

**Brother Industries (U.S.A.), Inc. and International Brotherhood of Electrical Workers Local 474.**  
Cases 26-CA-15556 and 26-CA-15660

September 20, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On February 2, 1994, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a brief, the General Counsel filed an answering brief, and the Respondent filed a reply to the General Counsel.

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

The Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>1</sup> findings, and conclusions<sup>2</sup> and to adopt the recommended Order.

ORDER

The National Labor Relation Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brother Industries (U.S.A.), Inc., Bartlett, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

<sup>2</sup> The Respondent argues it had a "good faith" belief that employee Lisa Ham engaged in misconduct by her repeated violations of Respondent's no-solicitation, no-distribution rule. As found by the judge, in the past the Respondent readily tolerated numerous violations of its no-solicitation, no-distribution rule. Ham's activities were consistent with the Respondent's practice and, therefore, did not constitute misconduct. Accordingly, we agree with the judge that the Respondent did not have an honest belief that Ham engaged in misconduct. Rather, the Respondent's attempts to enforce the rule against Ham's protected activities constituted unlawful disparate enforcement of its rule.

In view of our agreement with the judge's finding that employee Ham and her coworkers did not seek to effect the discharge of Personnel Director Gilley, but rather petitioned the Respondent to listen to their complaints about working conditions, we find it unnecessary to rely on *Hoytuck Corp.*, 285 NLRB 904 (1987), and related cases.

Chairman Gould questions the validity of cases which find unprotected employee concerted activity designed solely to effect or influence changes in the management hierarchy. However, he finds it unnecessary to resolve that issue in this case because he agrees with the judge and his colleagues that Ham did not seek to effect or influence changes of this nature and her conduct was protected under existing precedent.

successors, and assigns, shall take the action set forth in the Order.

*Rosalind Eddins* and *John Goree, Esqs.*, for the General Counsel.

*James H. Stock Jr.* and *J. Gregory Grisham, Esqs.*, for the Respondent.

*Benny Goolsby* and *James Anderson, Esqs.*, for the Charging Party.

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges and amended charges were filed in the above cases on April 1, June 15, and July 8, 1993. A consolidated complaint issued on July 9, 1993. The General Counsel alleged in the complaint that Respondent Employer's employees, including employee Lisa Ham, concertedly circulated and signed a petition complaining about a supervisor and conditions of employment; that the Employer thereafter enforced its no-solicitation no-distribution rule selectively and disparately against the above employees; that the Employer warned, suspended, and discharged employee Ham; that the Employer engaged in the above conduct to discourage employees from engaging in protected concerted activities; that the Employer also prohibited its employees from distributing union leaflets in its parking lot, engaged in surveillance of employee protected concerted activities, and threatened an employee with discharge because of employee protected concerted activities; and that the Employer thereby violated Section 8(a)(1) of the National Labor Relations Act. Respondent Employer, in its answer, denied violating the Act as alleged and raised various affirmative defenses.

A hearing was held on the issues raised on August 9, 10, and 11, 1993, in Memphis, Tennessee, and, on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Employer manufactures typewriters and word processors at its plant in Bartlett, Tennessee. The Employer is admittedly engaged in commerce and the Charging Party Union is admittedly a labor organization as alleged. The Employer admittedly maintained at its plant the following no-solicitation no-distribution rule:

There shall be no solicitation or buying or selling of any kind during working time unless prior written permission has been obtained from the personnel manager. This includes, but is not limited to, any form of solicitation such as contributions to employee funds, selling of tickets or membership in service clubs, membership in labor organizations, collection of bills, collection of debts, etc.

There shall be no distribution or circulation of literature, petitions, nor written or printed matter of any description, within the plant where production is being carried on unless prior written permission has been obtained from the personnel manager.

A. *The Firing of Employee Lisa Ham*

The Employer admits that about March 5, 1993, employee Lisa Ham "circulated and signed a letter complaining

about" Personnel Director Leonard M. Gilley; that the Employer thereafter "warned," "suspended," and ultimately, on March 10, "discharged" employee Ham because of her conduct. The Employer asserts that employee Ham "was discharged for violations of Company policy," and, alternatively, that the Employer "had a good faith belief that" employee Ham had "engaged in violations of Company policy." The evidence pertaining to the disciplinary treatment of employee Ham and the related contentions of the parties is summarized below:

Leonard M. Gilley testified that he is presently the Employer's vice president of administration and consultant to the president and that, previously, during the pertinent time period, he was the Employer's director of personnel and administration. Gilley explained that the Employer manufactures typewriters and word processors at its Bartlett plant. There are currently some 440 hourly production employees and 75 exempt employees including about 25 supervisors. The Employer has three main production lines referred to as the "A," "B," and "C" lines. Each line includes a "chassis" area. There are about 18 to 20 employees on the C chassis line. There are also three "relief operators" for this line and "their primary duty . . . [is] to take the position of any employee that goes to the bathroom." All line employees take their regular "breaks" at the same time. Employee Lisa Ham was a "lead person" on the C chassis line.

Gilley identified the General Counsel's Exhibit 2 as employee Ham's "separation notice." It states that the "reason" for her "separation" on March 10, 1993, was her "violation of the no-solicitation rule." Gilley also identified the General Counsel's Exhibit 3 as employee Ham's "status change" form. It too states as the "reason" for her "termination" and "discharge" her "solicitation on Company time in the production area." Gilley signed both documents. Gilley nevertheless asserted that in fact the "reason" for Ham's "discharge" was both her "solicitation" and "insubordination." Gilley, however, acknowledged that Supervisor Devin Morris, who had "requested" Ham's "status change" and had signed the General Counsel's Exhibit 3, had later stated in a prehearing affidavit:

I [Morris] wrote the change in status report immediately after this conversation. I believe I wrote that she [Ham] was discharged for violation of [the] solicitation rule. That was the reason for her discharge. No one mentioned that she was discharged for insubordination to me. No one ever mentioned insubordination as part of the consideration for Ham's discipline. Normally, I would have known if her discipline was related to insubordination . . .

Gilley admittedly had "discussed" Ham's "discharge" with Morris, and Morris was "involved" "in the decision to discharge" Ham.

In addition, Gilley acknowledged that Assistant Manager of Production Darol Swords, who also had signed Ham's "status change" form (G.C. Exh. 3), had later stated in a prehearing affidavit:

I [Swords] have reviewed the change in status [form] and affirm that it is accurate. I reviewed it before I signed it. It is correct that she [Ham] was discharged for soliciting on Company time in a production area.

Insubordination was never a consideration in our discussion of Ham's discharge . . . to the best of my memory . . .

Swords also had "input in discharging Ham."

Gilley identified the General Counsel's Exhibit 6 as the "petition" or "document" which was the subject of the above disciplinary action against employee Ham. It is a "letter" addressed to the Employer's president, Sam Matsumoto, dated March 4, 1993, and signed by Ham and 11 of her co-workers. It states:

Dear Mr. Matsumoto:

C-Line Chassis is writing this letter to you because we feel you may be our only hope. We don't mean to be complaining or to sound ungrateful, because all of us need our jobs very much, but all of us are so unhappy with the way things are handled at Brothers [sic] that we don't know where to turn or what to do. We all realize that any Company's main objective is to make money and we know there are rules to be followed, but never before have we seen a Company that could care less about its employees.

The morale of us hourly employees is at an all time low, and the chances of improvement are very slim. We feel like you are very unaware of things that go on at Brothers [sic]. There is so much favoritism and unfairness going on and we feel that most of that begins with Len Gilley. We know that he has a job to do, but he is one man that could care less about any employees out here. Most of us call him God, because he thinks he is Lord and Master, and he doesn't care who he steps on in his struggle for power and control. If you have been hearing talk about Union activities, you may be wondering why. The main answer to that question is Len Gilley. People feel like they have no other choice because they've been backed into a corner so far, there is no other way out. Everyone is scared to death of Len Gilley and his power in this Company, and most of us feel like we have no rights whatsoever. We really don't need a Union, what we need is a friend. One that cares about us enough to find out what is really going on out here at the plant. One that appreciates our hard work enough and realizes if it wasn't for us little people, Brothers [sic] would be nothing. Would you please be that friend, Sam? Please give us all a chance to meet with you and talk with you about our feelings. We may be the little people, but we're smart, we have brains, we have good ideas and concepts and could improve quality at Brothers [sic]. All we're asking for is a chance to be heard, and the right to be treated like a person instead of a number. Our complaints aren't about more money, they're about fairness. Please help us in our struggle for fair treatment so that all of us can be proud to be called a Brother employee. This is our cry for help, won't you please help us?

Thank you,  
C/Chassis

Gilley recalled that he first became aware of the above "letter" on Friday, March 5, when he was "informed of the

document by supervisor Jerry Sowell." Gilley told Sowell "that he [Sowell] was her [Ham's] supervisor, that he needed to do something, that he needed to tell her to stop circulating it." Gilley further recalled that he also told Assistant Manager Swords to "follow up" and "verify the fact that Ham had stopped the circulation of this letter." Gilley added: "I was concerned that that letter was being circulated in the work area . . . ."

Gilley next recalled that on Monday, March 8, he had "received a report . . . that someone was circulating Ham's letter on line B." Ham, as noted, did not work on line B. Supervisor Jan Pannell and/or Assistant Manager Swords "just [said] that the letter was being circulated on line B." Gilley then added that "sometime during the day" Supervisors Pannell and Paula Jacobson "reported . . . they saw the letter circulating on line B." Gilley was asked: "But they did not see Ham over on line B . . . ?" He testified:

You'll have to ask them exactly what they saw. . . . I made the decision along with my fellow managers and supervisors to suspend and discharge Ham and at the time on March 8 . . . they saw a letter on that line . . . and I asked them to prepare a statement, which somewhere became a part of the record, as to exactly what took place . . . . You'll have to ask them, I don't recall what they saw. . . . I understood her letter was there [on line B] . . . whether or not she was there . . . I don't recall . . . .

I don't know the exact sequence of who touched what, when and who got whatever was touched. . . . I don't recall that . . . .

Gilley acknowledged that

Ham was discharged because that letter was continuing to recirculate and solicited in the work place . . . . I don't recall that anyone told me on that Monday that they saw Ham [soliciting that letter] . . . .

No employee specifically said they saw Ham with that letter except to put it in her pocket . . . .

In addition, Gilley further acknowledged:

[Ham] was working at her station [on Monday, March 8], when an employee from another line gave her a letter, and she put it in her pocket . . . the employee [who] walked from line B to line C to give the letter to Ham . . . was [not] disciplined . . . [no one] on the B line [was] disciplined . . . only Ham, she was the only person who was disciplined for circulating this letter . . . .

And, Gilley also acknowledged that "prior to Ham's discharge a supervisor did in fact inform [him] that [Ham] [during] the morning on March 8 wanted to meet with Mr. Matsumoto with a copy of that letter."

Gilley was questioned about prior disciplinary actions taken by the Employer under its no-solicitation no-distribution policy. In the past, during 1987, a supervisor was "put on notice" for assertedly violating this policy. Later, during 1991, the plant production manager was "instructed" "not to sell" "clothes in the work area." Further, Gilley himself

admittedly distributed "religious pamphlet[s]" to plant personnel and "it may or may not have occurred on the working floor."

Lisa Ham testified that she started working for the Employer in 1987; she was "promoted" in April 1991 to "lead person" on the C chassis line working the first shift from 7 a.m. to 3:30 p.m.; her annual "performance evaluations" were "satisfactory"; and she was told by her supervisors that she did "a good job." In the past, she had received "verbal warnings" on attendance and on one occasion when she "had failed to check the seconds" "on the "conveyor" to ensure that "production runs on schedule." She had never been told by management "that there were any problems with respect to [her] job performance."<sup>1</sup> She also explained that the Employer had a "progressive disciplinary procedure":

Usually you receive a verbal warning . . . the second time you are written up you receive a written warning . . . the third time you receive a final warning . . . and after that you are out the door.

Ham identified the General Counsel's Exhibit 6 as the "letter" which she prepared "on behalf of [herself] and [her] co-workers." She "prepared this letter" at home on Wednesday, March 3, because

basically [of] the employees' discontent with the way things were handled out there [at the plant] . . . we all felt like there was a lot of favoritism, unfairness . . . this is something we openly discussed all the time.

And, Ham recalled that a few weeks earlier she had "mentioned" to her supervisor, Devin Morris, that she was "thinking about writing a letter" and that "it was something . . . that [she] needed to do for [her] co-workers and for [herself]."

Ham, as she further testified, read the letter to coworker Etta Nash on the telephone during the evening of Wednesday, March 3. Nash stated that she "was ready to sign it" the next day at work. Ham also spoke with coworker Kelly Carlisle "and her reaction was the same." Ham also spoke later that evening with former Plant Manager Keith Perkins and C Line Packing Supervisor Connie Ingle in a "three way telephone conversation." Perkins approved of the letter and did not believe that Ham "would get fired for that." Ingle on the other hand stated that Ham "could get in trouble." Ham then signed the letter. She explained:

My intent was to get my co-workers on C line chassis to read the letter and sign it if they felt that everything in it was true and they believed in what we were doing.

Ham took the letter to work on the morning of Thursday, March 4. She first "made sure that the line was running" and then went to the "repair station" with her "relief operators, Etta Nash and Janice Ferrell." Nash, who had been told previously about the letter, "didn't really need to read it"

<sup>1</sup>Ham later recalled a further "disciplinary warning" in 1990 for "disrupting the work of employees." This occurred before her "promotion" to "lead person."

and just signed it. Ferrell “read the letter, she agreed with it and she signed it.” This was all done at “the repair station on Company time.” Another employee, Peggy Morgan, whose “position on the line is right beside the repair station,” similarly “read” and “signed” the letter “during work time.” Morgan took about 3 minutes to “read” and “sign” the letter and there was no “interruption” in her “work.” Coworker Kelly Carlisle, also familiar with the letter, “just signed it” “at her station” taking “a minute or two” without “any interruption in her work.” Later, Ham, Ferrell, and Nash “discussed . . . how to take care of letting the people read the letter and sign it.” Other employees would take a “relief” break in the toilet, read the letter there and if they wished to “sign the letter.” Ham had started this process by 7:30 a.m. “and the letter was signed by all by 8:45 A.M.” Ham explained that “during this period,”

[I performed my] normal duties of making sure the line was running, and when the reliefs were relieving people to go to the bathroom, it was one at a time, and the other relief and myself were taking care of the line, making sure everything ran correctly.

Ham noted that she has never been “informed” “that there was a problem with production or any interruption with respect to the production line” as a consequence of this conduct.

After Ham had “obtained the signatures of the C line chassis employees,” she made “copies of the letter.”<sup>2</sup> And, about 9 a.m. she “showed” a “copy” of the letter to B Line Chassis Supervisor Janet Dixon. Ham testified:

I [Ham] asked her [Dixon] to read the letter and . . . if she had a problem with me taking the letter to her section and letting the relief operators see the letter, and ask the people . . . how they would feel about devising a similar letter of their own.

Dixon’s response was “I don’t know anything.” “A few minutes later,” as Ham further testified, Dixon’s “relief operator” Darlene Williams “came over” “and wanted to see the letter.” Williams, after a “discussion,” left with a “copy of the letter.”

Ham later discussed the letter with Assistant Manager Swords on the C line. Ham recalled:

I [Ham] told him [Swords] . . . I’ve written a letter for my section to the president . . . it expresses our feelings on how we feel Gilley runs things . . . I’m giving it to the president . . . I’ve made copies to take to the other sections . . . [Swords said] I [Swords] don’t want to see the letter . . . that way if I’m asked about it I can say I don’t know anything about it . . .

Swords did not then say that Ham’s “actions” or “plans” were “inconsistent with the [Employer’s] no-solicitation policy.”

<sup>2</sup>Ham explained that “all the signatures on the letter [G.C. Exh. 6] were gained [on] Thursday” and she then “put” the original signed letter in a “sealed” envelope to be presented to President Matsumoto. See also R. Exh. 2, the original letter later mailed to President Matsumoto.

Ham also had given a copy of the letter to “relief operator” Donna Melton on A line inspection “to see if anyone wanted to devise their own letter” there. And, coworker Nash took a copy of the letter to “relief operator” Vicky Fields (also spelled in the record “Felts”) on C line packing. Employee Fields showed the copy to her supervisor, Connie Ingle. Ingle then told Ham:

I [Ingle] don’t want that letter down here, and you know I am going to tell my employees not to sign that letter. Now get it out of here.

Ham “took the letter and . . . went back to [her] section.” Ingle placed no other “restrictions” on Ham “with respect to circulation of the letter” that day.

Ham also “stopped two relief operators” on the B line, Trish Booker and Jenny Noonan, “going to lunch.” “B line” Supervisor Steve O’Donnell “was looking over their shoulder reading the letter with them.” Ham told the employees to “read it . . . see if your section wants to devise one similar and get back with me.” Ham also gave a copy of the letter to “relief operator” Janet Blaylock on “PC B line.”

On the following morning, Friday, March 5, C Line Supervisor Connie Ingle apprised Ham:

Lisa, I [Ingle] love you [Ham] to death, you and I are friends, but I’m going to tell you right now, if I see you passing the letter around on Company time . . . I have no choice but to go to Len Gilley with it . . .

Ham responded:

I [Ham] told her [Ingle] that I was not soliciting the letter anymore, that I had already solicited all that I was going to do.

Ham had the original letter in an envelope in her “pocket” and she “was going to give [the original] letter to” President Matsumoto when he came out on the production floor.

Later on the morning of Friday, March 5, Supervisor Devin Morris approached Ham “and wanted to read the letter.” Ham gave Morris a “copy.” Morris read the letter and warned: “Lisa, you know you can get in trouble for this.” Shortly thereafter, Supervisor Sowell similarly approached Ham and asked to see the letter. Ham provided Sowell with a “copy” and he read it. Sowell, who was “very upset,” “hollere[ed]” “why did you write this”; “what has Len Gilley ever done to you”; “this is soliciting and you’re not supposed to do this on Company time.” Ham explained that “I’m not soliciting now.” Sowell accused Ham of engaging in a “personal vendetta.” Ham denied having “any personal reason for preparing the letter.” Sowell similarly confronted other employees in the section.

During the afternoon of Friday, March 5, Supervisor Sowell summoned Ham to the conference room where he again accused Ham of engaging in a “personal vendetta” against Gilley and told her that she “shouldn’t give the letter to the president . . . it was not a good time . . . Mr. Matsumoto had a lot of things going on right now . . .” Ham made clear that she would present the letter to President Matsumoto. Sowell warned: “Well just don’t let me catch you passing it around on Company time or soliciting on Company time because that is against Company policy.”

Ham noted that she in fact did not "solicit signatures for the letter" on Friday, March 5.

On Monday, March 8, as Ham further testified,

I returned to work; I was on the production line working with Jackie Terry . . . someone . . . handed me this paper . . . it was a copy of my letter; and I folded it up and stuck it in my smock and I continued to help Jackie work . . . .

"Two or three minutes later," B Line Supervisor Paula Jacobson "approached" Ham and said that she was "looking for . . . a letter." Ham "pulled the [copy of the] letter out of [her] pocket" and "showed it" to Jacobson. Jacobson admonished Ham:

Lisa, I'm telling you as a friend, do not be passing this letter around on Company time, do not be getting any signatures . . . you know you can get in trouble . . . .

Ham again explained that "I'm not soliciting . . . all my solicitation was done on Thursday." Ham added:

My original copy of the letter has been sealed and been in my pocket to give to the president . . . . This [copy of the] letter came back to me from B line. I was working here and it was just sent back to me a few minutes ago.

Ham went to the breakroom and there telephoned Company President Matsumoto's secretary, Lita Farley, in an attempt to make an appointment with the president. Farley responded that Ham "needed to get [her] supervisor to make that appointment." Ham also called home because her son was ill. Supervisors Sowell and Morris approached Ham in the breakroom, and the following exchange ensued:

Jerry Sowell asked me if I had asked to use the telephone. I told him, no. He asked me if I had permission to go to A line earlier, and I told him, no, I had not. He asked me if I had permission to go to B line and pass a petition around, and I told him I had not been on B line that day and I had not been passing any petitions around. He then told me, if you're caught passing any petitions around on Company time you are in violation of the no-solicitation rule and you will be fired.

Ham returned to her section whereupon Supervisor Morris warned her: "if I catch you soliciting you're out of here." Ham noted that in the past she had never been required to obtain permission to use the telephone or to go to other production lines.

Later, Assistant Manager Swords instructed Ham that he wanted to see Ham and Supervisor Morris in the conference room. There, Swords "read" the no-solicitation rule and informed Ham that she was being "suspended pending an investigation." Ham was told:

You need to leave the premises, you cannot go back on the floor and get anything.

Morris got Ham's personal belongings and Swords drove her home. Ham thereafter mailed the "original letter" to President Matsumoto.

Ham, in addition, testified in detail about "solicitation during work time" at the plant. Employees "bought and sold all types of things from Avon to Girl Scout cookies" and Ham "personally sold Mary Kay on Company time." Ham, as well as her coworkers, openly and repeatedly engaged in this and related types of solicitation during working time without permission. Supervision observed and participated in this and related types of solicitation. Other forms of solicitation included, inter alia, "football and baseball pots," "Christmas presents for the supervisors," and "birthdays."

Ham acknowledged that in her initial prehearing affidavit to a Board agent she had stated that "the signatures [on her letter] were signed on break, but that was not correct." She explained why she and various coworkers had made this untrue statement:

I think mainly out of fear, because once I had been discharged, the Company had a meeting with the employees about the solicitation, and several of the employees were concerned about having their signatures on the petition, and they were concerned about me as far as trying to get my job back.

Ham and her coworkers later gave corrected affidavits to the Board agent.

In addition, Ham also acknowledged that in 1988 she had "a brief affair" with Gilley. She explained that "this was several years ago" and had no "effect" on and did not "contribute at all" to the preparation and circulation and signing of her letter. As noted, she was later "promoted" to "lead person" in 1991, although she admittedly did "feel" at one time that she would not make "supervisor" while Gilley "was in personnel" and "didn't feel like Gilley should be in personnel anymore . . ." Ham also acknowledged that former Plant Manager Perkins, with whom she had conferred on March 3, "disliked Mr. Gilley very much." Ham nevertheless explained:

As far as trying to get Mr. Gilley's job, that was not my intention . . . .

Ham was questioned about a telephone call made by her on March 10. She attempted to speak on the telephone to Gilley "to resign." Gilley apparently would not speak with her and she would not "discuss giving [her] resignation with anyone" else. She was later told by Supervisor Morris that she had been "terminated."

Etta Nash testified that she is one of the employees who signed Ham's letter on Thursday, March 4, and participated in its circulation among her coworkers. Nash, although somewhat uncertain of times and dates, corroborated in significant part Ham's testimony as detailed above with respect to the preparation and distribution of the letter. (See Tr. 207 to 221.) Nash also admittedly had stated in a prehearing affidavit that "we all signed the letter during break." Nash later corrected this affidavit. She had made this untrue statement because she was "afraid" following a supervisory meeting discussing Ham's suspension and discharge for "solicitation on Company time." In addition, Nash also related the many solicitations which had occurred during working time at the plant. Supervisors observed and participated in these solicitations. (See Tr. 224 to 235.) Nash noted that there was a "change with respect to this practice" "right after Lisa

[Ham] got suspended.” Nash knew of no other employee disciplined under the Company’s no-solicitation policy.<sup>3</sup>

Kelly Carlisle testified that she too was one of the employees who had signed Ham’s letter on Thursday, March 4, at her work station. She corroborated in significant part Ham’s and Nash’s testimony detailed above with respect to the preparation and distribution of the letter. In addition, she had observed the many solicitations during working time at the plant, often participated in by supervisory personnel. (See Tr. 256 to 259.)<sup>4</sup> And, she had corrected her prehearing affidavit to admit that the signing of Ham’s letter was in fact during working time. She admittedly had lied because she “didn’t want to lose [her] job.” She recalled that she had attended a meeting,

and the employees were told [by management] that someone was terminated on their line for soliciting and that no action was being taken yet against the other employees who signed. . . . They stressed “yet” as if something could [happen].

See also the testimony of Patricia Arlene Booker, Transcript 360 to 362.

Steven Michael O’Donnell is a supervisor on B line chassis. He recalled that employee Ham had approached him with her letter. He assertedly told her:

if she wanted to write a letter to the president that that was fine and good but that she didn’t need to be passing it out on the production floor.

He could not “recall” the “exact date” or the “week” or “the exact details of the conversation.” He admittedly did not “see the letter a second time.” In addition, he acknowledged that in the past he had “seen employees with different things on the line . . . candy bars and stuff like that . . . items for charity . . . they have sold them during work time.” He then claimed that “we did have a meeting at one point in time where we were told that that could no longer take place in the assembly area”; however, he could not “remember the exact day of that meeting.” He admittedly did observe Ham “passing the football squares around . . . during work time” and “never said anything to her about that activity being in violation of the no-solicitation policy.”

Jan Allen Pannell is the Employer’s warehouse supervisor. He insisted that the Employer’s no-solicitation policy is “absolutely no solicitation of any kind on the production floor.” He denied, inter alia, ever engaging in such solicitation and asserted that he had instructed employees to stop doing so. He claimed that on Monday, March 8, he saw a letter,

I [Pannell] was walking down . . . the aisle between B line and the production office and I noticed two workers . . . had a piece of paper . . . they were

<sup>3</sup>Counsel for Respondent later acknowledged during colloquy concerning compliance with counsel for the General Counsel’s outstanding subpoena that “the only person where we have written documentation of violating the no-solicitation policy is Ms. Ham.” (See Tr. 342.)

<sup>4</sup>Offers by counsel for the General Counsel of additional essentially similar proof pertaining to solicitations during working time at the Employer’s facility were rejected as cumulative. (See Tr. 284 to 287, 362 to 365, 381 to 383, and 396.)

talking . . . one of the ladies picked up the piece of paper . . . and I asked her to give me that piece of literature . . . . She said that she didn’t want to have anything to do with the piece of paper, she simply wanted to give it back to the person who gave it to her . . . . I asked her one more time for the piece of paper and she kind of looked off, and I left and then informed the line supervisor Paula Jacobson and the area supervisor Steve O’Donnell.

Pannell “never observed that piece of paper again.”

Pannell had previously been told by management “that there was some literature circulating in the building that was not supposed to be there . . . .” Pannell, in the past, would assertedly tell employees to put such items away, however, he admittedly did not follow that course of conduct here. And, here, unlike in the past, he followed up the incident with a letter or memorandum to management. The above incident, as observed by Pannell, took about “twenty seconds maybe” and, although during “production,” was during “some lag time.”

Connie Ingle, a supervisor in C line packing, testified that she spoke on the telephone with employee Ham concerning the letter on Wednesday night, March 3. Former Plant Manager Perkins joined the telephone conversation. Ingle could not “remember” much of the conversation that ensued. She could not “recall” whether Ham had read the letter to her. Ingle assertedly told Ham that Ingle “didn’t think that she needed to be doing that” and “could possibly lose her job over that.” On the following day, Thursday, March 5, one of Ingle’s “relief operators” approached her with the letter and asked “if they should sign.” Ingle said “no” and “took the letter to “Ham and told Ham “to keep it out of my department.” Subsequently, Ingle told Ham that “if I caught her circulating the letter . . . I would go to Gilley and she would be fired.” Ingle acknowledged: “I never seen her circulate the letter.”

In addition, Ingle admittedly had observed the circulation of “football and baseball pots . . . during work time” and “supervisors’ names appearing on these football and baseball pots.” She also had observed “Tupperware being sold during work time” and “Home Interior being sold on work time.” She never disciplined any employees for these violations of the Employer’s no-solicitation no-distribution policy.

Paula Jacobson is a senior supervisor on the B line. Ham’s letter was “brought” to her attention on Monday, March 8, at a management’s meeting where she was told to be “on the lookout” for this “soliciting.” Later, Warehouse Supervisor Pannell had spotted this “piece of literature,” employee Bessie Bowers “had it,” and Pannell so informed Jacobson. Jacobson went to investigate. Jacobson testified:

I went up to [employee] Willie Bowers and asked her if she had the letter at her station and she said she had it, but . . . she had given it to Diane . . . . I went over to C line and asked [employee] Diane Webber about the letter, and . . . Diane didn’t know about it. When I walked back up the aisleway back over to B line, I saw Lisa [Ham] with something in her hand and she was fixing to put it in her pocket . . . . I asked [Ham] was that what I thought it was. . . . [Ham] said . . . do you want to read it, and I told her I didn’t want to

see it. [Ham] was not showing it to anyone. She was simply putting it in her pocket . . . I told her that she needed to not pass this around during Company time . . . she could get in trouble . . .

Jacobson acknowledged that she did not see Ham "passing [the letter] around during working time."<sup>5</sup>

Diane Neal was a B line employee during the above time period. Neal recalled that on a "Monday morning" employee Willie Bowers" gave a letter to her "to give back to Lisa" Ham. Neal in turn "passed it back to C line chassis." Neal gave it to a "girl" there. Neal admittedly did not get this letter from Ham nor return it to her. The "other lady" "delivered" it to Ham. Ham "put it in her pocket."

Sharon Marie Burchett is an assembly worker on the B line. She recalled that on Monday, March 8, employee Toni Oliver on the B line handed her a letter. She testified for Respondent Employer on direct examination:

Q. Now was this the original letter?  
A. Uh-uh.<sup>6</sup>

Elsewhere, she acknowledged that she "really didn't have time to read it" and "just put it on the stand behind" her.

Devin Morris was a supervisor on C chassis line during the above period. Morris recalled that employee Ham had told him "that she was going to write a letter to Mr. Matsumoto" because the "employees were unhappy." On Friday, March 5, Ham asked him if he wanted to see the letter. He "briefly scanned" "the letter." He claimed: "I saw approximately three or four signatures on there, I believe."<sup>7</sup> He then informed" Assistant Manager Swords about "the letter." Thereafter, on Monday, March 8, as he testified,

Lisa [Ham] was in the breakroom or the cafeteria. . . . Jerry Sowell and myself were in there, and Jerry had called Lisa over to the table, and asked her what she was doing on the telephone. And at that point he said, "I understand that the letter is being sent out or is out there on the assembly line," and he asked her, "if you are putting the letter out, put it up," and at that point he dismissed her and sent her back to the line.

Ham later asked Morris "what's going on," and he said "I really don't know." She said, "they're watching me," and he said, "I am not real sure, but you need to put up the letter." Ham "didn't have the letter out" at the time and "nodded her head." Morris acknowledged that he never saw the letter "being circulated."

Morris testified that nothing else happened that day with respect to the letter. However, as Morris further recalled, Assistant Manager Swords later summoned Morris and Ham to the conference room. There, Swords apprised Ham that "she

<sup>5</sup>In addition, Jacobson denied various testimony of Ham as recited above and claimed that the only solicitation she had observed during worktime was "a sympathy card" "probably about a year ago."

<sup>6</sup>Counsel for Respondent asserted, inter alia, that the "original letter" "was still circulating" on Monday March 8. (See Tr. 517 to 519.)

<sup>7</sup>Morris, in his prehearing affidavit to a Board agent, only stated that he "saw signatures" on the letter; he did not then mention how many signatures; the "first time" he "told anybody" that he saw "four names" was "last week."

was being suspended pending an investigation for soliciting on Company time." Morris subsequently apprised Ham on the telephone that she had been "terminated," as instructed by Gilley. In addition, Morris asserted that he could not "recall" whether he had ever bought or sold anything on company time. He also asserted that he had never observed "anyone buying or selling anything during work time," although he had seen "literature on the assembly lines and . . . asked" that it "be put up." He later added: "It was the policy, but it wasn't strictly enforced . . ."

Darol Swords, assistant production manager for the Employer during the above time, claimed that the Company's no-solicitation no-distribution policy was "enforced" prior to March 1993. He became aware of employee Ham's letter on Thursday, March 4, when Ham told him "that she had written a letter to Mr. Matsumoto." Later, on Friday, March 5, Gilley "paged" him and he, with Sowell, discussed the letter and the "signatures." He later met with Sowell and Morris and "asked them to check into this letter and to make sure that it's not being circulated during work time." He also told Ham that "she needed to circulate it outside of the work place, preferably on her own time, and away from Brother." He acknowledged that Ham then said: "I [Ham] have the letter sealed in an envelope," and "she patted her pocket." Later, on Monday, March 8, according to Swords, "we were informed [at a staff meeting] that there was a letter or a petition circulating on the production floor and in the warehouse area." He admittedly did not "see any of that happening." And, subsequently that same day,

Paula Jacobson came to me . . . and said she had seen a letter, that Jan Pannell had seen a letter, and she had went to investigate, and when she went to the C line . . . Lisa Ham had this letter in her hand.

Swords, as he testified, reported the matter to Gilley, and Jacobson spoke to Gilley. Jacobson assertedly "restated the same story exactly." Admittedly, no one had stated that "they saw Ham circulating and soliciting signatures for this letter or petition." Sowell was also called to Gilley's office. There,

We discussed how many times Lisa [Ham] had been asked not to circulate this letter, she was clearly not doing what we had asked, and we needed to take some form of discipline . . .

They determined to "suspend" her pending "further" investigation. Ham was so advised. Swords later recommended "discharge." He denied, inter alia, various statements attributed to him by Ham. Elsewhere, Swords acknowledged, as noted above, that "insubordination was never a factor in Ham's discharge" and "no supervisor had actually told [him] that they had seen Ham soliciting signatures for the letter." Further, the Employer's "progressive discipline policy," including "oral warnings," was "not followed" with respect to Ham.

Jerry Sowell was a C line supervisor. He testified that on Friday, March 5, employee Ham asked him to look at her letter. He read the letter and "glanced" at the "signatures." He assertedly observed "seven, eight or nine, something like that, signatures" on the letter. He was uncertain whether the letter was an "original" or "copy." He added: "It seems

. . . like it was a copy.” He asked Ham, “what Gilley ever did to you.” Ham responded, *inter alia*, that she was “sick of this shit.” One or more of Ham’s coworkers joined in, and he “walked off.” He reported the incident to Gilley who “got angry” and assertedly said: “You should have taken it away from her”—“that’s soliciting on Company time.” He was instructed to “counsel” Ham. He subsequently informed Ham in the conference room that she was engaged in “solicitation” and “could be discharged for this.” She protested. He warned that “we have got a new president” and he “didn’t think this is a good thing.” She faulted Gilley and his conduct, referring also to former Manager Perkins. She assertedly said at some point in time: “I wished I had never screwed” Gilley or “something like that.” He could “not recall” much of the remaining scenario. He also could “not recall” “observing employees buying or selling . . . things during work time.” He added: “If they had, they were told to put it up.” Elsewhere, he admitted that he had observed the “passing around” of “baseball and football pots,” and he “signed those pots.”

Company Vice President Gilley, in later testimony, denied, *inter alia*, that he had “ever heard that employees were selling Avon, Home Interior, candy, [or] football pots on the production floor during working time”; “in fact up until today I [Gilley] never heard of any sports pools in that factory.” Gilley insisted that employees may not under the above-cited no-solicitation no-distribution policy engage in such conduct during worktime in the work area. Gilley insisted: “To my belief the no-solicitation rule was being enforced.” Elsewhere, Gilley acknowledged that a “purpose” or one of the “objectives” of this rule was in fact to “continue” the Employer’s “objective” of being “Union-free.” (See Tr. 434.)

In addition, Gilley assertedly had told his “staff” at a “regular staff meeting” on Monday, March 8, “that there is a petition being circulated . . . on Company time which is against the Company rules, and I instructed area supervisors and supervisors to collect that petition and the Company would like it to stop.” Supervisor Swords later “indicated that the letter had been seen in the B line work area, and . . . I asked the people to bring forward any statements on what had taken place to track it down and come to some conclusion as to what action was going forward.” “I said we need to get this stopped right now.” He instructed Swords “to have a conference with Lisa Ham . . . to deal with the continued circulation of the petition and the possibility . . . [of] suspension for the continued violation of the Company rules and policies.” He later conducted an “investigation” and determined to “suspend” Ham for her “gross misconduct.” As Gilley now recalled, he had been told by supervision that

an employee gave the letter back to the person that gave it to them who in turn gave it back to Ms. Ham.

Gilley reported the matter to President Matsumoto and a few days later the decision was made “to discharge Lisa Ham.”

Company President Sam Matsumoto testified that his Company has an “open door” policy permitting employees to “come to” him and other members of upper management to communicate their complaints about, among other things, supervision. He noted that his Company also has a no-solicitation

no-distribution policy and, in the case of employee Ham,

I recommended to terminate [her] [after] . . . my own investigation . . . . I found [that] in spite of the warning from a couple or more people she continued such a violation. . . . The violation means that she circulated a letter to get other persons to sign during the [work] hour. . . .

Matsumoto did in fact later receive Ham’s letter in the mail. (See G.C. Exh. 6 and R. Exh. 2.) He claimed that “she continued” “solicitation” of this letter and “more people signed” after her “warning” and thus “she continued such violations.”<sup>8</sup>

#### *B. The Employees Attempt to Distribute Union Leaflets and Related Conduct*

Barbara Ann Harkness testified that she has been employed at Brother for over 2 years; that the Charging Party Union engaged in organizing activities at the plant during 1993; and that on June 4 she and coworkers attempted to “engage in handbilling” of union “literature and membership cards” in “the employees’ parking lot” at the plant. Harkness recalled that “we went into the “employees’ parking lot” about 12:30 a.m. when the shift changed and “we started handbilling.” Harkness further recalled:

We just asked them [the employees] if they would like to join the Union and if they said no we didn’t push it . . . . We told them we would be at Seessel’s [grocery store] parking lot after we got through, and if they needed to fill out their card or bring it to us or wanted any information, that we would give it to them there.

The plant security guard, Jack Quinton, was present during the handbilling. Harkness and her coworkers “passed out cards” for about 5 minutes and then went to Seessel’s parking lot about 2 miles from the plant. Seessel’s grocery store was not open at that time of the morning. However, Harkness observed security guard Jack Quinton “pull up” in the parking lot, checking his truck, and “he looked over at us.” Security guard Jack Quinton remained there for about 2 to 3 minutes.

Later, about 12:30 a.m. on June 12, Harkness and coworkers attempted to handbill again “at the employees’ parking lot.” Harkness testified:

We went near the entrance where they [the employees] would be coming out and we were standing there, and I guess two or three people, when they got off, passed us, and we were talking to them, and the guard [identified by her as “Chris”] came out and told us that we

<sup>8</sup>Lita Farley is President Matsumoto’s executive secretary. She could not “recall” ever telling anyone that they must go through their supervisor to make an appointment to see Matsumoto. She “vaguely” recalled that Lisa Ham had called her to make an appointment to see Matsumoto on Tuesday, March 9. She might have asked Ham: “Who is your supervisor,” or have you “talked” with your supervisor. In addition, Farley could not “recall” whether she “was there” on Monday, March 8. It is “possible” that calls could have been made on Monday, March 8, which were not recorded. See R. Exh. 4 and Tr. 309 to 320.

could not do that, and we asked him if he could get someone with authority to tell us that we couldn't do it, and he said he had it, and to take it to the street.

Later that morning, as Harkness and a coworker "edged back up . . . the drive," the guard stated: "Hey, I said take it to the street." Harkness and coworkers then moved out on the street. Harkness acknowledged that she and coworkers have subsequently handbilled "in the parking lot and in front" of the Employer's premises without incident.

Patricia Arlene Booker has been employed by Brother for over 5 years. She testified that she too participated in the handbilling on June 4. She recalled:

When they [the employees] started coming out the doors, we all went towards the employee entrance and just kind of spread out and started talking to people, handing out cards, fact books and business cards . . . . I asked them if they were interested in a Union . . . . to meet us at Seessel's [grocery store] parking lot . . . . I was told by [security guard] Jack Quinton that I could not do that on Company property. . . . I was right in between the employees' entrance to the parking lot, to the employees' parking lot. . . . I told him that I was an employee and he told me that I would not be an employee long if I kept that up.

Booker then went to Seessel's parking lot. She recalled that security guard Jack Quinton also drove to the same parking lot although the store there was not open at that hour. She observed security guard Jack Quinton get out of his truck, walk around, get back in, and drive off. Booker noted that security guard Jack Quinton "watches the [Employer's] parking lot," has an "office" at the plant, and "reports to Len Gilley."

Booker next recalled that "we had handbilled" "in the [employees'] parking lot" on June 11-12. Plant Manager Monty Botkin "came out and asked if I had permission to do that, and I said no." Botkin then stated that "I had to have prior permission to pass that out." Booker "put the rest of [her] handbills in [her] locker and went into the plant." Later, Booker again handbilled "in the employees' parking lot." This time, another security guard, identified as "Chris," "was standing out there" and told Booker and coworkers to "leave." "Chris," whose "authority" was challenged by Booker and coworkers, stated that he "he already had permission" "to make us leave." Booker and coworkers then "went to the road again." Booker noted that "Chris' duties [are] similar to Jack [Quinton's] duties."

Booker acknowledged that she is "a very active Union supporter"; caused an unfair labor practice charge to be filed against the Employer; was "suspended" by the Employer for "insubordination" for "three days"; and that her "charge was withdrawn by the Union." Booker also acknowledged handbilling on June 7 without incident, and handbilling after June 11-12 without incident.

See also the testimony of employee Judy Lane Mitchell, Transcript 375 to 381, and employee Donna Melton, Transcript 389 to 397. Employee Mitchell recalled, inter alia, that Supervisor Ken Walls approached her while handbilling on or about June 4 and stated: "I was not supposed to be on the parking lot unless I was working. To take my cards and

leave." Employee Mitchell also recalled that on or about June 11:

Monty in management came and told us we had to have permission to pass that out on Company property, that we needed to stop, and that we had to have permission from the president . . . . [Later,] [security guard] Chris came out and told us that he had been instructed to tell us to leave.

Employee Melton recalled, inter alia, that security guard Jack Quinton told the handbilling employees: "You're going to have to go to the street . . . you can't do it in the parking lot." And, security guard "Chris" also "told us we would have to go to the street."<sup>9</sup>

Company Vice President Gilley acknowledged that security guards Jack Quinton and Chris May "worked in my department"; "the guards were instructed initially that we didn't want anyone on the parking lot at the close of business"; "we didn't want really any off duty employees there"; and that "since this incident on June 11" "there's been no disruption of handbilling" after "we tried to check out the law." No effort was made "to explain to the employees that [management] had taken" any corrective or remedial action with respect to employee handbilling in the employees' parking lot.<sup>10</sup>

Production Manager Monty Botkin testified that on June 11 he had observed "people walking around in the parking lot [with] some sheets of paper in their hands," and

I asked what [they] were passing out . . . they showed me . . . I asked if they had asked Mr. Matsumoto for permission . . . they said no . . . and I said "as a courtesy I think you should do that" . . . thanked them and turned and walked off.

Eugene B. Quinton, also known as Jack Quinton, is a security guard at the plant. On June 4, he observed "employees" "in the parking lot" "passing out literature." He testified:

Well, I went out and inquired, and the procedure that I had been told to follow was no solicitation on the parking lot, and go on the street.

He followed this "procedure." He admitted that that "it's very possible" that he later "stopped down at Seessel's parking lot" on the way home. He claimed that he "had a problem with [his] radio antenna." He could not "recall" telling anyone handing out "literature" that "they would lose their job if they kept doing that." He generally referred to "incidents" in the past involving "cars stolen" and "peo-

<sup>9</sup>It is undisputed that Jack Quinton and Chris May were security guards at the plant during the pertinent time period. Respondent Employer, in its answer to the complaint, specifically admitted to the agency status of the two guards. See G.C. Exhs. 1(i) and (k). Counsel for Respondent first claimed at the hearing that "that was an error" and denied "agency." See Tr. 75 to 77.

<sup>10</sup>Elsewhere, Gilley asserted that his "guards" were "instructed" to prohibit the type of activity involved here because "we had some employees that sold drugs in the parking lot" and "we've had some drug busts" and "there weren't to be any outsiders on it in the middle of the night" "creating any disturbances."

ple breaking in cars” and “looking in cars.” Elsewhere, he asserted that his concern with the above employee handbilling was “with them holding up my shift employees . . . from getting out of the parking lot.”

Much of the testimony detailed in sections A and B, supra, insofar as pertinent here, is not seriously disputed or controverted. There are, however, some cited conflicts in testimony. Thus, with respect to the sequence of events culminating in the firing of employee Ham, counsel for Respondent Employer argues that the above testimony of Ham and her coworkers should be discredited noting, inter alia, that Ham and her coworkers initially made untrue statements to a Board agent with respect to whether they were on working time during the solicitation and signing of Ham’s letter. Ham and her coworkers explained in their testimony before me that they had in fact initially made these untrue statements “out of fear” and later gave corrected affidavits to a Board agent. Nevertheless, as a consequence of this and other cited defects in the testimony of Ham and her coworkers, I have carefully scrutinized their testimony as compared with the testimony of Respondent’s witnesses, and, on balance, I am persuaded on this full record that the above-cited testimony of employees Ham, Nash, Carlisle, and Booker represents a more complete, credible, and trustworthy account of the pertinent sequence of events. Their testimony is in significant part mutually corroborative; it is also substantiated in significant part by the admissions and acknowledgements of Respondent’s witnesses; it also withstood the test of extensive cross-examination; and, relying also on their demeanor, they impressed me as truthful and credible witnesses.

On the other hand, I do not credit the above-cited testimony of Gilley, Matsumoto, O’Donnell, Pannell, Ingle, Jacobson, Neal, Burchett, Morris, Swords, Sowell, or Farley insofar as their testimony conflicts with the testimony of Ham, Nash, Carlisle, and Booker. The testimony of Gilley, Matsumoto, O’Donnell, Pannell, Ingle, Jacobson, Neal, Burchett, Morris, Swords, Sowell, and Farley, as demonstrated above, was at times vague, incomplete, unclear, contradictory, shifting, and evasive. They did not impress me as trustworthy and reliable witnesses. As discussed more fully below, I reject as incredible the assertions of management witnesses that, in the past, the Employer had vigorously enforced its no-solicitation no-distribution rule. The credible evidence of record makes it clear that employees as well as management frequently had violated and ignored this rule. Indeed, employee Ham, despite the Employer’s “progressive discipline policy,” was the only person apparently ever terminated for a claimed violation of this rule. Further, I reject as incredible the shifting and essentially unsubstantiated claim by management that Ham was fired because she had, after having been warned, engaged in proscribed solicitation during working time. The credible evidence of record, including the admissions and acknowledgements of Respondent’s witnesses, is to the contrary. I also reject as incredible management’s shifting and essentially unsubstantiated claim that Ham was fired for “insubordination.” Here, too, the credible evidence of record, including the admissions and acknowledgements of management’s witnesses, is to the contrary. In short, as discussed below, I am persuaded here that Ham was fired because she and her coworkers had engaged in protected concerted activity and management wanted to stop this protected concerted activity.

In addition, with respect to the testimony pertaining to the employees’ later attempts to handbill in the employees’ parking lot and related conduct, I credit the testimony of employees Harkness, Booker, Mitchell, and Melton as detailed above. Their testimony is also in significant part mutually corroborative, substantiated by admissions of Respondent’s witnesses, withstood the test of extensive cross-examination, and, relying also on demeanor, they too impressed me as trustworthy and reliable witnesses. The above-cited testimony of Gilley, Botkin, and Quinton is vague, incomplete, and unbelievable. In particular, I find totally incredible the assertion by security guard Quinton that he showed up at the Seessel parking lot during the early hours of the morning to fix his antenna or the claim by Manager Botkin that he stated to the employees attempting to handbill in the employee parking lot that “as a courtesy” they should get President Matsumoto’s “permission” and then “thanked them and turned and walked off.” I also find totally incredible the assertion by Gilley to the effect that his “guards” were “instructed” to prohibit the type of activity involved here because “we had some employees that sold drugs in the parking lot” and “we’ve had some drug busts” and “there weren’t to be any outsiders on it in the middle of the night” “creating any disturbances.” Similarly, I find totally incredible Quinton’s related attempt to justify this conduct because assertedly “we’ve had cars stolen” and “incidents of breaking in cars.” The credible evidence of record makes it quite clear that management was again attempting to interfere with employee protected concerted activity and was not acting in furtherance of valid or lawful business objectives.

#### Discussion

Section 7 of the National Labor Relations Act guarantees employees 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,” as well as the right “to refrain from any or all such activities.” Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights. In *Hoytuck Corp.*, 285 NLRB 904 (1987), the Board explained:

We agree . . . that [the employee’s] conduct in preparing and circulating an employee petition that complained of the conduct of respondent’s [supervisor] towards employees and . . . sought his discharge is protected activity here because it is evident that [the supervisor’s] conduct had an impact on employee working conditions . . . .

The Board noted:

We wish to make it clear, however, that cases involving employee concerted activity regarding the selection and termination of a supervisor who has an impact on employee working conditions are distinguishable from cases in which employee concerted activity is designed solely to effect or influence changes in the management hierarchy . . . .

See also *Korea News*, 297 NLRB 537, 539 to 540 (1990); *Oakes Machine Corp.*, 288 NLRB 456 (1988), *enfd.* in part 897 F.2d 84 (2d Cir. 1990); and cases cited.

The credible evidence of record in the instant case, as detailed *supra*, shows that employee Ham and her coworkers "openly discussed" their "discontent with the way things were handled out there [at the plant]." Ham and her coworkers were concerned, *inter alia*, with "favoritism" and "unfairness" which they attributed to Company Personnel Director Gilley. Ham "mentioned" to her supervisor, Morris, that she was "thinking about writing a letter" to Company President Matsumoto relating her and her coworkers' complaints; "it was something . . . that [she] needed to do for [her] co-workers and [herself]." Later, on the evening of Wednesday, March 4, 1993, Ham composed such a letter at home to be presented to Company President Matsumoto. She conferred that evening on the telephone with coworkers who agreed to sign the letter the following day at work. The letter, as quoted above, complained to Company President Matsumoto that "all of us are so unhappy with the way things are handled"; "the morale of us hourly employees is at an all time low"; "there is so much favoritism and unfairness going on"; "we really don't need a Union, what we need is a friend"; "please give us a chance to meet with you and talk with you about our feelings"; "all we're asking for is a chance to be heard and the right to be treated like a person instead of a number"; "our complaints aren't about money, they're about fairness" and "fair treatment"; "this is our cry for help." Ham's letter, as noted, attributed her and her coworkers' complaints to Company Personnel Director Gilley who, in Ham's view and the view of her coworkers, "could care less about any employees out here."

Ham signed the letter and took it to work on Thursday, March 5. There, during the early morning hours, she solicited during working time the signatures of 11 of her coworkers on the C chassis line. There was "no interruption with respect to the production line" as a consequence of this activity and, in fact, management has never claimed "any interruption with respect to the production line" because of Ham's conduct. Ham, by 9 a.m., had obtained "all the signatures on the letter." She then made copies of the letter and put the original signed letter in a "sealed" envelope to be presented to Company President Matsumoto when he came out on the production floor. She also showed copies of the letter to various employees and supervisors explaining that she "had made copies" for other sections or lines in the plant in order to discover whether they wanted "to devise a letter of their own." Supervisor Dixon, Assistant Manager Swords, and Supervisor Ingle, although aware of Ham's "actions" and "plans," did not then apprise Ham that her "actions" or "plans" were "inconsistent with the [Employer's] no-solicitation policy."

Later, on Friday, March 5, Ham was first warned by Supervisors Ingle, Morris, and Sowell that, in effect,

don't let me catch you passing it [the letter] around on Company time or soliciting on Company time because that is against Company policy . . . .

Ham explained that she

was not soliciting the letter anymore, [she] had already solicited all that [she] was going to do.

Ham, as she credibly testified, did not in fact solicit any signatures to her letter on Friday, March 5. Ham had the original letter in a "sealed" envelope in her "pocket" and she "was going to give the [original] letter" to Company President Matsumoto when he came out on the production floor.

Personnel Director Gilley first became aware of Ham's letter on Friday, March 5. He instructed Supervisor Sowell "to do something"; "to tell her to stop circulating it." He instructed Assistant Manager Swords to "follow up" and "verify the fact that Ham had stopped the circulation of this letter." Ham was later told by Supervisor Morris that she "can get in trouble for this." She was told by Supervisor Sowell that this is "soliciting" and a "personal vendetta," and that she "shouldn't give the letter to the president . . . it was not a good time . . . Mr. Matsumoto had a lot of things going on right now." Ham, as stated, denied engaging in "soliciting" and also denied having "any personal reason for preparing the letter."

Later, on Monday, March 8, as Ham credibly recalled,

I returned to work; I was on the production line working with Jackie Terry . . . someone . . . handed me this paper . . . it was a copy of my letter; and I folded it up and stuck it in my smock and I continued to help Jackie work . . . .

"Two or three minutes later," B Line Supervisor Jacobson "approached" Ham and said that she was "looking for . . . a letter." Ham "pulled the [copy of the] letter out of [her] pocket" and "showed it" to Jacobson. Jacobson admonished Ham:

Lisa, I'm telling you as a friend, do not be passing this letter around on Company time, do not be getting any signatures, . . . you know you can get in trouble . . . .

Ham again explained that "I'm not soliciting . . . all my solicitation was done on Thursday." Ham added:

My original copy of the letter has been sealed and been in my pocket to give to the president . . . . This [copy of the] letter came back to me from B line. I was working here and it was just sent back to me a few minutes ago.

Supervisors Sowell and Morris similarly confronted Ham and she again protested that she "was not passing any petitions around." Subsequently, however, Assistant Manager Swords instructed Ham that he wanted to see Ham and Supervisor Morris in the conference room. There, Swords "read" the Employer's no-solicitation rule to Ham and informed her that she was being "suspended pending an investigation." Ham was told:

You need to leave the premises, you cannot go back on the floor and get anything.

Morris got Ham's personal belongings and Swords drove her home. Ham thereafter mailed the "original letter" to Company President Matsumoto. She was later told that she had been "terminated."

Ham credibly explained that some 5 years earlier, in 1988, she had "a brief affair" with Gilley; "this was several years ago" and had no "effect" on and did not "contribute at all"

to the preparation and circulation and signing of her letter; and, “as far as trying to get Mr. Gilley’s job, that was not my intention.” As noted, Ham was later “promoted” in 1991 to a “lead person.”

The Employer’s records and the testimony of Supervisors Morris and Swords show that Ham was in fact “separated” for an alleged “violation of the [Employer’s] no-solicitation rule.” However, the credible evidence of record shows that Ham—after having been first warned on Friday, March 5, not to engage in any further solicitation or distribution of her letter—did not in fact thereafter solicit signatures or distribute any “copies” of her letter. And, Ham had made this clear to management. The Employer then shifted over to “insubordination” and “gross misconduct” as reasons for her “termination.” Again, the credible evidence of record shows that Ham in fact did not engage in “insubordination” or “gross misconduct.” Indeed, the credible evidence of record also shows that in the past the Employer readily tolerated and its supervisory personnel often participated in numerous violations of its cited no-solicitation and no-distribution rule. Only Ham was “terminated,” despite the Employer’s “progressive disciplinary procedures,” for this alleged violation. As counsel for the Employer acknowledged, “the only person where we have written documentation of violating the no-solicitation policy is Ms. Ham.”

I find and conclude on this record that Ham was engaged in protected concerted activity when she, after conferring with her coworkers, composed and signed her letter and thereafter obtained the signatures of 11 of her coworkers to the letter. Ham and her coworkers, as her letter shows, were complaining about “favoritism” and “unfairness” in the workplace and they principally attributed this conduct to Personnel Director Gilley. Ham and her coworkers did not seek the ouster of Gilley; instead, they were petitioning Company President Matsumoto to meet with them and listen to their complaints. Ham and her coworkers were thus acting in concert to complain over their terms and conditions of employment. In any event, as the Board explained in *Hoytuck*, supra,

We agree . . . that [the employee’s] conduct in preparing and circulating an employee petition that complained of the conduct of respondent’s [supervisor] towards employees and . . . sought his discharge is protected activity here because it is evident that [the supervisor’s] conduct had an impact on employee working conditions . . .

Clearly, Ham and her coworkers reasonably perceived Personnel Director Gilley’s acts of “favoritism” and “unfairness” as impacting on their working conditions.

Personnel Director Gilley wanted to “stop” the “circulation” of Ham’s letter. He invoked the Employer’s no-solicitation no-distribution rule. According to Gilley, a “purpose” or one of the “objectives” of this rule was in fact to “continue” the Employer’s “objective” of being “Union-free.” He felt similarly threatened here by this protected concerted activity. However, “cumulative” evidence established that, in the past, employees, with the participation of management representatives, frequently violated and ignored this rule. This rule was thus being disparately invoked and applied to Ham and her coworkers in an attempt to “stop” this pro-

tected concerted activity. See *Cumberland Farms*, 307 NLRB 1479, 1490–1492 (1992), *enfd.* 984 F.2d 556 (1st Cir. 1993). Further, the record makes it clear that Ham was not engaged in “continued” “solicitation” or “circulation” of her letter. In sum, I find and conclude that the Employer admonished and ultimately discharged Ham in an attempt to prevent her and her coworkers from exercising their Section 7 rights, in violation of Section 8(a)(1) of the Act. I reject as incredible and pretextual management’s asserted shifting and unsubstantiated reasons for her termination.

The Employer argues that “the Company had an honest belief that Ham had engaged in repeated violations of the Company’s no-solicitation no-distribution policy which was the basis for her suspension.” The credible evidence of record, as detailed and discussed above, is to the contrary. And, as restated in *Keco Industries*, 306 NLRB 15, 17 (1992), “Where an employee is disciplined for having engaged in misconduct in the course of union [or other protected concerted activity], the employer’s honest belief that the activity was unprotected is not a defense if in fact the misconduct did not occur.” Ham did not in fact engage in “repeated violations of the Company’s no-solicitation no-distribution policy.” The Employer argues that “Ham’s activities were motivated by personal animus and therefore not protected under Section 7 of the Act.” Again, the credible evidence of record, as detailed and discussed above, is to the contrary. Ham was not, as argued by the Employer, “seeking the removal of a management official because of personal reasons.”

The Employer also argues that “Ham abused Board processes by lying in her . . . Board affidavit . . . and encouraging other affiants . . . to lie in their . . . Board affidavits.” As recited above, Ham and her coworkers credibly explained in their testimony before me that they had in fact initially made untrue statements “out of fear” and later gave corrected affidavits to a Board agent. Ham acknowledged before me that in her initial prehearing affidavit to a Board agent she had stated that “the signatures [on her letter] were signed on break, but that was not correct.” She explained why she and various coworkers had made this untrue statement:

I think mainly out of fear, because once I had been discharged, the Company had a meeting with the employees about the solicitation, and several of the employees were concerned about having their signatures on the petition, and they were concerned about me as far as trying to get my job back.

And, employee Carlisle similarly acknowledged before me that she too had corrected her prehearing affidavit to admit that the signing of Ham’s letter was in fact during working time. She admittedly had lied because she “didn’t want to lose [her] job.” She recalled that she had attended a meeting where the employees were told [by management] that someone was terminated on their line for soliciting and that no action was being taken yet against the other employees who signed. . . . They stressed “yet” as if something could [happen].

Although giving false statements to a Board agent is a serious violation of law and is not to be condoned, nevertheless, on balance, here, Ham and her coworkers gave cor-

rected affidavits and fully and credibly testified before me that they had thus acted “mainly out of fear.” This “fear” was the product of management’s attempt to disparately enforce its no-solicitation no-distribution rule against Ham and thus stop Ham and her coworkers from exercising their rights protected under Section 7 of the Act. Under the circumstances presented here, I would not find that Ham or her coworkers should be denied the protections of the Act; nor would I find that Ham, by this conduct, has rendered herself unfit for further employment. On this record, such a result would not reasonably effectuate the purposes and policies of the Act. See *ABF Freight System v. NLRB*, mem. 113 S.Ct. 2959 (1994).

The Employer did not simply attempt to prevent Ham and her coworkers from engaging in the above-protected concerted activities. Some 3 months later, when off-duty employees attempted to distribute union literature in the employees’ parking lot, the Employer again resorted to conduct which plainly tended to interfere with their Section 7 rights. As found above, Plant Manager Botkin told an employee that they “had to have permission to pass that out.” Supervisor Walls told an employee that she “was not supposed to be on the parking lot”—“to take [her] cards and leave.” The plant security guards similarly told the employees “to take it to the street”—they “could not do that on Company property.” One security guard admonished an employee that she “would not be an employee long if [she] kept that up.” He also followed the employees to a nearby parking lot where he engaged in open surveillance of their protected concerted activities. Such conduct clearly violates the proscriptions of Section 8(a)(1) of the Act as alleged. See *Republic Aviation Corp.*, 324 U.S. 794 (1945); *Sahara Tahoe Hotel*, 292 NLRB 812 (1989); and *Chopp & Co.*, 295 NLRB 1058 (1989).

Counsel for the Employer argues that it “had valid business reasons for prohibiting all solicitation on the Company’s property after hours.” I reject this asserted justification for the Employer’s broad prohibition here as not sufficiently supported by the credible evidence of record. Instead, I find here that the Employer was again attempting to interfere with employee Section 7 activities. See *St. Luke’s Hospital*, 300 NLRB 836 (1990). Further, as noted above, the Employer, in its answer to the complaint, specifically admitted to the agency status of its two security guards. (See G.C. Exhs. 1(i) and (k).) Counsel for Respondent first claimed at the hearing that “that was an error” and denied “agency.” (See Tr. 75 to 77.) I reject counsel for the Employer’s untimely attempt to change this answer and admission relied on by counsel for the General Counsel. In any event, the essentially undisputed evidence of record amply establishes the agency status of the security guards, within the meaning of Section 2(13) of the Act. Finally, as Company Vice President Gilley asserted, “since this incident on June 11” “there’s been no disruption of handbilling” after “we tried to check out the law.” Gilley acknowledged, however, that no effort was made “to explain to the employees that [management] had taken” any corrective or remedial action with respect to employee handbilling in the employees’ parking lot.

#### CONCLUSIONS OF LAW

1. Respondent Employer is an employer engaged in commerce as alleged, and the Charging Party Union is a labor organization as alleged.

2. Respondent Employer’s employees, including employee Lisa Ham, concertedly circulated and signed a petition complaining about a supervisor and conditions of employment. The Employer thereafter enforced its no-solicitation no-distribution rule selectively and disparately against the above employees. The Employer warned, suspended, and discharged employee Ham. The Employer engaged in the above conduct to discourage employees from engaging in protected concerted activities, in violation of Section 8(a)(1) of the Act.

3. Respondent Employer also prohibited its employees from distributing union leaflets in its employees’ parking lot, engaged in surveillance of employee protected concerted activities, and threatened an employee with discharge because of employee protected concerted activities, in further violation of Section 8(a)(1) of the Act.

4. The unfair labor practices found above affect commerce as alleged.

#### REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such conduct and like or related conduct and to post the attached notice. Respondent Employer, having violated Section 8(a)(1) of the Act by unlawfully discharging employee Lisa Ham, will be directed to offer her immediate and full reinstatement to her former job or, in the event her former job no longer exists, to a substantially equivalent job, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of the Employer’s unlawful conduct, by making payment to her of a sum of money equal to that which she normally would have earned from the date of the Employer’s unlawful conduct to the date of its offer of reinstatement, less net earnings during such period, with backpay to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 651 (1977), and interest as provided in *New Horizon’s for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Respondent Employer will also be directed to preserve and, on request, make available to the Board or its agents for examination and copying all payroll records and reports and all other records necessary to determine backpay and compliance with this Decision and Order. And, Respondent Employer will be directed to expunge from its files any references to the unlawful suspension and discharge of employee Ham and notify her in writing that this has been done and that evidence of this disciplinary action will not be used as a basis for future personnel action against her, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

#### ORDER

The Respondent, Brother Industries (U.S.A.), Inc., Bartlett, Tennessee, its officers, agents, successors, and assigns, shall

<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in protected concerted activities under Section 7 of the Act by selectively and disparately enforcing its no-solicitation no-distribution rule against them and by warning, suspending, and discharging an employee in an attempt to discourage the employees from engaging in such protected concerted activities.

(b) Interfering with, restraining, or coercing its employees in the exercise of their right to engage in protected concerted activities under Section 7 of the Act by prohibiting its employees from distributing International Brotherhood of Electrical Workers Local 474's leaflets in its employees' parking lot, engaging in surveillance of employee protected concerted activities, and threatening an employee with discharge because of employee protected concerted activities.

(c) 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 to employee Lisa Ham immediate and full reinstatement to her former job or, in the event her former job no longer exists, to a substantially equivalent job, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of her unlawful suspension and discharge, with interest, as provided in the Board's decision.

(b) 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, as well as all other records necessary and useful in analyzing and computing the amount of backpay under the terms of this Order.

(c) Expunge from its files any references to the unlawful suspension and discharge of employee Ham and notify her in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against her.

(d) Post at its facilities copies of the attached notice marked "Appendix."<sup>12</sup> 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 custom-

<sup>12</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

arily 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.

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 interfere with, restrain, or coerce our employees in the exercise of their right to engage in protected concerted activities under Section 7 of the National Labor Relations Act by selectively and disparately enforcing our no-solicitation no-distribution rule against them and by warning, suspending, and discharging an employee in an attempt to discourage our employees from engaging in such protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to engage in protected concerted activities under Section 7 of the Act by prohibiting our employees from distributing International Brotherhood of Electrical Workers Local 474's leaflets in our employees' parking lot, engaging in surveillance of employee protected concerted activities and threatening an employee with discharge because of employee protected concerted activities.

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 offer employee Lisa Ham immediate and full reinstatement to her former job or, in the event her former job no longer exists, to a substantially equivalent job, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of her unlawful suspension and discharge, with interest.

WE WILL expunge from our files any references to the unlawful suspension and discharge of employee Ham and notify her in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against her.

BROTHER INDUSTRIES (U.S.A.), INC.