

Simplex Wire and Cable Company and Timothy Giaimo. Case 1-CA-29899

May 26, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

Issues presented for Board review in this case¹ are whether the judge correctly found that the Respondent: (1) violated Section 8(a)(1) of the Act by prohibiting employees from engaging in union or other protected concerted discussion; and (2) violated Section 8(a)(3) of the Act by discharging employee Timothy Giaimo.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Simplex Wire and Cable Company, Newington, New Hampshire, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ On October 27, 1993, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

William F. Grant, Esq., for the General Counsel.
Peter R. Kraft, Esq. (Verrill & Dana), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Portsmouth, New Hampshire, on July 26 and 27, 1993, based on a charge¹ filed by Timothy Giaimo, an individual, on October 30, 1992, as amended, and a complaint issued by the Regional Director of Region 1 of the National Labor Relations Board (the Board), on January 28, 1993. The complaint alleges that Simplex Wire and Cable Company (Simplex or Respondent) violated Section 8(a)(1)

¹ The charge in Case 1-CA-29724 was withdrawn prior to hearing and General Counsel's motion to withdraw the complaint therein was granted.

and (3)² of the National Labor Relations Act, by prohibiting its employees from engaging in union or protected concerted activities and by discharging Timothy Giaimo, its employee, because he had engaged in such activities. Respondent's timely filed answer denies the commission of any unfair labor practices.

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

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS

Preliminary Conclusions of Law

The Respondent is a corporation with offices and a plant in Newington, New Hampshire, where it manufactures and sells wire and cable. In the course and conduct of its business operations during the calendar year ending December 31, 1992, Respondent sold and shipped goods valued in excess of \$50,000 directly to points located outside the State of New Hampshire. The complaint alleges, the Respondent admits, and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that Teamsters Local 633, International Brotherhood of Teamsters, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Prior to its decertification in August 1989, the Simplex employees were represented by the International Brotherhood of Electrical Workers (IBEW). During 1990 and 1991, Teamsters Local 633 conducted an organizing campaign, culminating in an election in February 1991, which the Union lost. Timothy Giaimo, the charging party herein, was one of the employees who was in contact with the representatives of that union; he also passed out authorization cards and provided information to other employees. At the time of the events of this case, the Simplex employees were not represented by any union.

B. *The Existence of, and Employee Discussions About, Lists*

During the organizational campaign in late 1990, Respondent prepared a list purporting to identify those employees who favored the Union, those who opposed it, and those who were undecided. The conclusions were based on judgments of the supervisors. The stated purpose of this "yes, no, maybe" list, as John Conley, Simplex's director of human resources, characterized it, was to count up potential votes and identify those who were on the fence. Initially, the employees were unaware of this list. After the election, it was turned over to counsel.

² The complaint included an allegation of an 8(a)(4) violation which the General Counsel did not pursue.

A second list surfaced some time in 1991. That list, handwritten on a piece of paper torn from a small notebook, listed eight names under the heading "Trouble 8 Pack." Along one side, it bore the words, "Tank Issues." Outside a bracket connecting the eight names it stated, "reinforce positive attitudes." This list was posted in the armorless department where Giaimo worked and in other departments.

Not surprisingly, the "Trouble 8 Pack" list became a subject of discussion among the employees. While it had been prepared by an acting supervisor merely to note people whom she perceived to have negative attitudes, it gave rise to speculation that the Employer was maintaining a list of union sympathizers or "troublemakers."

In July 1992,³ Giaimo received a warning which he believed to be unwarranted. He called Patricia Twist. Twist had been the manager of compensation and benefits and office manager for human resources; she was on leave from the beginning of 1992 until the end of July in that year, when her employment ended. He asked whether she thought the warning unusual and whether his job was in jeopardy. Twist inquired of him how he was perceived by his managers and supervisors. Giaimo asked what that had to do with anything and she told him of the list which had been maintained during the union campaign, saying that the "thought can stay in the mind of them."⁴

Giaimo told other employees of his conversation with Twist. The existence of such a list as she had described became a topic of conversation among the employees, some of whom questioned Giaimo to ask if Twist had really said that a list existed. Management was aware of the rumors concerning lists; it was also aware that the employees were concerned that Respondent was maintaining lists of employees based upon their union sympathies. The employees worried that management considered such employees to be "troublemakers."

In September, employee Patrick Chase visited Giaimo outside of work, told him of a warning he had received, and asked about the list which Twist had mentioned. As Giaimo recalled their conversation, he told Chase that it was a list of troublemakers and union sympathizers and Chase replied that his name must be on the list because he had been involved with the IBEW. Chase recalled Giaimo mentioning the list, stating that it was kept in the personnel department; when Chase asked if his name was on it, Giaimo told him, "No."

On September 2, Giaimo received a written warning for reading a newspaper while on the job. He protested the warning to Paul O'Leary, his supervisor, and asked to speak with Conley. After a discussion with O'Leary, Conley was summoned. Giaimo protested the warning. Conley said that they had to start with someone and were making an example of him. Giaimo then said, "I understand that you maintain a list of people that are considered troublemakers and union sympathizers and I want to know if my name is on the list because it seems highly unusual the way this thing is all coming about."

³ All dates hereinafter are 1992 unless otherwise specified.

⁴ While Giaimo's testimony was somewhat more detailed than that of Twist, their versions are essentially consistent. Twist was an entirely credible witness, no longer in Respondent's employ. The record does not explain the circumstances of her termination.

Giaimo's remark hit a nerve. Conley got upset, came out his chair, red in the face, and said that Giaimo was accusing him of having a hit list. He claimed, "It's a defamation of my character. I never did such a thing . . . You better be able to prove that, Tim." Giaimo said that he could and was warned, "You know that making false accusations like that could lead to termination." Giaimo insisted it was not false and, when asked who had told him about such a list, referred to his conversation with Patricia Twist. In the course of the conversation, Conley acknowledged that a list of union sympathizers had been maintained so that management could keep track of who was going to vote for the Union.⁵

On October 17, according to Giaimo, he was approached by Don McCallion, another employee in his department. McCallion told Giaimo of a conversation he had had with a recently terminated worker, Jeff Goodberry. McCallion said that when Goodberry had been in O'Leary's office being discharged, he had seen list of employees who were slated to be discharged. On that list, purportedly, was the name of Patrick Chase. He related that John Conley had observed Goodberry reading the list and had pulled it from his hand.⁶

After Goodberry's discharge, the existence of a "hit list" was a hot topic among the employees. Employee Craig DeCourt testified that there was a lot of talk about it. In a statement which DeCourt gave Roy on October 20 [in connection with Respondent's investigation of Giaimo's conduct], DeCourt stated that the talk started after Goodberry's discharge, that he had heard that Goodberry had seen a list in O'Leary's office and that he probably told some other employees about it.

C. Events Leading to Giaimo's Discharge

On October 19, management called a meeting of about 20 to 25 armorless department employees to deal with rumors in the plant. They met with Wilfred Roy, that department's technical manager, Paul O'Leary, manager, and the present and past foremen, Joyce Wilkinson and Mark Roux. O'Leary started out the meeting by stating that they were having problems with rumors. He discussed rumors about a layoff, about Simplex failing to get a contract with one customer, and about the termination of one employee. He then referred

⁵ Conley's version is not meaningfully different from Giaimo's. While Conley did not admit threatening Giaimo with termination for making a false accusation, he did not deny that he had done so. His testimony concerning the application of Respondent's "candor rule," discussed *infra*, implicitly acknowledges a threatened application of that rule to Giaimo.

⁶ McCallion acknowledged having a conversation with Giaimo regarding Goodberry's discharge but denied mentioning any lists. Noting McCallion's strong animosity toward Giaimo and the fact that the statement he gave Respondent refers to a conversation with Goodberry wherein Goodberry told him about seeing a list allegedly related to absenteeism, and further noting the statement which employee DeCourt gave to Roy concerning Goodberry having seen a list of people to be terminated when he was in O'Leary's office and the currency of discussion among the employees about such a "hit list," as discussed *infra*, I credit Giaimo and find that McCallion said something to him about Goodberry having seen a list in O'Leary's office. Given the atmosphere in the plant which was created by the acknowledged "Trouble 8-Pack" list and what Conley referred to as the "yes, no, maybe" list, it is hardly surprising that Giaimo may have concluded that such a list placed employees named thereon in jeopardy.

to "the rumors of me having a hit list or my management," and said, "You people put me in this position because you like me and I feel I'm an honest individual." He continued, "We never have maintained any kind of list whatsoever at Simplex. . . . We don't want to have any rumors going around. There is no hit list. If you want to talk to Bill [Roy] or myself, we'll be glad to talk to you about anything that concerns you."

Neither Giaimo nor Roy testified concerning any direct admonition at the October 19 meeting against further discussions of the "hit list" rumor. However, in the October 29 discharge letter sent to Giaimo (discussed *infra*), Roy wrote that at that meeting both O'Leary and he had advised the employees that the rumors about a "hit list" were false "and that such rumors should no longer be a topic of comment in the plant," that any questions or concerns about the rumor should be raised at the meeting or in private discussions with management. Giaimo's refusal to comply with this directive was deemed "blatantly insubordinate" and was one of the reasons given for his termination.

Following this meeting, Giaimo spoke with Patrick Chase on the smoking dock. As Chase recalled their brief exchange, Giaimo said, "I don't know if I'm going to be your buddy or not . . . but I heard from Jeff Goodberry that a [hit] list is going around and your name is on it." He told Chase that he did not believe O'Leary when O'Leary said that he did not have any list. Giaimo, Chase testified, did not mention McCallion or attribute the list to Conley. Chase told Giaimo that he did not believe that there was any "hit list." In his testimony, Chase described Giaimo as relating the information as if he knew a "great secret." He testified that Giaimo "was speaking sort of like he knew a big thing. Like 'ha-ha' . . . I found out about a hit list. Your name is on it." Chase, however, did not describe Giaimo's manner of relating the information when he gave Respondent a statement. According to Chase, Giaimo had also made a similar statement to him either earlier that day or during the preceding day.

Giaimo recalled their conversation somewhat differently. He claimed that he had heard that other employees had been teasing Chase about being named on a hit list purportedly maintained by O'Leary and sought to reassure him that it was Conley, not O'Leary, who was Chase's manager, who had such a list. As Giaimo recalled it, he told Chase of his conversation with McCallion in which McCallion had related what Goodberry had supposedly seen.⁷

Chase returned to his work station. He described himself as being "kind of upset" but he had no intention of reporting Giaimo's comments to management. However, he mentioned them to a coworker, Janice Casavant. She became upset and told Chase that if he did not report the conversation to his supervisor, she would. Casavant reported the conversation to Roux, her supervisor. At Roux's request, she repeated it again to O'Leary and gave O'Leary a written statement.⁸ Without waiting to be paged, Chase went to the office

⁷To the extent that it makes any difference, I find Giaimo's recollection of the events superior to that of Chase. Giaimo's version is essentially consistent with the version of that conversation which Chase related to Janice Casavant.

⁸That statement, which reads as if she witnessed the conversation, asserts that Giaimo told Chase "that McCallion said that Jeff Goodberry, while he was in Paul O'Leary's office had seen a hit list

where he also gave a statement. According to that statement, Giaimo told Chase that Goodberry had reported seeing a hit list in O'Leary's office; that list included Chase's name. Chase further related to management that Giaimo had said that he did not believe O'Leary's disclaimer regarding the list and that he, Chase, told Giaimo that he did not believe that there was any hit list.

Management also took statements from McCallion and Craig DeCourt. On October 20, Conley and Roy called Giaimo in and told him that an employee had made a charge against him that he had violated company policy in that he had circulated a "malicious rumor" about a manager and employee of Simplex. They asked him what had happened and he gave them a verbal statement. According to the notes which management made of this interview, Giaimo reiterated that he merely told Chase what he had been told by McCallion. He denied saying that he did not believe O'Leary but repeated his belief that Conley had a list. Conley told Giaimo that he was being suspended pending investigation on the basis of an allegation from an employee "that you have undermined a manager . . . made a statement to a fellow employee on the credibility of a manager's authority." Reference was made to Respondent's candor rule and work rule 23.

The "Employee Candor" rule, set forth in an interoffice letter of January 13, 1992, prohibited "unfounded, defamatory or malicious statements about a co-worker" under threat of discipline up to and including discharge. Work rule 23 similarly prohibited employees from "Making false or malicious statements concerning any employee, the Company or its products."

Giaimo was questioned again on October 26 and, once again, management took notes of the interrogation. At that time, Giaimo repeated his denial that he had impugned O'Leary's credibility. He reiterated that he had said that it was Conley who had the list. In the course of this meeting, he asked for and was given a copy of Respondent's "Employee Candor Policy." He was also told that there were two issues under investigation. The first was "making a false and malicious statement about a manager." The second was what he had said to Chase "concerning his employment status."

On October 29, Giaimo was given a letter setting forth the basis for his discharge. It listed seven conclusions:

1. That Giaimo told Chase that O'Leary had a "hit list" with Chase's name on it.
2. That his comment to Chase "perpetrated the false rumor of the existence of a management created hit list."
3. That he disregarded the directives of Roy and O'Leary to the effect that there was no hit list and that the rumors of a hit list "should no longer be a topic of comment in the plant."
4. That his comments to Chase about the existence of a hit list were in "direct violation of Mr. O'Leary's instructions restricting further talk about the 'hit' list."
5. That his comments to Chase were found to be false in that his alleged sources of information regarding the hit list [McCallion and Goodberry] had denied

of people who were going to be fired." It does not assert that Giaimo told Chase that his name was on it.

telling him about such a list and there were no such lists in the possession of O'Leary or any other management person, as Roy had stated in the October 19 meeting.⁹

6. That his comments to Chase were "found to be malicious" in that he "maligned the integrity of Paul O'Leary, expressly indicating that he had lied," he "maligned the leadership role of Paul O'Leary" by attributing to him the maintenance of a "hit" list, and he maliciously caused Chase to be afraid for his job status.

7. That his responses to management during its investigation were not credible or consistent.

The October 29 letter also reiterated the Employer's Candor Rule, charged Giaimo with being "blatantly insubordinate" in disregarding the direction to cease talking about a hit list, and asserted that he had intended to make Chase feel insecure about his job. It concluded that his employment was terminated "for the following reasons:"

1. Making false and malicious statements to a co-worker in violation of Company policy.
2. Insubordinate failure to follow management instructions to stop spreading a rumor.
3. Failing to be accurate and truthful in response to management questions during an investigation.

Each of these, the letter stated, was "sufficient grounds for termination standing alone."

D. Analysis

The first question which must be answered here is whether employee discussions of, or conjecture about, employer-maintained lists of employees sympathetic to union organization was either union or protected concerted activity such that an employer would be precluded from forbidding such discussions or disciplining employees for engaging in them. As I am convinced that it was union activity, protected under Section 7 and both 8(a)(3) and (1) without the necessity of showing of that it was engaged in with or on the authority of other employees, I need not discuss the question of protected concerted activity at any length.¹⁰ See generally *NLRB v. City Disposal Systems*, 465 U.S. 822, 832-833 (1984).

It is noteworthy that Respondent's own conduct gave rise to the rumors. Whether for a lawful purpose or otherwise,

⁹It is certainly arguable, given the admitted existence of both the "yes, no, maybe" list and the "Trouble 8-Pack" list, that both Roy's statements at the meeting and this claim in the letter violated Respondent's own rules respecting candor.

¹⁰Noting that discussion of the lists was "rampant" in the plant, dealt specifically with fears that the list or lists were of those employees destined for discharge because of their union activity and was thus intended to enable those employees to avoid discharge, that Respondent's own actions precipitated the discussions (as discussed herein), that Respondent was aware that employees were engaging in such discussions and that Respondent treated those discussions as a problem involving the employees as a group when it held its October 19 meeting, I must conclude, in agreement with the General Counsel, that these discussions or rumors were also protected concerted activity. *Meyers Industries*, 281 NLRB 882 (1986), *enfd.* 835 F.2d 1481 (D.C. Cir. 1987). See also *Elston Electronics Corp.*, 292 NLRB 510, 511 (1989) (activities of employee Riek), and *Whittaker Corp.*, 289 NLRB 933, 934 (1988).

Respondent created and maintained a list reflecting the unit employees' suspected union sympathies during the relatively recent Teamsters organizational drive. That list came to light when a member of management revealed it to an employee suspicious about a discipline he had received. Moreover, employee fears were heightened by publication of the "Trouble 8 Pack" list, another list which had been drafted by a supervisor and permitted to fall into employee hands. The "Trouble 8 Pack" list easily lent itself to a belief that prouction employees were being singled out for discharge or other special sanctions.

Experience over more than 50 years of NLRB history demonstrates that employees who are or have been involved in union organizational activities have reason to fear discriminatory retaliation, at least from some employers. Their discussions of those fears, or of real or perceived threats in the nature of such lists as existed here, can only be seen as a defense mechanism against such threats and/or, implicit preparation for the next campaign.

In *Cincinnati Suburban Press*, 289 NLRB 966 (1988), an employee was disciplined for writing and publishing an article critical of the antiunion tactics of some members of management during an organizational campaign which the union had lost within the past year. The Board concluded that the writing and publication of that article was one aspect of continuing efforts to organize and was union activity protected by Section 7 and 8(a)(3). In like measure, employee discussion of "hit lists" which they believe were created based upon their activities in an organization drive is a continuation of that prior campaign or, at the least, an effort to avoid discrimination based on their roles in that campaign. It is statutorily protected union activity.

As statutorily protected union activity, employee discussion of what they believed to be employer-maintained, union-activity related lists jeopardizing their continued employment could not be prohibited absent legitimate and substantial business justifications established by the employer. *Jeanette Corp.*, 217 NLRB 653 (1975), *enfd.* 532 F.2d 916 (3d Cir. 1976). Here, at the October 19 meeting, O'Leary directed employees not to talk about hit lists among themselves.¹¹ Other than to contend that the rumor was untrue, and that it impeded managerial effectiveness and credibility, Respondent offered no business justification.

Given employee knowledge of the prior maintenance of a "yes, no, maybe" list in the human resources department and of the existence of the "Trouble 8-Pack" list, there was at least a grain of truth in the "hit list" rumor. The existence of such a list was certainly a matter of legitimate concern to the employees. They were not required to accept managerial assertions that such a list did not exist. Further, Respondent's concern for the effectiveness or credibility of its management, while understandable, was irrelevant. That concern is akin to a concern that employee discussions of controversial

¹¹If there was any question whether O'Leary's words at that time could be construed as an order to that effect, the issue was clarified by Giaimo's discharge letter, signed by Roy. In that letter, Roy referred to his and O'Leary's "instructions restricting further talk about the 'hit' list rumor," characterized Giaimo's continued discussion of the "hit list" rumor following the October 19 meeting as "blatantly insubordinate" and listed his "insubordinate failure to follow management instructions to stop spreading a rumor" as one of the grounds for his discharge.

subjects will lead to jealousy and strife among the employees. As the Third Circuit stated in *Jeannette Corp. v. NLRB*, supra at 919:

The possibility that ordinary speech and discussion over wages on an employee's own time may cause "jealousies and strife among employees" is not a justifiable business reason to inhibit the opportunity for an employee to exercise section 7 rights.

Accordingly, I find that Respondent's prohibition of discussions of the "hit list" rumor violated Section 8(a)(1).

I further find, in agreement with the General Counsel, that Respondent's Employee Candor rule and its Work Rule 23 unduly restrict employees in the exercise of their Section 7 rights by prohibiting statements which are merely false, as distinguished from those which are maliciously so. While both rules prohibit malicious statements as well as those which were false, unfounded or defamatory, they do so in the disjunctive; forbidden and subject to discipline are "false or malicious statements" (Rule 23) and "unfounded, defamatory or malicious statements" (Employee Candor rule). The latter rule goes even further, to prohibit employee statements which are "less than totally honest."

In *Cincinnati Suburban Press*, supra, the Board considered a work rule virtually identical to Work Rule 23 and similar to the Employee Candor rule. In finding that rule unlawful, it quoted from the Eighth Circuit's decision, enforcing the Board's Order in *American Cast Iron Pipe Co.*¹² as follows:

We agree with the Board that the major flaw in both rules is that they proscribe "false" as well as "vicious or malicious" statements.

It is well established that, while employers may proscribe "maliciously false" statements, employers may not proscribe and punish for publication of false statements. *Texaco, Inc. v. NLRB*, 462 F.2d 812, 815 (3d Cir.), cert denied, 409 U.S. 1008, 93 S.Ct. 442, 34 L.Ed. 2d 302(1972); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1257 (4th Cir. 1969). Punishing employees for distributing merely "false" statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities.¹³

The more difficult question is whether Respondent's discharge of Giaimo violated Section 8(a)(3) and (1). On brief, Respondent argues that its actions toward Giaimo were justified because management believed that he had been both dishonest and malicious in telling Chase that his name was on a hit list.

¹²243 NLRB 1123 (1978), enfd. 600 F.2d 132, 137 (8th Cir. 1979).

¹³As the Board noted in *Cincinnati Suburban Press* at fn. 2:

[T]he Respondent may adopt rules in which the content of the rules is necessary to the credibility of the institution and/or the quality of its product, and the rules themselves are narrowly tailored, unambiguous, and designate the category of employees to whom the rules are applicable; provided, however, that such rules do not improperly impinge on the relevant rights of the affected employees. See *Peerless Publications*, 283 NLRB 334 (1987).

Respondent's brief did not attempt to support the other stated reasons for Giaimo's termination, his alleged "insubordinate refusal to follow management instructions to stop spreading a rumor" and "Failing to be accurate and truthful in response to management questions during an investigation." As to the first of these, it is clear that the order not to discuss the hit list rumor was itself unlawful. Giaimo's refusal to comply with that unlawful order was not insubordination upon which a sustainable discharge could be based. *AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977). To the extent that the discharge of Giaimo was motivated by his breach of that unlawful order, that discharge was unlawful. *Sunland Construction Co.*, 307 NLRB 1036 (1992).

The second of those reasons, Giaimo's alleged untruthfulness when questioned by management, is simply "bootstrapping" or, as General Counsel refers to it, "a makeweight." It is premised upon the same facts which go to the veracity of Giaimo's statement to Chase, i.e., whether McCallion told him of a conversation with Goodberry where in a list bearing Chase's name was mentioned. For an employer to choose to believe one version of an incident over another and then claim further justification for the discharge in its credibility resolution, would be akin to a finding of perjury on the basis of the trier of facts' determination of credibility. Moreover, acceptance of an employer's claim that its discrediting of an employee's explanation was an independent ground for discharge would insulate almost any discharge from the Board's remedial powers, no matter how clear the discriminatory nature of the underlying grounds for that discharge.

Moreover, Respondent's conclusion that Giaimo lied in the course of its investigation was not supported by the evidence before it. Casavant was not a witness to anything, neither Giaimo's conversation with McCallion nor the conversations with Chase. McCallion's statement, like his testimony, indicates a high level of animosity toward Giaimo. It further indicates that Goodberry told employees about having seen a list of employees whose jobs were in jeopardy. That is not inconsistent with Giaimo's statement to Chase that his name was on a list, even if he called it a "hit list." Similarly, the statement management took from DeCourt establishes that, following Goodberry's termination, there was talk about a "hit list of people who were to be terminated," which Goodberry had seen in O'Leary's office. It further establishes that someone who had talked with Goodberry passed that information on to DeCourt and that DeCourt, like Giaimo, passed it on to others. What DeCourt told Conley during this investigation is substantially corroborative of what Giaimo told him. The only difference is that DeCourt did not name McCallion as the source of his information.

Here, as in *Cincinnati Suburban Press*, supra, the Employer argues that even if Giaimo's activities were within the ambit of Section 7, they lost the Act's protection because they exceeded the permissible bounds of protected activity. In that case, at 967, the Board noted:

In *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), the Supreme Court held that employees may communicate with third parties in circumstances where the communication is related to an ongoing labor dispute and where the communication is not so disloyal, reckless, or maliciously

untrue as to lose the Act's protection. See also *Emarco, Inc.*, 284 NLRB 832 (1987).

Respondent contends that Giaimo engaged in malicious taunting of a mild-mannered coworker, Chase, and that his malice removed his words from the Act's protection. The facts do not warrant such a conclusion. Giaimo was, perhaps tactlessly, relating what I am satisfied he had been told about a list of employees whose jobs were in jeopardy, a list which had allegedly been seen in O'Leary's office. That information, which was consistent with the rumors that DeCourt said were circulating since Goodberry's discharge, was also consistent with what Giaimo had been told by Pat Twist and with what he knew of the "Trouble 8 Pack" list. Giaimo did what McCallion, in his statement to the Employer, claims he would have done with similar information, i.e., suggest to the employee whose job was in jeopardy that he should watch his step.

Moreover, the employee to whom his comments were directed did not deem them to be either serious or malicious, at least when the incident occurred. Chase did not credit Giaimo's remarks and told the Employer so. He was not so upset that he intended to take any action with respect to them. He reported what Giaimo said only after another employee essentially forced him to do so. While Chase, in the course of his testimony, described Giaimo's manner of relating the information as "speaking sort of like he knew a big thing. Like ha, ha . . . I found out about a hit list. Your name is on it," he did not include any such description in his statement to the Employer on October 19. Neither did he testify that Giaimo used any such words.

Finally, the contention that Respondent's disciplinary action was motivated by what it perceived as a malicious attack on Chase is belied by its actions and statements on October 19 and thereafter. When Conley first questioned Giaimo on October 20, Giaimo was asked if he had told Chase "that you did not believe what Paul [O'Leary] said and was told, "You are going to be suspended. An employee has come forward that you have undermined a manager The grounds of the suspension are that you made a statement to a fellow employee on the credibility of a Manager's authority." Similarly, on October 26, Conley questioned Giaimo, asking him whether he had said that he did not believe what O'Leary had said about not having a list. He was told that there were two issues, "Making a false or malicious statement about a manager" and "the conversation you had with Pat Chase concerning his employment status." There was no reference to his allegedly malicious taunting of Chase.

Indeed, in its October 29 discharge letter, Respondent did not allude to any malice supposedly directed at Chase. That letter lists, as management's conclusions as to what Giaimo had done, that Giaimo had made false statements about O'Leary's possession of a hit list, that those statements were in violation of directives that the hit list rumor not be discussed, and that they were "found to be malicious" not with respect to Chase but because they "maligned the integrity of Paul O'Leary, expressly indicating that he had lied."

Thus, it is clear that Respondent discharged Giaimo because he disregarded its unlawful order that employees not engage in union or other protected concerted activity, i.e., discuss the hit list rumor, and because he questioned the veracity or integrity of a manager in the course of his protected

activity. The tactless nature of Giaimo's comments to Chase was seized upon as a pretext to bring the discharge within the language of those cases which hold that an employer may punish employees for "maliciously false" statements but not those which are merely false. See *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979), and cases cited therein.

As noted above, the discharge of an employee for violating a rule which contravenes the statute is violative of Section 8(a)(1) and (3). *AMC Air Conditioning Co.*, 232 NLRB 283 (1977). And, as the Board made clear in *Cincinnati Suburban Press*, supra at 968, an employee's assertion, in the course of union activity, that a supervisor had been less than truthful in respect to his conduct of labor-management relations, does not rise to the level of misconduct which will forfeit the Act's protections. Therein, the employee had accused the newspaper's executive director of having "an insidious disregard for the truth," a much more direct accusation than was ever attributed to Giaimo. The employer contended that such language impugned its integrity and the truthfulness of its newspapers. The Board held that inasmuch as the statement related solely to a discussion of management's opposition to the union and was made only in that context, it did not disparage the director's personal integrity or truthfulness with respect to the employer's product, the publication of a newspaper. That statement did not go beyond permissible bounds or forfeit the protection of Section 7. In like fashion, whether Giaimo said that he believed that O'Leary had a list or did not believe him when he said that he had no list, and whether or not he referred to it as a hit list, his statement was made in the context of a protected discussion and did not impugn Respondent's products or O'Leary's integrity outside of that context.

Accordingly, I find that Respondent discharged Timothy Giaimo in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By prohibiting employees from engaging in union or other protected concerted activities, and by maintaining rules which prohibit employees from making false or unfounded statements, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging an employee because he engaged in union or other protected concerted activity, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest

as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, Simplex Wire and Cable Company, Newington, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from engaging in union or other protected concerted activity.

(b) Distributing, maintaining in effect, or enforcing Work Rule 23 and its Employee Candor Rule to the extent that they prohibit employees from making false or unfounded statements.

(c) Discharging or otherwise discriminating against any employee for engaging in union or other protected concerted activity or supporting Teamsters Local 633, International Brotherhood of Teamsters, AFL-CIO or any other union.

(d) 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) Offer Timothy Giaimo immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

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

(d) Post at its facility in Newington, New Hampshire copies of the attached notice marked Appendix.¹⁵ Copies of the

¹⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁵If 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

notice, on forms provided by the Regional Director for Region One, 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.

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

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 discharge or otherwise discriminate against any of you for engaging in union or other protected concerted activity or for supporting Teamsters Local 633, International Brotherhood of Teamsters, AFL-CIO or any other union.

WE WILL NOT prohibit employees from engaging in union or other protected concerted activity.

WE WILL NOT distribute, maintain in effect, or enforce Work Rule 23 and the Employee Candor Rule to the extent that they prohibit employees from making "false" statements.

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

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

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

SIMPLEX WIRE AND CABLE COMPANY