

Kenworth Truck Company, Inc. and Mark Johnson.
Case 9–CA–35631

January 29, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On November 3, 1998, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kenworth Truck Company, Inc., Chillicothe, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Teresa Donnelly, Esq., for the General Counsel.

Mark S. Shiffman, Esq. (Jackson, Lewis, Schnitzler), of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Chillicothe, Ohio, on May 27 and 28, 1998. The charge was filed on January 28, 1998,¹ and the complaint issued on March 3.

The complaint, as amended, alleges that the Respondent maintained an overly broad no-solicitation rule, engaged in surveillance of union activities, and solicited employees to report on union activities in violation of Section 8(a)(1) of the National Labor Relations Act. Also, it is alleged to have dis-

¹ 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.

The Respondent excepts to the judge's decision, asserting that it evidences bias and prejudice. On our full consideration of the entire record in this proceeding, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis and discussion of the evidence.

We correct the following error by the judge which does not affect our decision. The judge incorrectly found that Mark Johnson personally enlisted support for a union from about "300 employees." However, the record shows that Johnson talked to "several workers" about the Paperworkers Union and "probably more than 100 employees" about the Auto Workers Union (UAW).

Member Brame does not rely on the last sentence of sec. II.A.(1) of the judge's decision: "Although not hindered in that regard, Johnson was aware of Respondent's published and often repeated policy of being 'union free.'"

¹ Unless otherwise indicated, pertinent dates in this decision are in 1997.

criminatorily fired employee Mark Johnson in violation of Section 8(a)(3) and (1) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporate subdivision of PACCAR, Inc. (Seattle, Washington) employs approximately 1400 workers in manufacturing heavy duty truck tractors at a plant in Chillicothe, Ohio, from which it annually sells and ships vehicles valued in excess of \$50,000 directly to points outside the State of Ohio. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all pertinent times, Charging Party Mark Johnson has been a dues paying member of the International Brotherhood of Carpenters and Joiners, AFL–CIO, Local 437. He worked for the Respondent for approximately 2 years prior to his alleged unlawful discharge on December 5. During that time, his job entailed installing dashboard panels, including electrical connections, in cabs of tractors. Although he performed well and had a perfect attendance record, he engaged in activities that set him apart from other employees and were not of a kind to enhance his standing with management. For instance:

(1) Alone among the work force, Johnson wore hats and T-shirts emblazoned with union insignia while on the job; and he did so nearly every day throughout his employment. Although not hindered in that regard, Johnson was aware of the Respondent's published and often repeated policy of being "union free."

(2) On October 31, 1996, Johnson made a formal request that a (named) candidate for Congress be allowed to tour the plant and solicit votes. He was called into the office on the following day where Human Relations Manager Dan Peters denied the request, telling him PACCAR had a policy of not allowing plant tours by politicians during election years. When Johnson pointed out that a (named) candidate for president had been allowed to tour a PACCAR facility in Nashville earlier in the month, Peters became angry, asked whether pursuing the matter was worth his job, advised him "to forget about . . . [the congressional candidate] . . . [and] the Carpenters [Union] and keep . . . [your] mind on building trucks and nothing else during worktime." Peters also verbally counseled Johnson "to refrain from further activities" contrary to corporate policy.²

Undeterred, Johnson came to work next morning with a supply of T-shirts bearing the candidate's name and allegedly distributed them and verbally promoted the candidacy in the plant during worktime. On the following morning he was called to the office where Peters handed him two separate documents: a "written counseling" and a "last and final written counseling." In each, and apparently for separate incidents on the previous day, he was cited for violating company policy as stated in his

² The Respondent's progressive discipline program begins with "verbal counseling" followed by written counseling, last and final written counseling, plant manager warning, and termination.

employee handbook³ by “soliciting political information . . . on normal worktime . . . and disrupting the workplace.”⁴

(3) After work on a number of days in early August, and in full view of the Respondent’s employees driving by, Johnston joined a Teamsters picket line outside a United Parcel Service facility located about a half mile down the road from Respondent’s plant. The strike ended on August 19 and on the following morning Johnson made available in the locker area a stack of fliers announcing that the Teamsters had won all of their major goals. These were taken up by a number of employees.

(4) Also in August on an occasion when company CEO Ed Caudill addressed approximately 400 employees, Johnson (wearing a union hat) seated himself in the front row and, to the obvious discomfort of Peters who was seated on the dais, proceeded to champion the cause of temporary employees by speaking up and saying, among other things, that it was a “crime” they earned only \$7 an hour and received no vacation or medical benefits.

(5) Over a several week period in September and October, Johnson contacted about 300 employees in an effort to gain plantwide support for a union organization campaign. This elicited a management response in the form of meetings in mid-October with groups of employees at which supervisors read a memo from Plant Manager Ryland containing, among other things, this comment: “Recently, some of you approached us about a potential union organizing drive” followed by a restatement of its union-free policy and a paragraph reading:

Under the law, you have the right to join or not to join a union. If you are presented with a union card, read it carefully. Signing a union card is an authorization to have the union be your bargaining agent, despite what the union may tell you. It may even result in the union representing you without a vote. If you are presented with a card, you have a legal right to refuse to sign it. If anyone for any reason should try to harass you, please report it to me or . . . [Peters] and we will see that the harassment stops immediately.

B. Termination

On Friday, October 10, Johnson was seriously injured while riding as a passenger in an automobile. Rendered unconscious, he was taken to the emergency room of a local hospital where he was treated for a fractured skull, facial cuts a broken nose, a neck injury and loss of blood. He returned home with 16 stitches over his eye and wearing a neck brace. On Monday

³ The handbook, on p. 57, provides:

Solicitation of one employee by another while either person is on working time is prohibited. The only exceptions are the annual United Way Drive and the U.S. Savings Bond Drive.

Solicitation of one employee by another on nonworking time for various reasons is permitted as follows:

- a. Charitable purposes with prior approval of the plant manager.
- b. Gift collection with prior approval of the department head on superintendent.
- c. Sale of employee personal items through an internal classified advertising system complying with local bulletin board rules.

Employee distribution of literature of any kind is limited to nonworking areas and nonworking time.

Nonemployee solicitation or distribution for any reason is prohibited on company property.

⁴ The lawfulness of the disciplinary warnings is not challenged in the complaint or otherwise before me, no charge having been filed within the period allowed in Sec. 10(b) of the Act.

morning he phoned and reported his situation to Diane McDonald, an occupational nurse employed at the Respondent’s plant. She referred him for further treatment to a local facility (the Franklin Health Clinic) used by the Company in conjunction with its self-insured short term disability leave (STD) program.

Johnson went to the clinic a number of times and on four occasions drove 200 miles round trip to Cincinnati to an otolaryngologist (doctor Zipfel) recommended by the clinic—all the while keeping nurse McDonald advised of his progress. Doctor Zipfel operated on his nose on October 21 and removed nose packing on October 23 and a nose cast on October 29. At that time doctor Zipfel told him he could return to work but warned him against the possibility of nose bleed and advised against strenuous activity. Then, after several unsuccessful attempts to reach doctor Zipfel, Johnson spoke to a clinic nurse at about 8 a.m. on Friday October 31. When he told her he felt able to do his normal job she told him to go ahead but, like doctor Zipfel, cautioned him “not to overdo anything.”

A few minutes later Johnson called the plant and advised nurse McDonald that he was cleared to return and asked, “Do you want me to come in today?” She replied, “Come in Monday, honey.”⁵

Shortly thereafter Johnson received a call in which Union Steward Jim McBrayer from another company asked his help in an AFL–CIO-sponsored campaign to repeal a new law which reduced benefits available to workers under Ohio’s workmen’s compensation system.⁶ Specifically, he asked Johnson to distribute handbills to workers as they left the Respondent’s plant that day. Johnson agreed and, in turn, persuaded two fellow employees (Mark Brewster and Ron Beard) to aid in the distribution effort.

At 3 p.m. Johnson, McBrayer, and a member of a local postal worker’s union (Partee) all wearing jackets and caps emblazoned with union insignia, positioned themselves on public property outside plant exits and began to handbill departing employees as they stopped at traffic controls.

Within 10 minutes Plant Manager Ryland, accompanied by Peters,⁷ approached Johnson and inquired as to what he was doing. Johnson handed him a handbill. After reading it, Ryland attempted to return the document, stating “This wasn’t approved by Kenworth . . . and I don’t want it.” When Johnson refused the proffer, Ryland pointed to Johnson’s pickup truck which was parked on the gravel berm of the road, told him it was on private property, and directed him to remove it. Johnson again declined, observing that it was located within 30 feet of highway center and therefore within the County right-of-way. Ryland opted not to pursue the matter and left the scene.

Peters remained outside near the handbillers until they left at about 4 p.m. During that period, he accused them (repeatedly and sometime shouting) of trespassing and ordered them to

⁵ I find likely and have credited Johnson’s account of this conversation. McDonald’s testimony that he stated he could return on Monday and her “No.” to the nuanced question “Did he at any point say to you that he was released to work that day” fall short of a denial.

⁶ Among other things, the law eliminated coverage for carpal tunnel syndrome, and reduced wage loss benefits from 200 to 26 weeks.

⁷ When they were hired in 1993 and 1994, respectively, Human Relations Manager Peters and his assistant (Cheryl Barlage) were each specifically directed to reduce costs of the STD program and workmen’s compensation; and, as Peters testified, they had considerable success in that regard.

stand on the road itself.⁸ At times he appended a strident “I’ll not tell you again!” Finding himself ignored, Peters used a cellular phone to call “corporate legal” in Seattle, the local sheriff’s office,⁹ and his assistant (Barlage), ordering her to ascertain Johnson’s disability restrictions. On one occasion Peters pointed out to McBrayer that a handbill had blown onto company property and inquired if he was going to pick up the “litter.” When McBrayer replied, “Yes, if you give me permission,” Peters declined.

Johnson returned on Monday morning and reported to nurse McDonald. She had him fill out an application for disability benefits under the STDL program.¹⁰ She also inquired if he wanted a light duty slip. Johnson declined, feeling capable of doing his regular job, i.e., installing dashboard panels.

On reporting to work, his supervisor, John Flesher, without inquiring about his health or offering any explanation, assigned him to one of the most physically demanding jobs in the cab assembly department—pulling the main wiring harness through small apertures in the dash board. When Johnson expressed reservations and asked for his usual job, Flesher told him to “to clarify” his physical status.

Returning to the medical section, Johnson explained what happened to Nurse McDonald who promptly called Flesher, and on hanging up commented, “I don’t know why John is acting this way.” She then sent him home after arranging an appointment on the following day with the doctor (Lutmer) who had treated him at the clinic.

Johnson reported to work again on November 5. McDonald gave him a light-duty slip based on a faxed Report of Medical Evaluation form sent the previous day wherein Doctor Lutmer, on examining Johnson, limited his work assignments until November 24 as follows: no lifting over 10 pounds, no pushing or pulling, and no working shoulder level or above.

Johnson was given his regular job installing dash board panels and performed satisfactorily until close to the end of his shift on Friday, December 5. At that time Supervisor Flesher, aware that Johnson was about to be terminated, came by and said, “Get your union hat and jacket and come with me to the administration building.”¹¹

In the corporate office with Peters and Flesher present, Ryland read a two-page typewritten letter wherein Johnson was informed of his termination for “being involved in an activity that was outside your physician prescribed activity restrictions.” In particular, Johnson was cited for “walking, leaning into cars, and bending forward to distribute literature” outside the plant on October 31. The letter, after reciting:

This course of conduct is inconsistent with the terms of the disability program which requires compliance to qualify and obtain benefits. It is also conduct which flaunts your disregard

⁸ After their shift ended, employees Beard and Brewster left the plant intending to help the handbillers but soon changed their minds. Beard explains, “Well, we were out on the parking lot and saw . . . Dan Peters out there . . . having a disagreement with them. And we decided we really did not want to get involved in it.”

⁹ On arrival, the police declined to interfere apparently agreeing that trespassing had not occurred. The Respondent did not attempt at trial to establish that the handbilling occurred on company property.

¹⁰ Under the program Johnson was entitled to his base salary for the period during which he was medically disabled.

¹¹ Although Flesher denies making any reference to “union hat and jacket,” I have credited Johnson’s account as more probable in the circumstances.

for the disability benefits program to the hundreds of employees who were in the parking lot . . . Your behavior is detrimental to employees morale. Accordingly, due to your misconduct, discipline is appropriate.

goes on to cite as additional justification for termination the two warnings given to Johnson on November 1, 1996, as well as his having driven recklessly in the plant parking lot on October 4, 1997.¹²

C. Respondent’s Evidence

Human Relations Manager Peters states that when he stood by the gates on October 31 his only concern was to see that the handbillers did not impede traffic flowing out of the plant. He does not claim that any disruption occurred.

Also, and despite language in the termination letter, he claims that the sole reason for Johnson’s discharge was his abuse of the STDL program on October 31 by failing to observe assertedly then applicable restrictions on his physical activities imposed by doctor Zipfel. Further, he asserts that the violation was so serious that it warranted departure from the plant manager warning step of the Respondent’s progressive disciplinary system.

Peters’ conclusion that Johnson was under severe physical restrictions on Friday, October 31, derives from the following sequence of events:

As noted, Peters, while standing amid the handbillers at the plant exit on the afternoon of October 31 and using his cellular phone, directed his staff to ascertain Johnson’s status vis-a-vis physical restrictions; and in response to their inquiry the local clinic on Saturday, November 1, sent a fax in which doctor Beatrice states that Johnson was able to return to work on Monday, November 3, with no limitations.

Not satisfied with that response or with a report faxed by the clinic on November 4 wherein doctor Lutmer, based on an examination of Johnson on that date, approved his immediate return with light duty for a 3-week period, Peters directed the staff to pursue the matter with Johnson’s Cincinnati based otolaryngologist, doctor Zipfel. They received a faxed handwritten response from him later that day as follows:

Mark had nasal surgery on 10–21–97. He was unable to work that week—total disability. Not able to lift anything over 5–10 lb., no straining, no being near chemicals or ducts. Also post-operatively he was given narcotics for pain, [because of] which he should not drive while taking these or do any type of job while under the influence of these medications.

Thereafter Peters’ staff wrote to doctor Zipfel asking that he complete an attached Report of Medical Evaluation form that contains a listing of 29 physical limitation each preceded by a checkoff box. As faxed back on November 11, the form has check marks before 18 limitations, including ones bearing the legend, “No standing or walking [blank] hours per day,” and “No repeated bending on squatting.” However, doctor Zipfel added a notation stating that Johnson was able return to work on Monday, October 27 with no restrictions.

¹² When Manager Sue Wilburn called him to the office in early October and advised him that an employee had complained about a speeding burgundy Camaro, Johnson denied involvement, pointed out that there were other burgundy Camaros, and asked who had complained? She declined to provide any information; and Johnson was never admonished or given a warning over the incident.

The latter addition elicited another call to doctor Zipfel's secretary wherein Peters' representative, Cindy, asked for "clarification" of the return date, pointing out that from "all indications we had received [i.e., the fax (fn. 11) from doctor Beatrice]" Johnson was released for return and in fact had returned on November 3. Grasping the import of that information [fn. 15], she immediately sent another fax containing a handwritten note, purportedly signed by doctor Zipfel,¹³ which changed the return date to the Respondent had in its possession documents which, taken together, facially show that when Johnson handbilled on October 31 he was restricted, among other things, from standing, walking, bending and squatting—limitations which it used and now cites as justification for his termination.¹⁴

As examples of the Respondent's active and nondiscriminatory oversight of its STDL program, Peters cites disciplines meted out to three other employees, as follows:

Harold Beasley was discharged on February 4, 1994 for "continued absence." An internal company memo cites as additional reasons "you engaged in competitive auto racing in the summer of 1993 against medical advice while at the same time claiming light duty work [May 18 to July 13] or company disability benefits [Aug. 2 to Aug. 21]."

Beverly Alley was discharged on August 18, 1995. Her termination letter, in pertinent part, states: "since you have made no effort to authenticate your [disability claim and] ongoing absence from work you have discontinued your relationship with the company."

Jackie Trego was discharged on March 3, 1998 for not reporting to work at the end of a 2-week disability period ordered by her doctor. Her termination letter reads in significant part: "since you did not report to work on Wednesday, February 25 or provide to the company medical verification that you remained disabled, or have an authorized leave, you have indicated willful disregard for company policies and procedures. . . . As a result of your failure . . . the company is acknowledging your voluntary termination of employment . . ."

Discussion

Solicitation Policy. As set forth in the handbook issued to new employees, the Respondent maintains a rule (see fn. 3, above) which, while allowing solicitation of one employee by another on nonworking time "for various reasons," specifies only three and with respect to each requires prior approval of supervisors or, in the case of advertisements, compliance with bulletin board rules. Accordingly, the rule on its face is overly broad and therefore unlawful since it is readily susceptible of being interpreted as barring employees from engaging in union activity and a whole range of other concerted activities protected under the Act during their free time.¹⁵

The Respondent's claim that only a "technical violation" occurred (i.e., one not warranting a remedy) because "in practice, employees understood that solicitation during nonworking time

was permitted" is unsubstantiated. Indeed, Johnson was cited for violating the rule in an earlier disciplinary action. In any event, the Respondent continues to maintain it in effect despite being put on notice by the complaint in this proceeding that the rule was being challenged as unlawful.¹⁶

Solicitation to Report Union Activity. Prompted by its awareness of an incipient union organizing campaign—one in which Johnson personally enlisted support from about 300 employees—the Respondent, on October 17 (2 weeks before the handbilling incident) held plantwide meetings of employees at which supervisors read a letter from Plant Manager Ryland. The same letter also was concurrently mailed to the entire complement of employees. Therein management took the occasion to reiterate at some length its "union-free" policy. In particular, the letter includes a paragraph reading:

Under the law, you have the right to join or not to join a union. If you are presented with a union card, read it carefully. Signing a union card is an authorization to have the union be your bargaining agent, despite what the union may tell you. It may even result in the union representing you without a vote. If you are presented with a card, you have a legal right to refuse to sign it. *If anyone for any reason should try to harass you, please report it to me or . . . [Peters] and we will see that the harassment stops immediately* [emphasis added].

Broadly worded instructions similar to those underlined above have been found unlawful.¹⁷ In those cases, the Board has held that employer statements which request employees to report "abusive treatment" or "pressure" are unlawful because they have the "potential dual effect of encouraging employees to report to . . . [employers] the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors and their protected organizational activities."¹⁸ Here the instructions, given as they were in the context of a current and ongoing preorganizational effort, convey the proscribed chilling effect. Accordingly, they violate Section 8(a)(1), as alleged.

Surveillance. The question presented is whether Human Relations Manager Peters engaged in unlawful surveillance by standing outside the plant and in close proximity to Johnson and other union members as they handbilled departing employees assertedly to insure that no disruption of traffic occurred. The handbilling took place on public property, there was no disruption, and it went on for approximately 1 hour with Peters remaining in close proximity to the handbillers for virtually the entire time. The handbilling was intended to generate support for an AFL-CIO sponsored effort to repeal by referendum a statute that substantially reduced benefits available to employees throughout Ohio.

In *Eastex*,¹⁹ the Court held that in-plant distribution of a union newsletter by employees in nonworking areas on nonworking time in which employees were urged: (1) to write their leg-

¹³ The Zipfel "signature" on this note (R. 2j) differs significantly from that on R. 2i.

¹⁴ Acting consistently with its termination rationale, the Respondent used the "Zipfel correspondence" as justification for paying full STDL benefits to Johnson through and including October 31. Johnson was not aware of that correspondence or its contents prior to trial.

¹⁵ *Our Way, Inc.*, 238 NLRB 209 (1978); *Brunswick Corp.*, 282 NLRB 794, 795 (1987); and *MTD Products*, 310 NLRB 733 (1993).

¹⁶ *Wire Products Mfg. Corp.*, 326 NLRB No. 62 (1998), citing *Alamo Cement Co.*, 277 NLRB 1031, 1037 (1985), and *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1127 fn. 1(1978).

¹⁷ *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979); *Bil-Mar Foods of Ohio, Inc.*, 255 NLRB 1254 (1981); and *Arcata Graphics*, 304 NLRB 541 (1991).

¹⁸ See *Arcata*, supra.

¹⁹ *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

islators to oppose incorporation of a state “right to work” statute into their constitution and (2) to vote against opponents of an increase in the minimum wage, had sufficient relationship to employees’ interests as to come within the “mutual aid or protection” clause in Section 7 of the Act and, therefore, was a protected activity. In so ruling, the Court considered and expressly rejected employer claims that the literature was political in nature and unrelated to a specific dispute with employees within an employer’s control.

The Respondent, however, argues that *Motorola*²⁰ should apply. There, a circuit court of appeals denied enforcement of the portion of a decision²¹ wherein the Board, citing *Eastex*, found that distribution by employees of membership applications of a special interest group (Citizens Advocating the Protection of Privacy, CAPP) together with its suggested messages to city council members requesting a ban on random drug testing in the workplace, was within the scope of the “mutual aid or protection” clause. The circuit court disagreed and held the distribution unprotected because its purpose was to advance the agenda of an outside single issue political group. I find the case inapposite. Here, the handbilling was a union sponsored effort in opposition to a law having a significant and direct bearing on a basic concern of employees as employees.

That the handbilling was accomplished by three individuals, only one of whom was an employee of the Respondent, does not render the distribution unprotected. Section 2(3) of the Act provides that “the term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer.” In *Eastex*, the Court made it clear that this section:

was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own. In recognition of this intent, the Board and the courts long have held that the “mutual aid or protection” clause encompasses such activity.²²

I conclude that Johnson was engaged in protected, concerted activity and, since the handbilling overtly was accomplished by union members for a union sponsored purpose, it also is a protected union activity.

I also find that the Respondent’s human relations manager, Peters, engaged in unlawful surveillance.

In general where, as here, employees are conducting protected activities openly, open observation of such activities by an employer is not unlawful.²³ However, if the observation goes beyond casual and becomes unduly intrusive a violation occurs.²⁴

Here, Human Relations Manager Peters, aware of the union objective, positioned himself near the plant gate in close proximity to the handbillers shortly after it began. Although no disruption of traffic flow or other disorder occurred, he re-

mained there until the handbillers left approximately 1 hour later. During that period, and in full view of departing employees, he repeatedly (and erroneously) accused them of trespassing and, sometimes shouting, ordered them off company property, punctuating that directive with a threat “I’ll not tell you again!”

In these circumstances, I find Peters went beyond unobtrusive observation of openly conducted protected activity. His conduct was coercive in that it patently tended to discourage employees from either joining the distribution effort²⁵ or receiving the tendered literature. Accordingly, it constitutes surveillance in violation of Section 8(a)(1), as alleged.

Termination. I regard as incredible and entirely pretextual the Respondent’s claim that Johnson was fired solely because “[by] standing, walking, leaning into cars, and bending forward to distribute literature” he violated physical restrictions imposed by his doctor, thereby abusing the companies short term disability leave program (STDL) and “flaunt[ing] your disregard for the disability benefits program to the hundreds of employees who were in the parking lot.”

There is no indication that other employees, including Peters, knew that Johnson was “disabled” on October 31.²⁶ Indeed, Peters made no attempt to apprise Johnson of the “Zipfel correspondence” at any time prior to or during the termination interview nor did he or anyone else in management ever ask Johnson whether he knew he was under any physical disability on October 31. Further, a fair review of that correspondence makes plain that doctor Zipfel (or more likely his office staff) changed the return date from October 27 to November 3 only after being told that otherwise Johnson would not be eligible for disability pay during the interim.

Also, and even if Johnson was under some disability on October 31, neither he nor any other employee had ever been informed by rule or otherwise that non observance (as opposed to falsification) of restrictions was cause for any discipline let alone termination. In this regard, the Respondent fails in its attempt to negate a discriminatory motive. It cites only three instances of other employees being terminated in connection with disability claims. In each instance, however, the employee was discharged for failing to provide proof of disability or for not returning to work after a period of disability, or both.

On this record the real reason for Johnson’s termination is not hard to find. On being hired as human relations manager, Peters had been specifically directed to reduce expenses due to employee disabilities. Having had considerable success in doing so, he can hardly have viewed with disinterest a union sponsored effort to repeal a workmen’s’ compensation effort law that significantly reduced employer costs. But he went beyond mere disapproval and is shown to have expressed his opposition by engaging in surveillance of the protected union handbilling effort. Frustrated, he directed his attention over the next 10 days to finding a reason to punish the only employee to participate in the handbilling—Johnson, a person well known

²⁰ *NLRB v. Motorola, Inc.*, 991 F.2d 278 (5th Cir. 1993).

²¹ *Motorola, Inc.*, 305 NLRB 580 (1991).

²² For the same reason an employee’s act of participating in or honoring a picket line at another employer’s facility is protected. *Business Services by Manpower*, 272 NLRB 827 (1984); *Anaconda Insulation Co.*, 298 NLRB 1105 (1990); and *Whayne Supply Co.*, 314 NLRB 393, 400 (1994).

²³ *Roadway Package System*, 302 NLRB 961 (1991), citing with approval *Southwire Co.*, 277 NLRB 377 (1985) and *Porta Systems Corporation*, 238 NLRB 192 (1978).

²⁴ *Nashville Plastic Products*, 313 NLRB 462, 464 (1993); and *Carry Cos. of Illinois*, 311 NLRB 1058 fn. 2, 1073 (1993);

²⁵ Although a showing that employees were actually coerced is not necessary (*Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1534 fn. 8 (11th Cir. 1987)), I have found that two employees reneged on a promise to join the handbilling effort after they observed Peters’ performance at the plant gates.

²⁶ As to the asserted restrictions, Peters’ assistant, Barlage, admitted under cross-examination that there was nothing in company files showing that doctor Zipfel or anyone else had said Johnson could not “walk, stand, lean, bend or operate a motor vehicle as of October 31.”

within the Company to be a union activist and a probable leader in the recent effort to obtain support for a union organizing campaign. The "Zipfel correspondence" provided a reason, one heretofore found pretextual.

Further indication that antiunion animus motivated Johnson's termination is seen in: the Respondent's continued maintenance of a patently unlawful "no-solicitation" rule despite being put on notice by the complaint in this proceeding that the rule was being challenged as barring employees from engaging in union activity and a whole range of other concerted activities protected under the Act during their free time; its unlawful act in soliciting employees to report on union activity; and Flesher's comment on summoning Johnson to his termination interview: "Get your union hat and jacket and come with me to the administration building." Flesher was Johnson's immediate boss and an admitted supervisor and agent within the meaning of Section 2(11) and (13). He was privy to the fact that that Johnson was about to be terminated by upper management; and an inference is warranted, and taken, that the comment reflected the true reason for that action.

In light of my opinion that the Respondent's reason for terminating Johnson was pretextual, this is not a dual-motive case under *Wright Line*.²⁷ If it were to be treated as such, I would find the justification advanced by the Respondent does not demonstrate that Johnson, absent his protected union and otherwise concerted activities, would have been subjected to the discipline he received.

CONCLUSION OF LAW

The Respondent, Kenworth, is shown to have violated Section 8(1) and (3) of the Act in the particulars and for the reasons stated above, and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having discriminatorily discharged an employee, the Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

ORDER

The Respondent, Kenworth Truck Company, Inc., Chillicothe, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

²⁷ *Wright Line*, 251 NLRB 1083 (1980), enf'd., 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

²⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Maintaining or enforcing any solicitation rule which bars employees from engaging in protected union and other concerted activity in appropriate areas during their free time.

(b) Soliciting employees to report to management the protected union and other concerted activity of other employees.

(c) Hindering or preventing employees from engaging in protected union or other concerted activities through coercive surveillance or otherwise.

(d) Discharging or otherwise discriminating against employees for engaging in protected union or other concerted activities.

(e) 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) Within 14 days from the date of this Order, offer Mark Johnson 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.

(b) Make Mark Johnson whole for any loss of earnings and other benefits suffered as a result of the discrimination practiced against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a 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) Within 14 days after service by the Region, post at its facility in Chillicothe, Ohio, copies of the attached notice marked "Appendix."²⁹ Copies of the notice, on forms provided by the Regional Director for Region 9, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 1997.

(f) Within 21 days after service by the Region file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting what steps the Respondent has taken to comply.

²⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT maintain or enforce any solicitation rule which bars you from engaging in protected union and other concerted activity in appropriate areas during your free time.

WE WILL NOT solicit employees to report to management the protected union and other concerted activity of other employees.

WE WILL NOT hinder or prevent you from engaging in protected union or other concerted activities through coercive surveillance or otherwise.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected union or other concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Mark Johnson 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.

WE WILL make Mark Johnson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Mark Johnson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

KENWORTH TRUCK COMPANY, INC.