

Frick Paper Company, d/b/a Paper Mart and David R. Torres. Case 21-CA-29598

September 20, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On January 20, 1995, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

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

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

1. The judge dismissed complaint allegations that the Respondent violated Section 8(a)(1) by soliciting an employee's resignation because he had engaged in union activities and by threatening an employee with discharge if he solicited employee support for the Union. The General Counsel has excepted to these findings. We find merit in the General Counsel's exceptions.

On August 6, 1993,² the Respondent was advised by several employees that David Torres was talking to employees about the benefits of unionization and soliciting union authorization cards at work. Employees also advised the Respondent that Torres was having an organizational meeting at his home on August 7.

On August 9 the Respondent held two meetings with Torres regarding his soliciting and issued a written warning threatening him with discharge if he continued soliciting. The judge found that the written warning violated Section 8(a)(3).

At the first meeting with Torres, Respondent's president, Marianna Seward, told Torres that she was very concerned that there had been some complaints from

¹The 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.

The Respondent has requested oral argument. This request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

In sec. II.D, par. 7, the judge stated that Supervisor Patrick Briefman prepared an Employee Warning Report dated July 24, when in fact the warning was dated August 24. This error does not affect the outcome of the case.

²All dates are in 1993 unless otherwise indicated.

employees "in connection with union organization" and that he should not solicit employees on company time or company premises. Seward asked Torres if he was unhappy with Paper Mart, and Torres replied that he was happy working there. Seward then asked Torres why he was trying to promote the Union if he liked working there. Torres did not respond. Seward advised Torres that if he was not happy he could seek employment elsewhere, and that the Respondent would help with the "transition out." Seward reminded Torres of several personal favors he had received from the Respondent and stated that these opportunities would be taken away in a union environment. Torres was warned that continued solicitation "would result in further disciplinary actions, up to and including termination."

We find, in the context of the discussion about his soliciting for the Union, that telling Torres he should seek employment elsewhere if he was not happy working for the Respondent implies that Torres' union activities were incompatible with continued employment. We find these statements to be implicit threats of discharge. See *Stoody Co.*, 312 NLRB 1175, 1181 (1993). The Respondent also told Torres that continued solicitation for the Union "would result in further disciplinary actions, up to and including termination." This statement constitutes a threat that interferes with employees' Section 7 rights, in violation of Section 8(a)(1).

2. The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(3) when it discharged Torres on August 30. Although the judge found that the General Counsel "more than sufficiently" established a prima facie case of discrimination, he concluded that the Respondent discharged Torres because it believed he had stolen confidential information. We agree with the General Counsel's exception to this finding.

As mentioned above, on August 9 the Respondent met with Torres twice regarding his soliciting for the Union. During these meetings, the Respondent committed several unfair labor practices, including threatening Torres with discharge and issuing a discriminatory warning.

Torres continued to solicit for the Union. On August 30 the Respondent again met with Torres to discharge him. Seward informed Torres that the Company knew about the union activity and that she was sad he would not cooperate with the Company. After reading a lengthy termination notice, Seward asked Torres if he had anything to say. Torres replied that he did not.

The Respondent has a nondisclosure of wages policy and asks its employees not to disclose their wages to anyone. Seward claims she decided to terminate Torres on August 26 because she believed he had violated this policy by improperly obtaining confidential wage in-

formation and sharing that information with employees. The Respondent reasoned as follows:

- While soliciting support for the Union, Torres mentioned Accounting Supervisor Meza's salary.
- Meza denied informing anyone about her wage increase.
- Seward observed Torres standing outside Human Resource Manager Rheault's office on August 26.³
- Because Meza denied discussing her salary with anyone and because Seward observed Torres outside the office of a manager who kept salary records, Torres must have surreptitiously obtained the wage information from Rheault's office.

Nonetheless, Seward admitted that after she observed Torres standing outside Rheault's office, she entered the office to investigate whether there were any confidential documents on the desk or out in the open. She found none.

The judge found that the General Counsel presented a prima facie case, but that the Respondent had shown it "would have discharged Torres for misuse of obviously confidential, and intrudingly acquired, information . . . even in the absence of protected union activities." We agree with the judge that the General Counsel established a prima facie case, but we do not agree that the Respondent has shown it would have discharged Torres even in the absence of his protected activity.

The Respondent's reliance on Seward's observation of Torres standing outside Rheault's office on August 26 as evidence that Torres must have stolen the information is more suggestive of fabrication than a reasonable belief. That Seward immediately entered the office and found no confidential information in view further weakens the Respondent's claim that it reasonably believed Torres stole the information from Rheault's office. In short, we do not believe it is reasonable to infer from Torres' presence outside Rheault's office that he entered the office, picked up Rheault's note pad, and paged through it to find the wage information.

In arguing that Torres must have stolen the information, the Respondent emphasizes Meza's denial that she discussed her wage increase with anyone. We accept that the judge's credibility finding means that Meza told the Respondent she did not disclose her wage increase to anyone. Rheault, however, admitted that the Respondent is aware that employees reveal their compensation to other employees. Further, the

³Rheault kept a personal note pad about all personnel matters, including information concerning pay raises. She sometimes carried the note pad with her when she left the office and sometimes left it on her desk.

Respondent did not inquire of Torres how he obtained the information. Given the knowledge that employees routinely breached the nondisclosure policy, we do not believe it was reasonable for the Respondent to conclude, based on Meza's denial without seeking Torres' explanation, that he obtained the wage information surreptitiously.⁴

Finally, we find that the Respondent's defense is further undermined by the fact that its treatment of Torres deviated from past practice. In a previous instance of suspected pilferage, the Respondent hired a private investigator who observed the suspected employee taking merchandise from the warehouse to his car. The Respondent discharged this employee based on the investigator's report. Because the employee was a friend of two other employees, the Respondent initially suspected them. During questioning, one of the friends denied involvement and was not terminated; the other did not deny involvement and was terminated.

In the previous theft case, the Respondent hired an investigator to substantiate its suspicion before taking any personnel action. In the instant case, the Respondent conducted no investigation of its purported suspicion that Torres had stolen confidential information before discharging him. Further, in the previous instance where the Respondent had less conclusive grounds for its suspicions, the Respondent interviewed the employees before acting. In the instant case, we do not believe the record supports the Respondent's claim "that Torres was given an opportunity at the termination meeting to present his side of the story." Rather, we find that the Respondent decided to discharge Torres before meeting with him, that Torres learned about this allegation for the first time at the August 30 meeting, and that the Respondent at that meeting simply informed Torres he was terminated.⁵

Because the record does not show that the Respondent had a reasonable or honest belief that Torres stole confidential wage information and because the Respondent indicated that it would not have discharged Torres had he not engaged in such conduct,⁶ we find

⁴The fact that the record does not disclose how Torres obtained the information does not mean we must find that he stole it if we accept the judge's crediting of Meza's denial. As we noted, the credibility finding means we must accept that Meza told the Respondent she did not discuss her wage increase. That finding, however, does not necessarily mean that the Respondent's action based on the information it obtained from Meza was reasonable.

⁵The record does not support the judge's finding that Torres was "invited" to explain himself in the termination interview. In fact, Torres was asked if he had "anything to say" only after Seward read to him the two-page termination notice.

⁶Although the Respondent claims that Torres continued to harass employees after August 9, we need not decide whether the purported harassment alone justified termination. Seward testified that if Torres had not given out confidential wage information to other employees, he would not have been discharged.

that the Respondent did not meet its burden of showing that it would have terminated Torres absent his protected activity. Accordingly, we conclude that Torres was unlawfully discharged. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

AMENDED CONCLUSIONS OF LAW

Add the following as Conclusions of Law 6–8.

“6. By threatening an employee with discharge if he solicited employee support for the Union, the Respondent violated Section 8(a)(1) of the Act.

“7. By soliciting an employee’s resignation because he engaged in union activities and other protected concerted activities, the Respondent violated Section 8(a)(1) of the Act.

“8. By discharging an employee because he assisted the Union and engaged in protected concerted activities, the Respondent violated Section 8(a)(3) and (1) of the Act.”

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, we shall order it to cease and desist. We also shall order the Respondent to offer David Torres 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 to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We also shall order the Respondent to remove from Torres’ files any reference to the unlawful warning and discharge. Finally, we shall order the Respondent to rescind the no-solicitation rule, which the judge found unlawful.

ORDER

The National Labor Relations Board orders that the Respondent, Frick Paper Company, d/b/a Paper Mart, City of Commerce, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling an employee that it will not allow the employee to solicit support for the Union on company time or company premises.

(b) Threatening an employee with discharge if he solicited employee support for the Union.

(c) Soliciting an employee’s resignation because he engaged in union activities and other protected concerted activities.

(d) Reducing an overly broad no-solicitation rule to writing which could subject an employee to disciplinary action if he continued to solicit support for the Union on company time or company premises.

(e) Threatening an employee with discharge if he solicited support for the Union, by issuing a written warning to this effect.

(f) Discharging an employee because he assisted the Union and engaged in protected concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

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

(a) Offer David Torres 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 amended remedy section of the decision.

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

(c) Rescind the overly broad no-solicitation rule which could subject an employee to disciplinary action if he solicited support for the Union on company time or company premises.

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

(e) Post at its facilities in City of Commerce, California, copies of the attached notice marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 21, 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.

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

⁷If 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.”

CHAIRMAN GOULD, concurring.

I concur in my colleagues' findings and conclusions in this case that a violation has been established under the standards set forth in *Wright Line*. I write separately to set forth my view as to the appropriate mode of analysis for examining causality in dual-motive cases, such as this one, alleging unlawful discrimination—that is, the relationship between the employees' protected activities and actions on the part of their employer which detrimentally affect their employment.

Under *Wright Line*, once the General Counsel has met his burden of proving that protected union activity was a substantial or motivating factor in an adverse action taken by the employer against an employee, the burden shifts to the employer to prove that the alleged adverse action would have taken place even in the absence of the protected union activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). If the employer is able to carry this burden, the Board will find that the employer has not violated the Act. The Supreme Court approved this approach in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983), where the Court held that the Board's *Wright Line* shifting allocation of the burden of proof was "clearly reasonable." However, in *Transportation Management*, the Supreme Court also stated that it would have been "plainly rational and acceptable" for the Board to construe the Act so "that to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity." Id. at 398–399. Later, in that same case, the Supreme Court stated it "assume[d] that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer." Id. at 402. Consistent with this Supreme Court analysis, I would find unlawful discrimination in any case in which the General Counsel proves by a preponderance of evidence that an employer's adverse action against an employee because of his protected activity is based in whole or in part on antiunion animus. Further, I would find that an employer's showing that the adverse action would have occurred in any event would go *only* to the remedy issued against the employer.¹ Thus, I would overrule

¹I have set forth similar views in the context of Title VII of the Civil Rights Act of 1964. See William B. Gould IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 Tul. L. Rev. 1485, 1502 (1990); William B. Gould IV, *The Law and Politics of Race: The Civil Rights Act of 1991*, 44 LAB. L.J. 323, 337 (1993). These views were specifically adopted by Congress in the Civil Rights Act of

those portions of *Wright Line* that are inconsistent with this view.

Applying the above, I agree with the judge that here the General Counsel has proven that protected activity was a motivating factor in the discharge of David R. Torres. That finding is sufficient to establish that Respondent violated Section 8(a)(3) and (1) of the act when it discharged Torres. I next turn to the remedy. I agree with my colleagues, for the reasons they set forth, that the Respondent did not establish that it would have terminated Torres absent his protected activity. Therefore, the Board's usual remedy, as provided for by my colleagues, is appropriate.²

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

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

WE WILL NOT tell our employees that we will not allow them to solicit support for the Union on company time or company premises.

WE WILL NOT threaten our employees with discharge if they solicit employee support for the Union.

WE WILL NOT solicit employees' resignations because they engage in union activities and other protected concerted activities.

1991. Civil Rights Act of 1991, § 107, 42 U.S.C.A. § 2000e-2(m) and § 2000e-5(g)(2)(B) (West 1994).

I would not apply this mode of analysis for examining causality in a pretext case. As the Supreme Court stated in *Transportation Management*, 462 U.S. at 400 fn. 5, a pretext case involves "the situation in which the issue is whether either illegal or legal motives, but not both, [are] the 'true' motives behind the decision." In pretext cases, there is no shifting of burdens. Once the administrative law judge or the Board makes the credibility determination of which story is the believable one, the inquiry is over.

²I recognize that there is not, at present, a Board majority to overrule the portions of *Wright Line* which are inconsistent with my view. Until there is such a Board majority, I will apply the *Wright Line* analysis. Further, having fully set forth my views, I do not intend to adopt the practice of citing this opinion in future cases. This should not, however, be taken as indicating that I no longer adhere to the view set forth above.

WE WILL NOT reduce an overly broad no-solicitation rule to writing which could subject employees to disciplinary action if they continue to solicit support for the Union on company time or company premises.

WE WILL NOT threaten our employees with discharge if they solicit support for the Union, by issuing written warnings to this effect.

WE WILL NOT discharge our employees because they assist the Union and engage in 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 David Torres 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 WE WILL make him whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

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

WE WILL rescind the overly broad no-solicitation rule which could subject our employees to disciplinary action if they solicited support for the Union on company time or company premises.

FRICK PAPER COMPANY D/B/A PAPER MART

Frank M. Wagner, for the General Counsel.

Teresa R. Tracy (Baker & Hostetler), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried in Los Angeles, California, on March 3 and 18, 1994, then concluding on April 4, 1994. The charge was filed by David R. Torres on August 31, 1993 (amended October 13, 1993),¹ and the complaint was issued October 14. There are independent issues as to whether Frick Paper Company, d/b/a Paper Mart (the Respondent), violated Section 8(a)(1) of the National Labor Relations Act by allegedly threatening an employee and otherwise, however the primary issue of the case is whether Respondent discharged David R. Torres, after first issuing a written warning to him, because of his concerted activity in assisting Bottlers, Beer Drivers, Salesmen and Helpers, Brewers, Maltsters, Yeast Workers and Clerical Employees, Local 896, International Brotherhood of Teamsters, AFL-CIO (Teamsters or the Union), and thus discriminated against him to discourage membership in

¹ All dates and named months hereafter are in 1993 unless otherwise indicated.

a labor organization in violation of Section 8(a)(3) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a partnership with its office and place of business in City of Commerce, California, where it is engaged in distribution of industrial packaging products. In the conduct of such business operations, Respondent annually derives gross revenues in excess of \$500,000, while purchasing and receiving goods and materials at its facility in excess of \$50,000 directly from points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

In mid-1993, Torres made contact with the Teamsters organizer who would guide him in steps toward unionizing his Employer. Torres was quickly identified within the workplace as an in-house organizer, and then soon interviewed by officials on the subject. Contemporaneously the Employer came to harbor dissatisfaction with Torres, contrasting with his uneventfully successful progress during 2 years of employment.

A precipitating situation arose in which Respondent believed that Torres' ostensibly tolerated organizing activity was both adversely affecting his work, and had led to prohibited leaks of information about the amount of pay various employees earned. Additionally, those employer officials closest to all interconnected happenings believed that Torres had falsely denied being the revealer of confidentially held wage scales. Torres was then discharged at a point when his openly known union activities had been underway for about a month.

B. Evidence

1. Introduction

Torres had been hired in July 1991 as a night-warehouse restocker. In March 1992, he went to day shift with a 50-cent-per-hour pay increase, and in November of that year was promoted to lead will call puller with a weekly \$20 attendance bonus attached to the change. A periodic written performance evaluation in April 1992 by Router and later Traffic Manager Larry Dickey rated Torres as comfortably above average for an employee at the time. The following year Torres was comparably rated above average by then-Assistant Warehouse Manager Patrick Briefman.

Respondent is a family enterprise and now a partnership of five persons surnamed Frick. The business culture emphasizes successful growth from its founding 70 years ago, an aversion to unionism, and management's intention to recognize worthy employees, coupled with an expectation that efficient and loyal work would be shown in return. The written

statement of company policy forbids unauthorized solicitation "on Company premises," phrased as "circulation of petitions, or passing out handbills." Respondent employs about 50 persons, with Marianna Seward as its president during material times and Doreen Rheault, the manager of human resources.

2. The 8(a)(1) allegations

Torres interspersed an initial employee meeting at his home on Saturday, August 7 with cautiously obtained Teamsters authorization cards which he solicited at work. This on-premises activity was promptly reported to management, following which Torres was called into a meeting with Seward, Rheault, and Briefman on Monday, August 9, and issued a written warning about soliciting employees and passing out literature "on company time or on the company premises." Torres testified that in the course of this meeting Seward threatened to discharge him for soliciting other employees, solicited his resignation from the Company, threatened to close the facility if employees selected the Union, and intimated that Torres' wife, also an employee there, would lose her job under a Union because of her child care obligations. The making of such utterances is denied by Seward and Rheault, with some indirectness of expression, corroborates that the utterances were not made. Additionally, however, Respondent's officials piqued Torres about the need to turn to a union in terms of his employment. Seward stated plainly that his actions were like a personal affront, and Rheault, with Seward's tacit condonation, scoldingly said that if he was as happy working at Respondent as he professed that it would not seem he would try "to promote" the Union. These comments were cast in terms of three specific policy objectives of importance to management; they being (a) an intendedly enlightened problem solving policy, (b) an outplacement assistance policy, and (c) a nonharassment policy with open communication between involved persons as a foundation. In this latter regard Rheault stated that employees were complaining of Torres "disrupting" them at work, a point of information that left him seemingly puzzled to learn. The warning memorandum termed Torres an employee with unresolved grievances who had gone to the Union with them, however, upon prompting from Torres reference to the Union was formally changed to the words "different alternative."

3. The 8(a)(3) allegations

When company truckdrivers' potential hourly rate changes were used by Torres to persuade fellow employees that Teamsters representation would lead to better pay, the employer concluded that he had somehow obtained and released confidential information. The leak also involved a reported pay increase for the accounting supervisor, as told by Torres to Accounts Payable Clerk Chris Jalteco. Respondent's officials had by then also received reports from several employees that Torres had been soliciting them to support or align themselves with the Union, with the solicitation occurring while they were actively engaged in the performance of work duties. Furthermore, past observations by Seward of Torres' unexplained presence near to or at the threshold of Rheault's private office at times she was not there, lent support to a growing belief by Respondent's officials that he had surreptitiously obtained confidential information concerning pay

change discussions or commitments by and between Rheault and company employees. Torres unconvincingly denied having done so.

On a combined number of reasons Torres was discharged on August 30. The warning notice issued to Torres on August 9 is alleged as a previous and associated violation of Section 8(a)(3). The termination was carried out at a meeting in Seward's office with Rheault and supervisors present. A summarizing discharge memorandum recounted background events and termed Torres "disrupting [employees]" so as to make him a "negative force within the organization" and because of "pilfering confidential information"

C. Credibility

I discredit the testimony of Torres, whose statements were often fanciful and seemingly contrived. I credit the testimony of Seward, Rheault, and Briefman, each of whom testified in a particularly candid manner. I also credit Respondent's witnesses Linda Alvarez, Jalteco, Rebecca Hernandez, and Rosemary Martin. In further terms of credibility assessment affecting accepted facts of a case, I was particularly impressed with the authentic-seeming assertions of Monica Meza, and fully credit her denial of being in any way a source of divulging the pay increase assurances she had negotiated with Rheault for again temporarily assuming higher duties of an accounting manager.

D. Discussion

As to paragraph 7 of the complaint, I have found no factual support for its several allegations. Respecting paragraph 8 the doctrine of *Our Way, Inc.*, 268 NLRB 394 (1983), is applicable. Respondent's conduct enunciated an overly broad union solicitation policy, which was presumptively invalid by its prohibition of employees from engaging in union activities on their own time. *Grimmway Farms*, 314 NLRB 73 (1994). Respondent's somewhat vague rule of its written 1989 company policy was unlawfully applied to Torres on August 9, both by Rheault's verbal prohibitions and by the memorandum she authored. There was a total absence of any assurance to Torres that his union activities, to the extent engaged in during nonworking time, could be carried out on the Employer's premises. On this basis I find paragraphs 8(b), (c), and (d) are each supported with adequate proof that an unlawful prohibition on employee rights to solicit for a union was imposed. I do not, however, find comparable support as to paragraph 8(a), wherein General Counsel has alleged Rheault created the impression that Torres' union activities were under surveillance by Respondent. The mere conversational reference to an employer's awareness is not tantamount to appearing to have spied in the manner this area of Board doctrine requires. Neither the context or seriousness of Rheault's remarks warrant a finding of violation as to this branch of the case. Cf. *M. K. Morse Co.*, 302 NLRB 924, 931 (1991). As to this allegation that an impression of surveillance had been created, I also note *Page Avjet, Inc.*, 278 NLRB 444 (1986); and *Asociacion Hospital del Maestro*, 291 NLRB 198 (1988). These cases made the point that a human resources functionary's remark about having heard about union activities "falls short" of an intimation that they are under surveillance, and in the second instance that a supervisor's mention of having "received a report"

about an employee having solicited authorization cards during worktime was not unlawful. I believe the reasoning in both instances is persuasive in the resolution of this comparable issue here.

Under *Wright Line*, 251 NLRB 1083 (1980), aff'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Co.*, 462 U.S. 393 (1993), General Counsel has the initial burden to prove that union or other protected concerted activity was a motivating factor in an employer's decision to take adverse action against an employee. If General Counsel meets this burden, the employer then has the burden to show it would have taken the same action even in the absence of the protected activity. The *Wright Line* analysis is generated by the chief discharge allegation in paragraph 6 of the complaint.

I find initially that General Counsel has met his burden of showing how protected union activity was a motivating factor in this Employer's actions. Respondent plainly associated Torres' discharge with his protected activity while on company premises. There is no convincing record of progressive discipline against Torres on grounds of inattention, failure to maintain his work area, or unauthorized use of company telephones. I find that the several warehouse meeting notes placed in evidence are remote in time or nonspecific as to Torres versus others of the crew. Additionally, a July 23 "Employee Warning Report" prepared by Day Warehouse Supervisor Mike Aitkens was only mildly critical of Torres in contemplating his "more constructive manner" of task fulfillment, but was also not presented to Torres who correctly claimed never to have seen it. What is shown, therefore, is a situation in which a relatively satisfactory employee is discharged soon after commencing union activities, coupled with evidence that officials of Respondent viewed such activities with both personal and institutional dismay. General Counsel has more than sufficiently met a burden of proof that protected union activity was a motivating factor in the discharge of Torres.

An analysis under *Wright Line* then turns to the question of whether this employer has met its consequential burden of proof that the termination would notwithstanding have taken place. As a close question on the facts, and permissible inferences that may be drawn from them, I believe Respondent has met this burden of proof. At the outset it should be emphasized that Respondent's aversion to unionism is akin to an 8(c) right of expressing views. This contrasts with more determined and flagrant opposition by an employer to the specter of unionism, a showing of which permits the factor of animus to be inferred. While Torres was inappropriately reined in soon after Respondent's officials learned about his activity, this does not show that Respondent embarked on a deliberate course of creating a pretext for his termination.

By the credible testimony of certain rank-and-file witnesses it is shown how Torres repeatedly exploited his status as principal in-house organizer for the Union. Alvarez, a former employee and thus presumptively a more disinterested witness, confirmed a memorandum of Rheault that as early as August 6 Torres had telephoned her from a point within the facility while she was actively engaged in her data processing duties. Her confirmation established both that the call was to solicit support for the Union, and that Torres was himself then in an apparent working time setting by reason of calling from the UPS telephone located in a work area of

the premises. In a second instance Alvarez had gone to the "will call" area for a pickup of invoices, when Torres left the forklift he had been routinely operating to approach her and urge immediate support for the Union in attaining its organizing goals. A third occasion testified to by Alvarez occurred when she described Torres appearing at her desk as his further "hound[ing]" of her about the Union, and with his home address slipped in among business papers should she be willing to attend an after hours meeting.

This pattern of conduct in fulfilling Torres' efforts concerning the Union was also shown from the credible testimony of Hernandez. She is employed as Respondent's UPS shipping clerk, and described being repeatedly interrupted by Torres as she worked. These interruptions were on practically a daily basis to seek support for the Union. As to her observations of Torres' diligence regarding his own job, Hernandez also credibly testified that on two occasions in mid-1993 he ignored customer needs while engaged in personal telephoning or simply sitting in delay of what needed to be done.

As the month of August passed several factors turned the essence of what was affecting Torres away from his being little more than an annoyance in terms of protected union activities to suddenly becoming a person of diminished work attitude and one rather slyly bent on undermining his Employer's legitimate interests. Respondent continued to accord him attentions however, as when on August 13, Rheault listened concernedly to his report of ill treatment by fellow employee Ruben Herrera. This tends to show that Respondent had normal inclination to retain Torres, and invites the inference that it was only later discovered conduct which actually caused Respondent to act as it did. Significantly an Employee Warning Report dated July 24 and prepared by Briefman recorded a plain instance of attempted deception by Torres in regard to work attendance. Not only was this warning one that cautioned about a future termination, but it was also acknowledged in writing by Torres.

The most prominent evidence in establishing Respondent's meeting of its requisite burden of proof is the reasoning process used by Seward as she reflected on what she had seen as Torres repeatedly loitered near to where Rheault had unprotected notes of her wage change plans with employees. When Meza denied, as I find to be credibly true, that she had released any information about her own intended pay change, this left Respondent free to assume the leak was intentionally given by Torres. Jalteco had also reported him to have divulged wage change information regarding truck-drivers, and Respondent considers that an infraction warranting termination. Respondent invited Torres to explain himself in the termination interview, but he declined to give any responses that might have given the Employer cause in the course of its action. As Briefman candidly conceded, job performance was not a factor in Respondent's decision to discharge, however the confidentiality standards expected of company employees were too fully understood, and, more importantly, Torres could only have acquired the information for dissemination by unacceptably clandestine means. General Counsel cites *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), and related cases in arguing that prohibiting discussion by employees about earnings violated Section 8(a)(1), and that axiomatically discharge of an employee for violating an unlawful rule is itself an unfair labor practice.

However here Respondent has only sought employee cooperation among employees in not discussing their *own* earnings; moreover the policy was not the grounds for the infraction which it viewed Torres to have committed. I conclude from the above that Respondent would have discharged Torres for misuse of obviously confidential, and intrudingly acquired, information, and that this action would have been taken even in the absence of protected union activities. Notably, too, the Board has held that even where an employer has relied on an invalid rule in undertaking discharge of an employee, this does not necessarily affect the shifting burden of proof analysis required under *Wright Line*. See *MTD Products*, 310 NLRB 733 (1993). On this basis I do not find the 8(a)(3) allegation regarding Torres' discharge to be supported from the evidence.

CONCLUSIONS OF LAW

1. Frick Paper Company, d/b/a Paper Mart is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Bottlers, Beer Drivers, Salesmen and Helpers, Brewers, Maltsters, Yeast Workers and Clerical Employees, Local 896, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling an employee that it would not allow the employee to solicit support for the Union on company time or company premises, Respondent violated Section 8(a)(1) of the Act.

4. By threatening an employee with discharge if he solicited employee support for the Union, and by the issuance of a written memorandum to this effect, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By reducing an overly broad no solicitation rule to writing, which could subject an employee to discipline, Respondent violated Section 8(a)(1) 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.

In the fashioning of required affirmative action, I shall order Respondent to post an appropriate notice, but shall not order it to rescind the written warning notice to Torres because I have found his subsequent discharge from employment not to be unlawful.

[Recommended Order omitted from publication.]