Section 8(1) and (3) of the Act.³⁷ Brasfield was hired by MTD in Decem-

³⁶ Rogers' testimony would place Melton there when the initial conversation between he and Galey took place. Galey's testimony would have Melton leaving before it took place.

³⁷ The charge by the Union on behalf of Brasfield was filed on April 11, 1989 (Case 26-CA-13124), and based on the charge a separate complaint was thereafter issued on May 3, 1989.

ber 1985 as a press operator on the second shift. After a year, he changed to the first or day shift (6 a.m. to 2:30 p.m.) under Supervisor Ben Gregg. In general, MTD's reason for discharging Brasfield were multiple rules violations, including leaving work without permission, threatening or intimidating other employees, and careless workmanship, including the damaging of a die in a press by a "double hit," occurring twice in one shift.

Brasfield testified that his outward support for the Union came on the day of the election (October 21, 1988) when he wore a union T-shirt and passed them out in the breakroom on his lunch hour. According to Brasfield, one other employee was passing out union T-shirts that day, and on the way to his lunchbreak he observed an MTD supervisor named Bill Harrington passing out company T-shirts "in his department . . . on the assembly line," and later in the breakroom where he gave him "a real dirty look." Brasfield added that Harrington passed out the company T-shirts to "a few girls around in the plant," including one Sheila McDonald.³⁸ Brasfield testified that after his lunchbreak was over (11:30 a.m.) he took the remaining T-shirts to his work station and laid them down beside his machine (press), whereupon Supervisor Barry Wilson came up to him and said, "Don't you know you can get fired for . . . having those T-shirts." According to Brasfield, soon thereafter Supervisor Gregg asked him what he was doing with the T-shirts, and he replied that he was going to leave them there until his next break and then take them to his locker, and Gregg then instructed him to take them to his locker now, which he did. Brasfield testified that on his way back he met Gregg and Personnel Director Schuster, who indicated that he could "get dismissed for having those T-shirts, by it being [sic] that close to election time." Brasfield testified that he responded, "No, I didn't know," and Schuster then stated that since he did not know, he would let him go this time.³⁹ Brasfield denied handing out T-shirts in any area other than the breakroom.⁴⁰

Brasfield testified that in late November (1988) Gregg "pulled" him off the job and they went to Schuster's office where he was informed that employee Mike Jones had filed a complaint about him for "harassing and intimidating [Jones] on the job," which resulted in Jones quitting his job. Brasfield related that Schuster showed him a letter Jones had written about the matter, part of which he denied, explaining that he had only warned Jones that the Company did not like him wearing a union T-shirt and was "disappointed" in him. According to Brasfield, Schuster then said that he had been "caught passing union T-shirts out in the plant, and [he] had

³⁸ According to Brasfield, appearing on the T-shirts were the words "Be A Winner, MTD." Neither Harrington or McDonald testified in the case.

³⁹ There is no violation alleged in the amended consolidated complaint regarding Schuster's alleged remarks about the T-shirts, and no written warning was given to Brasfield.

⁴⁰ On cross-examination Brasfield conceded that he knew it was against MTD's rules to distribute things on working time in working areas. David Reid, who I do not credit, testified that Brasfield did not hand out any T-shirt in the pressroom.

been harassing and intimidating Mike Jones, and that this was going in [his] record.”⁴¹

Brasfield testified that “around January 1989” he was called into Schuster’s office regarding a complaint of harassment by employee Mary Boyd, and that Schuster again brought up his passing out of union T-shirts. The Mary Boyd incident was over a soap dispenser in the ladies restroom, and Brasfield denied being involved. Brasfield related that the following day he was again called into Schuster’s office, and also present were Gregg and Mary Boyd. According to Brasfield, Schuster stated he had investigated the matter and determined the he was not involved but it was still going to be put in his record because “Mary Boyd and [he] had had problems before . . . and the best thing for [him] to do was start looking for . . . another job, because [he] had been caught passing union T-shirts out, and [he] had harassed Mike Jones, and [he] had been in the office over production, and that [his] file was getting very thick and he was going to have to do something with [him].”

Brasfield testified that he was suspended in 1989 “around the last of February or the first of March.” Brasfield indicated that on a Saturday he had reported for work at 6 a.m. and at about 10:30 a.m. they ran out of material to run through the press and Pressroom Foreman Barry Wilson said he could either leave or stay if there was cleanup work to do. Brasfield related that he told Wilson that he would like to leave if he had a choice, but Wilson then told him not to leave until he checked with one Tim Dawson regarding cleanup work in the toolroom department. Brasfield testified that Wilson did not get back to him, and thus at about 11 a.m. he approached Wilson who stated that he was free to go home, and he then clocked out. Brasfield indicated that the following Monday he was late to work, arriving around 7:30 a.m., and Wilson asked him why he was late, to which he replied that he overslept. According to Brasfield, Wilson replied, “Well, we all do that sometimes.” Brasfield testified that at about 1:30 p.m. that day he was called into Personnel Director Schuster’s office, where, in the presence of Ben Gregg (and later Wilson), Schuster accused him of leaving the plant the previous Saturday without permission and failing to return. When Wilson arrived, he verified that Brasfield did not have permission to leave, which Brasfield claimed he contested. Brasfield related that Schuster believed Wilson, who recommended a suspension, and Schuster then suspended him for 3 days. Brasfield testified that he did not get any kind of suspension notice, but that Schuster again mentioned the union T-shirts, together with the Mike Jones and Mary Boyd incidents, and further added that the next step was to “get” him for being late, advising him to find another job somewhere else. Brasfield testified that Wilson then escorted him out of the plant and on the way out he asked Wilson why he did not tell the truth, to which Wilson replied that he “was sorry,” and suggested that he tell the other employees that he just took a few days off to take care of some business. Employee David Reid testified that Brasfield was not asked to stay, and thus went home. He conceded that he was not present when Wilson talked to Brasfield. As earlier, I again discredit Reid’s testimony.

⁴¹ As indicated earlier, no written warning was given to Brasfield for passing out T-shirts, but Brasfield did receive a written warning on November 7, 1988, for harassing Mike Jones.

Brasfield was actually discharged on March 23, 1989. He testified that on the day before (March 22, his last day of work), at about 9:30 a.m. parts kept sticking on the top of the die at his station on the machine (press) and he did not see a sticking part, and when he put another part in the press made a hit and broke some pins in the die. This resulted in down time while the die was being fixed. Brasfield related that after the die was fixed his Supervisor Barry Wilson told him that the next time a part stuck to the die, he should notify him. Brasfield testified that they again started operating the press and again parts kept sticking to the top of the die “real bad,” and he thus told the other operators of the press to stop operations, and he then went to Wilson who told him to go ahead and run the press until breacktime when he would have the die polished. Brasfield related that again a part stuck but they “caught it in time” and no damage was done, adding that during the 11 a.m. break the die was fixed (polished). According to Brasfield, later that day he was approached by Supervisor Mitchell Whitney who asked him why he had allowed a bad hit to occur twice, to which he replied, “I just overlooked the part . . . it was just an honest mistake that I just couldn’t help, I overlooked . . . didn’t see it,” further explaining to Whitney that he was not “drunk” or “high,” and that he was in his “right mind.” Brasfield indicated that Whitney then stated, “Well, I believe you,” and told him to go back to work. Brasfield testified that the following morning at 8:30 a.m. Ben Gregg came and took him to Schuster’s office, whereupon Schuster discharged him “because I had made two bad hits on the machine.” Brasfield indicated he tried to defend himself, but that Schuster told him to “shut up.” Brasfield related that in the past “bad hits” had been made by Ben Gregg, Mitchell Witney, and one Opal Thorpe, all of whom were still at MTD.⁴²

At this point, a description of MTD’s press operations would be in order. From Brasfield’s testimony, and other testimony and evidence in the case, it appears that MTD operated and maintained several sizes of presses, the largest of which was the 500-ton press, a large free-standing machine with four operators working as a team, with two standing on each side. The 500-ton press has four dies, one for each operator. Each die has a top and bottom part, attached to the top and bottom of the press. The cycle begins when an operator’s helper runs a bare piece of steel through oil and hands it to the lead or first operator, who places it on top of the bottom part of his die. Each operator has his own press activation button and when each operator has his piece in place, he pushes his activation button. When the last operator to ready his piece pushes his button, the top part of the press (containing the top parts of the four dies) comes down on the metal below it with great speed and force, and the metal piece(s) are stamped out, after which the top of the press rises back up to its peak and stops. At full operation, there is metal being stamped out on each die. The piece is fully

⁴² David Reid, who I have discredited in this case, earlier testified that everyone in the press department had made double hits, and that some had made a lot of them, including David Tibbs, Danny Jones, David Helms, Jasen Kemp, and Randy Morgan. Reid indicated that Tibbs once put “slugs” in dies deliberately to break the pins so there would be down time. Tibbs, Jones and Helms did not testify in the case. Kemp and Morgan did testify, but were not asked about double hits.

stamped out at the fourth operator's station on the press, whereupon it is stacked and later checked by an inspector. During normal operation, after the stamping process, the piece is sitting on the bottom die and is loosened by air feed through an air hose under each bottom die. The operator then takes the piece and places it on the next die to his left or across from him. However, on occasion the piece will stick to the top die, and when this die cycles up and stops, the operator must remove it before the press is activated to stamp down again on another piece, or the result will be the stamping of two pieces at one time, a "double hit." A double hit not only results in the scraping of both pieces, but more seriously the damaging of the die. The die then has to be removed from the press and taken to another department for repair, resulting in down time for the press. A "bad hit," as opposed to a double hit, is less serious and would occur, for example, when an operator places a piece unevenly on the bottom die. Normally, there is no damage to the die, although the piece does have to be scraped.

The day of Brasfield's two double hits, he was at the last (fourth) position on the press on a 500-ton press running "hitch plates," which Brasfield conceded had a tendency to stick, requiring more attention. Brasfield also conceded that pieces were sticking "on and off" that whole day, and further conceded that he knew of no other employee who had had two double hits in one shift.

Mike Jones testified as a former employee at MTD where he had worked in the pressroom from May 1985 to late October 1988 when he voluntarily quit.⁴³ Jones testified that on a Wednesday morning at 7:30 a.m. employee Brasfield told him "to watch [his] step, they're out to try to get rid of [him]." Jones, who had apparently displayed support for both the Union and MTD, took this to mean that either MTD or certain other employees were out to get him, adding that he had heard a rumor to this effect from one other person in the plant, whose name he could not remember. Jones testified that after Brasfield made the statement to him he went to his Supervisor Ben Gregg and told Gregg that he "was going back there to tell Joe Brasfield to take his union and shove it up his ass." According to Jones, Gregg made no response and he then walked off his job, left the plant and went home. Jones testified that several hours later he returned and talked to Plant Manager John Rainone and Personnel Director Schuster in an attempt to get his job back, and Schuster told him that if he had been there, he would have tried to talk him out of walking off the job.⁴⁴ Then, according to Jones, his Supervisor Ben Gregg told him to go home and write a statement about the incident and bring it back "to see about getting [his] job back." Jones indicated he did this and returned 2 days later with the written statement and gave it to Gregg, who then informed him that the statement "wasn't good enough." Jones related that, with the help of Gregg, he then wrote out another statement which "was supposed to have been helping [him] to get [his] job back at the plant, but . . . it was helping me to hurt Mr. Joe

⁴³ Jones initially testified that he left MTD in August 1988, but other testimony and evidence places his departure in late October 1988, after the October 21 election, and on or about October 26, 1988.

⁴⁴ Jones was not rehired. MTD had a policy of not rehiring employees that quit.

Brasfield."⁴⁵ According to Jones, Gregg told him he was going to put the statement in his file "where it was going to be locked up where Joe Brasfield wouldn't see it."

During the Board's investigation, Jones had given an affidavit wherein he stated, "I told Ben Greg, my supervisor, I was quitting because Joe Brasfield and others told me that the company was out to get me because I was for the union." Jones acknowledged the statement as being true, but again indicated that beside Brasfield, there was only one other person that had made such a statement to him, which was prior to Brasfield's remarks, and that he could not remember the name of the person. The affidavit also states the Brasfield did not harass him, and Jones indicated that the statement was true. During cross-examination, Jones conceded that when he walked off the job, he knew that MTD had a policy against rehiring employees that quit.⁴⁶ He also conceded that in truth, Brasfield had been giving him a hard time because he had been wearing a "Vote No" button which he finally took off, and then wore a union T-shirt on the day of the election, after which Brasfield told him he was going to be fired because of the T-shirt.

In testifying, Jones appeared as a bitter, hurt, and angry individual. His testimony, in great part, was either uncertain, disjointed, or inconsistent. At various times he flatly refused to answer questions. It was difficult to tell whether he was motivated by anger directed at Brasfield, MTD, or himself. In any event, Jones was not a creditable witness.

Billy Summers testified as a former employee of MTD, from October 1985 to approximately January 1989, over a year of which was working in the press room. Summers indicated that on occasion he had seen "double hits" occur, citing "human elements" and having "just a bad day." Summers testified that he, himself, had a double hit, but not on the 500-ton press that ran hitch plates, where each of the four operators had to manually insert the metal and take it out. Summers conceded that in the hitch plate situation, each member of the crew "ought to be watching what's happening." Summers related that on one occasion employee Terry Wade, who "didn't know what he was doing," ran a "ram adjuster" too low, causing down time on a press of at least one shift. Summers added that when he left MTD, Wade was still working there.⁴⁷ However, Summers testified that he knew of no case where anyone had made two double hits on a hitch plate in one shift.

John Rainone testified as the general manager of the MTD plant in Martin, Tennessee since 1984, when the plant was built. As such he was present during the union election on July 30, 1987, and on October 21, 1988. Rainone confirmed that there were no charges filed, and no objections filed by the Union after the first election, adding that there were objections filed after the second election, which were subse-

⁴⁵ The statement was admitted into evidence and is undated. It recites that on October 26, 1988, Jones was "harassed" by Brasfield to such an extent that he became "so upset" and "afraid," and thus quit. Jones testified that on the same day as the statement, he also filled out a complaint form to go before the the review board in an attempt to get his job back. This form was also admitted into evidence, is undated, and uses the word "harassment." According to Jones, he inquired about his job and the review board action on several days thereafter, but never got any response, and just "gave up."

⁴⁶ In yet later cross-examination, Jones denied that he knew this.

⁴⁷ Wade did not testify in the case.

quently withdrawn. Regarding terminations, Rainone testified that first there would be an investigation by Personnel Manager Schuster and the supervisors "in the area," after which he, Schuster, and one Mike Murray (the vice president for employee relations in Cleveland, Ohio) would confer, and if the three agreed, the termination would take place. Regarding the three terminations in this case (Brasfield, Robertson, and Reid), Rainone indicated that the above procedure was used, adding that he personally did not conduct any investigation or talk to the three individuals terminated, and his decision was based on Schuster's recommendation and "the facts of the investigation as presented." Rainone testified that at no time did the union activities of the three individuals come up, although he did know that Robertson had passed out union literature once at the gate and that Brasfield had worn a union T-shirt on the day of the election, as did "about 35 percent of the plant." Rainone added that he knew of no union support by Reid. According to Rainone, there were at least six other employees who were more active or outspoken supporters of the Union than Brasfield, Robertson, or Reid. Regarding the reasons for Brasfield's termination, Rainone testified as follows:

Mr. Brasfield, again, had several rules violations in his file. The ones that I recall are distributing materials in the work place on working hours, leaving work without permission during regularly scheduled working hours, intimidating fellow employees. And the final straw was having two double hits on the same job within a very short period on one shift.

Rainone testified that MTD established an employee review board to hear appeals of employees who feel that they have not received fair treatment in the administration of discipline. The review board consists of seven named employees, from which the disciplined employee can pick three who would handle (or sit on) the review, after which they would make a written recommendation to Rainone, who could either follow or reject the recommendation.⁴⁸ Brasfield and Reid used the review board (and Robertson did not). Brasfield's review board results reads as follows:

The employee review board met on March 23, 1989, at the request of Joe Brasfield. The employee review board unanimously agreed that the company acted in good faith in the termination of the employee. The review board took into consideration every aspect of the employee's dispute with the company. Upon evaluation of the employees records and discussing the problem with the employee and his fellow employees, we felt it was a fair decision.⁴⁹

⁴⁸Sec. 9 of the Employee Handbook establishes the employee review board. It dictates that the seven members are chosen by the personnel manager (Schuster) from "all departments and job classifications throughout the organization," who shall serve up to one year. The complaining employee selects three from the list of seven "to sit on his or her panel."

⁴⁹The panel members who signed the results were Winston Sutton, Steve Melton, and Chris Olds. Rainone signed as concurring with the review board's decision. Steve Melton was one of the six named employees which Rainone indicated more outwardly supported the Union than Brasfield, Robertson, or Reid. The Review Board's decisions regarding both Brasfield and Reid were admitted

In testimony, and through a series of photographs and a video tape of the 500-ton press Brasfield was working at during the shift when two double hits occurred at his station (and on his die), Rainone described in great detail the workings of the press and the action (or inaction) of Brasfield in causing the double hit. Rainone knew of no other employee who ever had two double hits during the same shift, and concluded his testimony regarding the matter as follows:

The situation, having a double hit after being warned of problems with the press, and being warned after having an initial double hit during the day which required an hour and a half of down time to fix the die, and then immediately thereafter having a second hit shortly after the die was fixed and we were back in operation, warranted the discipline.⁵⁰

James Schuster became the personnel manager at MTD's Martin plant in September 1987. Schuster testified that it is he who decides what constitutes the appropriate level of discipline for violations of the plant rules, including making the final recommendation to discharge an employee. During his initial testimony, Schuster related that Brasfield was discharged for "multiple rule violations, the most recent of which was careless workmanship," citing Brasfield's double hits on the press.⁵¹ Schuster conceded that there had been other employees with double hits, but none "that close together on the same day after being warned that many times." He also conceded that between May 1, 1987, and November 17, 1989, and to the best of his knowledge, no other employee had been disciplined for misuse of a press, including bad hits or double hits. Schuster testified that prior to Brasfield's two double hits, he had "a series of rules violations in his file, [and] had been warned on several occasions that future rules violations could lead to discharge." Schuster indicated that among these "series" of violations were distributing union T-shirts and harassing employee Mary Boyd.⁵² Brasfield was given a written warning on Feb-

into evidence. Reid's will be discussed later herein. In admitting the decisions, their purpose and use was limited to reflect the review board action taken, as part of the discharge process only. Their opinions and results will not be used in my final determination as to MTD's true motivation in the discharges of Brasfield or Reid.

⁵⁰At the time, hitch plates were being run through the press and according to Rainone, at the rate of 306 per hour, the normal rate being between 320 to 325 an hour. As described by Rainone, a hitch plate is the piece of metal that "ties the upper frame of a riding lawn mower together in position."

⁵¹Schuster was called as the General Counsel's first witness and later, as an MTD witness, when he gave expanded and more detailed testimony. The State Department of Employment Security separation notice, signed by Schuster on March 22, 1989, recites, under circumstances of the separation, "multiple rules violations—not suited for industrial work." According to Schuster, Brasfield was awarded unemployment compensation after a hearing.

⁵²The Boyd incident involved alleged comments by Brasfield to janitor Mary Boyd about soap in the ladies bathroom. Boyd testified in the case and her testimony will be discussed later herein. The incident also involved employee Russell Busby who, according to Schuster, implicated Brasfield and who was also given a written warning regarding the matter. Busby did not testify in the case. A typed summary of Boyd's complaint, including the results of an investigation about the matter (occurring on February 8, 1989), were admitted into evidence and reflect that Busby related he was trying

Continued

ruary 9, 1989, as a result of the Boyd incident.⁵³ Schuster testified that on November 7, 1988, Brasfield was issued a written warning for “threatening and intimidating” employee Michael Jones. Schuster was advised initially about the matter by Supervisor Ben Gregg. Jones, whose testimony is summarized earlier, had walked off the job and was later unable to get his job back because of MTD’s policy of not rehiring employees that quit.⁵⁴ Schuster testified that he talked to Jones about the matter, who stated that on the day he quit, Brasfield had told him he had better watch his step as the Company was out to get him. According to Schuster, Jones further related that he could no longer take Brasfield’s harassment and intimidation, which “scared” him, and he “panicked” and quit.

On February 27, 1989, Brasfield was issued a 3-day suspension (commencing on February 28) for leaving the plant during working hours without permission (in violation of plant rule 14).⁵⁵ Schuster testified that his written report reflects accurately the facts regarding the suspension.⁵⁶ That report indicates that Brasfield had asked to go home early, and his request was denied by Supervisor Barry Wilson, who signed the report (which included the actual suspension). When Brasfield left for his lunch break, he did not return for work that day. In his testimony, Brasfield claimed that Wilson did give him permission to leave early. The report warns Brasfield that a further Rules violation will subject him to dismissal. The report also lists employee Ollie Jordan as a witness. In their testimony, Wilson denied giving Brasfield permission to leave early, and Jordan confirmed Wilson’s version. Schuster further testified that employees who leave the plant during working hours are always disciplined, citing a 3-day suspension given to an employee on March 9, 1988.

to aggravate Boyd by stating to her “How about the soap in the girls bath room?” and further reflects that Busby admitted “he put” Brasfield up to saying the the same thing to Boyd.

⁵³ Under the “Comments” section of the warning, the following appears:

Any future violations of this plant rule [# 11] or any other plant rules will be grounds for a 5 day out of plant suspension or dismissal from plant. This is your final warning. Employee refused to sign but does understand comments.

A summary of the results of an investigation over the Boyd complaint reflects that Brasfield admitted he had “run in’s” with boyd before.

⁵⁴ The written warning to Brasfield regarding the Jones incident was alleged as a violation of Sec. 8(a)(1) and (3) of the Act in par. 13 of the third (and final) amended consolidated complaint. The allegation did not appear in the second complaint (Case 26-CA-13124) issued May 3, 1989, upon the Union’s charge on behalf of Brasfield alleging only his improper suspension and discharge (on February 28 and March 23, 1989). The November 7 written warning, under “Employee’s Explanation,” recites that Brasfield “did not intentionally harass anyone” and was “just joking” with Jones. It was signed by Gregg and Schuster. Brasfield refused to sign the warning. Schuster testified that MTD has a “no rehire” policy regarding employees that quit, and sticks to it.

⁵⁵ This suspension was alleged as a violation of Sec. 8(a)(1) and (3) of the Act in the initial charge filed by the Union on behalf of Brasfield on April 11, 1989, and was contained in the resulting (second) complaint issued May 3, 1989. It appears in par. 14 of the (third and final) amended consolidated complaint.

⁵⁶ This written report was a one page type memo “TO: FILE,” dated February 28, 1989, with the heading “NAME: JOE BRASFIELD,” and signed by Schuster.

According to Schuster, when he gave Brasfield the 3-day suspension, Brasfield claimed that since the “T-shirt” incident (election day, October 21, 1988), he had been picked on by the Company. Schuster testified that he then told Brasfield that his subsequent warnings were not “trumped up because he supported the union . . . [they] were things that he actually was involved with on his own, and we had documented proof of that.” Schuster related that he then warned Brasfield that his next rules violation would subject him to dismissal, whereupon Brasfield became upset, loud and boisterous, banging on his desk and claiming that they were out to get him. Schuster denied that he ever told Brasfield he had better start looking for another job.

Brasfield’s double hits occurred on March 21, 1989. Schuster testified that he learned about the first double hit in a phone call from pressroom Supervisor Barry Wilson, who wanted Brasfield to be seriously dicliplined. But Schuster, not wanting to “over react,” told Wilson to counsel Brasfield about being more careful. According to Schuster, Wilson indicated that he had done this prior to the beginning of the shift, but agreed to do so again. Schuster testified that several hours later Wilson again called him and reported that Brasfield had sustained another double hit. Schuster related that he then meet with Wilson and pressroom foreman Mitchell Whitney (who worked with Wilson on the same shift) “to figure out what had really happened,” after which he, Corporate Vice President Murray and Plant Manager Rainone went over Brasfield’s record, and then decided to discharge him. The actual discharge took place the following day, March 22, 1989.⁵⁷ Schuster conceded that he knew Brasfield had passed out union T-shirts on the day of the election (October 21, 1988), but denied that Brasfield’s union support had anything to do with his discharge. Schuster named some six employees who he personally knew were open and active union supporters, and who were still at MTD, adding that some of those employees were outspoken about the Union at meetings, and some passed out union materials in the morning outside the plant.

Barry Wilson testified as a pressroom foreman, a position he held for 3 years. His supervisor was superintendent of fabrication Ben Gregg. Wilson related that in late October 1988 employee Mike Jones came to him and complained that Brasfield was “harassing” him over money he owed him, and about the Union, adding that Jones was “unsure” about the Union and stated that the only reason he showed union “involvement” was the money he owed Brasfield, who was holding it over his head. Wilson indicated he told Jones that he could not help him and advised him to go to Gregg. Wilson testified that on a Saturday in late February 1989,⁵⁸ his first shift was scheduled to work 8 hours but that “about lunchtime” they ran out of steel and he had to reassign employees to other jobs. Wilson indicated he approached Brasfield and employee Ollie Jordan and told them they would be working for Toolroom Supervisor Tim Doss in the afternoon, after lunch. According to Wilson, both Jordan and Brasfield ask if they could take the afternoon off, to which

⁵⁷ The written discharge notice indicates a violation of plant rule 16 (careless workmanship), and also notes that during the discharge Brasfield stated, “Let me shake your hand, I don’t know what took you so long to fire me.”

⁵⁸ Other evidence in the case establishes the date to be Saturday, February 25, 1989.

he replied that they were to report to Doss after lunch, and when Doss finished with them, they "might" leave early, adding that he would check with Doss and get back to them. Wilson did indicate that he told Jordan and Brasfield that some employees were going home early, on the basis of seniority, and after checking with Doss, he told them "there was a good chance they could leave a little early." According to Wilson, he allowed three employees to go home at lunchtime, who were senior to Jordan and Brasfield. Wilson testified that he "made sure" Brasfield understood he was to return after lunch and report to Doss.⁵⁹ Wilson related that the following Monday morning (February 27) he met with Gregg and Schuster and it was decided that Brasfield would receive a 3-day suspension for leaving early the previous Saturday.⁶⁰ The suspension began February 28, with Brasfield still claiming that Wilson did give him the afternoon off. Wilson escorted Brasfield out of the plant at the beginning of his suspension, and denied that he in any way apologized to Brasfield for the suspension.

Wilson testified that the only time he ever saw Brasfield do anything in support of the Union was on election day (October 21, 1988) when he observed Brasfield come into the pressroom after lunch with T-shirts in his hand, and walk back to the last press and hand one to employee Kenneth Biggers, a press operator.⁶¹ Wilson indicated that he took no action because Gregg and Schuster were there, and they handled the matter. Wilson denied that he ever told Brasfield that he could get fired for having the T-shirts, adding that on the day of the election there were six to eight other employees in the pressroom wearing union T-shirts.

Wilson testified that he made the press assignments on the day of Brasfield's two double hits. Wilson indicated that they had problems with the hitch plate sticking at Brasfield's assigned position, and thus at the beginning of the shift he so advised Brasfield, telling him to be careful and make sure the part was out. According to Wilson, at about 8:30 a.m. Brasfield made a double hit, after which the die was pulled out and sent to be repaired, resulting in 1-1/2 hours of down time. Wilson related that he again told Brasfield about the tendency of the part to stick and to be careful, but about 15 minutes after the press was again started, Brasfield made another double hit. Wilson denied that Brasfield came to him that morning complaining about the sticking hitch plate, indicating that as far as he knew no employee had ever sustained two double hits during the same shift.

Mitcheal Whitney was also a foreman in the pressroom on the first shift. He had worked for MTD for 4 years. Whitney testified that sometime double hits do occur, and if it is the

first time for the employee, they normally are not disciplined, but counseled. According to Whitney, Brasfield was the only employee who ever had two double hits on the same job on the same shift. Whitney testified that he also counseled Brasfield after his first double hit, including the fact that the die at his position had an inclination to stick, but that the second double hit occurred about 20 minutes after the repaired die was inserted back into the press. Whitney indicated that the downtime for the press after the first double hit was approximately 2 hours, with less downtime after the second double hit when the press was worked on over the lunchbreak. Whitney testified that after the second double hit, they switched Brasfield to another position at the press, and later he asked Brasfield about the second double hit, and Brasfield indicated he did not do it on purpose and "just wasn't paying attention." Whitney denied that he told Brasfield to forget it, or not to worry about it, but indicated that he talked to Schuster about the incident because he thought that Brasfield's second double hit warranted discipline. Whitney also testified that he saw Brasfield pass out a union T-shirt to Kenneth Biggers during working time, but that he said nothing to Brasfield about the incident. Regarding the Mike Jones incident, Whitney testified that he observed Jones "crying" and "very upset," and overheard Jones yell to Brasfield "Fuck you and your union."

Ben Gregg was superintendent of fabrication at MTD's Martin plant where he had worked for over 5 years. As such, under him was the welding department and the pressroom. He had been with MTD a total of 18 years. Gregg testified that Brasfield was discharged "For his record . . . for his writeups, and of course, the double hit." According to Gregg, at the beginning of the shift in which the double hits occurred he told Brasfield that the part was sticking occasionally and to be careful, and not to worry so much about production but to make sure he took the part out before he put another in. Gregg indicated that Brasfield stated he understood. Gregg testified that several hours later Brasfield had the first double hit and broke the die, which took about 2 hours to repair. When they got ready to start the press up, Gregg indicated that he again reminded Brasfield of the sticking problem and to be careful, and not to worry about production as much as safety, and to make sure the part was taken out. According to Gregg, Brasfield again stated that he understood, but a short time thereafter Brasfield made another double hit. Gregg testified that he then reported the second double hit to Personnel Director Schuster because in his opinion it warranted discipline as it endangered the safety of all four press operators, and Brasfield had been told about the part sticking problem twice.⁶² According to Gregg, no other employee ever had two double hits on the same shift. Gregg later recommended to Schuster that Brasfield be terminated, based on his past record and the two double hits.

Gregg testified that the only union support or activity that he knew of relative to Brasfield was the wearing of a union T-shirt and passing one out during working time on the day of the election only. Regarding the Mike Jones incident,

⁵⁹ A 5-year employee, Ollie Jordan, corroborated Wilson's testimony. She was absolutely certain that Wilson told them to return after lunch. According to Jordan, she and Brasfield exchanged words about the matter, Brasfield insisting that Wilson had given him the afternoon off, and she insisting that Wilson had not. Jordan was particularly disturbed about Brasfield's leaving as she had seniority over him. Jordan testified that upon her return from lunch, she reported to Doss in tool and die and Wilson thereafter came to her and asked where Brasfield was, to which she replied that she did not know.

⁶⁰ Jordan testified that she was called into the meeting with Wilson, Gregg and Schuster to verify what had happened on Saturday.

⁶¹ Biggers testified that he did in fact receive a union T-shirt from Brasfield while at his press, which was during "working time." As noted earlier, Brasfield admitted having the T-shirts in the pressroom but denied that he handed any out.

⁶² In later testimony, Gregg discussed the safety aspect by indicating that a double hit was like putting a quarter in a dime slot, and could cause the die to blow apart, resulting in pieces of the die hitting the operators. According to Gregg, the force of the press involved was 500 tons.

Gregg testified that shortly after the election Jones came up to him and said he was going to quit because Brasfield was harassing him and holding a loan over his head. Gregg indicated that he tried to calm Jones down but Jones insisted that he could not work there any longer with Brasfield there, and he walked out, but that evening Jones called him at home after he had been drinking and commenced to talk in circles. Gregg then told Jones to write down what he was trying to say and bring it to him at work. According to Gregg, a day or so later Jones brought him a piece of paper with scribbling that he could not understand, and Jones then said he would go back home and have his wife write it out. Gregg testified that a day or so later, Jones came back with another "formal complaint" against Brasfield, which he took from Jones and gave to Schuster. Gregg denied telling Jones he could get his job back if he filed a complaint against Brasfield, and indicated that he had told Jones prior to submitting the complaint that the policy was not to rehire anybody that had quit. According to Gregg, Jones told him the reason for filing the complaint against Brasfield was because he did not think it was right that he no longer had a job when it was Brasfield who had done the harassing. Regarding the Mary Boyd soap incident, Gregg testified that he investigated the matter after Boyd had gone to Schuster about the matter, because Brasfield was working under him at the time. Boyd's complaint of harassment by Brasfield, Reid, and employee Russell Busby over the lack of soap in a ladies restroom, resulted in written warnings to Brasfield and Busby. Regarding his investigation, Gregg merely testified that "it turned out that Joe was harassing her and he got a written warning for it."⁶³

Mary Boyd had worked at the plant for over 4 years as a janitor. Apparently Brasfield and Busby, at least, had learned at a departmental meeting that the soap dispenser in the ladies restroom was not functioning properly. Boyd testified that while in the breakroom, Brasfield, Reid and Busby started "teasing" her about the soap dispenser, to which she responded that it had been taken care of, and to leave her alone.⁶⁴ According to Boyd, Brasfield "kept on and kept on," telling her that she needed to do a better job than she had on the soap dispenser, and she then told Brasfield that she did not have to take such "abuse" from anybody, and left the room crying. Boyd then reported the incident to Plant Manager Rainone and Assistant Plant Manager Gido, who told her to report the matter to Personnel Manager Schuster, which she did. Boyd was later called to Schuster's office where also present were Gregg and Brasfield. Boyd testified that at Schuster's request, she again explained what had happened. Boyd related that Brasfield then denied it, and she then told Brasfield that he was a "lie," adding that he was not going to run her off like he had done to Mike Jones, then she left the office. Boyd testified that she had had "many problems" with Brasfield before but had not reported them, and had reached the point where she "just couldn't take no

⁶³The written warning itself is without specifics, but recites that Brasfield claimed he did not intend to harass Boyd. Busby's written warning recites that Busby provoked Brasfield into "saying things" to Boyd.

⁶⁴Although Boyd gave no dates in her testimony, other record evidence indicates the incident occurred on either February 7, 8, or 9, 1989. Brasfield's written warning was dated February 9 and Busby's was dated February 7.

more." In describing these "problems," Boyd included such things as throwing stuff on the floor and putting ketchup on a table. Boyd conceded that she was against the Union, and knew that Brasfield was in favor of the Union, but maintained she had nothing against Brasfield, although the two had cursed each other before.

Brasfield appealed his discharge to the employee review board, and the panel which heard the case was composed of Chris Olds, Steve Melton, and Winston Sutton. Olds testified that the board went over Brasfield's record with Schuster, and then heard from Brasfield, who maintained that he was discharged because of his union support. Olds indicated that Brasfield felt the double hits were not a good enough reason to discharge him. Olds testified that he told the two other panel members that as far as he was concerned, the Union had nothing to do with Brasfield's discharge because "I just don't feel that they would fire somebody for that reason . . . there's too many people down there that was union supporters, because the vote was so close." Olds indicated that the panel also asked Brasfield about his leaving work early without permission, and Brasfield said he thought he had permission. Olds related that the panel then heard from Barry Wilson, and considered a letter in the file from Ollie Jordan, and decided that Brasfield had in fact left without permission. Olds indicated that the panel, while alone together, decided to uphold the discharge, finding that MTD had acted in "good faith." Panel member Steve Melton's testimony corroborated the essential elements of Olds' testimony,⁶⁵ as did that of member Winston Sutton, who added that Brasfield was "vague, and not very definite on anything," "evasive," and "would talk in circles."

2. Brasfield conclusions

In *Wright Line*,⁶⁶ the Board established that if the General Counsel makes a prima facie showing that protected activity was a "motivating factor" in the employer's decision to take disciplinary action, the burden shifts to the employer to demonstrate that the action would have taken place even in the absence of the protected activity. Paragraphs 13, 14, and 15 of the amended consolidated complaint allege violations of Section 8(a)(1) and (3) of the Act against Brasfield. Paragraph 13 contains the written warning allegations on or about November 4, 1988 (the Mike Jones matter), February 9, 1989 (the Mary Boyd incident), and February 28, 1989 (leaving the plant without permission). Paragraph 14 contains the suspension allegation (leaving plant without permission),⁶⁷ and

⁶⁵Melton also testified that he had been a union supporter and as such was a member of the organizing committee, had worn a union pin during the campaign, and wore a union T-shirt on election day. Melton indicated that he once initiated a conversation with Schuster regarding the Union, asking Schuster if there would be any retaliatory action against him because of his union involvement, to which Schuster replied, "As long as you're not breaking any rules [sic] violations, attendance problems, tardiness, you've got no problem, you let me know and I'll take care of it."

⁶⁶251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁶⁷The February 28 allegations in pars. 13 and 14 are one in the same, involving Brasfield's early departure from the plant on Saturday, February 25, 1989. Brasfield was given a 3-day suspension, but there was no written warning or written notice of suspension given

paragraph 15 alleges Brasfield's discharge on March 23, 1989 (after the two double hits on March 21). By his own admission, supported by other substantial evidence, Brasfield's only display of union support was his wearing of, and the passing out of union T-shirts on the day of the election (October 21, 1988). As indicated earlier, I discredit virtually all of Brasfield's significant testimony in the case,⁶⁸ and I credit MTD's supporting witnesses against Brasfield.⁶⁹ Although I could not credit the pathetic Mike Jones, I find that Brasfield was the primary (if not sole) cause for Jones' walking off his job, and that the written warning given Brasfield on November 7, 1988, was justified. I also find that February 9 written warning for harassing Mary Boyd (with Russell Busby) was justified, and that the February 28 suspension for leaving early and without permission was justified. Finally, there came Brasfield's two double hits on March 21, 1989, followed by his discharge on March 22, 1989, some 5 months after the election, which was won by MTD. In my opinion, Brasfield's double hits were a serious matter, and taken so honestly and legitimately by MTD. They involved at least pure carelessness on the part of Brasfield, and also brought into play matters of safety and economy. In my opinion Brasfield self-destructed, and his scant union support from the past played no roll in his written warnings, his suspension, and his discharge. Under *Wright Line*, supra, I find that the General Counsel failed to make a prima facie showing that Brasfield's union activity and support was a motivating factor in MTD's decision to warn, suspend and discharge Brasfield.⁷⁰ I shall thus recommend that the 8(a)(1) and (3) violations alleged in the amended consolidated complaint involving Brasfield be dismissed.

J. The Discharge of Reid

1. Testimony and evidence

Paragraph 15 of the amended consolidated complaint alleges that on or about March 23, 1989, employee David Reid was discharged in violation of Section 8(a)(1) and (3) of the Act.⁷¹ Reid began his employment with MTD in early December 1986 as an assembly helper. He became a press operator in September 1988, which position he held until he was discharged on March 22, 1989. Reid worked the first (or morning) shift in the pressroom and his supervisor was Ben Gregg. Reid claimed he supported the Union and testified that he wore union button on his hat starting about August 1988, and that sometimes he also wore one on his shirt. Reid

to him. Schuster did draft a memo "TO: FILE" reciting the facts and circumstances of the event, as gathered during his investigation of the matter.

⁶⁸ I am convinced that, as far as this case is concerned, Brasfield was a chronic liar.

⁶⁹ These include Rainone, Schuster, Wilson, Jorden, Biggers, Whitney, and Gregg.

⁷⁰ Even if the General Counsel had established a prima facie case, I would have found that MTD has shown it discharged Brasfield solely for lawful reasons.

⁷¹ Reid filed the charge in Case 26-CA-13157 on April 28, 1989, alleging only the discharge. The resulting amended consolidated complaint was issued June 6, 1989, containing Reid's discharge allegation, the allegations in the first and second complaints, together with 11 new allegations of 8(a)(1) violations ranging from May 1988 to late February 1989.

also indicated he passed out "some green cards," 8 or 10 union buttons in the plant, and some union literature in the parking lot "about twice" prior to the October 21 union election, and attended two union meetings. Reid related that Assembly Department Foreman Lynn Payne saw him passing out the literature in the parking lot, and in mid-August Payne commented on his union button in front of other employees, saying "he thinks that's going to help him."⁷²

Reid testified that on March 22, 1989, he reported for work at the normal time, 6 a.m., and worked until the 8:30 a.m. break, after which he returned and had been working 20 or 30 minutes when his Supervisor Barry Wilson told him he was wanted in the office. Reid indicated that he followed Wilson to Schuster's office when Ben Gregg also arrived. Reid testified that Schuster accused him of "coming down on Jason Kemp pretty hard lately," and that "things are just piling up on you too fast here lately." According to Reid, Schuster then referred to a "harassment" charge made against him by Jason Kemp, and then stated, "We've investigated it, and we're just deciding that for the safety of the department and for the people in the department, that we're going to discharge you."⁷³ Reid testified that he pointed out that he had received only one written warning, had never been in any trouble, and that others had first received suspensions, and asked why he was being treated differently, to which Schuster replied, "We just don't want you working here." According to Reid, he was then "ushered" out of the plant by Ben Gregg and Barry Wilson, and as he was walking out the door, Schuster said, "Good luck with your next job, I hope you've learned something." Reid testified that his separation slip or notice stated that he was discharged "for horseplay, intimidating a fellow employee."⁷⁴ Reid indicated that the one written warning he had received prior to his discharge was given to him by Gregg "about" January 1989 for "horseplay," and involved a broom that he was holding and the top of which was grabbed by one Charles Dillon after which they were "just going around," with Dillon trying to take the broom away from him. According to Reid, Gregg came by, accused them of horseplay and re-

⁷² Payne testified that Reid was very "vocal" about the Union, wore a union button on his cap, and passed out union buttons in the plant.

⁷³ Reid had referred to Kemp in earlier testimony, indicating that on March 15 his press had broken down and he and employee Randy Morgan went back to Kemp's press "to help them get their production up so we would have something to do." Reid testified that since he and Morgan were a little faster than Kemp, he piled parts "up high" in Kemp's bin, causing Kemp to get behind, whereupon employee Larry Little, who was also working at Kemp's press, "hollered" at them to stop. Reid related that later on, Little told him that Kemp "was really mad and he was fixing to go tell on us," and subsequently Kemp, himself, indicated that he had complained to Ben Gregg. Reid also testified that at the time he was discharged, Schuster asked him if he had ever "put grease in [Kemp's] eyes, or oil, or boogers on his glasses," to which he replied, "No."

⁷⁴ The employee conference report or discharge notice was dated March 22, 1989, and signed by Gregg and Schuster. Under "comments," it reads as follows: "Due to continued problems with this employee and our concern for the safety of the workers in this plant we feel it necessary to discharge this employee to avoid serious injury or harm to employees." Reid's separation notice, signed by Schuster and dated March 22, 1989, states, under reason for separation, "Violation of Plant Rules—Intimidating fellow employee—Horseplay."

marked, "What if somebody had got hit or hurt." Reid indicated that right after the incident Dillon "got wrote up," and 3 or 4 days later Gregg called him to the office and also gave him a written warning concerning the incident.⁷⁵ Reid testified that prior to his discharge he had also been "counseled" once by Schuster "about a month" or "a couple of months" prior to the election (October 21, 1988), for "disturbing a SPC class," which was a training class taught by one Virgil Hooks, and during which there had been a lot of talking and laughing, the throwing of paper wads, and flying airplanes. According to Reid, Hooks got mad and said he was going to turn in about five names, which included him.⁷⁶ Reid testified that thereafter he was called into Schuster's office, and Schuster said, "just try not to disturb his [Hook's] class If you'll do that for me, everything will be all right." Reid also testified that two supervisors had complemented his work, indicating that Barry Wilson in February 1989 had remarked that since he had come to the press room he had no problems with him, had never seen him do anything wrong, and that he was as good a worker as he had in the department. According to Reid, at this time Wilson related that he had heard rumors that he was "horseplaying," and that Wilson stated the he did not want to see Reid get into any trouble. Reid testified that a week later Ben Gregg patted him on the back and told him that he had been doing "a real good job of changing over the dies." Reid conceded that he had been discharged from his previous job for "horseplay," but denied he was guilty thereof, adding that he was going to quit anyway because of not enough pay. Reid also denied that he ever told anyone at the plant that he was against the Union. Reid testified that he appealed his discharge to the employee review board, and that he was given a list of only five names, two of which he did not know.⁷⁷ According to Reid, the remaining three were Steve Melton, Ken Landry, and Chris Olds, which he chose, but adding that none of the three supported the Union.⁷⁸ Reid testified that some of the witnesses the review board talked to were Jason Kemp, Larry Little, James Edge, David Tibbs, and Spanky Williams, who Reid claimed were "all enemies."⁷⁹

The plant's General Manager John Rainone testified that Reid was discharged on Personnel Director Schuster's recommendation, for "horseplay" and "threatening or intimidating" employees, adding that the discharge was "triggered" by a written complaint from an employee.⁸⁰ Rainone

⁷⁵ Dillon did not testify in the case.

⁷⁶ Hooks did not testify in the case.

⁷⁷ Schuster testified that he gave Reid seven names selected by him at random from a computer printout sheet.

⁷⁸ Steve Melton testified that he had been a union supporter and as such he was a member of the union organizing committee, had worn a union button during the organizing campaign, and wore a union T-shirt on election day.

⁷⁹ Tibbs and Williams did not testify in the case, but the other three did, and their testimony regarding Reid is summarized later herein. Reid also wrote a letter to the review board dated March 28, 1989, claiming discrimination and alleging that the people who "talked" against him had the worst records in the plant and kept their jobs by "telling" on other people.

⁸⁰ Rainone indicated that he hired Schuster in September 1987 as an individual "who could be responsive to the needs of the people in the plant, who could improve the communication process among

related that he knew of the union support of Brasfield and Robertson prior to their discharges, but that Reid's union support was a "complete surprise" to him.⁸¹

Schuster testified that he recommended Reid's discharge after reviewing his file and talking to supervisors and other employees. Schuster identified a note in Reid's file which indicated that a warning had been given to Reid on June 23, 1988, by Supervisor Bill Harrington for kicking a "Tom's" machine.⁸² Schuster also identified a letter of reprimand to Reid, dated July 5, 1988, and signed by Virgil Hooks as "SPC Co-ordinator." The reprimand accuses Reid of "constantly disrupting" Hooks' class.⁸³ After Reid transferred to the pressroom, a 60-day probationary evaluation was completed on him by Pressroom Foreman Mitcheal Whitney, in consultation with Superintendent of Fabrication Ben Gregg, dated December 9, 1988. Schuster identified the evaluation, which reflects that Reid's work was not satisfactory and his attitude was bad. The evaluation also indicates "a problem with horseplay," "ridiculing other employees," and not taking his work seriously, and while the evaluation recites that Reid was not "progressing," it recommends that Reid "be retained in this classification."⁸⁴ Schuster testified that in December an employee named James Edge complained that Reid was making fun of him. Schuster indicated that he talked to both Edge and Reid, and thereafter "issued a counseling session" to Reid and asked Reid to stop it, to which Reid agreed.⁸⁵ Schuster described Reid's actions as "verbal harassment," and also indicated that they had a horseplay problem with Reid.⁸⁶ Schuster identified a hand written note by Pressroom Foreman Barry Wilson, which reflects that on January 21, 1989, Wilson talked to Reid about his "attitude and horseplay," and also advised Reid that he

all employees, and who could administer the rules and the policies of the Company in a fair and equitable manner for all."

⁸¹ Rainone named six employees who were "more outwardly in support of the union." Only two of those named testified in the case (Ronald Rogers and Steve Melton). Brasfield, Reid, and Robertson were not among the six named employees.

⁸² Reid testified that he was "counseled" after the incident in Schuster's office, but he claimed that he did not "kick it in," and that Supervisor Steve Baker had told him to kick the machine after it had taken his money. Reid conceded that he failed to mention Baker to Schuster, to protect him. Baker did not testify in the case, nor did Bill Harrington.

⁸³ Hooks did not testify in the case. More specifically, the reprimand accuses Reid of "loud and unnecessary remarks" and adds that Reid "refuses to pay attention; he has also thrown objects [such as spit balls, paper clips, paper wads, etc.] at [Hooks] and at the screen."

⁸⁴ Reid denied that he ever saw the evaluation or received a copy. When asked if Whitney mentioned the deficiencies to him, Reid could not remember, adding that Whitney did tell him that he talked too much. In later testimony, Reid claimed that Whitney did not mention any deficiencies.

⁸⁵ This "counseling" was in writing and was dated December 9, 1988, and was signed by both Whitney and Schuster. Edge's testimony is summarized later herein.

⁸⁶ Reid's version was that he was trying to get Edge to speed up, adding that "I probably used some bad language, but I didn't call him any names on that occasion." Reid conceded that Wilson and Whitney did talk to him about his ridiculing and making fun of Edge, and he agreed to stop it, adding that he also asked Wilson and Whitney to talk to Edge about Edge's harassing him.

was "heading for serious trouble if he kept on with his horseplay and child like pranks."

Schuster testified that Reid received a written warning on February 3, 1989, for wrestling with employee Charles Dillon in the pressroom.⁸⁷ Schuster indicated that during the months of December, January, and February (1988-1989) was when "all the complaints were coming in" about Reid and involving "a lot of horseplay, harassment, teasing people, [and] throwing objects." According to Schuster, he could not take any action on many of the complaints because the employees would not file a complaint in writing.

On or about March 20, 1989, employee Jason Kemp filed a written complaint with Superintendent of Fabrication Ben Gregg, who investigated the matter and reported back to Personnel Director Schuster. Kemp's complaint involved harassment by Reid and employee Randy Morgan over a 5-month period, and alleged such things as putting "buggers" on him, putting grease on his face, the throwing of metal shavings at his face, getting into his lunch box, and other verbal harassment. Gregg's investigation gave merit to Kemp's allegations, and Gregg so advised Schuster. Schuster testified that he then talked to Kemp, and became satisfied that Kemp's allegations were true, and that the harassment had been ongoing for at least 3 months. Schuster indicated that he considered Reid's conduct serious violations of company rules, and that on March 22, 1989, he met with Reid and discharged him.⁸⁸ Employee Randy Morgan, who had no prior written warnings, was initially given a 5-day suspension, but during the suspension period Schuster changed his mind, and by a letter dated March 29, 1989, Schuster also discharged Morgan because of the Kemp incident. Morgan, like Reid, appealed his discharge to the employee review board, which recommended against the discharge, and Schuster followed the review board's recommendation and put Morgan on probation for 1 year with the stipulation that if there were any rules violations or problems during the probation period, Morgan would be discharged, with no appeal rights to the review board. Schuster testified that he decided not to ultimately discharge Morgan because Reid had been the "ringleader" and Morgan "was just a follower" and had no prior warnings. Schuster indicated that other employees had been disciplined for horseplay, intimidation, or harassment, as was David Dobson who was suspended in September 1988 for harassing another employee, and later discharged for continuing the same conduct.⁸⁹ According to

⁸⁷ The warning was signed by Gregg, Schuster, and Reid, and indicates that employee Ralph Ramsey was bumped in the head. Dillon's testimony is summarized later herein. Ramsey did not testify in the case. In testimony Reid denied that Ramsey was hit or bumped, claiming that Gregg made that up. Reid did not deny the wrestling with Dillon.

⁸⁸ Reid's discharge report, signed by both Gregg and Schuster, reflects that Reid was discharged for repeated rules violations and intimidating a fellow employee. Under comments, reference is made to "continued problems with this employee and our concern for the safety of the workers in this plant." Reid's state separation notice, signed by Schuster, reflects that he was discharged for violation of plant rules, intimidating a fellow employee, and horseplay.

⁸⁹ The written warning and discharge notice pertaining to Dobson were admitted into evidence, together with written warnings for horseplay to Dan and Melisa Smith on November 4, 1988, a written warning to Tony Prince on November 8, 1988, a written warning to

Schuster, up until Reid's discharge he was unaware of any situation where there was no discipline after incidents of horseplay or harassment, and he was also unaware of any employee who had more disciplinary writeups or notes in their file concerning horseplay and harassment than Reid. Schuster also testified that he never mentioned the Union in any conversation with Reid, and that to his knowledge Reid never wore or did anything which would indicate that he supported the Union.

Superintendent of Fabrication Ben Gregg was the overall supervisor of the pressroom, and testified that Reid was an "average" press operator, and was discharged for "horseplay, lack of production, [and] attitude." Gregg related that he had "written [Reid] up for not working up to capacity," and that he actually observed Reid and Dillon wrestling on February 2, 1989, during which they were "bumping into people, and they bumped into one fellow and hit him in the head." Gregg gave written warnings to both Reid and Dillon because of the incident.⁹⁰ Gregg testified that employee James Edge complained to him that Reid was calling him names and "tormenting" him.⁹¹ According to Gregg, after the Edge complaint, Jason Kemp came to him "pretty upset" and "afraid," stating that he wanted to file a formal complaint against Reid for "picking" on him.⁹² Gregg then told Kemp to put his complaint in writing, and he would then investigate it. Kemp did so and Gregg testified that on March 20, 1989, he talked to at least six other employees who verified Kemp's complaint, and the involvement of employee Randy Morgan to a lesser extent, who would "occasionally . . . chime in." Gregg testified that based on his investigation and Reid's record, he recommended to Schuster that Reid be discharged, and that Morgan suspended. Reid was discharged 2 days later. Gregg indicated that MTD did not tolerate horseplay, and the only horseplay he had ever seen was the Reid-Dillon wrestling on February 2. Gregg also testified that he had never seen Reid wearing a union button or T-shirt and had no idea as to whether or not Reid supported the Union.

Mitchel Whitney was a pressroom foreman on the first shift and had worked for MTD for 4 years. Whitney testified that he never saw Reid wearing a union T-shirt or a union button, and that Reid never said anything to indicate he supported the Union. After Reid was transferred to the pressroom, it was Whitney who performed Reid's 60-day evalua-

Michael Riddick on January 4, 1989, and a written warning to Chad Martin on April 17, 1989. Plant rule 31 prohibits horseplay.

⁹⁰ Reid testified that he and the four other operators of a press were "counseled" by Gregg in November on production, but he blamed it on one particular operator who he said had a bad record and was slow. In later testimony, Gregg conceded that he only verbally counseled the press operators together. Reid did not deny the actual wrestling, but testified that he did not "agree" with the warning because everybody in the department had done the same thing and had not been written up. Reid also testified that nobody was bumped in the head, accusing Gregg of making that up.

⁹¹ Reid was given written counselling after Edge's complaint by Pressroom Foreman Mitchel Whitney on December 11, 1988. In the comments section appears the notation that "David agreed it would stop."

⁹² Kemp testified in the case and that testimony will be summarized later herein, including the contents of the written complaint which describes serious, dangerous, and degrading acts by Reid and, to a lesser extent, Randy Morgan.

tion, and Whitney testified that it was “fairly bad” because he had received complaints about Reid “picking on people . . . [and] holding back on production.” Whitney testified that he meet with Reid and discussed the evaluation with him, pointing out that he had caused a lot of trouble and problems, had talked a lot and cut up, was not very serious about things on the floor, and advised him that they expected him to come in and do a job and not disrupt the department.⁹³ Whitney indicated that he disciplined Reid once, when employee James Edge came to him “pretty mad” and complained that Reid was making fun of him and calling him names. Whitney explained that the discipline was in the form of written counseling on December 9, 1988.⁹⁴

Employee James Edge worked in the pressroom on the first shift with Reid. Edge testified that Reid “liked to harass people, and joke at them, and pick on them most of the time,” adding that Reid would throw slugs at him, call him names like “Monkeyhead,” “Wolf man,” and “son-of-a-bitch,” and knock his hands off the buttons of the press (those buttons that each individual press operator would push to activate the press).⁹⁵ Edge testified that these things bothered him, and that he asked Reid to stop it, but things got worse and it came to the point where he could not do his job properly. Edge related that he first complained to Pressroom Foremen Whitney and Wilson, after which Reid “slowed down for a couple of days, and then . . . it started back up, it just got worse,” whereupon he went to Personnel Director Schuster. Edge indicated that Reid then left him alone, but “started on other people,” including Jason Kemp. Edge testified that he was with Reid “during the time of the election,” but never saw Reid wearing a union T-shirt or a union button. Edge indicated that he was a union supporter, and testified that 2 weeks before the election he approached Reid to seek his support for the Union, and Reid stated, “No, I’m not for the union . . . Because I don’t want to be for the union, and I don’t think we need a union in here.”⁹⁶

Jasen Kemp, who came to work with Reid in the pressroom, testified that at first he and Reid were just working partners, and later on they got to know each other “pretty

well,” but the only social thing they ever did together was to go out to dinner once. Kemp indicated that later on, Reid “figured out he could push [him], and keep pushing, he progressed to be where I wouldn’t call him so much of a friend.”⁹⁷ Kemp testified that Reid made fun of his farming and his hogs, and told other people (including women) that he was “screwing hogs.” Kemp indicated that on one occasion after October 1988 he was working on the same press that Reid and Randy Morgan were on and Morgan took his arm guard off and tossed it on the other side of the press, and he then asked Reid to hand back the arm guard and Reid, after wiping grease on it, threw it at him. Kemp indicated that he then wiped the grease off his arm guard with one of his gloves and tossed it (the glove) to the other side of the press where it hit Reid in the chest, after which Reid came around to his side of the press and wiped a finger full of grease in his beard. Kemp testified that as he was trying to get the grease out of his beard, everybody was laughing and Reid went back to his side of the press and put aluminum shavings on the greasy glove and ask him if he had enough, whereupon Reid threw the glove at him causing aluminum shavings to go all over him.⁹⁸ Kemp related that on two other occasions, Reid put “boogers” on him.⁹⁹ Kemp testified that on yet another occasion he was “jabbed” with a broom, once by Morgan and twice by Reid, and he also found out that Reid and Morgan had been going through his lunch box, and that he finally went to Ben Gregg and told him what had been happening but asked Gregg not to do anything yet because he had talked to Reid and wanted to see if that worked. Kemp indicated that a few days later the incident with Reid and Morgan at his press occurred, with Larry Little present. Kemp testified that he was running “shop mount brackets” slowly because of bad metal when Reid and Morgan approached his press, and Reid said that he should be running them faster, whereupon Reid went to another press and started running the brackets “wide open,” causing his bin to become overflowing with the brackets. According to Kemp, Reid and Little exchanged words about the situation, with Little telling Reid that they did not need his help, to which Reid replied, “Well, you’re going to get our damn help,” and then Foreman Barry Wilson approached, and Reid and Morgan left. Kemp testified that he again went to Gregg, who advised him to put his complaints in writing, so that he could do something about the matter. That night, at home, Kemp drafted his written complaint, and the following morning he gave it to Gregg. Kemp indicated he later learned that Reid and Morgan had been discharged but had appealed to the review board, and he subsequently appeared before both. Kemp testified that on the day Reid was dis-

⁹³The evaluation, dated December 9, 1988, was discussed in some detail earlier, during the summary of Schuster’s testimony. Reid denied Whitney’s version of the discussion, indicating that Whitney told him he had been doing “a real good job,” but that he “just liked to talk a little bit too much.” Reid also denied that Whitney mentioned anything about horseplay or that Whitney went over the evaluation with him.

⁹⁴The specifics of this written counseling are mentioned earlier, also during the summary of Schuster’s testimony. Reid conceded that he “probably used some bad language,” but denied that he called Edge any names, claiming that Edge was also harassing him.

⁹⁵Edge testified that everybody “tossed” slugs underhanded, but that Reid “threw” slugs overhanded. Slugs were rounded metal pieces the size of a dime, and were part of the residue of the press stamping process. At one point, Reid testified that “everybody throws things at everybody.” Penny Robertson testified that in 1988 (during the night shift) horseplay would go on all the time, sometime in front of supervisors. Robertson indicated this horseplay included the throwing of a glove with metal pieces in it, water fights with the use of five extinguishers and 5-gallon buckets, and the throwing of metal shavings, screws, nuts, and bolts. According to Robertson, at one point the Company called a meeting in the pressroom to discourage horseplay.

⁹⁶Reid never directly refutes these statements during his testimony.

⁹⁷Reid, on the other hand, testified that Kemp was “our [meaning his and Randy Morgan’s] friend You know, we’d kid around with him, and he’d kid with us Me and Jason would go out on weekends Just pretty good buddies, you know.”

⁹⁸In his testimony Reid conceded that he threw a glove at Kemp, adding “Maybe he’d throw one at me and I’d throw one back.” When Reid was asked if he ever threw metal at Kemp, Reid answered as follows: “There might have been a time or two when the little round slugs, when he’d throw at me, I’d throw one back across the press or something. Everybody done it.”

⁹⁹Reid claimed that on the day he was discharged (March 22, 1989), Schuster ask him if he “put grease in [Kemp’s] eyes or boogers on his glasses,” and Reid answered, “No.”

charged, he passed Morgan's driveway on the way home and Reid was parked in the driveway, and then Reid started following and tailgating him and shaking his finger at him. Kemp related that at one point Reid passed him, still pointing his finger at him, and they both stopped for a traffic light, and thereafter Reid again pulled in behind him. Kemp indicated that it was not until he pulled into "the Sheriff's station" that Reid left.¹⁰⁰ Kemp testified that "for the most part" Reid was the leader and Morgan "would be a laugher right beside him [Reid]," adding that he never had problems with Morgan until Reid came into the department, and when Reid and Morgan would "pick and carry on," supervisors were not present.

Larry Little had worked in the pressroom at MTD for 3 years, during both the day and night shifts. He had worked the day shift with Reid for 4 months. Little testified that he and Reid used to be friends until he found out how Reid was treating "some people," and the more he got to know Reid, the further away he got from him. Little related that Reid "would find things about you that bothered you, [and] just keep on with it, because he knew it bothered you." Little indicated that Jason Kemp was on of those people that Reid was bothering, and that Reid would kid Kemp about his hogs, and would "wipe grease" on Kemp and "pick his nose and wipe it on him." Little added that once Reid went through Kemp's lunch box and through his personal things. Little testified that right before Reid was terminated, he and Kemp were running shock mount brackets at separate but adjacent presses, and he had stopped using his press to allow Kemp to "get caught up" when Reid appeared unsolicited and started running the brackets again on his press, which caused Kemp's bin to become overflowing with parts which were falling off onto the floor "on Jason's feet."¹⁰¹ Little indicated that he ask Reid to stop twice but Reid refused, whereupon he then unplugged the conveyor leading to Kemp's bin and threatened to go get Foreman Barry Wilson, and Reid then left. Little testified that he told Superintendent Ben Gregg about the incident after Kemp had also seen him, and later on appeared before Reid's review board. Little conceded that other employees engaged in horseplay, but not as "severe" as Reid, adding that horseplay never occurred when supervisors were around. Little testified that he never saw Reid wearing a union button or a union T-shirt.

Employee David Gallamore had worked in the pressroom for 3 years, and testified that Reid was "very rude" and "liked to harass people," adding that Reid would do whatever he could to aggravate somebody to the extent where it made them mad. Gallamore indicated that Reid primarily picked on him and Jason Kemp, but also others, and "would do all kinds of things" like throwing slugs and gloves containing oil and grease. On cross-examination Gallamore conceded that slugs and gloves were thrown by others, but only to get someone's attention and not to hurt somebody, as was the case with Reid. Gallamore testified that Reid once "thumped" a cigarette at Kemp which went into Kemp's

¹⁰⁰ Reid admitted that he followed Kemp and passed him, but denied that he ever shook his finger at Kemp, and also denied that he again began to follow Kemp.

¹⁰¹ Little later testified that Kemp was not behind, and that he stopped using his machine so he could stack his own parts on his press.

pocket and caught his shirt on fire.¹⁰² Gallamore indicated that after Kemp made his complaint, he was questioned about Reid by Foreman Barry Wilson, Superintendent Ben Gregg and, in Personnel Director Schuster's office, by "y'all."¹⁰³ He also appeared before Reid's review board where he was asked about "stuff" and about an incident when Reid and Morgan had put a cigarette butt in his drink. Gallamore testified that when Reid was working in the pressroom, he did not like going to work "because [he] knew what was going to happen as soon as [he] got to work," and that since Reid was terminated "it's a whole lot better." Gallamore could not remember whether or not he ever saw Reid wearing a union button or T-shirt.

Employee Ollie Jordan had worked in the pressroom for 4 years. When asked about Reid's conduct in the pressroom she answered simply, "Bad." When asked to explain she testified that Reid "threw slugs and messed with Jason [Kemp] terribly." Jordan also testified that Reid "never" wore a union button or T-shirt.

The three-member employee review board panel which heard Reid's case was composed of Chris Olds, Kenneth Landry, and Steve Melton, and all three testified in the case.¹⁰⁴ Olds testified that they went through Kemp's letter of complaint with Reid, item by item, and Reid admitted to doing all of the things in the letter but stated that he "didn't think it was serious." Olds related that they then asked Reid why he didn't stop when Kemp ask him to stop, to which Reid responded, "He didn't really think he really meant for him to quit." According Olds, the panel thought the glove throwing incident was serious and they ask Reid if in fact he dipped a glove with metal shavings on it into grease and threw it at Kemp hitting him in the face, and Reid admitted it, but indicating that he didn't mean to hit Kemp in the face. Olds testified that the panel interviewed a number of employees over a 2-day period, including Kemp, Gregg, Barry Wilson, Larry Little, Kenneth Williams, Opal Thorpe, and Darrell Gallamore. The testimony of panel members Landry and Melton, who was a strong and outward union supporter, essentially corroborates that of Olds.¹⁰⁵

Pressroom Foreman Barry Wilson testified that horseplay is not tolerated, and that he has never seen gloves, slugs or metal fragments thrown, or any other such conduct. Wilson described Reid as a "below average to average" press operator, and not a hard worker. Wilson testified that five or six employees complained to him about Reid for "everything

¹⁰² Kemp did not mention any cigarette incident during his testimony, nor was he asked about it. In rebuttal testimony, Reid denied that it was he who "thumped" the cigarette, but that it was Randy Morgan, adding that the cigarette hit Kemp's shirt and fell on the floor, and Kemp picked it up and threw it back at Morgan. As indicated earlier, Morgan did not testify in the case.

¹⁰³ Although the record does not elaborate on who is referred to in the term "y'all," from his demeanor, I concluded that Gallamore was referring to Schuster and counsel for MTD.

¹⁰⁴ As in Brasfield's case, the actual results or decision of Reid's review board (panel), to uphold the discharge, will not be considered as evidence in the case. This same panel also heard the appeal of employee Randy Morgan, who was first suspended, then terminated, and ultimately reinstated on probation.

¹⁰⁵ The written report of the panel, dated March 29, 1989, lists 13 individuals which appeared, in addition to Reid. According to Landry, Randy Morgan did not appear because he was on suspension at the time.

from wiping a booger on an individual to throwing a part at a person's feet, to verbal harassment." Wilson related that on one occasion, employee James Edge came to him in tears, stating that Reid had been harassing him over his haircut, calling him "monkey head." Wilson testified that he then met with Reid and talked about his horseplay and harassment, indicating that it was getting out of hand, and that he needed to stop it. According to Wilson, Reid admitted "doing some of it," but added that he did not realize he was causing so much trouble, indicating that he would "settle down." Wilson denied that told Reid to disregard employee complaints, that those complaining were troublemakers, that he had been watching him but had not seen him do anything wrong, or that he had no idea why people were complaining about him. Wilson indicated that he received complaints about both Reid and Morgan, but more regarding Reid, adding that since Reid's discharge, he has received none regarding Morgan.

Reid had transferred into the pressroom (a promotion regarding pay) on September 26, 1988, and Pressroom Foreman Mitchael Whitney did Reid's 60-day evaluation (dated December 9, for the period September 26 to November 26) which indicates that Reid had a bad attitude and engaged in horseplay. Wilson testified that he and Whitney had consulted together about the 60-day evaluation. Wilson, after consulting with Whitney, did Reid's 90-day evaluation, which reflects no deficiencies. Wilson testified that he and Whitney agreed that Reid did "straighten up" and did show "an improvement" after his 60-day evaluation, but that a month after his 90-day evaluation, complaints about Reid "started coming in one after the other" regarding horseplay and verbal harassment, and he thus met with and counseled Reid on January 21, 1989.¹⁰⁶ Wilson denied that he ever told Reid he was doing a good job, but indicated that during Reid's 90-day evaluation he did tell him he had "improved somewhat." Wilson testified that he never saw Reid wear a union button or T-shirt, and that soon after he came to the pressroom he talked with Reid about how things were going, and Reid stated that he had been for the Union when he worked on the assembly line, "but he wasn't now."¹⁰⁷ Regarding press operations, Wilson testified that if an operator's press goes down, he should start cleaning up his area and should not go to and operate another press unless told to do so by himself or Whitney.

2. Reid conclusions

Reid testified that he supported the Union and demonstrated that support by wearing a union button on his hat and sometimes on his shirt beginning in August 1988, by passing out "some green cards," by handing out union buttons in the plant, and by passing out union literature in the parking lot "about twice." I discredited Reid early on in this case, and I doubt that Reid's union activities were as extensive and longlasting as he would have us believe, and I find there came a time when Reid's union support (at least outwardly) ceased. Prior to coming to the day shift in the pressroom on September 26, 1988, Reid had worked on the as-

sembly line. Assembly Department Foreman Lynn Payne, who supervised Reid on the assembly line in June, July, and August 1988, creditably testified that Reid was "very vocal" in his support of the Union, and confirmed that Reid wore a union button on his cap, and passed union buttons out in the plant. Payne attributed Reid's union support to the fact that Reid was "angry" that he had been moved from one job to another, and thought that such would not have been the case if there had been a union. However, when Reid bid for and received the pressroom job with day work at a higher salary, he came to feel more secure, especially with a good 90-day evaluation. Besides Payne, some 13 witnesses testified against Reid, and all gave testimony regarding Reid's work and behavior in the pressroom only. Of the 13 witnesses, 9 were either involved with or worked in the pressroom, and out of those 9, 8 never saw Reid wearing a union button or T-shirt, or knew what his union sentiments were.¹⁰⁸ Employee Edge credibly testified that 2 weeks before the election (on October 21, 1988), Reid told him he did not support the Union, and Pressroom Foreman Wilson credibly testified that Reid had told him he was for the Union when he worked on the assembly line, but had changed his mind when he was transferred to the pressroom (on September 26, 1988). I in fact find this to be the case.

Having been transferred to a better and higher paying job, and having passed the 90-day probationary period, the true character of Reid emerged. As Personnel Director Schuster put it, in December, January, and February, "all the complaints [about Reid] were coming in." Reid, the chronic liar and bully, turned into a cruel, thoughtless, and disruptive individual and employee. I find that all of the cruel, tormenting, and disruptive actions ascribed to Reid by the many witnesses against him did in fact occur. Reid's answer to his accusers was that either he flat out did not do it, or everyone else in the plant did due it. Randy Morgan I find was indeed a follower, and Reid certainly gave him plenty to follow. Reid understandingly became an undesirable and unwanted employee. Kemp's written complaint of March 20, 1989, describing cruel, sadistic, and degrading behavior, was a heavy and final blow against Reid. Schuster knew that if the acts described in Kemp's complaint proved to be true (which they did), Reid would have to go. The union election was far in the past (5 months) and Reid had dropped his support for the Union almost a month before the election. I find that Reid's actual (or imagined) support for the Union played no role in his discharge, which I find was motivated solely by his behavior and misconduct. Consistent with the above findings, I further find, in accordance with the Board's decision in *Wright Line*, 251 NLRB 1083, that the General Counsel failed to make a prima facie showing that the protected or union activity of Reid was a motivating factor in MTD's decision to discharge him.¹⁰⁹ I shall thus recommend that the wrongful discharge of Reid, as alleged in paragraph 15 of the amended consolidated complaint, be dismissed.

¹⁰⁶ Wilson made a written memo about this counseling which was admitted into evidence.

¹⁰⁷ In rebuttal testimony, Reid denied making such a remark to Wilson.

¹⁰⁸ Those eight were Rainone, Schuster, Gregg, Whitney, Wilson, Edge, Little, and Jordan. Gallamore could not remember.

¹⁰⁹ As in *Brasfield's* case, even if the General Counsel had established a prima facie case against Reid, I would have found that MTD has shown it discharged Reid solely for lawful reasons.

K. *The Suspension and Discharge of Robertson*

1. Testimony and evidence

Paragraphs 14 and 15 of the amended consolidated complaint allege Penny Robertson's unlawful suspension on November 2, 1988, and discharge on November 4, 1988, in violation of Section 8(a)(1) and (3) of the Act.¹¹⁰ Robertson started her employment with MTD in October 1985, working on the assembly line. Two years later she bid on and was awarded a job in quality control, inspecting parts in the pressroom, the job she held up until her discharge. Robertson was an active, open, and outward union supporter prior to both elections. Before the first election in July 1987, she was an organizer and a union election observer. Robertson testified she also obtained a "large amount" of signed union authorization cards, attended union meetings, and wore a union button. Robertson indicated she was equally active before the second election on October 21, 1988. She was on the organizing committee, and again was a union observer during the election. She also wore a union button (or "pin") at work and, in public (but not at work), a union T-shirt.¹¹¹ Robertson testified that in quality control she worked the second shift (4:30 p.m. to 2 a.m.) and her supervisor was Jim Black. Robertson indicated that as part of her job, she was required to leave the pressroom and go to other departments, including spot welding, mig welding, and the assembly line. Robertson related that she went to mig welding once an hour to check the length of "deck handles" which were later to be welded to "decks." Robertson testified that on November 1 she was taken to Personnel Director Schuster's office by Supervisor Dick Roll, and was suspended for 3 days by Schuster for "talking" in mig welding, but she added that other inspectors "would go there" (to mig welding), and people from the assembly line would go there to smoke. During her cross-examination Robertson initially and again claimed that her quality control job required her to go to the mig welding department to insure that brackets which were welded on decks were not too long or too short, yet later on Robertson testified that mig welding had its own inspector, and she went there to check that "the holes were precise . . . for [her own] sake," adding that if she were to ask the other quality control inspectors in the pressroom, they would have told her to go to mig welding once per hour to check parts. On cross-examination Robertson conceded that she sometimes went to the mig welding department on her work-

¹¹⁰ Robertson filed her charge on November 30, 1988. The complaint (the first in these cases) was issued by the Regional Director on December 23, 1988, alleging Robertson's unlawful suspension and discharge, and also two violations of Sec. 8(a)(1) of the Act involving threats by Ben Gregg on or about October 21, 1988 (par. 9(d) of the amended consolidated complaint), and the promulgation and maintenance of an unlawful no-solicitation rule on and since November 4, 1988 (par. 12 of the amended consolidated complaint). I had earlier dismissed both of the 8(a)(1) allegations after MTD's *Nickles Bakery* motion. They, as all others, were reinstated by the Board, and those two have been handled in secs. D and E, earlier in this decision.

¹¹¹ There is no real issue in the case about Robertson's union support, and MTD's knowledge of the same. However, during cross-examination she conceded that prior to the 1988 election she tried to keep a low profile regarding her union involvement until near the end of the union campaign.

ing time for personal business or to talk to friends, and that she had dated mig welders Brad Oliver and Wayne Boyd, who she is presently engaged to. Robertson also conceded that Pressroom Supervisor Dwight Emerson, Quality Control Foreman Jim Black, Superintendent Ben Gregg, Mig Welding Supervisor Kevin Rogers, and Schuster, himself, had talked to her about staying out of mig welding and remaining in the pressroom. In later testimony, Robertson indicated that none of these admonishments came prior to September 1988. Robertson testified that when Schuster suspended her on November 1, he had a written statement which indicated that her "boss" (Jim Black) could not control her, and she told Schuster that part of the statement was not true, but signed the statement and refused to tell Schuster what part was not true. Robertson indicated she also told Schuster and Supervisor Dick Roll that she was not the only employee who went to other departments, but she refused to give Roll any names.

Robertson testified that neither Schuster or any other supervisor told her she could not enter the plant while on suspension. According to Robertson, after she was suspended and left the plant she called back by phone and talked to Superintendent Ben Gregg, who gave her permission to come to the "front office" between 3 and 4 p.m. the following day (November 2) to pick up her paycheck. In cross-examination, Robertson conceded that Gregg did not give her permission to go anywhere other than the front office. The following day (November 2) Robertson related that she went to the plant with her 4-year-old daughter, arriving around 3 p.m. She also had a "petition" to circulate in an attempt to get Jim Black, her former supervisor, his job back. Black had been discharged that same day (November 2).¹¹² Robertson testified that she went up to the employee entrance and stood there a few minutes, and then walked inside and asked two employees just inside the employee entrance to sign the petition, and they refused. Robertson indicated she then "went around to the even clock" and three employees signed the petition before they clocked in, and she then went to a point just outside the paint department and talked to a girlfriend for "no more than five minutes" and then proceeded past the paintroom and into the front office with her daughter to get her paycheck. During cross-examination Robertson admitted that she could have obtained her paycheck from the receptionist's window by coming in the front (lobby) door, where visitor's parking is just outside, but that she used the employee entrance "by habit." Robertson testified she then left the front office and saw employee Brad Oliver, who was standing 20 feet from the door to the front office but not in a work area, and she talked to him for about 10 minutes, and then proceeded to leave when Schuster came up and asked her if in fact she had a petition. Robertson related that she admitted she had the petition and told Schuster that she planned to submit it to Plant Manager John Rainone, after which Schuster commented, as they were walking outside, that she would have to stop fighting other people's battles. Robertson indicated that her daughter was getting upset, and Schuster then said that they "would continue this on Mon-

¹¹² Black had been discharged in part because of his inability or failure to control the goings and comings of Robertson. Black did testify in the case and the subject of his discharge will be discussed later herein.

day” [the next weekday], indicating that she was “in trouble” and it was “out of his hands,” whereupon she left the plant. Robertson testified that Schuster did not tell her then that she violated any rule against employees entering the plant while on suspension, did not tell her that she had interfered with work being performed in the plant, and did not mention the wearing of safety glasses, or the fact that her daughter was with her. Neither Robertson or her daughter put on safety glasses when they entered the plant, and on cross-examination Robertson conceded she knew that MTD had a rule about wearing safety glasses in the plant. Robertson indicated that while she was at the plant, she did not go into any area where work was being performed, and at all times her daughter was at her side, adding that she had seen Supervisor Ben Gregg bring his kids into the plant without wearing safety glasses, and another employee bring her child into the plant, and she had insisted that the child wear safety glasses.¹¹³ Robertson testified that on the morning of November 4 she learned that Schuster had tried to reach her by phone, and she in turn called Schuster at about 10 a.m. and Schuster told her she was fired, adding that the reason was the petition and not her work performance, and he would give her a good reference. According to Robertson, Schuster also stated that the petition was against company policy and rules, and her discharge “had come from . . . higher up.” On cross-examination Robertson conceded that Schuster also gave, as reasons for her termination, the fact that she was in the plant while on suspension and the violation of safety rules. Robertson testified that people had sold candy bars and Tupperware in the plant, and also circulated baseball and football pools in the plant. Robertson related that she went to the plant at 3 p.m. that day (November 4) to get personal things from her file, but Schuster told her that the only things in her file belonged to MTD, Robertson adding that her discharge was not discussed. Robertson testified that at her 90-day review, Quality Control Supervisors Dick Roll and Jim Black told her she was doing a good job, and approximately 2 weeks before the election Superintendent Ben Gregg told her that the quality of her work was very good.

James H. Black was hired by MTD on February 13, 1985, as a quality control inspector. In June or July 1988 he was promoted to a foreman in quality control on the night shift, where Robertson worked. Black was discharged on November 2, 1988, the first full day of Robertson’s suspension. As foreman, Black was responsible for his own job, and also was responsible for two other inspectors, one of which was Robertson. Black testified that Robertson’s “main stage of work” was a room adjoining the press area, and she was responsible for the parts that came off the presses in the pressroom. Black indicated that some of the parts that came off the presses “required other additional work,” requiring Robertson to check the course of a part in the spot welding department, the mig welding department, or in the paint spray booth. According to Black, Robertson was required to go to or through mig welding sometimes two or three times a night, and sometimes not for a week, depending on what was being run on the presses. During cross-examination, Black

¹¹³ A diagram of the plant layout, drawn by Robertson from memory and admittedly not to scale, was admitted into evidence, and Robertson traced her path thereon while in the plant on November 2.

conceded that Robertson had to go to mig welding only “once in a while,” and that “her mostly main reason” for leaving the press room was to go to spot welding. Black testified that all that separated mig welding from the assembly line was a red line on the floor, and on the mig welding side of the line was a smoking area, and although against company rules, his inspectors and people from the assembly line could “grab a quick smoke there, instead of having to wait until a break or something.” Black testified that from time to time “visitors” came through the plant and also “family members,” who sometime were “escorted through by their people,” and sometime they brought a meal to an employee, but “[n]ot very often,” adding that on Friday nights they would sometimes have pizza delivered to the cafeteria. Black also indicated that Girl Scout cookies were sold in the plant during worktime, breaktime, and lunch hour. In his cross-examination, Black testified that there came a time when Welding Supervisor Kevin Rogers complained about Robertson interrupting the mig welders, but Black claimed Robertson “was being pushed,” and they were “trying to sort out Penny here,” thus he began to “escort” Robertson through the plant. Black conceded that Robertson went to mig welding on personal business, and had a boyfriend there, but Black contended that Rogers (and others) “blowed up” the situation. Black also conceded that Pressroom Supervisor Dwight Emerson would complain that that he could not find Robertson, but Black claimed that Emerson was trying to set up Robertson, and had been told “If you even see her leave the department, complain about it.”¹¹⁴ Black testified that Robertson was no different than any other employee, and that he had no complaints about her work. Black indicated that he felt like a regular employee with a job to do the same as Robertson, and “they just tacked on the foreman job on [him],” a job he had refused three times earlier. Black testified that Robertson’s actual supervisor was Quality Control Manager Dick Roll, who would sometimes make complaints about Robertson’s work, and he would mention it to Robertson, but he never prepared or participated in any of her reviews and was not consulted prior to her discharge. In cross-examination Robertson’s reviews (30, 60, and 90 days) as a quality control inspector were shown to Black, and reflect that he in fact signed them (on 4–8–88, 5–5–88, and 6–15–88). While acknowledging his signature, Black maintained that the “Remarks” section on all three had been filed out by Roll.¹¹⁵ Except for the “Remarks,” two of which Black agreed with, the evaluations were good.¹¹⁶

¹¹⁴ Black was discharged in part because he could not control Robertson and was obviously bitter over the matter and loyal to Robertson. This, I find, affected his credibility at times. Black was definitely not a “company man,” even before his discharge, and he testified that he was not bitter at MTD, but was “with a few bad eggs in it.” He appeared to take the complaints about Robertson very personally, and devised the defense that the complaints were blown out of proportion, and that MTD was out to get Robertson. The term “union” does not appear in Black’s testimony and he advanced no real reason as to just why MTD was out to get Robertson.

¹¹⁵ Quality Control Manager Dick Roll had left MTD and was working for another company in Ohio. He did not testify in the case.

¹¹⁶ Although Black signed the evaluations as “foreman,” near the top of the form is a space entitled “FOREMAN,” with the name Dick Roll written in. Black testified that he filled in the middle part of the evaluations which required only checkmarks or an “X.” On all three evaluations, Black’s markings indicated that Robertson’s

Jeffrey Brad Oliver was a current MTD employee where he had worked as a mig welder since November 1987. Oliver testified that on November 3, 1988, as he was clocking in, he saw Robertson and her daughter in the plant at about 3:15 p.m. just before the start of the second shift (3:30 p.m.). According to Oliver, he heard Robertson "holler" at him and he went over and they talked for about five minutes in the shipping area, where forklifts were loading trucks.¹¹⁷ Oliver apparently did not consider the shipping area a "work" area, and he testified that he had not yet started to work, and as he was leaving Robertson to go to his work area he saw Schuster who was walking towards Robertson. Oliver testified that he knew Robertson had a petition with her but she did not ask him to sign it. Oliver indicated "on a few occasions" in the past he had seen assembly line employees in the mig welding area talking and "sneak" a cigarette. Oliver testified that his foreman wore safety glasses, but he wore a helmet that protected his eyes, adding that when he took his helmet off he would wear safety glasses. Oliver was asked if he had ever observed employees who were not on duty come into the plant without wearing safety glasses, to which he answered, "Maybe on a few occasions . . . I really don't recall that." On cross-examination Oliver indicated that he and Robertson were "very good friends" and that he had dated her on and off for about 1-1/2 months beginning in mid-September 1988. Oliver testified that on a "few" occasions Robertson would come into his mig welding booth and talk about personal matters, later adding that she did come to mig welding in her capacity as a quality control inspector, and the frequency depended upon what parts the pressroom was running.

Ronald Rogers had worked for MTD since October 1986, and was a quality control inspector in welding, under Supervisor Dick Roll. Rogers testified that about 1:30 p.m. on November 4, 1988, Roll called all of the day-shift quality control employees (six or seven) together and told them that Robertson had been fired because she was in the plant with her daughter without safety glasses, "going up and down the assembly line with a petition for Jim Black's job, to try to get it back." According to Rogers, Roll also commended Robertson for trying to get Black's job back, but added that the petition "was against the law and wrong."

General Manager John Rainone testified that Robertson was discharged on the recommendation of Personnel Director Schuster for "several" rules violations including "being out of her work area with great regularity" for which she was suspended, coming back into the plant through the employee

work was satisfactory, that she was progressing, her attitude was good, and retention was recommended. On the 30-day evaluation, Roll's remarks read "Penny needs to concentrate her work habits in a safer manner. I have counseled her about this on 4/7/88." The 60-day evaluation contains the remarks "Continues to have trouble with SPC charts. Has been counseled twice on this matter. Must show improvement in next 30 days." The 90-day evaluation contains the remark, "Penny needs to make a concentrated effort to improve her SPC charting." Black agreed with Roll's remarks on the 60- and 90-day evaluations, but questioned Roll's remarks on the 30-day evaluation.

¹¹⁷ Oliver had composed a rough diagram of the plant and during some of his testimony he referred to it, pointing out where he and Robertson were when they talked. From the diagram, their best placement would be in a "main aisle" along an inside far corner of the loading or shipping dock area.

entrance with a young child without wearing safety glasses and while on suspension, and also distributing a petition after she had been specifically told not to enter the plant during the suspension, which Rainone characterized as "insubordination." Rainone testified he knew that Robertson supported the Union because he had seen here passing out union literature at the gate, but Rainone added that Robertson's union support did not come up in his discharge discussion with Schuster and Vice President Mike Murray (in Cleveland). Rainone indicated that employees come to work and first go to their locker on the second floor (near the break or lunchroom), and when they come back down the stairs and enter the plant area they are required to wear safety glasses at all times until they go back up to the breakroom or leave the plant.¹¹⁸ Rainone testified that visitors, who come into the plant with authorization, and vending machine people and any other "recurring" individuals who come into the plant are all required to wear safety glasses. Rainone conceded that on occasion visitors do get into the plant without safety glasses, "but we track them down pretty quick most of the time."¹¹⁹ Rainone indicated that employees and supervisors have brought friends or family into the plant, but only after receiving authorization from either him, Factory Manager Gido, Personnel Director Schuster, or Night-Shift Superintendent Mosley.

Personnel Director James Schuster testified he recommended that Robertson be terminated based on "documents that were in her personnel file, at the time, as well as [his] conversations with employees and other foremen and supervisors." Schuster indicated that the final incident that resulted in Robertson's termination was her "insubordination" in returning to the plant with her daughter while on suspension during working time, and without wearing safety glasses. Schuster testified that "in the 2:00[pm] range" he was notified by employee Judy Gullede that Robertson was in the plant, and he then proceeded up the "main aisleway of the plant" and saw Robertson standing to the right of the aisleway with a tablet and pen in her hand talking to employees, some of which "scattered" when he approached.¹²⁰ Schuster added that he also saw Robertson's child "crossing the aisle unattended" and coming over to Robertson's side, thereafter taking her mother's hand.¹²¹ Schuster testified that when he came up to Robertson he asked what she was doing,

¹¹⁸ Rainone elaborated that the requirement for wearing safety glasses pertained to "manufacturing," "service" and "stock" areas. During her cross-examination, Robertson admitted that she knew MTD's rule regarding safety glasses.

¹¹⁹ The Employee Handbook and Plant Rules do not mention safety glasses specifically. Rule 24 makes "Failure to use or wear safety equipment prescribed for the job" a violation, and Rule 29 makes the "Disregard of safety rules or common safety practices" a violation. During his cross-examination, Rainone explained that visitors to the plant would get their safety glasses from their "guide."

¹²⁰ During his testimony, General Manager Rainone had identified a scale drawing of the plant, and Schuster referred to that drawing during a portion of his testimony. However, in my opinion Schuster's testimony, as it appears in the record during his use of the drawing, is lacking in sufficient specifics to accurately locate on the drawing where Robertson and her daughter were, other than in the "main aisleway" of the plant where, according to Schuster, other employees were working in the area.

¹²¹ In cross-examination, Robertson maintained that she held her daughter's hand the entire time she was in the plant.

and Robertson replied that she was circulating a petition to get Jim Black's job back. Schuster related he then pointed out that he had told her not to come back to the plant during her suspension, adding that she had brought her child without permission, and they both were not wearing safety glasses, to which Robertson replied she "couldn't remember" that he told her not to enter the plant during her suspension. Schuster testified that they were standing in a "highly congested area with a lot of forklifts, and the bins [were] stacked pretty high," and he thus suggested that they get out of the work area and talk about it. Schuster indicated that they then exited the plant through the employee door, with Robertson holding one of her daughters' hands, and he holding the other. Schuster related that when they were outside he told Robertson that she had violated the no solicitation rule in the handbook, and that he was concerned about her "insubordination," and Robertson then asked if he was going to fire her, to which he replied that he would "look at it" and call her later.¹²² Schuster conceded that he made a remark to Robertson about the fact that she could not afford to fight Jim Black's battles. Schuster indicated that he then looked at Robertson's file again and tried to reach her by phone, but was unable to do so and he left a message, and the following day (November 4) Robertson returned the call and he informed her that she was discharged "for rules violations," adding that "She knew . . . We had talked about them [the day before] going out the door."¹²³ Schuster testified that all deliveries and visitors come to him first, except for "pre-authorized" deliveries (vending and soft drink people), and they all are required to wear safety glasses, adding that some have their own. Schuster indicated that when he suspended Robertson for 3 days he told her not to return to the plant, that her timecard had been pulled, and that if she had to return to the plant for any reason, to come through the front or lobby entrance and have the secretary page him. Ac-

¹²² Schuster was asked if the no solicitation rule was the same for supervisors, and Schuster replied that supervisors and management were under a different set of rules and are "supposed to understand right from wrong, and when to do things and when not to do things." Former employee Billy Summers, who had worked for MTD in various jobs from 1985 to early 1988, testified that he had seen supervisors bring their "wives, girlfriends, or friends" through the plant, and also their kids, and that he had also seen truck drivers pulling up to the loading docks, and "if they had their wives or girlfriends, they usually took the 15 cent tour." Summers further testified that he had seen a lady named Hazel, who was on a 6-month leave, come into the plant with her 18-year-old son.

¹²³ A typed note "to file," dated November 4, 1988, and signed by Supervisor Richard Roll and Schuster, recites in part that Robertson, while on disciplinary layoff, was found in the plant on November 3, 1988, in an unauthorized area, with a small child, without safety glasses and soliciting an unauthorized petition. Under "Rules Violated" there appears the following:

Plant Rule #4—Insubordination—was told not to be in the plant during disciplinary lay-off. Plant Rule #24—Failure to use or wear safety equipment (glasses). Plant Rule #27—Unauthorized soliciting of written matter, pledges, petitions, without approval. Plant Rule #29—Disregard of safety rules by having a small child in the work area without approval.

Under "Action taken" there appears "Termination of job effective November 4, 1988." Robertson's state separation notice dated 11-4-88 and signed by Schuster reads, under "circumstances," "Disciplinary Problems—Violation of Plants Rules."

ording to Schuster, all suspended employees are told this for "a lot of reasons," including "Workmen's Compensation."

Regarding Robertson's suspension on November 2, Schuster testified that Robertson had been warned "on numerous previous occasions for being out of her work area," and that after he checked her file, "talked to people about it," and talked to both Pressroom Foreman Jim Black and Robertson, herself, he decided to suspend Robertson for 3 days. Schuster testified that Second (Night) Shift Supervisor Dwight Emerson had talked to him on several occasions about Robertson leaving and going to the welding area, and Superintendent Ben Gregg had complained that Robertson had not been in the pressroom when he needed her. Schuster testified there came a point when he had heard from "so many people that [Robertson] was out of her work area visiting" that he finally talked to her immediate supervisor, Foreman Jim Black, and Black conceded that other foremen and supervisors had been notifying him about the problem, and also conceded that after repeated talks with her he could do nothing about it. According to Schuster, he then told Black "that it's going to end up costing him his job," and Black responded, "She just won't listen to me." Schuster testified that while he and Black were talking, Robertson walked into the office and he and Black brought up the subject, and Robertson "admitted that she had been in there" but claimed that she was not stopping production and was not trying to cause anybody any trouble, adding "they were friends of her's in there [the welding dept.], and she just dropped in there to talk to them." Schuster indicated that he then told Robertson to stay out of the welding department, as she already had some notes in her file about it, and that it was going to be a problem if it continued, and Robertson stated that she would "stay out of there."¹²⁴ Schuster testified that he "felt like" Robertson supported the Union, but this had nothing to do with her suspension or termination.

Regarding the discharge of Robertson's foreman, Jim Black, on November 2, Schuster testified that Black was discharged "for failure to perform his job" in that he lacked the ability to lead people, had trouble passing on instructions given to him by the first-shift foreman, and tried to do everything himself, adding that the problem with "managing" Robertson was also "a pretty big factor."

Superintendent of Fabrication (over the pressroom and the welding department) Ben Gregg acknowledged his written counselling of Robertson on October 10 about her visits to the welding department. Gregg also acknowledged that he had complimented Robertson for doing a good job "like anybody else . . . when they did good jobs." But Gregg testified that MTD did not tolerate employees going into other

¹²⁴ Schuster identified certain items from Robertson's personnel file, including her suspension notice dated November 2, and her discharge notice dated November 4. Other items which referred to Robertson's visits to mig welding are written notations (or reports) of counseling or warnings as follows: October 6, from Second-Shift Pressroom Supervisor Dwight Emerson; October 10, from Superintendent of Fabrication Ben Gregg; October 13, from Quality Control Supervisor Dick Roll; October 21 and November 1, from Second-Shift Welding Supervisor Kevin Rogers. The suspension notice of November 2 was signed by Roll, Schuster, and Robertson, herself, and reads in part as follows: "Her unauthorized visiting with the Mig Welders during working hours disrupts both the welding department and leaves the press room area without proper coverage."

departments on personal business during working hours, and when it happened he would normally only have to tell the employee one time, but in Robertson's case it was different and she was told by other supervisors and himself. Gregg indicated that Robertson's job required her to go to the spot welding department from once to three times a month, but not ever to mig welding. Gregg testified that sometime after 5 p.m. on the day she was suspended, Robertson called him at the plant and asked if she could come to the plant and get her paycheck, to which he replied that "she could come the next day in the main lobby and ask the receptionist for her check." Gregg denied that he told Robertson she could enter the production area of the plant, or bring her child into the plant. Gregg testified that company rules required that visitors to be escorted by a "foreman or a manager and wear proper safety equipment."

Judy Gulledge testified as a present employee of MTD where she had worked in the assembly department for over 3 years, currently as a foreman. Gulledge observed Robertson enter the plant during her suspension, and testified that as she arrived in the parking lot to clock in for work on the second shift, she saw Robertson coming up through the parking lot and enter the plant right in front of her, through the employee entrance. Gulledge related that as she was about to clock in, Robertson ask her to sign a petition to get Jim Black's job back, and she refused. Gulledge testified that she started to go up to the breakroom but changed her mind and headed for the "line" when she again saw Robertson "in an intersection between the front office and the assembly line, coming toward the assembly line," in the opposite direction from the front office. Gulledge indicated that she then decided that Schuster "needed to know" that Robertson was in the plant with her little girl, because it was her understanding that when on suspension, employees were not supposed to be in the working area of the plant, which was any point past the front office, adding that the front office has its own (main) entrance door. Gulledge testified that she then went to Schuster's office and he was not there, but that his secretary paged him and she talked to Schuster and informed him over the phone, and as she returned back out into the plant, she saw Robertson walking closer to the shipping area, talking to several people on the way.¹²⁵ On cross-examination, Gulledge testified she knew Robertson was on suspension because it was "common knowledge" in the plant. Gulledge also indicated that Robertson did not "get all the way" to the assembly line, and that during the time she observed Robertson, her daughter was "by her side."

Dwight Emerson testified as the present supervisor over shipping and receiving at MTD. Between March and November 1988 he was a second-shift pressroom supervisor. Emerson testified that Robertson came to the pressroom on his shift as an inspector, under Foreman Jim Black, and her job was to "keep a check on all the parts and to ensure that we didn't have any defective ones." Emerson added that if they were running bad parts and it was not caught, it would cost

¹²⁵ Gulledge placed various markings on the same to scale drawing of the plant that Schuster referred to in his testimony, and these markings were more clear or definitive regarding actually where Robertson entered the plant, through the employee entrance. The main (lobby) entrance and the front office area were also clearly marked on the drawing by Gulledge, and her testimony with reference to the drawing establishes Robertson's path in the plant.

the Company.¹²⁶ Emerson testified that the problem with Robertson was finding her, and that "when we would have a question or something would go wrong, it was finding where she was . . . [s]he was not in her department." Emerson indicated that Robertson's work place was in the pressroom, and between the summer and fall of 1988, he would personally have to go and find her, and most of the time she would be in the mig welding department in either the "booths" with the welders or in the "aisle" talking.¹²⁷ Emerson testified that Robertson's duties in the pressroom never required her to go to the mig welding department, and only "occasionally" to the spot welding department or to "Assembly." Emerson related that he talked to Robertson "several times" about the problem, and she would agree to stay out of mig welding, but she never did. Emerson indicated that on most occasions he would just talk to Robertson but that on one occasion he made a note about a conversation.¹²⁸ Emerson testified that he talked about the problem first with Robertson's immediate Supervisor Jim Black, and after nothing happened, he then talked to his Supervisor Ben Gregg, and to Welding Department Supervisor Kevin Rogers, but the problem continued. Emerson estimated that between two and six times per shift he could not find Robertson when he needed her. Emerson indicated that he knew Robertson supported the Union, but that this support had nothing to do with his counseling of her.

Kevin Rogers testified as a present employee of MTD, and a second-shift supervisor in the pressroom. From August through November 1988, he was a second-shift supervisor over the mig and spot welding departments. Rogers testified that Robertson's work area was in the pressroom, and although she had no job related reason to come mig welding, starting in early September she came there to talk to either Wayne Boyd, David Jones, or Brad Oliver in their "booth," which was their work area. Rogers testified that he would ask Robertson "what the problem was," and she always indicated that she had no business there, other than she just wanted to talk. According to Rogers, Robertson was dating both Boyd and Oliver.¹²⁹ Rogers testified that he would ask

¹²⁶ In the transcript, the word "caught" appears incorrectly as "cost," and the correction is hereby made. Emerson testified that they make "a lot of gauge checks" and parts were put into a "fixture" in the quality control area of the pressroom to check tolerances.

¹²⁷ Robertson testified that on one occasion she "separated some parts over in the mig welding area," and denied that she thereafter wandered in and out of the welding booths talking to people.

¹²⁸ Emerson identified that note, which was written in longhand and signed. The note was placed in Robertson's personnel file after he and Ben Gregg had discussed the problem about Robertson, and how to handle it. The note, which was shown to Robertson, reads in part as follows: "On Thursday, Oct. 6, 1988, I counseled Penny Robertson on being in her work area. . . . Mainly to be in the press room at all times unless job related business required her to be out of the department or her breaks or supper." The note also recites that Robertson had been told before to stay in her department, but that she continued to go to other departments. On cross-examination, Emerson was asked if he remembered where Robertson was on October 6, and he replied, "The only area that we'd ever find her [sic] would be in there talking with the mig welders. . . . That's where she spent her time out of the Pressroom."

¹²⁹ Wayne Boyd and David Jones did not testify in the case. As earlier noted, mig welder Brad Oliver did testify, and indicated that

Continued

Robertson to leave and she would be back within 2 hours, adding that he “couldn’t do anything with her.” Rogers indicated that he then talked to Pressroom Supervisor Dwight Emerson, explaining that Robertson was disrupting production in his department, and Emerson indicated that he had his own problems with Robertson. Rogers testified that he then went to Jim Black, but the problem continued and he then “documented” the problem and gave it to Quality Control Manager Dick Roll.¹³⁰ Rogers indicated that he then went to Roll and Roll’s foreman, Robert Gailey, and yet the problem still continued,¹³¹ and on November 1 he again wrote Robertson up, letting Roll, Gailey, and Black know that he still needed their help regarding Robertson.¹³² The following day (November 2), Black was discharged and Robertson was on suspension. Rogers testified that he knew Robertson supported the Union, but that this support had nothing to do with his warnings to Robertson, or his complaints about her. Rogers indicated that “occasionally” people from assembly would smoke in the welding area, but would never bother the welders or go into the welding booths.

2. Robertson conclusions

Robertson was a strong, outward, and known union supporter both prior to the first election (July 30, 1987) and the second election (October 21, 1988). MTD strongly opposed the Union, and Robertson was suspended and discharged on the heels of the second election. Given these facts, and initially assuming the testimony of Robertson, former Quality Control Foreman Jim Black, and mig welder Jeffrey Oliver to be true, I find that under the test in *Wright Line*, 251 NLRB 1083, the General Counsel made a prima facie showing that Robertson’s union activity and support was a motivating factor for her suspension on November 1 and her discharge on November 4. The burden thus shifts to MTD, to demonstrate that the suspension and discharge of Robertson would have taken place even in the absence of her union activities and support. I so find in this case.

he dated Robertson “for about a month and a half” beginning in the middle of September, and that they were still very good friends. Oliver testified that Robertson would come into his booth and talk about personal matters on only a “few” occasions and, contrary to Schuster, Gregg, Emerson, and Rogers, Oliver testified that Robertson was required to be in mig welding to check parts. Robertson became engaged to mig Welder Wayne Boyd.

¹³⁰ This “documentation” was written on an employee conference report form, dated October 21, 1988, and checked were “counseling,” “Verbal warning,” and “Written warning.” In it Rogers states in part that he had asked Robertson not to bother the mig welders, and had gone to Jim Black about the problem, both without success, and that again today he had asked Robertson to leave mig welding, and as she was leaving she stated, “O [sic] I didn’t know you was watching me.” Rogers testified that he did not show the document (or report) to Robertson, but he told her that he was “going to write this up and turn it into the Manager of Quality Control.”

¹³¹ Roll did not testify in the case. Gailey did testify but was never questioned about Robertson’s time spent away from the pressroom.

¹³² This writeup was in the form of a written warning on an employee conference report, dated November 1, and reading in part “I have asked to leave the mig welders alone several times. . . . But she continues to go from booth to booth disrupting the mig welding department. . . . Tonight I had to ask her twice to leave the mig welding department.”

There are major conflicts in the testimony in three areas: (1) whether Robertson’s job duties required her to go to mig welding; (2) the frequency of Robertson’s visits to mig welding; and (3) whether Robertson was told not to enter the plant work area while on suspension.

Robertson was basically an honest person who, in the beginning, avoided lying by staying away from the subject or skirting around it to the extent possible, which would sometimes result in inconsistencies. When things closed in on her and a definite yes or no was required, Robertson was untruthful on occasion. Regarding her job duties, Robertson testified first that she was required to go to mig welding once an hour to check “deck handles,” and later the reason was to see that “holes were precise,” and still later to check “brackets.” Robertson later conceded that sometimes she went to mig welding on personal business or to talk to friends. Robertson also related that she dated mig welders Oliver and Boyd, and became engaged to Boyd, and that beginning in September when she started dating Oliver, she was told to stay out of mig welding by Pressroom Supervisor Emerson, Quality Control Foreman Black, Mig and Spotting Welding Supervisor Kevin Rogers, Superintendent Gregg (over all welding and the pressroom), and by Schuster, himself. Emerson testified that Robertson never had to go to mig welding, that her work place was in the pressroom, and between two and six times each shift he could not find Robertson when he needed her. Former Quality Control Foreman Black, who I discredited earlier herein, testified that Robertson was required to go to mig welding “once in a while,” and that her main work area was a room adjoining the pressroom. Rogers, Gregg, and Schuster all testified that Robertson’s job never required her to go to mig welding. I find that Robertson’s job in the pressroom did not require her to go to the mig welding department, and I discredit Robertson’s and Black’s testimony to the contrary.

Regarding the frequency of Robertson’s visits to mig welding, Robertson herself testified she went there once an hour. Other testimony put the number from a “few” times to six times per shift. The average from the testimony would place Robertson in mig welding at least five or six times per shift, and I so find. From the testimony and evidence, I further find that Robertson’s visits to mig welding were disruptive to the mig welding department and caused serious problems in the pressroom.

Robertson testified that Schuster did not tell her to stay out of the plant during her suspension. Schuster claimed he did, as he always had done with employees on suspension. Assembly line employee Gullede, who saw Robertson and her daughter enter the plant through the employee entrance, testified that she knew Robertson was on suspension, and knew suspended employees were not supposed to be in the plant, so she reported Robertson’s presence to Schuster. The previous day (November 1), after she had been suspended and left the plant, Robertson telephoned the plant and talked to Gregg about her pay check, and Gregg told her she could pick her check up the following day in the front office, which had its own separate front entrance. During her testimony Robertson was asked why she used the employee entrance, and she answered, “By habit,” an answer which in my opinion was very telling. Robertson conceded that Gregg used the term “front office,” and acknowledge that she intended to get employees to sign the petition she brought with

her to get Jim Black's job back. I find that the area mainly traversed by Robertson while in the plant was a "work" area, containing bins piled up, finished product, and operating forklifts. I also find that Schuster did tell Robertson not to enter the plant during her suspension, that Robertson knew she should not be in the plant's work area around other employees, and that she knew about the front entrance which she could use to obtain her paycheck. I thus find that Robertson intentionally disregarded the legitimate instructions of Schuster and Gregg for the purpose of obtaining employee signatures on her petition. Schuster and Plant Manager Rainone labeled Robertson's conduct as "insubordination," and I agree. Robertson and her daughter also did not put on safety glasses, and Robertson of course had no permission to bring her 4-year-old daughter into the plant. I find that both the glasses and the permission were required. Robertson conceded that she knew the rule regarding safety glasses.

I find and conclude that Robertson's suspension and discharge were justified, and would have taken place even if Robertson had never supported the Union. I shall thus recommend that paragraphs 14 and 15 of the amended consolidated complaint, as they pertain to Penny Robertson, be dismissed.

L. *The Nickles Bakery Issue*

In all three of the charges filed herein, there is alleged only 8(a)(3) violations against the individuals concerned (Robertson, charge filed Nov. 30, 1988, Brasfield, charge filed May 3, 1989, and Reid, charged filed June 6, 1989). When the complaints were issued, numerous alleged 8(a)(1) violations also appeared. The first complaint (Robertson) contained two 8(a)(1) violations, both allegedly occurring within 6 months of the Robertson charge (Nov. 4, 1988, and Oct. 21, 1988). The second complaint (Brasfield) contained seven 8(a)(1) violations, two of which were dismissed on the merits during the hearing, and the remaining five allegedly occurred within 6 months of the Brasfield charge (Nov. 4, 1988, Jan. 1989, and Feb. 28, 1989). The third complaint (Reid-the amended consolidated complaint) contained 10 8(a)(1) violations reaching as far back as "in or about late May 1988" and "in or about September 1988." Three of the "in or about September 1988" 8(a)(1) allegations were withdrawn by motion of the General Counsel, leaving seven 8(a)(1) allegations remaining, five of which occurred well beyond the 6-month period following the charge. These allegations appear in paragraphs 7(a) and (b), and 8(a), (b), and (c) of the amended consolidated complaint. Reid's testimony (the only evidence presented by the General Counsel) places these five allegations in August and September 1988, still beyond the 6-month period following the charge.

The remaining two-third complaint 8(a)(1) allegations are alleged in the complaint to have occurred "in or about February 1989," but the testimony of the General Counsel's only witness (Ronald Rogers) places the alleged violations "a short time right after the election last year" (October 21, 1988), or the "week right after the election" and "close" to the election. MTD's witness (Galey) places the incident "About two days after [the election]." The two allegations involved here are found in paragraphs 11(a) and (b) of the third (amended consolidated) complaint and appear to also fall outside the 6-month period following the third charge. These two allegations were the basis for the only two viola-

tions initially found in the case. I can not (and should not) stretch Rogers' testimony to reach October 28, 1988, or before, to be within 6 months after the filing of the third charge. The burden of establishing these violations by a preponderance of the evidence is on the General Counsel, and there is no explanation in the record as to why the complaint date is "in or about February 1989."

In *Nickles Bakery*, 296 NLRB 927, the Board discontinued its reliance on the "By the above and other acts" language on the Board's standard unfair labor practice charge form as being procedurally sufficient support for particularized 8(a)(1) complaint allegations where there has been no showing of factual relatedness between the complaint allegations in question and the underlying unfair labor practice charge. In *Nickles* the Board further stated it would require a factual nexus between the charge and complaint allegations in all 8(a) cases, and it would apply the "closely related" test set forth in *Redd-I, Inc.*,¹³³ to 8(a)(1) allegations. However, there is a first and initial test. The newly added complaint allegations must allege violations which occurred within 6 months from the date of the timely filed charge, and if not, they are time-barred by Section 10(b) of the Act. See *Redd-I, Inc.*, supra. Under this initial test, I shall thus recommend that the alleged 8(a)(1) violations contained in paragraphs 11(a) and (b) of the amended consolidated complaint be dismissed.

As to newly added complaint allegations which occurred within 6 months following a timely filed charge, under *Redd-I, Inc.*, supra, these new allegations are not time-barred if the are "closely related" to they allegations in the timely filed charge. In *Redd-I, Inc.*, the Board said that in applying the "closely related" test, it would look at the following factors:

First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge. [290 NLRB at 1118.]

Having cited and discussed Board law on the subject of newly added complaint allegations, I find it nearly impossible to apply the law hypothetically in this case. Expect for the two Galey allegations found above to be outside of the 6-month period following the charge (pars. 11(a) and (b) of the amended consolidated complaint) and the invalid no-solicitation rule allegation (par. 12 of the amended consoli-

¹³³ 290 NLRB 1115 (1988).

dated complaint), I found no 8(a)(1) violations based almost entirely on credibility resolutions. I also found that Robertson and Brasfield were not unlawfully suspended and discharged, and that Reid was not unlawfully discharged. From these findings, and from the overall record, I conclude that while MTD had an overall plan to resist the Union's organizing attempts (which is had a perfect right to do), the plan did not include resistance at any cost, or the inclusion or anticipation of unfair labor practices under the Act. Additionally, there was no plan or intent by MTD to rid itself of all (or certain) employees who supported the Union. I thus choose not to speculate on what my conclusions would have been had violations been found regarding some (or all) of the added 8(a)(1) allegations. Simply put, the Nickles Bakery issue no longer exists in this case. In retrospect, I concede that my

early ruling (during the hearing) on MTD's *Nickles Bakery* motion was hasty or premature.

CONCLUSIONS OF LAW

1. That the Respondent Employer, MTD Products, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. That the International Union, United Automobile, Aerospace & Agriculture Implement Workers of America, UAW is a labor organization within the meaning of Section 2(5) of the Act.

3. That the Respondent Employer, MTD Products, Inc., has not violated the Act as alleged in the amended consolidated complaint issued herein.

[Recommended Order for dismissal omitted from publication.]