

**Gallup, Inc. and United Steelworkers of America,
AFL-CIO-CLC.** Case 16-CA-20442

June 27, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND
WALSH

On March 7, 2001, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Respondent filed a reply 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 briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified³ and set forth in full below.

1. The judge found that by promulgating new rules in its interviewing policies and procedures manual on May 29, 2000, in response to the Union's campaign at the Respondent's Austin, Texas facility, the Respondent violated Section 8(a)(1) of the Act. The new rules in the Respondent's manual prohibited taping, by audio or video, activities at work; prohibited solicitation and distribution in the workplace at any time; prohibited posting nonbusiness materials in working areas and common areas of the building; limited posting of nonbusiness materials to the breakroom bulletin board provided the notice was dated and had been approved by a manager and provided the notice would be removed after 1 month; prohibited using the Internet for anything other than

business; and prohibited using e-mail to solicit for non-business matters.

In agreeing with the judge's finding of a violation, we emphasize the fact that the Respondent promulgated and enforced the above-mentioned rules immediately after discovering the Union's organizing efforts. As the Fifth Circuit Court of Appeals has stated, an employer's "promulgation of a [new rule] upon the commencement of a union organizational campaign is strong evidence of discriminatory intent," although the employer may demonstrate that imposing the new rule "was justified because the union campaign brought about substantial work disruption." *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046, 1049 (5th Cir. 1979), *enfg.* 232 NLRB 409 (1977). The record contains no evidence that the Union's organizing efforts interfered with work in any way.⁴ Indeed, the judge specifically found that the "Respondent did not change its rules and implement its new manual because of production problems" at the Austin Center. Accordingly, we agree that the Respondent violated Section 8(a)(1) by promulgating the new rules.

2. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by temporarily closing its Austin, Texas facility, from May 25-30, 2000, because of the Union's organizing efforts. The judge also found that the posting of a memorandum on May 26, 2000, informing employees that the facility was temporarily closed because of the union campaign was an independent violation of Section 8(a)(1).

In its exceptions, the Respondent argues, *inter alia*, that it was error for the judge to find the independent 8(a)(1) violation because the complaint did not allege the memorandum to be an unfair labor practice. We find no merit in this contention.

It is well established that the Board may find and remedy an unfair labor practice not specifically alleged in the complaint "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). Here, the necessary connection is clear: the subject matter of the complaint concerned the Respondent's response to the unionization effort, including the closing of the Austin facility, and the memorandum in issue explained the Respondent's reasons for the closing. Further, the circumstances surrounding the posting of the memorandum were fully litigated at the hearing. Accordingly, we conclude that the *Pergament* test has been satisfied and that the judge

¹ The General Counsel filed a motion to strike the Respondent's exceptions and supporting brief on the ground that they do not comply with the Board's Rules and Regulations. We find that the Respondent's exceptions and supporting brief substantially comply with our requirements, and we therefore deny the General Counsel's motion.

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

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

³ In addition to the modifications discussed below, we shall modify the recommended Order to track more closely the violations the judge found. We shall also change the date in par. 2(b) of the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). Finally, we shall modify the judge's recommended Order to require the Respondent to rescind the rules it discriminatorily promulgated. See *Youville Health Care Center*, 326 NLRB 495 (1998).

⁴ We do not rely on the judge's alternative analysis under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U. S. 989 (1982).

properly found the posting of the memorandum to constitute a violation of Section 8(a)(1).

The General Counsel excepts to the judge's failure to include this posting violation in his conclusions of law. We find merit in the exception and shall modify the judge's conclusions of law and recommended Order accordingly.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3:

"3. The Respondent has violated Section 8(a)(1) by engaging in the following conduct because of its employees' union activities: changing its rule to prohibit personal use of its copy machine; changing its rule to prohibit posting notices except in the break room after dating the notice and securing supervisory approval; posting a notice to employees on May 26, 2000, explaining that the Center would be temporarily closed because of its employees' union activities; issuing a new Interviewing Policies And Procedures Manual on May 29, 2000; telling employees they cannot distribute union materials inside the building, but outside the Center; telling employees they cannot distribute union literature in the front bulletin board area; telling employees that distribution of union literature is prohibited in work areas and that union literature may be distributed only in the break room; telling employees that they may not offer union literature to any employee who has previously declined union literature; telling employees that distribution of union literature in work areas is not permissible and that employees may be charged with harassment for offering literature to anyone who previously declined union literature; and posting a USAA Realty notice prohibiting solicitation outside its Center."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Gallup, Inc., Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing its rule to prohibit personal use of its copy machine, because of its employees' union activities.

(b) Changing its rule to prohibit posting notices except in the break room after dating the notice and securing supervisory approval, because of its employees' union activities.

(c) Posting a notice to employees explaining that the Austin, Texas Center, would be temporarily closed, because of its employees' union activities.

(d) Issuing a new interviewing policies and procedures manual, because of its employees' union activities.

(e) Telling employees they cannot distribute union materials inside the building, but outside the Center, because of its employees' union activities.

(f) Telling employees they cannot distribute union literature in the front bulletin board area, because of its employees' union activities.

(g) Telling employees that distribution of union literature is prohibited in work areas and that union literature may be distributed only in the breakroom, because of its employees' union activities.

(h) Telling employees they may not offer union literature to any employee who has previously declined union literature, because of its employees' union activities.

(i) Telling employees that they may be charged with harassment for offering literature to anyone who previously declined union literature, because of its employees' union activities.

(j) Posting a USAA Realty notice prohibiting solicitation inside and outside of the building, because of its employees' union activities.

(k) Temporarily closing its facility, because of its employees' union activities.

(l) Issuing disciplinary action to its employees, because of its employees' union activities.

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

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

(a) Rescind the following discriminatorily promulgated rules: the rule prohibiting personal use of its copy machine; the rule prohibiting posting except in the break room after dating the notice and securing supervisory approval; the rule prohibiting taping, by audio or video, activities at work; the rule prohibiting solicitation and distribution in the workplace at any time; the rule prohibiting posting nonbusiness materials in working areas and common areas of the building; the rule limiting posting of nonbusiness materials to the break room bulletin board provided the notice was dated and had been approved by a manager and provided the notice would be removed after 1 month; the rule prohibiting using the Internet for anything other than business; and the rule prohibiting using e-mail to solicit for nonbusiness matters.

(b) Within 14 days from the date of this Order, remove from its files all reference to its unlawful closure of its Center from May 25-30, 2000, and its unlawful warning issued to William Lewandoski on June 9, 2000, because of its employees' union activities, and within 3 days thereafter notify William Lewandoski and all employees involved in its unlawful closure, in writing, that this has

been done and that those unlawful actions will not be used against any of those employees in any way.

(c) Within 14 days after service by the Region, post at its facility in Austin, Texas, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 May 23, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director, Region 16, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that 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.

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 change our rules to prohibit personal use of our copy machine, because of our employees' union activities.

WE WILL NOT change our rules to prohibit posting notices except in the break room after dating the notice

⁵ 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."

and securing supervisory approval, because of our employees' union activities.

WE WILL NOT post notices to employees explaining that our Austin, Texas Center, will be temporarily closed, because of our employees' union activities.

WE WILL NOT issue a new Interviewing Policies and Procedures Manual, because of our employees' union activities.

WE WILL NOT tell employees they cannot distribute union materials inside the building, but outside the Center, because of our employees' union activities.

WE WILL NOT tell employees they cannot distribute union literature in the front bulletin board area, because of our employees' union activities.

WE WILL NOT tell employees that distribution of union literature is prohibited in work areas and that union literature may be distributed only in the breakroom, because of our employees' union activities.

WE WILL NOT tell employees they may not offer union literature to any employee who has previously declined union literature, because of our employees' union activities.

WE WILL NOT tell employees that they may be charged with harassment for offering literature to anyone who previously declined union literature, because of our employees' union activities.

WE WILL NOT post a USAA Realty notice prohibiting solicitation outside our Center, because of our employees' union activities.

WE WILL NOT temporarily close our facility, because of our employees' union activities.

WE WILL NOT issue disciplinary action to our employees, because of our employees' union activities.

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

WE WILL rescind the following discriminatorily promulgated rules: the rule prohibiting personal use of our copy machine; the rule prohibiting posting except in the break room after dating and securing supervisory approval on the notice; the rule prohibiting taping, by audio or video, activities at work; the rule prohibiting solicitation and distribution in the workplace at any time; the rule prohibiting posting nonbusiness materials in working areas and common areas of the building; the rule limiting posting of nonbusiness materials to the breakroom bulletin board provided the notice was dated and had been approved by a manager and provided the notice would be removed after 1 month; the rule prohibiting using the Internet for anything other than business; and the rule prohibiting using e-mail to solicit for nonbusiness matters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful May 25–30, 2000, closure of the Center and the unlawful June 9, 2000 warning issued to William Lewandoski, and WE WILL, within 3 days thereafter, notify Lewandoski and all our Austin Center employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

GALLUP, INC.

Linda Reeder, Esq., for the General Counsel.

William A. Harding, Esq. and *Jack L. Shultz, Esq.*, of Lincoln, Nebraska, for the Respondent.

DECISION

STATEMENT OF CASE

PARGEN ROBERTSON, Administrative Law Judge. A hearing was held in Austin, Texas, on December 18 and 19, 2000. Respondent and the General Counsel were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent and the General Counsel filed briefs.¹ I have considered the entire record and briefs. At material times Respondent has been a Delaware corporation with a place of business² in Austin, Texas, where it has been engaged in market research and consulting services for various companies; during the 12 months before the complaint issued, in conducting those business operations, Respondent performed services valued in excess of \$50,000 in States other than Texas; and it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). The Charging Party (the Union) has been a labor organization at material times within the meaning of Section 2(5) of the Act. Patrick Bogart, Viet Nguyen, Nancy Moses,³ and Jean Timmerman have been supervisors and agents of Respondent at material times.⁴

The Record Evidence

The complaint alleges that Respondent made unlawful rule changes including solicitation and distribution of union materials, and a layoff, because of its employees' union organizing activities. The General Counsel's witnesses included former employee Adam Fischer and employees Brent Malkus, William Lewandoski, Sandra Griffin, Kristal Cain, Ariel Coleman, and Shannon Mouser. The employees are interviewers and trackers. Both conduct opinion polls and market research surveys. Trackers are interviewers who work on the same project for a period of time. Employees do not adhere to a specific schedule but commit to work a designated number of hours during a specific period of time. Adam Fischer last worked as a tracker.

¹ Respondent's motion to file a reply brief is denied. The Board's rules and regulations do not provide for reply briefs.

² The Austin facility known as the Austin Interviewing Center is frequently referred to as the "Center."

³ Nancy Moses is sometime referred to as Nancy Arredondo.

⁴ All the above-mentioned matters were admitted in Respondent's answer.

On a typical workday he would start at the front bulletin board where the news of the day was posted. Other postings included information about projects, quotas, team meetings, etc. Sometimes there would be nonbusiness materials posted. Someone worked with a theater and there would be theatrical notices on the board. One woman was cooking and selling food at Ann's Kitchen. She posted an advertisement along with prices. There was a stack of flyers from Sears. Below the front board there were plastic paper holders and there was an advertisement having something to do with Disney's Magic Kingdom. After consulting the board, Fischer would routinely go to one of the computer terminals near the managers' office and sign in to his assigned project. He would then go to his computer and log on, put on his headset and start the computer dialing phone numbers. While waiting for a response from an eligible respondent to the phone dialings, he would read, draw, do collages, play board games with his immediate neighbors, and talk to people in the area. They talked about anything including things that were not work related such as politics, religion, and anything else.

Brent Malkus was the employee that contacted the Union and he did so on February 29, 2000. There were six or so meetings with employees about the Union from February 29 until May 31, 2000. Malkus was paged to Patrick Bogart's office around 7:30 p.m. on March 6. Bogart told Malkus to shut the door and then Bogart said that he had heard that Malkus was saying some very negative things. He asked Malkus if there was anything he was disgruntled about. At one point Malkus said that he would like to get back to work and Bogart said no, that Malkus was getting paid for that time. At the end of the conversation Malkus asked if he was skating on thin ice because of the conversation and Bogart assured him that he wasn't. That meeting lasted for 98 minutes.⁵ That was the first closed door meeting Malkus had with Bogart. Bogart did not deny Malkus' testimony about that meeting.

Adam Fischer testified that he first met with the Union and other employees on May 15. The union meetings have continued since May 15. Attendance continued to grow at the union meetings until after the Memorial Day weekend shutdown of the Center. After the shutdown attendance dropped off.

Patrick Bogart identified a notice he posted on the break room bulletin board in the second or third week of May (R. Exh. 16). The reason for its posting was to clean up the board, which was looking trashy. He wanted the bulletin board to look clean and include only material that was current.

Respondent posted a May 23 notice on the front bulletin board about use of the copying machine and posting of notices. The notice said that the copy machine was for Gallup use only and that personal notices could not be posted without a supervisor's approval. Before that it was commonplace for employees to use the copy machine for personal and nonbusiness matters. Lead Supervisor Patrick Bogart admitted that he posted a copy of news on May 25 that included a reference to the use of the copy machine (R. Exh. 14), but Bogart denied that represented

⁵ Malkus was able to recall the exact time because he noted when he closed down his computer after being paged and when he started on the computer after the meeting.

a change of policy. He testified that Respondent's Exhibit 15 had been posted above the copy machine from before implementation of the new policy manual. Bogart testified that on all occasions when employees asked him to use the copy machine for personal reasons, he denied their requests. Bogart denied that he ever denied a request to post something on the break room bulletin board. He recalled that on one or two occasions he called in employees after learning they had used the copy machine for personal reasons, and told those employees they could not do that. Sometimes party invitations would be copied on the machine and dropped off at employees' desks. People would also post things on their cubicles. Lead Supervisor Bogart admitted that employees posted materials in their cubicles before introduction of the new policy manual. Those included newspaper articles about the U.S. presidential election campaign. There were materials posted by employees in the break room bulletin board and there was no requirement that an employee needed a supervisor's permission to post any of those matters. Before the May 23 notice, employees solicited and distributed literature for nonwork related matters. Malkus openly campaigned for the Green Party Presidential candidate in view of supervisors and nothing was said to him. He even solicited Supervisor Nancy Moses. Moses was ineligible to sign a petition for the Green Party candidate because she had voted in the Democratic or Republican elections, and Malkus asked if it was okay if he solicited other employees. Moses said that it was no problem. There was no prohibition against posting for nonbusiness matters and all types of things were posted on all the posting areas. Those included ads for cars, candy bars, Girl Scout cookies, and others. Patrick Bogart testified that he did enforce a no-distribution rule before May 2000. In 1999 he received a complaint that employee Dayana Sanabria had been passing out a quiz on the work floor. Bogart told Sanabria that it was not appropriate for her to distribute nonworking material at work. On an earlier occasion he was told that Tracy Malasko was passing out party invitations and that she had used the copy machine. Bogart told Malasko that she could not do that. On another occasion Cory Barrow passed out materials and may have used the copy machine. Bogart told Barrow that he could not do that and he told Barrow to pick up the materials that he had already passed out. Bogart testified that the 1998 policies (R. Exh. 40) regarding use of computers and the Internet are no different than the policies contained in the manual effective May 29, 2000.

Brent Malkus testified that before May 23 he made copies for personal use even in open view of supervisors and the only thing said was to the effect of don't abuse the privilege of using the copy machine. No one had ever said that employees were prohibited from personal use of the copy machine. Adam Fischer noticed that after May 23 postings on the front bulletin board continued to include the menus from Ann's Kitchen and the ads for the Disney's Magic Kingdom. Fischer mentioned the Disney's ad to Patrick Bogart on June 6 but the ads were still there the first week in July.

Patrick Bogart testified the Disney material was posted because it came from one of Respondent's clients (i.e., Disney), which it had received from its corporate headquarters. The Sears materials were also provided by a client—Sears. As to

some of the other postings the Center had a number of different committees. One was called a community builders committee, which used contributions from employees for community affairs including community theater. In the case of community theater the community builders committee purchased tickets for the community theater, which were available free to employees. By that means the committee helped both employees and the community theater. As to news articles, Respondent provided a small incentive to employees for bringing in articles that mentioned Gallup. Only news articles that mentioned Gallup were posted according to Bogart.

William Lewandoski,⁶ Sandra Griffin, and Shannon Mouser testified that the employees were scheduled to attend a forum⁷ around 6 p.m. on May 25. The forum was canceled around 5:15 p.m. and around 5:30 p.m. the computers went down. Around 5:45 p.m. all employees were told to leave the building and that each one of them would be paid for the entire time each was scheduled to work that day. That had never happened before. The employees had never been told to leave and that they would be paid for the full scheduled time. Routinely, when the computers went down, the employees were told to wait and then were paid for that part of the time they waited for the computers.⁸ After the announcement on May 25, managers came out and directed the evacuation of the employees. Sharon Warner asked Patrick Bogart why they didn't go ahead and hold the forum. Bogart replied no because they were leaving the building. Lewandoski and other employees returned to the Center the next day expecting to work but the Center continued to be shut down. There was a notice posted on the Center door. The employees returned for work on Tuesday (May 30) after the Memorial Day holiday and a new interviewing manual (GC Exh. 5) was on each employee's desk.

Adam Fischer and several other union organizing committee members met at the Center, May 26, 2000, to speak to coworkers about the ongoing union campaign. When Fischer arrived he saw a notice on the door to the Center (GC Exh. 3). Fischer then spoke with coworkers and distributed two pieces of union literature. He taped a copy of each piece of literature next to the elevator on the first floor. He left between 5–6 p.m.. Fischer returned to the Center on May 27. He noticed the two pieces of literature he had posted near the elevator had been removed so he posted two more. He also distributed union literature that day. He next returned on May 30 when the Center reopened for business. There was a memo⁹ on the front

⁶ Lewandoski has worked for Respondent for 3-½ years.

⁷ Meetings of employees conducted by management.

⁸ The Center had closed on earlier occasions such as for holidays and because of computer problems. Routinely the employees were told to "hang tight" while they tried to bring the computers back up. That lasted from 15 to 45 minutes.

⁹ The memo stated:

INTEROFFICE MEMORANDUM
TO: OPERATIONS
SUBJECT: AUSTIN INTERVIEWING CENTER
DATE: MAY 26, 2000

Last night a blip occurred on the system that caused all interviewing centers to go down momentarily. Although most centers were back on line within minutes, the Austin Interviewing Center

door regarding why the Center had closed from May 26–30, 2000. That notice was posted when Fischer arrived at 4 p.m. but, it had been removed when he left for dinner around 6 p.m.. It was reposted on June 9 along with a memo of questions and answers from a June 6 forum. The employees were given a new rulebook for interviewers on May 30 (GC Exh. 5). Before the new rule book, employees were permitted to make audio recordings in the workplace; to use specific computers at the Center for internet and e-mail for nonbusiness purposes; to engage in posting and solicitation of nonbusiness related matters without it being approved by a supervisor; and there was no rule against offering another employee something that employee had previously declined.

Sharon Warner distributed antiunion leaflets after Respondent distributed the new manuals on May 30. Warner went from desk to desk in the work area passing out antiunion items. The items included buttons that said “Union No” with a check. Warner asked employees to take the buttons and wear them to a mandatory forum¹⁰ that night to show solidarity against the Union. Warner was also asking for money to cover the cost of the buttons. Warner testified but she did not deny that she had gone around in the work area distributing antiunion materials.

Bogart identified Respondent’s Exhibit 71 as an employee corrective action form awarded to Brent Malkus on May 31, 2000, after Sharon Warner reported that Malkus was raising his finger to the intercom as Bogart was making announcements. Malkus denied to Bogart that he had been making the alleged gestures. Sharon Warner testified that she saw Brent Markus raise his middle finger in a defamatory sign in the direction of the intercom as Patrick Bogart was making an announcement. She reported that incident to Bogart.

Fischer distributed union literature outside the Center on June 2. Supervisor Viet Nguyen talked with Fischer in the Center. He told Fischer that he had checked with other supervisors and that it was okay to distribute literature outside but not inside the building where the Center was located. Nguyen testified about his June 2 conversation with Fischer. Nguyen phoned another supervisor and then told Fischer that he could pass out flyers outside the building but he could not pass them out in the common areas inside the building. Nguyen testified that he told Fischer that he could pass out flyers in the breakroom. On June 6 there was a fax posted on the doors from the front and back into the Center (GC Exh. 2).¹¹ Fischer went to

Supervisor Nancy Moses and asked her where it was permissible to distribute nonbusiness literature. Moses said it could be distributed only in the breakroom. He also talked to Patrick Bogart that day in the break room. Fischer along with Stephen Nelson, then Ariel Colman and Shannon Mouser, was handing out union literature in the break room between 4–4:30 p.m. Sandra Griffin and Kristal Cain were also passing out union literature. Shannon Mouser had not actually distributed any literature. She was scheduled to relieve Ariel Colman and Adam Fischer distributing the union literature. Sandra Griffin, Kristal Cain, and Ariel Colman testified that they were distributing union literature as well as Adam Fischer and Beth Gonnell. Patrick Bogart came up and asked them to come into his office. Bogart was angry and pointed at Mouser and said that he had three people in the last 5 minutes complain that they were harassing them. Bogart said that in the rule book if somebody said they’re not interested, it would constitute harassment to approach that employee again. Mouser asked how she would know if the particular employee had been approached and Bogart said that was for her to find out. She asked Bogart for a list of employees so they could go over the list and make sure not to contact anyone a second time but Bogart said no list would be given to the union committee. Bogart said they had been accused of verbal harassment because they had passed Erma some union literature and Erma stated that if she had known it was union literature she would not have taken it. Bogart said they shouldn’t have been passing out literature in the front because that was a working area. The employees argued that it was not a working area because employees were expected to read the bulletin board on their own time. Adam Fischer said they did not want to interfere with the Center’s business and they would comply with its rules.

Late on June 6, around 6 p.m. Fischer and Ariel Colman spoke to Bogart in Bogart’s office. Fischer pointed out that posting had been permitted such as the Disney’s ads on the front bulletin board and Bogart said that he would look into it. Fischer and Colman complained about abusive conduct including threats to union committee people from Sharon Warner. Also on June 6, Kristal Cain saw employee Sharon Warner going throughout the workroom selling antiunion buttons. Sharon Warner testified that she received two verbal warnings on June 6 (R. Exhs. 87–88) over confrontations regarding the Union with Colman and Fischer. After Ariel Colman’s meeting with Patrick Bogart on June 6, he and Adam Fischer went to Bogart’s office to discuss other employees distributing literature in the workplace. They filed a complaint over Sharon Warner distributing antiunion buttons in the workplace but nothing happened regarding the complaint. Bogart testified that he did not see Sharon Warner soliciting antiunion materials

was not brought back up. The Austin Interviewing Center will be closed for the weekend and will reopen on Tuesday, May 30, 2000. Interviewers will be paid their hourly average for those hours that they were scheduled over the weekend. Trackers will be paid their hourly average based on the number of hours they had remaining for the week.

We have been proactively working on putting our policies and procedures in writing over the last year. Quite candidly, we had heard rumblings of a union organizing campaign and wanted to have all of our policies and procedures in writing. Therefore, the Austin Interviewing Center will remain closed until Tuesday, May 30, 2000, to give us the time necessary to assemble our policies in writing and have them in place nationwide effective Monday, May 29, 2000.

¹⁰ A meeting of employees called by Respondent.

¹¹ The fax stated:

NOTICE OF BUILDING POLICY

Please be advised that building policy for one La Costa Office Building strictly prohibits soliciting of any nature. This policy would include handing out or posting handbills, flyers, or other materials, or direct solicitation to individuals, anywhere on the premises inside or outside the building. “No Solicitation” signage is posted on the premises. Failure to comply with this policy constitutes trespassing and is subject to penalties provided therein.

and he denied that either Ariel Colman or any other employee, complained to him about Sharon Warner soliciting antiunion materials.

In mid-June while Coleman was handing a piece of literature to Stephen Nelson near Shannon Mouser's desk, Patrick Bogart told them they were in violation of the work rules. Nelson told Bogart that he had requested the literature and Bogart said that was still a violation of the rules and they would have to do it in the breakroom. Before the new rule book issued, employees were permitted to exchange papers on the workroom floor.

Paula Boyd is the senior property manager for USAA. USAA is the real estate lessor to Respondent. Patrick Bogart phoned her on June 6 and asked if the building had a policy against soliciting. Boyd told him they had such a policy and that soliciting involving putting flyers under windshields of cars in the parking lots or distributing literature on the property, selling goods and produce. Bogart asked if Boyd could type up something to the effect, so she did and faxed it to Bogart. Boyd asked what this was about and Bogart replied that he did not want to get into that. Boyd faxed a statement involving the solicitation rule to Bogart (GC Exh. 2). Afterward other tenants in the building phoned Boyd and complained that people were congregating outside the building and passing out leaflets. Boyd went out to the building and saw that the notices she had faxed to Bogart were taped to the entry doors to the building. Boyd removed those notices and threw them away. She explained that she had not mailed General Counsel's Exhibit 2 to Bogart with the intent they be posted on the building entrances and that a posting by Respondent should have been limited to their own rented spaces. Bogart had actually violated a provision of Respondent's lease agreement by posting General Counsel's Exhibit 2 in common areas of the building.

Adam Fischer and Brent Malkus, testified about an incident with Supervisor Viet Nguyen at the Center on June 9. Brent Malkus, along with Karen Frame and Adam Fischer, were distributing literature in the reception area near the front bulletin board. Deann, the receptionist, was working at her desk about 10 feet away. Viet Nguyen approached and said they were not allowed to talk to people and distribute literature. Malkus replied they had a federally protected right to do that. Malkus said that he would not be insubordinate and would follow orders but he would consider filing charges. Nguyen left saying he would be right back. When Nguyen returned he told them they could talk to people but they could not distribute literature. Viet Nguyen testified the he did tell Malkus, Fischer, Cher Carmody, and Deann Wootten that they could not pass out flyers in the area in the vicinity of Deann Wootten's desk but that they could talk in that area. On June 9 William Lewandoski passed out and posted copies of a letter to coworkers about the Union. Nancy Moses had approved the letter. However, Moses came up to him and said that he could not pass out the letter except in the breakroom and gave him a verbal warning (R. Exh. 22). Employees were permitted to pass out materials on the workroom floor before the new manual was issued on May 30.

In mid-June Shannon Mouser was present when Steve Nelson asked Ariel Colman for a copy of union literature that Colman had taken from Mouser's desk. Bogart came up and said

they could not do that there. Nelson told Bogart that he had asked for the literature and Bogart said that it did not matter whether he asked or not, and that could only be done in the break room.

On June 25 after Adam Fischer came to Kristal Cain's workstation and gave her some literature that she had requested, Patrick Bogart came up and told them they were going to have to wait until they were in the break room before exchanging any nonwork-related material.¹² Cain told Bogart that she had asked for that material and that Fischer was not soliciting but Bogart said they would still have to wait until they were in the break room. Adam Fischer, along with Kristal Cain and Julie Consolvis, talked with Bogart in Kristal's cubicle on June 25. Fischer was handing out a union committee newsletter and Bogart said that he could pass out that material only in the break room. Fischer asked Bogart if that applied to all nonwork related material and asked Kristal for a copy of the video "The Matrix," which was on her desk. Bogart just repeated that they were not permitted to distribute nonworking materials in working areas. Nancy (Moses) Arredondo identified Respondent's Exhibit 84 as an incident report she issued Andy Lewandoski on June 30 because he was distributing union literature on the floor. She testified the Lewandoski asked her to initial a letter that he was going to post on the bulletin board and she subsequently saw him passing out the letter in the work area. She told him he would have to pick up all that he had passed out and that he would have to go to the break room.

Respondent called Gisela Uria-Ruiz as its first witness. She is director of executive and language interviewing and is located at Respondent's Houston North office. Uria-Ruiz was the Respondent's representative during an unfair labor practice hearing in Case 16-CA-19898, et al. She prepared a memo on May 27, 1999, that diluted some prior work policies. The pre-May 1999 policy strictly prohibited distribution of anything on the interview floor without permission. The May 27, 1999 memo came about because a prounion employee insisted she had a right to distribute literature during the union organizing campaign there in Houston, because a precedent had been set for such distribution. During the existence of that 1999 diluted policy, production declined. For that reason, consideration was given to renewing the more restrictive rules. However, because of ongoing unfair labor practice litigation regarding the Houston office, the new policy manual (GC Exh. 5) was not implemented at the Houston North office in May 2000 when it was implemented in Austin. At the conclusion of the Houston unfair labor practice litigation the manual was implemented at Houston.

Ken Anderson is Respondent's associate counsel. He testified that the Internet and E-Mail policy contained in General Counsel's Exhibit 5 is not a new policy. Instead, as shown in Respondent's Exhibit 40, that was Respondent's systemwide policy on May 14, 1998.¹³ Anderson developed General Coun-

¹² Bogart identified R. Exh. 20 as a corrective action report he awarded Fischer for passing literature to Kristal Cain at her cubicle.

¹³ The May 1998 policy was referred to as the January 1998 manual (R. Exh. 40).

sel's Exhibit 5 and his work included use of software that he ordered on June 1, 1999 (R. Exh. 42). The new manual had been discussed before he ordered the software. He testified about discussions in April and May 1999. Anderson added provisions to the new manual including prohibition against taping any conversations with a supervisor, meetings, forums, or other activities, in part because of problems Respondent experienced in Houston during the union organizing drive. Also there was an ongoing title VII case in Houston,¹⁴ where employees taped telephone conversations and face-to-face meetings.¹⁵ Additionally, the restrictions were included out of concern for confidentiality of clients and respondents.¹⁶ Anderson testified that General Counsel's Exhibit 5 no-solicitation/no-distribution policy came directly out of its "Knowledge Point" software and in consideration of tensions arising due to the union organizing campaign at Houston. Anderson testified there were problems of harassment and that production had dropped. He also considered a memo from Respondent's chief operating officer referred to as clean sweep (R. Exh. 45). Additionally, Anderson testified that the policy prohibiting anyone being solicited after expressing disinterest has been rescinded and all reprimands for that infraction have been rescinded as well.

Patrick Bogart testified that the only restriction against posting in employees' cubicles was those to insure that inappropriate matters such as "half-clothed people pictures" were not posted. That was the policy before the new manual and it continues to be the policy.

Viet Nguyen testified that he has received a lot of questions about whether employees could pass out materials in the office areas or breakrooms and he has told them they could do that only in the breakroom. That happened about 3 weeks before the December 19 hearing. He testified that he has not denied anyone's request to put up a personal notice on the breakroom bulletin board. Nguyen testified that he has seen antiunion buttons but no one has complained to him about those buttons being distributed on the workroom floor. Viet Nguyen testified that he has not seen anyone distributing antiunion buttons on the work floor. Nancy (Moses) Arredondo denied seeing anyone soliciting or purchasing antiunion materials in work areas. She testified that she strictly enforced the rules contained in the manual effective May 2000. Ryan Schuchart testified that he has seen antiunion buttons but he denied that he has seen or received a complaint that those buttons were being passed out in work areas.

Dayana (Sanabria) Moore testified that she distributed material related to her schoolwork but unrelated to Respondent's work. Patrick Bogart came to her and directed her to pick up everything she had passed out. She also posted a notice related to her volleyball team on the breakroom bulletin board without supervisory permission in late July or early August 2000, and the notice was removed. Patrick Bogart verbally warned Cath-

erine Bradley for selling Avon products at her workstation in July 2000. Ryan Schuchart also cautioned her because she delivered a card regarding her nonprofit theater organization to another employee in the work area. Schuchart told her that she could not distribute materials in the working area. Bradley had been at the other employee's seat discussing the theater and left to pick up some material for the employee. Bradley testified that she is limited to posting for the community theater on the breakroom bulletin board. Sharon Warner received two verbal warnings on June 6 (R. Exhs. 87-88) over confrontations regarding the Union with Colman and Fischer. She received a written warning (R. Exh. 75) on August 2, 2000. She asked Patrick Bogart and he told her she would be fired if she received another warning. In another incident, Warner saw Brent Markus raise his middle finger in a defamatory sign in the direction of the intercom as Patrick Bogart was making an announcement. She reported that incident to Bogart.

Credibility

I was impressed with the demeanor of Adam Fischer. His testimony appeared truthful when considered in light of the entire record. I credit his testimony. I was impressed with the demeanor of Brent Malkus, Paula Boyd, William Lewandoski, Sandra Griffin, Kristal Cain, Ariel Coleman, and Shannon Mouser. I credit Malkus' testimony that he contacted the Union on February 29 and regarding his 98-minute conference with Patrick Bogart on March 6. That testimony is not in dispute. I credit the evidence regarding notices and the interviewing policies and procedure manual posted or issued by Respondent during May 2000. That evidence is not in dispute. I find that the testimony of Bogart, Nguyen, Dayana Moore, Ryan Schuchart, Catherine Bradley, and Sharon Warner was not credible to the extent it tended to show that Respondent consistently enforced its policies both before and after it learned of its employees' union activities. The full record shows that was not the case. Before the union activities and in some instances, as late as May, the employees openly posted materials on the front bulletin board and talked and exchanged nonwork-related materials at their work areas, without interference from supervision. Moreover, during those times employees were permitted to use the copying machine for personal matters with only occasional comments from supervisors that the employees should not abuse their privileges. I credit the testimony showing that employees were not stopped from distributing antiunion materials in the work areas after Respondent issued its May 29 manual. Sharon Warner did not deny that she engaged in that activity.

Findings

There was evidence to the effect that Respondent had in place policies and procedures before 1999, which were similar to those contained in its May 29, 2000, "Interviewing Policies & Procedures Manual." However, I credit evidence including that of employees Fischer, Malkus, Lewandoski, Griffin, Cain, Coleman, Mouser, as well as that of Gisela Uria-Ruiz¹⁷ showing that pre-1999 policies were relaxed or nonexistent until May 2000.

¹⁴ The title VII case involved Houston's Bellaire facility rather than Houston North.

¹⁵ Those recordings occurred around March-June 1999.

¹⁶ The term respondent is used to identify a person answering one of Respondent's telephone surveys.

¹⁷ Uria-Ruiz testified specifically about the policy at Houston North.

A. Before May 25, 2000

As shown above Respondent posted a notice dated May 26, 2000, showing that it had heard rumors of a union organizing campaign. Patrick Bogart testified that he first learned about the union campaign from two employees around May 20. The evidence does not show that Respondent knew of the union activities before May 20. As shown above Brent Malkus first contacted the Union on February 29. Thereafter, Malkus was called into a 98-minute closed door meeting with Patrick Bogart regarding Bogart having heard that Malkus was saying some “very negative things.” However, nothing was said about the Union at any time during that meeting. That meeting failed to prove that Respondent was aware of its employees’ union activities.

The evidence illustrated Respondent’s practices before it learned of the Union on May 20. Brent Malkus testified that before that date he made copies for personal use in view of supervisors. He was told on occasion to not abuse his privilege of using the copy machine but no one stopped him from copying personal material. Adam Fischer testified that the front bulletin board was used for personal as well as business matters before May 30. Several nonbusiness matters including menus from Ann’s Kitchen, and ads for Disney’s Magic Kingdom, and Sears appeared on the front bulletin board both before and after May 30. Patrick Bogart did not dispute the testimony regarding Disney and Sears but he testified that was posted because Disney and Sears were clients. Bogart admitted that the community builders committee placed notices on the bulletin board regarding a community theater. Notices were posted on both the front and the breakroom bulletin boards for indefinite periods and employees were not required to seek approval from a supervisor. Employees freely posted different materials in their personal work cubicles without approval by a supervisor. As shown above, the evidence also illustrated that employees were permitted to use computers and the Internet and E-Mail without approval. Employees openly solicited and distributed material that was not related to work in work areas, in the area near the front bulletin board, and in the breakroom. For example, Brent Malkus openly solicited for the Green Party U.S. presidential candidate and was told by Supervisor Moses that it was all right to do that in the work area. I am also mindful that Patrick Bogart testified that he cautioned Dayana Sanabria, Tracy Malasko, and Cory Barrow against solicitation and, on at least one occasion, against using the copy machine. However, the credited testimony and the overall record, illustrated that Respondent’s practice immediately before May 20 was one of leniency and many work rules, to the extent they may have existed, were routinely ignored by Respondent’s supervision.

Testimony also illustrated that the practice before May 25, was to wait for the computers to restart at any time the computers went down and that employees were paid only for the time spent waiting for the computers to come up as well as the time actually working. Employees were never told to leave the premises because of computers going down and they were never told they would be paid for days off while the computer was down.

B. Near and After May 25

Respondent posted a May 23 notice regarding copy machines and postings. On May 25 Respondent evacuated its employees and closed its Center. A notice dated May 26 (GC Exh. 4) stated that the Center was not reopened and would not reopen until May 30, because Respondent was working to put its policies and procedures in writing and because of rumors of a union organizing campaign.

C. The Alleged 8(a)(1) violations

1. Respondent posted and promulgated a rule prohibiting personal use of the copy machine on May 23

Respondent posted a notice on the front bulletin board on May 23 regarding use of the copying machine and other things. The notice said that the copy machine was for Gallup use only. Patrick Bogart testified that he posted the notice (R. Exh. 14) on May 25, but he denied that notice represented a change of policy. Bogart testified that another notice (R. Exh. 15) had been posted above the copy machine from before implementation of the new policy manual. He testified that on all occasions when employees asked him to use the copy machine for personal reasons, he denied their requests. He recalled that on one or two occasions he called in employees after learning they had used the copy machine for personal reasons, and told those employees they could not do that. Sometimes party invitations would be copied on the machine and dropped off at employees’ desks.

I am convinced that employees occasionally used Respondent’s copy machine for personal matters before May 23. There was a posted rule against personal use of the machine before the union campaign. However, I am convinced that credible evidence showed that Respondent’s supervisors tended to overlook moderate personal use of the copier until the start of the union organizing campaign. The credible evidence shows that when it came to a supervisor’s attention that someone was using the copy machine for personal reasons, the supervisor occasionally advised the employee to not abuse the privilege. I find that Respondent moved to restrict its permitted moderate use of the copy machine after it learned of its employees’ union activities, and that activity tends to restrict, restrain, and coerce employees in their Section 7 rights and constitutes a violation of Section 8(a)(1) of the Act.

2. Respondent posted the rule: “Postings of a personal nature not approved by a manager can only be posted on the break room board,” on May 23

The May 23 notice (R. Exh. 14), included reference to posting of notices as well as use of the copy machine. The notice said that personal notices could not be posted unless on the break room bulletin board. Notices on the breakroom bulletin board were required to include the date and a signed approval by a manager. Patrick Bogart denied that he ever denied a request to post something on the breakroom bulletin board. People would also post things on their cubicles. Lead Supervisor Bogart admitted that employees posted materials in their cubicles before introduction of the new policy manual. Those included newspaper articles about the 2000 U.S. presidential election campaign. There were materials posted by employees

in the break room bulletin board and there was no requirement that an employee needed a supervisor's permission to post any of those matters. There was no prohibition against postings for nonbusiness matters and all types of things were posted on all the posting areas. Those included ads for cars, candy bars, Girl Scout cookies, and others. Patrick Bogart testified that he did enforce a no-distribution rule before May 2000. In 1999 he received a complaint that employee Dayana Sanabria had been passing out a quiz on the work floor. Bogart told Sanabria that it was not appropriate for her to distribute nonworking material at work. On an earlier occasion he was told that Tracy Malasko was passing out party invitations and that she had used the copy machine. Bogart told Malasko that she could not do that. On another occasion Cory Barrow passed out materials and may have used the copy machine. Bogart told Barrow that he could not do that and he told Barrow to pick up the materials that he had already passed out. Bogart testified that the 1998 policies (R. Exh. 40) regarding use of computers and the Internet are no different than the policies contained in the manual effective May 29, 2000.

As shown above, I do not credit Bogart's testimony to the extent it would show that Respondent consistently enforced a no-solicitation/no-distribution rule before May 23. Bogart testified to the effect that he occasionally enforced a no solicitation, no distribution rule in the work area,¹⁸ but as shown herein there was credited evidence that Respondent instituted a new policy immediately after learning of the union campaign and that on occasion after May 30 it ignored an employee soliciting and distributing antiunion buttons in the work area. The credited record showed that Respondent's routine practice immediately before learning of the union campaign was to overlook solicitation and distribution in all areas of the Center especially when no one complained about the activity. As to Bogart's testimony that 1998 policies did not differ from those in the May 29 manual, I find that evidence does not go to the material point. The material question is what were Respondent's established policies immediately before the union organizing campaign and before Respondent made its late May announcements regarding its policies. The evidence proved that Respondent's policy at that time included solicitation and distribution in all areas of the Center and that employees were permitted to post personal materials on all the bulletin boards and in their cubicles. I find that Respondent unlawfully changed its notice posting policy on May 23 in violation of Section 8(a)(1).

¹⁸ Respondent pointed to R. Exh. 74, 85, and 86 (dated July 6, June 30 and 12, 2000), plus evidence that employee Sandy Kesaras was told that she had to post Christmas card solicitations in the breakroom and Steven Nelson was told that he would have to post a notice seeking a roommate in the breakroom.

3. Respondent issued a new Interviewing policies and procedures manual on May 29, which implemented changes in terms and conditions of employment¹⁹

Respondent issued a new manual on May 29 (GC Exh. 5). The manual included a prohibition against taping by audio or video activities at work; a prohibition against solicitation and distribution in the workplace at any time; a prohibition against posting nonbusiness materials in working areas and common areas of the building and a directive limiting postings of nonbusiness materials to the break room bulletin board provided the notice was dated and had been approved by a manager and providing the notice would be removed after one month; a prohibition against using Internet for anything other than business; and that E-mail may not be used to solicit for nonbusiness matters.²⁰ Respondent announced through a notice dated May 26 (GC Exh. 4), that the new manual was being prepared to issue on May 30 because of rumors of union organizing activity at the Austin Center. As shown above, I have credited testimony showing Respondent's policy before May 2000, was to permit employees to use tape recordings in the workplace; to solicit and distribute nonbusiness materials in the workplace; to post nonbusiness materials in the workplace including in employees' cubicles and on bulletin boards other than the bulletin board in the break room; that notices were not required to be dated or approved by a manager and that notices were not removed from a bulletin board at the end on 1 month.²¹ The General Counsel argued that Respondent's actions constitute unfair labor practices. (*NLRB v. Roney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979); *Eaton Corp.*, 302 NLRB 410, 411 (1991); *Cannondale Corp.*, 310 NLRB 845 (1993); *Montgomery Ward & Co.*, 220 NLRB 373, 374 (1975), *enfd.* as modified 554 F.2d 996 (10th Cir. 1977); *Predicasts, Inc.*, 270 NLRB 1117, 1119 (1984); and *Permian Corp.*, 189 NLRB 860 (1971), *enfd.* 457 F.2d 512 (5th Cir. 1972).) Respondent argued that it started preparation of the manual long before the union organizing campaign; that its policies were not new; and that the manual was prepared for business reasons. Ken Anderson testified that Respondent was at work preparing a new manual before the union organizing campaign started. However, the evidence shows that the alleged unlawful policies were not instituted until after Respondent learned of the union

¹⁹ Although the General Counsel argued that Respondent engaged in an unfair labor practice by issuing its manual on May 29, I have found and considered that Respondent engaged in questionable actions by including certain rules in that manual as noted here. I do not find that the entire manual was unlawful.

²⁰ As to Respondent's policy regarding the Internet and e-mail, Adam Fischer credibly testified there were certain computers at the Center that employees were permitted to use for nonbusiness matters and the employees were permitted to use the Internet and e-mail on those computers.

²¹ As shown above Patrick Bogart testified that he posted R. Exh. 16 regarding posting notices on designated bulletin boards and that the notices would be removed 1 month from the date of posting, during the second or third week of May 2000. Due to the vagueness as to date plus demeanor and conflicts between Bogart and other credited evidence, I do not credit his testimony to the extent that it would show R. Exh. 16 was posted before Bogart learned of the employees' union activities on May 20.

campaign. The alleged unlawful policies differed from the policies in practice immediately before the union campaign started. Even though Respondent may have at one time, enforced other, stricter policies that is of no importance if the evidence shows that the policies at the beginning of the union activity were different. As shown above, the credited evidence showed that Respondent permitted solicitation in all areas of the Center, including the work areas, immediately before the union campaign. As shown above, among other matters, I credit the testimony of Brent Malkus that Supervisor Nancy Moses allowed him to campaign for the Green Party U.S. presidential candidate in the work area. The credited evidence also showed that employees posted personal notices on all Respondent's bulletin boards immediately before the union campaign. Respondent's argued that it implemented its May 2000 manual because of legitimate business reasons and that it would have issued the manual in the absence of union activities.

The evidence in that regard included testimony of Respondent's associate counsel, Ken Anderson, to the effect that work started on the manual long before the 2000 union organizing campaign in Austin, and testimony of Respondent's director of executive and language at Houston North office, Gisela Uriaruiz, to the effect that production dropped at the Houston North office during a 1999 union organizing campaign. Uriaruiz attributed that drop in production to relaxed rules including Respondent's solicitation and distribution policy. Additionally, she testified about the use of tape recordings made by employees at Houston and used during litigation at an unfair labor practice hearing and a title VII hearing.

Respondent's argument suffers in several respects. As to the tape recordings, I am not impressed that problems generated during litigation qualify as the type of business reason that would enable and employer to interfere with, restrain, or coerce protected activity. Of course, there may be a showing of added costs generated by losses during litigation but that does not appear to be the type of business reason the Board and courts have considered in the earlier cases. Moreover, no evidence was offered to show that changes were considered at the Austin Center before Respondent learned of its employees' union activities on May 20. Within 3 days thereafter, Respondent changed its approach to the use of its copy machine and posting personal notices. There was no evidence showing that anything occurred during those 3 days to justify those changes for business purposes. Then from May 29 Respondent enforced its new manual rules but, as shown here, enforcement took a different turn when union activity was involved. Employees soliciting for the Union including, for example, William Lewandoski, were stopped, told to pick up everything that had been distributed, and warned, while employees opposing the Union including, for example, Sharon Warner, were not stopped and were not required to go back and retrieve the antiunion materials. There was evidence that Warner, like Lewandoski, received a warning. Additionally, I note that the testimony by Gisela Uriaruiz failed to show that Respondent determined that stricter rules would resolve the problems noted during the 1999 union organizing campaign at Houston North. Indeed her testimony appeared to show that the relaxed rules became a problem only because of conflicts between prounion and

antiunion employees. The drop in productivity occurred during the union campaign. Therefore, to fully realize a business related benefit from its change in rules, it would appear that only during a union organizing campaign, would the new rules prevent a drop in production. Additionally, Respondent implemented a rule against employees soliciting any employee that had previously declined union material. That rule was not included in the manual even though Respondent argued that it constituted harassment. Although the manual addressed harassment, it does not defined harassment to include solicitation of an employee that previously declined similar material. Under those circumstances, I find that the evidence failed to support Respondent's claim that it would have instituted all the rules contained in its May 2000 manual, in the absence of its Austin employees' union activities.²² I find that Respondent did not change its rules and implement its new manual because of production problems.²³ Instead, I find that Respondent engaged in conduct in violation of Section 8(a)(1) by including the alleged unlawful provisions in the May manual.

4. Respondent, by its supervisor, Viet Nguyen, told employees that distribution of literature inside the building but outside the Center was not permitted on June 2

Supervisor Viet Nguyen talked with Adam Fischer after Fischer distributed union literature outside the Center on June 2. Nguyen told Fischer that he had checked with other supervisors and that it was okay to distribute literature outside but not inside the building. Nguyen testified about his June 2 conversation with Fischer. Nguyen phoned another supervisor and then told Fischer that he could pass out flyers outside the building but he could not pass them out in the common areas inside the building. Nguyen testified that he told Fischer that he could pass out flyers in the break room.

Before May 20 employees solicited and distributed literature for nonwork related matters in all areas. For example, I credited the evidence that Brent Malkus openly campaigned for the Green party presidential candidate in view of supervisors and nothing was said to him. He solicited Supervisor Nancy Moses. Moses was ineligible to sign a petition for the Green Party candidate because she had voted in the Democratic or Republican elections, and Malkus asked if it was okay if he solicited other employees. Moses said that it was no problem. I find the evidence established that Nguyen did tell employee Fischer that he could not distribute literature inside the building. The Center, which constitutes Respondent's facility, is only a part of the building. By his directive Nguyen prohibited Fischer's distribution in areas outside Respondent's work areas. As shown here Patrick Bogart posted a fax that he received from Respondent's lessor, USAA Realty, prohibiting solicitation in the building. The action tended to support Nguyen's comments. Regardless of the lessor's policy, the record

²² This is not a situation where I would normally question whether Respondent would have taken the allegedly unlawful action in the absence of union activities (*Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)). However, Respondent raised this issue in its brief.

²³ *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979); *Champion International Corp.*, 303 NLRB 102 (1991).

showed that before the union campaign it was not Respondent's practice to prohibit its employees from distributing literature outside its Center. By doing so in regard to union materials, Respondent engaged in conduct in violation of Section 8(a)(1) of the Act.

5. Respondent, by its supervisor, Viet Nguyen, told its employees that distribution of literature in the front area was not permitted

On June 9 Brent Malkus, along with Karen Frame and Adam Fischer, were distributing literature in the reception area near the front bulletin board. Deann, the receptionist, was working at her desk about 10 feet away. Viet Nguyen approached and said they were not allowed to talk to people and distribute literature. Malkus replied they had a federally protected right to do that. Malkus said that he would not be insubordinate and would follow orders but he would consider filing charges. Nguyen left saying he would be right back. When Nguyen returned he told them they could talk to people but they could not distribute literature. Viet Nguyen testified the he did tell Malkus, Fischer, Cher Carmody, and Deann Wootten that they could not pass out flyers in the area in the vicinity of Deann Wootten's desk but that they could talk in that area.

The full record shows, and I find, that employees were permitted to solicit and distribute materials in the front area near the bulletin board before the 2000 union organizing campaign. Nguyen's orders to Respondent's employees to forego that activity in the future does constitute interference with, restraint, and coercion of the employees Section 7 rights and constitutes an unfair labor practice.

6. Respondent told its employees that distribution of literature was permissible only in the breakroom, on June 6. Respondent told its employee Andy Lewandoski that distribution of literature on the workroom floor was not permitted on June 9

Nancy Moses came up to William Lewandoski and said that he could not pass out a letter to coworkers about the Union, except in the break room and gave him a verbal warning (R. Exh. 22). Lewandoski had passed out and posted copies of the letter in the Center on June 9. Nancy Moses had approved the letter. As shown above, employees were permitted to pass out materials on the workroom floor before the new manual was issued on May 30. Nancy (Moses) Arredondo identified Respondent's Exhibit 84 as an incident report she issued Andy Lewandoski on June 30 because he was distributing union literature on the floor. She testified that Lewandoski asked her to initial a letter that he was going to post on the bulletin board and she subsequently saw him passing out the letter in the work area. She told him he would have to pick up all that he had passed out and that he would have to go to the break room. I find that Moses' action constitutes a change in established policy because of the union campaign in violation of Section 8(a)(1) of the Act.

7. Respondent, by its supervisor, Patrick Bogart, told its employees that offering literature to any employee who had previously declined literature was impermissible, on June 6. Respondent, by its supervisor, Patrick Bogart, told its employees that distribution of literature in the working areas was imper-

missible and that employees could be charged with harassment for offering literature to any employee who had previously declined literature, on June 13

Adam Fischer, along with Stephen Nelson, then Ariel Colman and Shannon Mouser, was handing out union literature in the break room between 4-4:30 p.m. Sandra Griffin and Kristal Cain were also passing out union literature. Shannon Mouser had not actually distributed any literature. She was scheduled to relieve Ariel Colman and Adam Fischer distributing the union literature. Sandra Griffin, Kristal Cain, and Ariel Colman testified that they were distributing union literature as well as Adam Fischer and Beth Gosnell. Patrick Bogart came up and asked them to come into his office. Bogart was angry and pointed at Mouser and said that he had three people in the last 5 minutes complaining that they were harassing them. Bogart said that in the rulebook if somebody said they're not interested, it would constitute harassment to approach that employee again. Mouser asked how she would know if the particular employee had been approached and Bogart said that was for her to find out. She asked Bogart for a list of employees so they could go over the list and make sure not to contact anyone a second time but Bogart said no list would be given to the union committee. Bogart said they had been accused of verbal harassment because they had passed Erma some union literature and Erma stated that if she had known it was union literature she would not have taken it. Bogart said they shouldn't have been passing out literature in the front because that was a working area. The employees argued that it was not a working area because employees were expected to read the bulletin board on their own time. Adam Fischer said they did not want to interfere with the Center's business and they would comply with its rules. Respondent raises the question of what would have been legitimate solicitation and distribution under Respondent's interpretation of its rules after May 30, but for the alleged harassment. Bogart defined harassment as offering union material to someone that was either not interested, as was the case with "Erma," or to someone that had previously expressed disinterest. The effect of such a rule is abolition of all solicitation and distribution because absent some unusual circumstances not shown to have existed here, no prounion employee could be sure that a solicited employee was neither disinterested in the union material nor had previously expressed disinterest to another employee. Moreover, regardless of the question of harassment, it is clear that Respondent has instituted a new rule that became effective only upon its learning of the union organizing campaign. I find that Bogart's action constitutes conduct in violation of Section 8(a)(1) of the Act.

8. Respondent, by its supervisor, Patrick Bogart, told its employees in mid-June that distribution of literature on the workroom floor was impermissible

In mid-June Shannon Mouser was present when Steve Nelson asked Ariel Colman for a copy of the union literature that Colman had taken from Mouser's desk. Patrick Bogart came up and said they could not do that there. Nelson told Bogart that he had asked for the literature and Bogart said that it did not matter whether he asked or not, and that could only be done in the breakroom. On June 25 after Adam Fischer came to

Kristal Cain's workstation and gave her some literature that she had requested, Patrick Bogart came up and told them they were going to have to wait until they were in the breakroom before exchanging any nonwork-related material. Cain told Bogart that she had asked for that material and that Fischer was not soliciting but Bogart said they would still have to wait until they were in the breakroom. Adam Fischer, along with Kristal Cain and Julie Consolvis talked with Bogart in Cain's cubicle on June 25. Fischer was handing out a union committee newsletter and Bogart said that he could pass out that material only in the break room. Fischer asked Bogart if that applied to all nonwork related material and asked Kristal for a copy of the video "The Matrix," which was on her desk. Bogart just repeated that they were not permitted to distribute nonworking materials in working areas. As shown here, Respondent's actions were contrary to the policy it practiced before the 2000 union organizing campaign and the record shows that other employees were not stopped when distributing antiunion literature. I find that Respondent engaged in unfair labor practices by preventing all distribution of materials by prounion employees in the working area.

9. On June 6 Respondent posted a no solicitation rule from the building landlord, USAA Realty Company

Paula Boyd is the senior property manager for USAA. USAA is the real estate lessor to Respondent. Patrick Bogart phoned her on June 6 and asked if the building had a policy against soliciting. Boyd told him they had such a policy and that soliciting involving putting flyers under windshields of cars in the parking lots or distributing literature on the property, selling goods and produce. Bogart asked if Boyd could type up something to the effect, so she did and faxed it to Bogart. Boyd asked what this was about and Bogart replied that he did not want to get into that. Boyd faxed a statement involving the solicitation rule to Bogart (GC Exh. 2). Respondent posted copies of Boyd's fax on the doors from the front and back into the Center (GC Exh. 2) on June 6. Afterward other tenants in the building phoned Eddie Paula Boyd and complained that people were congregating outside the building and passing out leaflets. Boyd went out to the building and saw that the notices she had faxed to Bogart were taped to the entry doors to the building. Boyd removed those notices and threw them away. She explained that she had not mailed General Counsel's Exhibit 2 to Bogart with the intent they be posted on the building entrances and that a posting by Respondent should have been limited to their own rented spaces. Bogart had actually violated a provision of Respondent's lease agreement by posting General Counsel's Exhibit 2 in common areas of the building.

By posting the USAA Realty fax Respondent was advising its employees that it was prohibiting their solicitation and distribution of materials including union materials outside the Center whether inside or outside the building. As shown here Respondent's practice before the union campaign was to permit solicitation and distribution inside its Center. Regardless of USAA Realty's practice, Respondent's action had the tendency to interfere with, restrain or coerce its employees in the exercise of rights under Section 7 or the Act and constitutes an unfair labor practice.

D. The Alleged 8(a)(1) and (3) violations

1. Respondent closed its Center from May 25-29²⁴

As shown above, the evidence is not in dispute but that Respondent closed its Center after its computers went down on May 25, 2000. The testimony of the General Counsel's witnesses Lewandoski, Griffin, and Mouser to the effect that the normal procedure when the computers went down, was for the employees to wait at the Center for the computers to come back up, was not disputed. On those occasions employees were paid for the time spent waiting for the computers. On May 25 when the computers went down the employees were rushed out of the building about 15 minutes later. Before May 25 the employees had never been sent home when the computers went down and paid for their time even though the Center was closed. Respondent posted a notice to its employees explaining that after a May 25 computer blip, most Centers were brought back up but that the Austin Center was not brought back up; and that the Center would remain closed until Tuesday, May 30, because of rumors of a union organizing campaign.²⁵

INTEROFFICE MEMORANDUM

TO: OPERATIONS

SUBJECT: AUSTIN INTERVIEWING CENTER

DATE: MAY 26, 2000

Last night a blip occurred on the system that caused all interviewing centers to go down momentarily. Although most centers were back on line within minutes, the Austin Interviewing Center was not brought back up. The Austin Interviewing Center will be closed for the weekend and will reopen on Tuesday, May 30, 2000. Interviewers will be paid their hourly average for those hours that they were scheduled over the weekend. Trackers will be paid their hourly average based on the number of hours they had remaining for the week.

We have been proactively working on putting our policies and procedures in writing over the last year. Quite candidly, we had heard rumblings of a union organizing campaign and wanted to have all of our policies and procedures in writing. Therefore, the Austin Interviewing Center will remain closed until Tuesday, May 30, 2000, to give us the time necessary to assemble our policies in writing and have them in place nationwide effective Monday, May 29, 2000.

The General Counsel argued that Respondent's closing its Center constituted unlawful conduct (*General Battery Corp.*, 220 NLRB 1078 (1975); and *Power, Inc.*, 311 NLRB 599 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994)). In consideration of this allegation I shall consider whether the General Counsel proved that Respondent was motivated by its employees' union activities and its animus against those activities, in taking the

²⁴ The General Counsel stated on the record that it is not seeking a remedy that includes money. The employees were paid for the time the Center was closed.

²⁵ The General Counsel argued that this comment constitutes an independent violation of Sec. 8(a)(1) and I agree. That comment tends to interfere with, coerce, and restrain employees in the exercise of Sec. 7 rights.

allegedly unlawful action. If I find that was the case, I shall examine whether Respondent would have closed the Center in the absence of union activities. (See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).) As shown here, Respondent has demonstrated its animus by its conduct in violation of Section 8(a)(1). Moreover, its memo shows that it was motivated by a rumor of its employees' union organizing activities in its decision to close the facility from May 25.

Respondent offered no credible evidence that it would have closed the Center in the absence of union activity.²⁶ What it did offer was evidence that it was working on the revised manual long before the union activity and that the new manual applied to all its employees. However, the issue here is not why did Respondent issue a new manual but why did it close its facility from May 25 to 30. As shown in its memo, that action was caused by rumors of union organizing activity. Respondent's action is prohibited by Section 8(a)(1) and (3) of the Act. Obviously, an employer tends to interfere with protected rights by illustrating to its employees that it will close its facility because of rumors of union activity. Additionally, Respondent's closing of the facility effected the terms and conditions of employment to encourage or discourage membership in any labor organization. I find that Respondent engaged in unfair labor practices by closing its Center. As shown above, Respondent did pay its employees for the time the Center was closed and the General Counsel does not seek a remedy that includes money. However, the fact remains that Respondent closed its facility because of its employees' union activities and that action is prohibited by Section 8(a)(1) and (3) of the Act.

2. Respondent, by its supervisor, Patrick Bogart, verbally warned its employee Brent Malkus for making an obscene gesture in the workplace, on May 31

Patrick Bogart admitted that he issued a corrective action report to Brent Malkus on May 31 (R. Exh. 71), after Sharon Warner reported that Malkus was raising his finger to the intercom as Bogart was making announcements. Malkus denied to Bogart that he had been making the alleged gestures. Sharon Warner testified that she saw Brent Malkus raise his middle finger in a defamatory sign in the direction of the intercom as Patrick Bogart was making an announcement. She reported that incident to Bogart. In view of the timing of its action, its knowledge of Malkus' union activities and its demonstrated animus I am convinced that the General Counsel proved a prima facie case. However, I have carefully examined the testimony of Sharon Warner and I find that she was a convincing witness. Warner was the employee that complained to Respon-

dent about Malkus. Despite my determination that Brent Malkus was truthful in his testimony, I am not convinced that he was fully truthful regarding this allegation. The record supported Respondent's claim that it routinely warned employees for similar infractions. Therefore, I find that Respondent proved it would have warned Malkus in the absence of his union activities.

3. Respondent violated Section 8(a)(1) and (3) when it warned its employee Lewandoski for distributing a letter regarding the Union to employees

On June 9 William Lewandoski passed out and posted copies of a letter to coworkers about the Union. Nancy Moses had approved the letter. However, Moses came up to him and said that he could not pass out the letter except in the break room and gave him a verbal warning (R. Exh. 22). Employees were permitted to pass out materials on the workroom floor before the new manual was issued on May 30. Nancy (Moses) Arredondo identified Respondent's Exhibit 84 as an incident report she issued Andy Lewandoski on June 30 because he was distributing union literature on the floor. She testified the Lewandoski asked her to initial a letter that he was going to post on the bulletin board and she subsequently saw him passing out the letter in the work area. She told him he would have to pick up all that he had passed out and that he would have to go to the breakroom. The record as shown herein, proved that Respondent knew that William Lewandoski supported the Union. That fact was evident by an examination of the letter he was distributing on June 9. Moreover, as shown above, I find that Respondent demonstrated animus. As to whether Respondent would have disciplined Lewandoski in the absence of his union activities, the evidence showed that the opposite is the case. Before the union campaign Respondent permitted employees to engage in the very activity Lewandoski engaged in on June 9 without disciplinary action. I find that Respondent engaged in conduct in violation of Section 8(a)(1) and (3) by issuing a verbal warning to William Lewandoski.

CONCLUSIONS OF LAW

1. Gallup, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by changing its rule to prohibit personal use of its copy machine; by changing its rule to prohibit posting notices except in the break room after dating and securing supervisory approval on the notice; by issuing a new interviewing policies and procedures manual on May 29; by telling employees they cannot distribute union materials outside the Center; by telling employees they cannot distribute union literature in the front bulletin board area; by telling employees that distribution of union literature is prohibited in work areas and that union literature may be distributed only in the breakroom; by telling its employees they may not offer union literature to any employee that has previously declined union literature; by telling employees that distribution of union literature in work areas is not permissible and that employees may be charged with harassment for offering literature to any one that previously

²⁶ Respondent argued, among other things, that the Center was closed because of computer failure. However, as shown here, the record evidence including Respondent's May 26 memo, proved that it was not Respondent's practice to close the Center because of computer failure; that the computer failure on May 25 lasted for only "momentarily"; that other Centers that experienced the same failure resumed operations after a brief delay and the Center was closed until May 30 because of rumors of union organizing activity.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

declined union literature; and by posting a USAA Realty notice prohibiting solicitation outside its Center; because of its employees' union activities, has engaged in conduct in violation of Section 8(a)(1) of the Act.

4. Respondent, by closing its Center from May 25–30, 2000, because of a rumor of union organizing activities; and by issuing a warning to employee William Lewandoski because he distributed a letter regarding the Union to employees in a working area on June 9, 2000; has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of section 2(6), (7), and (8) of the Act.

REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and

desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully closed its facility from May 25–30, 2000; issued a new manual that unlawfully included no-solicitation/no-distribution provisions, provisions against taping activities at work, provisions against posting personal notices and prohibitions against using computers and Internet and e-mail for personal use; and unlawfully warned employee William Lewandoski on June 9 because of his protected union activities; in violation of sections of the Act, I shall order Respondent to rescind all reference to its May 25–30 closing; rescind unlawful provisions of the May 2000 manual and rescind the disciplinary action against William Lewandoski, and to notify each of its employees in writing that it has taken that action.

[Recommended Order omitted from publication.]