

Shamrock Foods Company and International Brotherhood of Teamsters Local Union No. 104, General Teamsters (excluding Mailers), State of Arizona, affiliated with International Brotherhood of Teamsters, AFL-CIO. Case 28-CA-15477-2

July 30, 2002

DECISION AND ORDER

BY CHAIRMAN HURTTGEN AND MEMBERS LIEBMAN AND BARTLETT

On May 23, 2000, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. Each party filed an answering brief to the other's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,² except as indicated below, and to adopt the recommended Order as modified.³

I. SUSPENSION AND DISCHARGE OF VINCENT D'ANELLA

The judge found that the Respondent violated Section 8(a)(1) of the Act by, among other things, suspending and discharging employee Vincent D'Anella for engaging in misconduct during the course of his union solicitation and organizational activity. The judge based this finding on the absence of credible evidence that D'Anella had engaged in such misconduct, correctly citing *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), which held that a violation of Section 8(a)(1) is established where it is shown that the discharged employee was engaged in protected activity, the basis of the discharge was an alleged act of misconduct in the course of that activ-

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), enf. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In the absence of exceptions, we adopt the administrative law judge's recommendation to dismiss complaint pars. 6(a), (g), (h), (i), and (j).

³ We have modified the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container, Inc.*, 325 NLRB 17 (1997); and *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB 175 (2001).

ity, and the employee was not, in fact, guilty of that misconduct.

We adopt the judge's findings. We further agree with the judge that the analytical model established in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), is not applicable in this situation, because the Respondent's motive is not at issue: it is undisputed that Respondent discharged D'Anella because of his conduct in the course of protected activity. See *Honda of America*, 334 NLRB 751, 753 (2001); *Felix Industries*, 331 NLRB 144, 147 (2000), remanded 251 F.3d 1051 (D.C. Cir. 2001); *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994); and *Mast Advertising & Publishing*, 304 NLRB 819 (1991). Accordingly, we find it unnecessary to pass on, and we disavow, the judge's additional discussion of Respondent's motivation or good faith in responding to the reports of D'Anella's misconduct.

In view of our finding that D'Anella's suspension and discharge violated Section 8(a)(1), we agree with the judge that it is unnecessary to pass on whether the suspension and discharge also violated Section 8(a)(3), as alleged by the General Counsel.

II. IMPRESSION OF SURVEILLANCE

We do not agree, however, that the Respondent created an impression, in the mind of employee David Trujillo, that D'Anella's union activities were under surveillance. We adopt the judge's findings that the Respondent (through Night-Shift Manager Shalley) interrogated Trujillo about whether D'Anella had asked Trujillo to sign a union card; that Shalley told Trujillo to inform him if D'Anella asked Trujillo to sign a card in the future; and that these two actions violated Section 8(a)(1). However, there is nothing beyond this to convey to Trujillo that the Respondent was generally engaging in surveillance of D'Anella's union activity. The surveillance, if any, was confined to asking Trujillo to report any future solicitation efforts by D'Anella toward Trujillo. In our view, this matter is sufficiently covered by the former two violations we have found.⁴

⁴ Member Liebman agrees with the judge, for the reasons he states, that the Respondent, through Shalley's statements to Trujillo, created the impression that D'Anella's union activities were under surveillance. This finding is not cumulative, as the majority implies, because no other violation we have found involves the creation of an impression of surveillance, which is a distinct violation of Sec. 8(a)(1). See, e.g., *Seton Co.*, 332 979, 980-981 (2000); *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). Moreover, although the remedial order adopted by the majority prohibits actual surveillance by the Respondent, it does not prohibit all actions which could reasonably create an impression of surveillance.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c).
2. Substitute the following for paragraph 2(d).

“(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.”

3. Substitute the following for paragraph 2(e).

“(e) Within 14 days after service by the Region, post at its Phoenix, Arizona facility copies of the attached notice marked “Appendix.”²³ Copies of the notice, on forms provided by the Regional Director for Region 28 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 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 4, 1998.”

4. Substitute the attached notice for that of the administrative law judge.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVE YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on
your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or discharge employees for engaging in activities protected by Section 7.

WE WILL NOT coercively interrogate you about your activities protected by Section 7.

WE WILL NOT solicit employees to report to us about other employees’ Section 7 activity.

WE WILL NOT engage in surveillance of your activities for Teamsters Local 104 or any other union.

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

WE WILL, within 14 days from the date of the Board’s Order, offer Vincent D’Anella full reinstatement to his former job without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make him whole with interest for any loss of earnings and other benefits resulting from his suspension and discharge in October 1998.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files all references to Vincent D’Anella’s unlawful suspension and discharge and WE WILL provide him written notice that this has been done, and that his October 7, 1998 suspension and his October 8, 1998 discharge will not be used against him in any way.

SHAMROCK FOODS COMPANY

William Mabry III and Paul R. Irving, Attys., for the General Counsel.

Scott V. Kamins and D. Jay Sumner, Attys. (Krupin, Greenbaum & O’Brien), of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. International Brotherhood of Teamsters Local Union No. 104, General Teamsters (excluding Mailers), State of Arizona, affiliated with International Brotherhood of Teamsters, AFL-CIO (Local 104 or Union) filed the charge in this case on October 9, 1998.¹ Based on that charge the Regional Director for National Labor Relations Board (NLRB or the Board) Region 28 issued a complaint on November 30 alleging that Shamrock Foods Company (Company or Respondent) engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National

¹ All relevant events occurred in the 1998 calendar year; unless shown otherwise, all further dates refer to that calendar year.

Labor Relations Act (Act).² Respondent filed a timely answer to the complaint denying that it engaged in the unfair labor practices alleged.

I heard this case on July 15 and 16, 1999, at Phoenix, Arizona. After my thorough review of the entire record, my assessment of the witnesses' credibility, and my careful consideration of the briefs filed by the General Counsel and Respondent, I find that Respondent engaged in most of the unfair labor practices alleged based on the following

FINDINGS OF FACT

I. RELEVANT EVIDENCE

A. Background and Overview

Respondent, an Arizona corporation, maintains an office and place of business in Phoenix (the only facility involved in this proceeding) from which it is engaged in the wholesale sale and delivery of food products. In the 12-month period preceding the filing of the charge, Respondent sold and shipped goods and materials valued in excess of \$50,000 directly to points outside the State of Arizona. Accordingly, I find Respondent meets the discretionary direct outflow standard established by the Board for exercising its statutory jurisdiction and that it would effectuate the purposes of the Act for the Board to resolve this labor dispute. Further, Respondent admits that the Union is a labor organization within the meaning of the Act.

Nationwide Respondent employs about 2400 employees. It employs around 500 warehousemen and drivers at the Phoenix facility. This case grows out of the Union's 1998 efforts to organize the Phoenix warehouse and driver employees. That organizing campaign commenced in April 1998 following a meeting between Union Agent Cliff Davis and employees Luigi Baratta, Frank Meza, and Vincent D'Anella, the alleged discriminatee in this case. Ultimately, the organizing campaign culminated in a union-filed NLRB representation petition on June 16. For reasons not specified, the Union withdrew that petition a short while later on June 24 but then it filed a new petition on September 14.³

The Company openly opposed the Union's organizing effort almost from the outset. Following the filing of the Union's June petition, company officials conducted "communication" meetings with groups of employees to express their opposition to unionization. They held the first round of employee meetings on June 18. During these sessions Company President Kent McClelland told employees that a union had once represented employees but, in his view, union representation had not been good for the Company and that he did not think employees needed a union. The vice president for human resources director, Charles Roberts, told employees that they did not need union representation, suggested that perceived problems could

² Sec. 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees for exercising their right, among other things, to join or assist a labor organization. Sec. 8(a)(3) prohibits employers from discriminating against employees in order to encourage or discourage membership in a labor organization.

³ In its June petition, the Union sought to represent only warehousemen. The MacKenzie Incident Reports discussed below contains a hint suggesting that the appropriateness of this unit may have been challenged on the ground that it did not include the drivers.

be taken care of through its "open door" policy, and warned union advocates against intimidating employees with strong-arm tactics.

Company officials conducted a similar series of employee meetings on June 29 shortly after the Union withdrew its initial petition. During these meetings company officials told employees that they did not know why the petition had been withdrawn but otherwise the tone of their message remained the same. None of the General Counsel's allegations pertain to the Company's communication meetings with employees in June.

The Union's September petition remained pending at the time of the hearing in this proceeding apparently blocked by this unfair labor practice case. Only the General Counsel's allegation about D'Anella's discharge pertains to events following the filing of the second petition; all others relate to events alleged to have occurred immediately prior to or during the time the June petition was pending. Thus, complaint paragraph 6, as amended, alleges that Respondent's supervisors and agents engaged in nine independent violations of Section 8(a)(1) between late May and June 25. Complaint paragraph 5 alleges that Respondent violated Section 8(a)(1) and (3) by discharging employee D'Anella on October 9.

The accounts provided by Respondent's witnesses flatly deny or sharply conflict with the accounts provided by the General Counsel's witnesses about the events alleged as unfair labor practices. The findings below reflect my factual conclusions about those events following a thorough review of the testimony and exhibits. Witness demeanor and inherent probability considerations have been assessed in making the credibility resolutions critical to the findings I have ultimately made. Testimony contrary to my findings, though occasionally noted, has been discredited because it conflicted with credited testimony or documentary evidence, or because I found it to be inherently incredible and unworthy of belief. As the assertions made by Respondent's witnesses in support of its defense against D'Anella's discharge contain particularly troubling and conflicting accounts of his alleged misconduct in the course of his organizing activities, I have summarized these accusations greater detail in order to provide a fuller understanding for the basis of my credibility resolutions central to that issue.

B. Complaint Paragraphs 6(a) Through (e)—The Shalley Allegations

These allegations assert that Respondent's night-shift manager, Bud Shalley: (1) threatened employees in late May or early June with unspecified reprisals if they signed union authorization cards; (2) unlawfully interrogated employees on June 4 and 9; (3) created the impression on June 9 that Respondent was engaged in surveillance of employee union activities; and (4) requested employees on June 9 to engage in surveillance of other employees' union activities. Respondent's answer denies each of these unfair labor practices.⁴ Shalley denied that he made the statements attributed to him by employ-

⁴ Respondent's answer denied Shalley's supervisory status. At the hearing, Respondent admitted Shalley's status as a supervisor within the meaning of the Act..

ees Frank Meza and David Trujillo detailed below that form the basis for these allegations.

Around June 1, Shalley approached Frank Meza, a warehouse employee, in the deli area of the warehouse when no one else was present. Shalley, described by Meza as “kind of upset,” then spoke to him [about] unionization. Shalley stated to Meza that “[w]e really don’t need a union unless you’re mistreated” and that “[t]hey don’t need a union here.” Meza did not say too much but at one point he did ask Shalley to identify those “involved” with the union. Meza gave no indication that Shalley responded.

Concerning the Shalley-Meza exchange, the General Counsel argues that it was a “one on one” affair and further asserts that Shalley was “angry,” that his remarks were an attempt to intimidate Meza and to elicit an employee’s position about unionization. In sum, Shalley’s remarks, in the General Counsel’s view, represent some threat of “unspecified reprisal.” Respondent contends the even if Shalley made the remarks attributed to him by Meza, they amount to nothing more than expressions of opinion. I agree.

Shalley’s remarks to Meza contain no overt threat or promise and, in my judgment, the two statements read fairly do not even imply any potential threat or promise. Meza’s assertion that Shalley appeared somewhat “upset” fails to convey the kind of out-of-control anger that might lead an employee to conclude that, despite the actual words spoken, the supervisor really sought to intimidate. For these reasons, I have concluded that Shalley’s remarks amount to little other than an expression of his own opinions, perhaps strongly held, about conditions that would warrant union representation and the lack of such conditions at that time and place. Viewed as such, I conclude that Shalley’s remarks to Meza failed to stray beyond the bounds of speech, either in content or tone, protected by Section 8(c).⁵ See, e.g., *Ross Stores*, 329 NLRB 573, 575 (1999). Accordingly, I recommend dismissal of complaint paragraph 6(a).

In late April D’Anella invited David Trujillo, a warehouse fork runner, to attend a union meeting. Trujillo accepted the invitation and attended because he had become piqued about company policies that routinely permitted newer employees to be off work on Sundays and that required employees to make up absences by working on their scheduled off days. However, following the union meeting, Trujillo took no active role in the organizing drive and never discussed unionization with other employees.

Around June 4 Shalley encountered Trujillo seated in a warehouse office completing paperwork. Initially Shalley spoke to Trujillo about their mutual interest in softball and then Shalley asked Trujillo if D’Anella had approached him about signing a union card. Trujillo denied that any such solicitation had occurred and the conversation ended. About 5 days later, Shalley again approached Trujillo in the warehouse office and stated: “I can’t believe Vinnie hasn’t come to you yet about the union.” After Trujillo surmised aloud that D’Anella might not

⁵ Sec. 8(c) provides that the “expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”

“trust” him, Shalley stated: “Well, if you find out that Vinnie’s trying to hand out union cards let me know.” Trujillo promised to keep his “eyes open.”⁶

I find in agreement with the General Counsel that Shalley’s remarks to Trujillo on both occasions violated the Act. In the first conversation, Shalley’s outright questioning of Trujillo concerning employee union activity contains the classic earmarks of unlawful interrogation. *Clear Pine Mouldings v. NLRB*, 632 F.2d 721, 725 (9th Cir. 1980). Nothing supports a conclusion that, in doing so, Shalley had a legitimate business purpose for his inquiries. Similarly, Shalley’s remark in the second conversation a few days later, though in the form of a declarative statement rather than a query, amounts to little more than pressuring Trujillo for information about D’Anella’s union activity. Therefore, I concur with the General Counsel’s argument and allegation that Shalley again engaged in unlawful interrogation on this occasion. I further find, as alleged, that Shalley unlawfully solicited Trujillo to report D’Anella’s union solicitation attempts. And finally, Shalley’s remarks during the second encounter, read in their entirety and considered with his interrogation in the first encounter, establish the General Counsel’s allegation that Shalley created the impression that D’Anella’s activities were under surveillance as they show that he was “closely monitoring the degree of an employee’s union involvement.” *Electro-Voice, Inc.*, 320 NLRB 1094 (1996). Accordingly, I find merit to complaint paragraphs 6(b) through (e) and conclude that Respondent violated Section 8(a)(1) by that conduct.

C. Complaint Paragraph 6(f)—Other Surveillance Claims

Complaint paragraph 6(f) alleges that from June 18 until June 25, Supervisors Joe Hefley, Mike Mack, Jim Robinson, Frank Sheng, as well as Shalley engaged in surveillance of employees to discover their union activities and sympathies. Hefley is the night-shift warehouse manager. Mack, Robinson, and Sheng were supervisors at the time.⁷ As discussed in more detail below, General Counsel’s witnesses claim that these

⁶ Shalley flatly denied Trujillo’s assertions. He claims that he first learned of the union drive and D’Anella’s activity later in June. However, as Meza’s account of an earlier conversation is uncontradicted, I do not credit Shalley’s denials here.

⁷ Respondent denies liability for the conduct of its supervisors on the ground that they are not supervisors or agents within the meaning of the Act. As General Counsel charges all supervisors with similar, unlawful conduct, I find it sufficient for remedial purposes here to resolve those issues only as to Sheng. On this record, Sheng’s status as a supervisor is problematic. However, as Respondent has cloaked Sheng with sufficient apparent authority to act on its behalf, I find him to be an agent within the meaning of Sec. 2(13). Respondent characterized Sheng’s job as a “key management position.” GC Exh. 15. Sheng assigns work to employees, corrects employee errors, documents and calls his manager’s attention to employees’ deviations from company policies, and arranges conferences between his manager and employees to address their deficiencies. Sheng also attended management’s meetings with other admitted managers and supervisors and received the confidential materials distributed by the Company, both of which provided guidance about the conduct Respondent expected of them during the organizing campaign. Accordingly, I find this evidence sufficient to conclude that Sheng is Respondent’s agent and that Respondent, therefore, is liable for his conduct. *Dentech Corp.*, 294 NLRB 924 (1989).

supervisors in particular frequently followed employees working in the warehouse in order to listen to their conversations, began appearing in the lunchroom during employee breaks for the same purpose, and watched employees as they arrived and left the company parking lot.

The Company maintains two employee lunchrooms at the warehouse; employees may use either one. After the Union filed its June petition, D'Anella observed that Supervisor Sheng "made himself comfortable at our table," joined in discussions with the employees, and occasionally would "throw in a little asking a question about . . . 'What's up with this union thing.'" He also observed Supervisors Shalley and Robinson began hanging out in the lunchroom around this time whereas before they ordinarily came there only to purchase a soda drink and leave. On one occasion, D'Anella asked Sheng about the frequent visits by the supervisors to the lunchroom and Sheng told him that "[t]his is all part of Shamrock's new policy of supervisors getting closer to the men."⁸

Meza corroborates D'Anella's account concerning Sheng's frequent visits to the lunchroom during the period when the June petition was pending. By his account, Sheng's visits to the lunchroom in this period "was almost like an every day affair" and that it "never was like that" before. Previously, he said, Supervisor Sheng would join Baratta, D'Anella, and himself for lunch "once in a while" but after the petition was filed Meza noticed that Sheng would "sit down with us [to eat lunch] . . . almost every day" and that "Shalley would walk around [in the lunchroom]." After the Union withdrew its June petition, Meza noticed that the supervisor's visits to the lunchroom returned to normal.

Employee Trujillo also noticed a similar lunchroom phenomenon during this period. By his account, certain supervisors "started eating lunch with us or sitting in the break room, not necessarily [eating], but they sat in the lunchroom with us." He identified two particular supervisors, Sheng and Mike Mack, and asserted that one or the other frequently appeared in the lunchroom where he ate and that they would generally "just sit there watching TV." Trujillo claimed that, during his 3 years at the warehouse, he never saw either supervisor in the lunchroom he used except during the brief period in June while the Union's petition was pending.

General Counsel also sought to establish that supervisors became more attentive of employee shop floor conversations during the organizing campaign. Meza observed that supervisor Shalley went from area to area around the warehouse and approached employees talking together as though he was attempting to eavesdrop on the conversation. On some occasions, Shalley asked employees specifically what they were talking about and on other occasions Shalley merely stood and stared at employees talking together. Meza had "never seen them do that before till [sic] that time," i.e., during June. In addition, Warehouse Manager Hefley admittedly stood on the platform outside the employee entrance at the conclusion of most night shifts during this period. From this vantage point, Hefley would be able to observe most of Respondent's parking

lot. Hefley claims that he engaged in this practice to thank the night shift employees for their extraordinary efforts during the long hours they worked through this period. There is no evidence that Hefley ever approached any group of employees talking among one another in the parking lot as commonly occurred following a work shift.

An employer may lawfully observe public union activity occurring on its own premises but an employer violates Section 8(a)(1) where company officials do something out of the ordinary to keep union activities under watch. *Albertsons v. NLRB*, 161 F.3d 1231, 1238 (10th Cir. 1998). See also *The Broadway*, 267 NLRB 385, 399-402 (1983), and the cases cited there. Contrary to claims by Sheng and Shalley that they did not alter their ordinary conduct at this relevant time, I find that both frequented the lunchrooms substantially beyond their ordinary practice during mid-to-late June in order to monitor employee union activity. D'Anella's uncontradicted claim that Sheng admitted his more frequent visits during this period as a new company policy strongly supports my conclusion that the conduct by two individuals in particular was designed for the purpose of engaging in surveillance of employee breaktime to limit union activity. This conclusion concerning conduct in the lunchrooms also lends support to the conclusion that the purpose of Shalley's increased attentiveness to employee discussions on the shop floor as observed by Meza are ascribable to the ongoing union activity. Accordingly, I find that this close monitoring of employee interaction on the floor and during break periods violated Section 8(a)(1) as alleged.

Hefley's conduct is another matter. Although I have considerable doubt about Hefley's motive for positioning himself on the doorway platform, I have concluded that in the absence of evidence showing that he interfered in any way with any exchanges by employees during their parking lot conversations he engaged in no unlawful conduct. Apart from positioning himself at a considerable distance from such employee conversations, Hefley apparently did nothing further. Accordingly, I recommend that the Board dismiss this allegation.

D. Complaint Paragraphs 6(g) and (h)—The June 22 Meetings

Complaint paragraphs 6(g) and (h) allege that Duane Lawson, the Company's superintendent of operations, verbally promulgated an overly broad and discriminatory no-solicitation rule on June 22 and threatened employees with "unspecified discipline" if they violated the rule. Complaint paragraphs 6(i) and (j), added by amendment at the hearing, allege that around June 22 Vice President Roberts unlawfully interrogated employees and created an impression that employee union activities were under surveillance.

For a number of years prior to this organizing campaign the Company maintained a standard no-distribution, no-solicitation rule prohibiting all kinds of solicitations "during the working time of either the associate doing the soliciting or the associate being solicited, or at any time in customer and public areas." The no-distribution policy covers the same time periods and areas as well as "working areas." Such rules are presumed valid. *Our Way, Inc.*, 268 NLRB 394 (1983). No evidence shows that the Company forbade casual employee conversation

⁸ D'Anella's testimony concerning this statement by Sheng is not contradicted.

while working. Hence, employees regularly engaged in shop floor talk (presumably brief) without interference from their supervisors about such topics as sports, current events, weekend activities, and their family life. Shalley's discussions with Trujillo concerning their mutual interest in softball lends credence to the claims made uniformly by Baratta, D'Anella, and Meza that such nonwork discussions on working time formed an integral part of the workplace culture at this warehouse.

On June 22, Lawson, Roberts, Warehouse Manager Anthony Diana, and Operations Manager Daniel Myers met with employee union organizers Baratta, D'Anella, and Meza in separate, closed-door sessions at Lawson's office.⁹ Management summoned the employees to Lawson's office virtually one right after the other because of reports from employees that they were being "pressured" about signing union authorization cards while "on duty." The purpose of the meetings, Roberts claims, was to "do something to stop that."

When the management officials met with Baratta, Lawson stated that they had learned he had been "handing out union cards during working hours" and cautioned Baratta "that it's against company policy to be *talking* about the union during working hours and handing out . . . union authorization cards." (Emphasis added.) Lawson further advised Baratta that he could not use company equipment, i.e., copy machines, faxes, phones, anything for his union activity.¹⁰ Finally, Lawson told Baratta that "Shamrock Foods takes this very seriously and as a result [he could] be terminated." Thereafter, Roberts addressed Baratta about his "right to organize." Roberts told Baratta that he could engage in organizing activities "during [his] breaks and lunch hour, [and] outside work" but that he wished Baratta would not do so. Baratta admitted that he was told in the course of this meeting that he "was not being threatened" and that he did "have [the right] to organize if that was what [he] wanted to do."

At the outset of the June 22 meeting with D'Anella, Lawson stated that the Company had learned that D'Anella had been soliciting for the Union on company time. Lawson also told D'Anella that the Company took a very serious position with respect to the topic of unions and that the purpose of the meeting was not intended as a threat but rather to inform him of his rights concerning union solicitations. Before turning the meeting over to Roberts, Lawson informed D'Anella that the Company had been told by some employees that they were being harassed and threatened in connection with signing union cards. He apparently did not elaborate on these allegations at all. Thereafter, Roberts explained to D'Anella that he could not solicit union cards during worktime in work areas but that he could solicit during lunch and break periods in the lunchroom and breakrooms. Roberts then asked if D'Anella had any

⁹ Myers was present for some but not all of the meetings. In any event, there is general agreement that only Lawson and Roberts spoke.

¹⁰ Baratta denied that he had ever used any of the Company's equipment for his organizing activities but admitted that "we used [the copy machine] all the time" to photocopy personal items such as party announcements and jokes. Although he claims supervisors observed this conduct, Respondent's managers denied that the Company permits employees to use its equipment for their personal work.

comments or questions. D'Anella told the group of company officials only that he understood and the conference ended.

In the meeting with Meza, Roberts explained that it was his "right or anybody else's right to go and give [union] cards out" but that if he was ever "caught on company time doing this [he] could be terminated." Roberts added that the Company "didn't want a union and they didn't think they needed a union. He further stated that the Company "had an open door policy and that if [Meza] wanted to talk about anybody that was involved with the union . . . [he] could come and talk to them." Meza responded by saying that he did not know what Roberts was talking about but that he had talked to a couple of people. Meza thanked the managers and left.

Within a couple of days following these meetings, employee Jeff Mackenzie provided management with two written "Incident Reports," both dated June 24, purporting to describe on-the-job solicitations by Baratta and D'Anella.¹¹ The first report [R Exh. 4] states that Baratta and D'Anella had asked Mackenzie at approximately 5:45 p.m. on June 22 (presumably working time) "if he would be interested in signing a union card." The report further states that "they" told Mackenzie that they would answer questions for him at lunch. The second report states that Baratta and D'Anella again approached Mackenzie "on the dry dock (presumably while at work) about signing a union card" and that D'Anella promoted the benefits of union representation. This report further states that D'Anella later approached Mackenzie at 2:30 a.m. in a work area and again began discussing the Union. Neither report indicates that either Baratta or D'Anella actually tendered an authorization card to Mackenzie on any of the three occasions discussed.¹²

The General Counsel does not attack the Respondent's written rules governing solicitation and distribution. Apart from that the General Counsel's position is not entirely clear. Citing that portion of *Barnes & Noble*, 233 NLRB 1326, 1336 (1977), finding the promulgation of a "no union talk" rule unlawful, the General Counsel first argues that "Lawson and Roberts informed [the three employees on June 22] that . . . they could only discuss the Union during coffee breaks, lunch, and non-working hours . . . [and that] no such rule applied to the multitude of non-work related subjects that employees discuss, with Respondent's knowledge, during working hours." Soon there-

¹¹ The General Counsel objected to the receipt of these two Incident Reports on the ground that they fell within the scope of his subpoena duces tecum and that Respondent had failed to produce them at the outset of the hearing. I overruled the General Counsel's objection. In his brief, the General Counsel again moves to suppress these reports on the same ground. That motion is denied as the General Counsel has made no showing that Respondent's failure to produce the reports prejudiced his case-in-chief or that Respondent's failure to produce the reports otherwise impaired the integrity of the proceeding. See *Be-Lo Stores*, 318 NLRB 1, 14 fn. 35 (1995).

¹² MacKenzie's Incident Reports provides no rational basis for the perception he purportedly harbors that Baratta and D'Anella threatened him. That assertion suggests that an atmosphere poisoned by rumor, innuendo, and preconceived notions prevailed during this organizing campaign that precluded a reasoned consideration the merits, or lack thereof, of organizing. In my judgment, Respondent's reference to strong-arm tactics from the beginning of the campaign contributed to this atmosphere.

after, however, the General Counsel argues that these two managers “informed these employees that they would be terminated if they *continued to talk about the Union or passed out union authorization cards during work hours.*” (GC Br. at 28; emphasis added.) On these points, Respondent argues that nothing occurred in the June 22 meetings other than to verbally state “Shamrock’s well-established and uniformly applied policy, which, in all respects, is consistent with applicable law.” (R. Br. at 24; footnote omitted.)

Without citation to a single shred of supporting evidence, the General Counsel also argues that “Respondent conducted separate but consecutive *interrogations* of union organizers Baratta, D’Anella, and Meza.” The General Counsel further asserts that “[t]hese statements [at the June 22 meetings] not only were unlawful *interrogations*, but also created the impression that employee union activities were under surveillance by Respondent . . . [and that Respondent by]” singling out these employees and interrogating them violated Section 8(a)(1) of the Act. (GC Br. at 25, emphasis added.)

Despite repeated assertions by the General Counsel concerning interrogation, no evidence establishes that either Lawson or Roberts engaged in any questioning of the three union supporters at all in the course of the June 22 meetings apart from an insignificant inquiry as to whether they understood what they could and could not do in connection with union solicitations. Moreover, the General Counsel’s claim that Respondent created an impression of surveillance apparently by holding the meetings and telling the employees that they were aware of their union activity, overlooks Roberts’ credible claim that management received employee reports that these union activists engaged in solicitation during worktime. I reject General Counsel’s interrogation and surveillance claims. Instead, I find the June 22 meetings lawful in view of Respondent’s longstanding no-distribution, no-solicitation policy and reports to management about violations of that rule. Simply put, an employer does not commit an unfair labor practice by lawfully enforcing a lawful plant rule.

Unquestionably, Baratta, D’Anella, and Meza received warnings during the June 22 meetings that they could face termination for soliciting union authorizations during work hours. As General Counsel’s own evidence shows that Respondent maintained a lawful written rule to this effect for years, I find no basis for concluding, as General Counsel claims, that Lawson and Roberts established a new no-distribution, no-solicitation policy for discriminatory purposes or that it discriminatorily enforced its existing policy. General Counsel failed to show that Respondent permitted solicitations for other purposes during work time. Although Baratta claimed that Lawson barred him from using the Company’s equipment to copy union materials and the General Counsel adduced evidence that employees occasionally used the Company’s copier to reproduce party and car wash announcements, the General Counsel failed to fully develop this evidence so as to permit a conclusion that Respondent tolerated solicitations for these other purposes on work time. Therefore, to the extent the General Counsel claims that the verbal warnings at these meetings violated the Act, I reject that assertion.

Likewise, to the extent that the General Counsel argues that Lawson and Roberts established a more encompassing policy against talking about unionization at all during worktime while tolerating discussions concerning other nonwork matters, I am satisfied that the General Counsel’s case fails. To be sure, an employer that broadly bars only union talk while tolerating other nonwork discussions during actual working time infringes on its employees Section 7 rights in violation of Section 8(a)(1) of the Act. *Emergency One, Inc.*, 306 NLRB 800 (1992), and the cases cited at page 806. However, the primary thrust of the June 22 meetings plainly amounted to little other than a reiteration of Respondent’s longstanding, lawful no-distribution, no-solicitation rule coupled with warnings to the three employee organizers that they could be terminated for violating that rule.

As only Baratta asserted that Lawson stated that he could not “talk” about the Union during worktime, I have concluded that this testimony represents an imprecise conclusion about the nature of the prohibition explained to the three employee union organizers on June 22 rather than a recitation of Lawson’s actual statement or intent. Quite clearly, the General Counsel had the means to establish differently but failed to utilize it. Both Baratta and D’Anella admitted that they surreptitiously recorded their meetings with management on June 22. The General Counsel made no attempt to offer those recordings as evidence in support of his claim that Respondent sought to establish a broad no-union-talk rule nor did he otherwise explain his failure to do so. By adducing weak evidence when strong evidence is obviously and readily available warrants the inference that the stronger evidence does not support the proposition advanced. *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1939). Furthermore, the lack of subsequent action, disciplinary or otherwise, by management against Baratta and D’Anella over the matters related in the two MacKenzie incident reports lends support to my conclusion that Respondent did not impose an unlawful no-union-talk rule or, for that matter, did not even restrictively apply its no-solicitation rule.

Accordingly, I recommend that the Board dismiss complaint allegations 6(g) through (j).

E. Complaint Paragraph 5—D’Anella’s Discharge

Complaint paragraph 5 alleges that Respondent discharged Vincent D’Anella around October 9 for his protected union activities. Respondent admits discharging D’Anella but claims, in effect, his termination resulted from unprotected activity, i.e., “threats of physical violence towards other [employees]” in connection with soliciting union authorization cards. Specifically, Respondent charges that D’Anella threatened two employees, Chris Hargenrader and Daniel Brooks, with “violent repercussions related to his efforts to secure their support for the Teamsters, in direct violation of Shamrock policies prohibiting such conduct.” (R Br. at 2.)

D’Anella commenced working for Respondent in February 1994 as an order picker. In 1995 he was promoted to the bulk runner position. On June 25 the bulk runner position was abolished and D’Anella once again became an order picker. There is no evidence to indicate that he was ever disciplined in any manner, or that he was other than a good employee. Respon-

dent suspended D'Anella on October 7 and terminated him the following day.

John Culligan, one of Respondent's security agents, escorted D'Anella from his workstation to a meeting with Hefley and Myers in Hefley's office. At that time, Myers, who had already decided to suspend D'Anella before this meeting began, stated that "it had been brought to their attention that there was [sic] associates being harassed and threatened into signing the blue cards for the union." There is no evidence that any company official provided further detail to D'Anella at this time or later, or that the identities of D'Anella's accusers were ever disclosed to him. Myers told D'Anella that he was being sent home while the Company set about to "investigate it further." D'Anella was told to return the following afternoon around 4 p.m. for a further meeting in the conference room. When asked if he had anything to say in response, D'Anella stated: "[T]his is absolute nonsense . . . [b]ut . . . you do what you got to do. I hope you know what you're doing." D'Anella asserted that he "didn't want to dignify it at all with an answer because it was just an attack on my character at that point." Hefley said nothing.

Virtually no added investigation occurred. Myers' principal action related to securing Roberts' authorization to proceed with D'Anella's discharge. Myers explained that at the time he suspended D'Anella he "fully expected him to defend these allegations against us (sic) and give us some kind of material to go out and conduct a proper investigation." However, according to Myers, D'Anella "did not deny anything."

D'Anella reported as requested on October 8 and Culligan escorted him to the conference room. On this occasion Myers, Hefley, and Culligan were present with D'Anella but only Myers spoke. Myers again asserted that associates had reported harassment and threats by D'Anella and that the "company felt as if they had what they needed at this point to effect [his] termination, so [he] was [thereby] terminated." D'Anella responded by saying: "You know, guys, I've been here for close to five years and it's come down to this. Now, because of this union thing I'm being terminated, you know, after not hearing a peep out of me . . . after all those years. You never heard from Vince. Vinnie never got involved in any disciplinary matters whatsoever and here I am, I'm gone." The conference ended and D'Anella was escorted out.

Respondent's case rests on the accounts of threats and intimidation provided by Hargenrader and Brooks. D'Anella denies the threats attributed to him by both of those employees. He claims that he did not know Brooks and did not solicit his authorization card. Baratta supported D'Anella's assertion about the solicitation of Brooks' card. After seeing Brooks at the hearing, Baratta recalled that he solicited Brooks' card and that he was alone when it occurred. Therefore, the case turns primarily on credibility resolutions by the trier of fact as to the various accounts provided concerning the purported threats and the manner in which they were brought to the attention of Respondent's officials. Those accounts are detailed below.

1. Chris Hargenrader

Hargenrader began working at the warehouse in late 1996 as a sanitation employee on the night shift.¹³ Baratta initially contacted Hargenrader about his interest in unionizing and solicited him to sign an authorization card. Hargenrader claims that he told Baratta that he "just wanted some information" and that Baratta promised that more information would be provided if he signed the card. With this assurance by Baratta, Hargenrader signed the card.¹⁴

After a couple of weeks passed and Hargenrader had received no further information, he began asking "around" to learn what was going on but apparently still learned little. His account suggests that his inquiries attracted the attention of the employee organizers, most notably D'Anella, who asked to speak with him in a little-traveled warehouse aisle. When the two men met in that aisle, D'Anella purportedly stated: "I hear you've been shooting your mouth off." In response to Hargenrader's inquiry as to what D'Anella was talking about, D'Anella supposedly told Hargenrader that they had been working on the organizing effort for a long time and that he needed "to keep [his] mouth shut." Hargenrader asserts that D'Anella then told him that they "had the whole Mexican contingent" and almost enough cards to have a vote.¹⁵ When asked what the "Mexican contingent" was, D'Anella purportedly said: "You know we have all the Mexican loaders. You know how those guys are, I can't control them or anything. They have no problems doing drive-bys and stuff."

After the June 18 "communications meeting," Hargenrader told Supervisor Hefley that he had "mistakenly . . . signed a [union] card" and asked Hefley how he could "get it back." Hefley did not have an immediate answer but a couple of days later Hefley told him he could seek its return by calling or writing the Union, asking the person who "took my card" for it back, or just let it "ride." Initially, Hargenrader testified that he chose the later option because he was a "little worried" about D'Anella's remarks concerning "the Mexican contingent and drive-bys and such." However, Hargenrader asserted that later he went to D'Anella to seek the return of his card. According to Hargenrader D'Anella told him: "Sure, I can get your card back for you. I'll rip it up in front of everybody." The conversation went no further.

Over the next week or two following the company meeting, Hargenrader began to notice that the recent friendliness that "people in the warehouse" had exhibited toward him changed. Instead of waves and smiles from others, Hargenrader claimed that he began "getting the cold shoulder." This atmosphere prompted Hargenrader to speak again with D'Anella alone in

¹³ Hargenrader's workday commenced at 5:30 p.m. and continued until the completion of existing work. Sanitation employees engage in cleaning chores around the warehouse.

¹⁴ Hargenrader placed his entire involvement in the events about which he testified as having occurred in the summer of 1998. Beyond that he could not be more specific as to a time frame for the events addressed in his account. However, his testimony suggests that he would have most likely signed his authorization card, which is not in evidence, between late May and mid-June.

¹⁵ Apart from denying the threats attributed to him by Hargenrader, D'Anella also denied ever using the phrase "Mexican contingent."

one of the warehouse aisles in an effort to learn “why everybody was acting so funny.” Hargenrader asserts that D’Anella “got right in my face, like about two inches [away]” and told him “You’re a rat.” When Hargenrader protested, D’Anella supposedly said: “You know, we know you went up there and told them everything.” In response, Hargenrader claims that he told D’Anella that he “didn’t tell nobody nothing. I mean, they knew there was a union going on because they mentioned it in the meeting.” D’Anella purportedly responded: “Well, you need to keep your mouth shut. Remember what I told you about the Mexican contingent. They know who you are. You know, they’re looking at you and they know where you live.” These remarks frightened Hargenrader and prompted him to tell D’Anella: “Hey, you know, I’m not a rat. Can you get the word out or pass it out that I’m not a rat?” Supposedly, D’Anella assured him that he would “see what I can do” and that he wanted to talk with a “few of the key players or big dogs or something like that.”

Later that same evening, Hargenrader encountered D’Anella in the warehouse. D’Anella motioned Hargenrader to approach and when he did so, Baratta came up from behind. Hargenrader found that strange because Baratta was not scheduled for work. When Baratta approached, Hargenrader claims that he asked: “Do we have a problem here?” Both Hargenrader and D’Anella responded by saying there was no problem. Baratta then said, “Good, I thought we were going to have to take care of a problem.” Nothing further occurred at this time.

Hargenrader, a married man with children, asserted that D’Anella’s threats pertaining to his home and drive-byes “really scared” him. As he perceived it, “it would be real easy of somebody to come around at night to do something to my family without me being there.” When Hargenrader told his wife about the threats she too became scared. For this reason, he moved his wife and children to his in-laws home for about 3 or 4 months, and began carrying a gun to work. As noted above, Hargenrader appeared unable even to approximate when the events in his saga occurred apart from his recollection that he sought to have his authorization card returned after the first “communications meeting.” Apart from that, Hargenrader could only say that they occurred “[t]hroughout the summer.” This uncertainty even extended to when he purportedly moved his family to his in-laws.

The first company official who learned anything about Hargenrader’s claims appears to have been Warehouse Manager Diana. Diana recalled that they first discussed the alleged threats in July, which would have been at least 2 weeks to a month or more after Hargenrader claims he was first threatened. According to Hargenrader, he “approached . . . Diana and . . . told him that . . . [he] had been threatened.” Admittedly, Hargenrader did not tell Diana who had threatened him because he “didn’t want any repercussions throughout the warehouse” and Diana, according to Hargenrader, did not ask.¹⁶ Instead, Hargenrader anticipated that the Company “would put

out a memo or have a meeting . . . [to explain] that threats weren’t part of Shamrock’s policy.” Nonetheless, Hargenrader claims that Diana promised “that he would do his best to get to the bottom of it . . . as quickly as he could.”

Diana recalled that Hargenrader stopped him as the two passed each other by chance on the warehouse floor. Hargenrader then told him that “he was in the middle of this union stuff and that he had been called a rat and that he was being hassled.” According to Diana, Hargenrader also advised that when he tried to get his authorization card back he had been told that “there was a Mexican contingent out there that would possibly do drive-by shootings . . . and he was pretty upset about that.” A couple of weeks later, by Diana’s account, the two men had another conversation in the warehouse. At this time, Hargenrader told Diana that “[n]othing has changed” and that he was still being called a rat. Diana related that on this occasion Hargenrader told him that he had been told “that the Mexican contingent could not be controlled, that they would have no problems doing a drive-by shooting and he had fear for his family . . . [and that] he might possibly move his family out of the house.” Diana asked Hargenrader on both occasions if he wanted to file a formal complaint and that Hargenrader declined to do so. Although Diana claims to have reported this information to Lawson and Myers, there is no indication that either these two officials or any other company official ever spoke to Hargenrader concerning the account of the events he described to Diana.

On August 25 and September 1, Respondent’s counsel prepared statements for Hargenrader’s signature based on information provided to counsel by Diana. These two statements have some minor variations from the accounts provided by Hargenrader during his testimony. However, contrary to Myers’ assertion in his testimony, neither of these two statements nor a third statement signed by Hargenrader on September 29 wherein he named D’Anella as his threatening protagonist for the first time makes any mention about moving his family because of D’Anella’s alleged threats.

2. Daniel Brooks

Brooks, a Navy veteran, began working for Respondent in late May as a night-shift order picker. By his account, he walked to and from work each day while employed at the Company. Brooks signed a union authorization card dated July 21 but he provided the following account of the circumstances under which he signed the card.

Brooks left work around 4 a.m. and, as he walked through the warehouse parking lot someone, apparently Baratta, called out to him but he kept walking. According to Brooks, it was still quite dark and there were no security personnel around the parking lot. However, before he got completely out of the parking lot, Baratta approached him “and then he like walked me back . . . over by his jeep and he talked to me.” As this occurred, two other men, one of who he identified as D’Anella, came up so that by the time he reached the Jeep “there was three guys around me and there’s this jeep in front of me.” Amidst the on-going small talk, “one guy pulls out a blue [union authorization] card, puts it on the top of the hood of the jeep

¹⁶ Thus, Hargenrader testified: “[A]t first I was not asked to give names. I was just asked what had happened and that’s all I did. I wasn’t going up there to snitch or cut anybody’s head off. I was going up there because I was being threatened in my place of business.”

and . . . they give me the spiel about the union.”¹⁷ Brooks told the three, much larger men that he “didn’t want to sign the card” and that he “didn’t want to have nothing to do with this.” Brooks claims that D’Anella then stated: “If you don’t sign the card, something bad is going to happen to you.” Brooks claims that, surrounded as he was by three larger men in the dark parking lot, he became frightened and wondered if they planned to “jump on me” right there or after he left the gated area, or if he would lose his job. Given these circumstances, Brooks felt compelled to comply so he filled out the card and then he “just took off.”

Brooks and the Company’s officials who testified concerning this alleged threat by D’Anella claim that he never returned to work until more than 2 months later. Brooks asserts that the “strong-arm” tactics by the three men in the parking lot that early morning frightened him so much that, after discussing it with his wife and his mother, he decided to find work elsewhere rather than return to work at the Company. Seemingly, Brooks never communicated this decision or the reason for it to any company official. Instead, he claims that he applied for unemployment compensation (which he did not receive) and began searching for other employment, a process that purportedly went on for more than 2 months without success.

Finally, on September 23, Brooks filed an application with Alliant Foodservice, one of Respondent’s competitors. In the application’s work history section Brooks listed “union harassment” as his reason for leaving his employment at Shamrock. Shortly thereafter, an Alliant human resources clerk telephoned Diana, a former Alliant employee, to inquire about Brooks. That clerk advised Diana of Brooks’ stated reason for leaving Shamrock. Diana in turn informed Myers of this development and Myers telephoned Brooks to arrange an interview on September 28 about his allegation on the Alliant application. After that interview, Myers prepared a statement (R Exh. 7) that Brooks signed describing his account of the parking lot incident slightly more than 2 months earlier. Although that statement alludes to three individuals surrounding him and blocking his progress, the only person identified in the statement either by name or any specific description was D’Anella. Myers also arranged for Brooks to return to work at the Company following assurances that he would be protected.

Baratta admits that he solicited Brooks’ authorization card after work one morning in the parking lot area. He asserts, consistent with D’Anella’s denials, that D’Anella was not present at the time and, hence, that D’Anella uttered no threat to Brooks to induce him to sign the card. Further, Baratta insisted while testifying during the General Counsel’s case-in-chief and as a rebuttal witness that he observed Brooks at work around the warehouse after signing the union card. Brooks’ Alliant application tends to provide some support for that claim. It shows his period of employment at Shamrock as lasting from “5–27–98 to 9–20–98.”¹⁸ Respondent offered no payroll re-

ords or personnel records to support the claims made by Brooks and its officials that Brooks’ tenure at the Company was more limited nor did Respondent seek to explain this obvious inconsistency reflected in that application, one of its own exhibits.

3. Further findings and conclusions

An employer violates Section 8(a)(1) by discharging an employee based on its good faith but mistaken belief that the employee engaged in misconduct in course of activity protected by Section 7 of the Act. *NLRB v. Burnip & Sims*, 379 U.S. 21 (1964). To find such a discharge unlawful, no specific showing of motive is required.¹⁹ *Tracer Protection Services*, 328 NLRB 734 (1999). In cases of this nature, the General Counsel has the burden of showing that the employee did not, in fact, commit the misconduct. *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952). As Respondent concededly discharged D’Anella for misconduct in connection with his union solicitation and organizational activity, the General Counsel prevails if no basis exists to find that D’Anella, in fact, engaged in the misconduct attributed to him by Brooks and Hargenrader.

I find that the accounts of threats and intimidation attributed to D’Anella by Hargenrader and Brooks lack any credible quality. As to Hargenrader, I find it utterly incomprehensible that a man terrorized to the point of moving his family, the truth of which is supported solely by his own testimony, would only seek to have his employer hold a meeting or issue a general warning memo cautioning all employees against such serious threats, or that he would withhold his nemesis’ identity for well over 2 months. And even assuming that Hargenrader only wanted the Company to issue a general warning, it strikes me as equally inexplicable that he seemingly exerted no pressure for that minimal action when it failed to quickly materialize. Given his purported state of mind about D’Anella’s alleged threats, Hargenrader’s extreme procrastination simply belies the truthfulness of his charges. For this reason, and as I found his testimonial demeanor and consistency insufficient to accept his account at face value, I do not credit Hargenrader’s claims about D’Anella’s threats.

Likewise, I am not impressed with the veracity of Brooks’ challenged account. As with Hargenrader, his purported conduct in reaction to the threat and intimidation at the core of his story is unusually extreme. Once having satisfied the demand that he sign a card, Brooks’ claim that he continued to harbor such a fear that something “bad” would happen that he felt compelled to just walk away from his job without explanation strikes me as highly questionable. The support for the claim that he actually abandoned his job, which he regarded as highly desirable, suddenly and without notice to the Company is equally questionable. As Brooks’ unexplained entry on the Alliant application about his tenure with the Company lends support to Baratta’s claim that he saw Brooks on the job after he signed a union card, I find Respondent’s failure to support the testimonial assertions by Brooks and Respondent’s managers that he walked off the job in July

¹⁷ During the preliminary exchange, Baratta acknowledged that he did not know Brooks well.

¹⁸ The distinctive, open top numeral “9” used in writing the date “9–20–98” is consistent with the numeral 9 used throughout the application.

¹⁹ For this reason, I find that the analytical model established in *Wright Line*, 251 NLRB 1083 (1980), is inapposite to the facts of this case.

with its own regularly kept business records merits the inference that those records would not support this key assertion. For these reasons, I cannot credit Brooks' assertion that he left his job because of an alleged threat by D'Anella in connection with soliciting his union card.

In addition, the conduct of company officials in the face of the serious claims made by Hargenrader and Brooks verily smacks of pretext. The lack of evidence showing absolutely no effort on the part of any manager for well over 2 months to convince Hargenrader to identify the source of the alleged threats that supposedly led him to relocate his family and to carry a gun in the vehicle he drove to work purportedly for his own protection strongly supports such a conclusion. I find this type of inaction at complete odds with ordinary norms for maintaining employee safety and discipline, Respondent's own policy against threats, and its past enforcement of that policy. Likewise, the statement Myers prepared for Brooks' signature (R Exh. 7) simply quits with the identification of D'Anella even though the Brooks' account there reflects that the intimidation he purportedly felt resulted in considerable measure from being surrounded by three much larger men. This lack of a more thorough effort to identify all of those allegedly present and participating suggests that the Company's sole interest rested in ridding itself of D'Anella who by that time appeared to be the most active and confrontational union advocate.²⁰ Moreover, I find Myers' assertion that D'Anella failed to deny the allegations against him during the suspension interview entirely disingenuous where, as here, the evidence fails to show that Myers detailed either the specific nature of the misconduct attributed to him or the identity of his accusers.²¹ As I have concluded the Company's officials response to such serious claims by employees entirely at odds with its purported "zero tolerance" policy toward threats and intimidation in and around the work place, I am unable to ascribe either a persuasive quality or good faith to Respondent's affirmative defense.

Accordingly, I find that General Counsel has sustained his burden of proving that Respondent violated Section 8(a)(1) by suspending and discharging D'Anella. In view of this conclusion I find it unnecessary to address the General Counsel's 8(a)(3) allegation.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

²⁰ Baratta and D'Anella appear to have been the most active union organizers. Baratta quit his employment on August 26. D'Anella challenged Division Manager Yancy during an employee meeting in July over his pay reduction when his job was abolished in June and later filed an unfair labor practice concerning that. That charge was withdrawn apparently following a no-merit determination.

²¹ Although a failure to specifically disclose the identity of his accusers might be an understandable course, Myers otherwise disclosed only a vague charge that D'Anella engaged in harassment and threats. D'Anella's characterization of these charges as "absolute nonsense" constitutes a clear denial.

3. By suspending and discharging D'Anella, by coercively interrogating employees, by creating the impression that employee union activity is under surveillance, by engaging in surveillance of employee union activity, and by soliciting employees to report other employees' union activity to management, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. Respondent's unfair labor practices 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.

Respondent, having unlawfully discharged D'Anella, 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).

Further, Respondent must remove from any of its records all reference to D'Anella's October 7, 1998 suspension as well as his October 8, 2000 discharge and notify him in writing that such action has been taken and that any evidence related to that termination will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

ORDER

The Respondent, Shamrock Foods Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging employees for engaging in activities protected by Section 7 of the Act.
 - (b) Coercively interrogating employees about their activities protected by Section 7 of the Act.
 - (c) Creating the impression that it is engaged in surveillance of employee activity on behalf of International Brotherhood of Teamsters Local Union No. 104, General Teamsters (excluding mailers), State of Arizona, (Teamsters Local 104) affiliated with International Brotherhood of Teamsters, AFL-CIO, or any other labor organization.
 - (d) Engaging in surveillance of employee activity on behalf of Teamsters Local 104 or any other labor organization.
 - (e) Soliciting employees to report to management about the other employees' activities protected by Section 7 of the Act.
 - (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed

²² By failing to file exceptions as provided in Sec. 102.46 of the Board's Rules and Regulations, my findings, conclusions, and recommended Order will be adopted by the Board and all objections to them shall be deemed waived for all purposes. See Sec. 102.48 of the Board's Rules.

them by Section 7 of the Act, or discriminating against employees because they engage in union activities.

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 Vincent D'Anella full reinstatement to his former job discharging, if necessary, any replacement employee in order to return him 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 Vincent D'Anella whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge in October 1998 in the manner set forth in the remedy section of the decision in this case.

(c) Within 14 days from the date of this Order, remove from its files any reference to the Vincent D'Anella's suspension on October 7, 1998, and his discharge on October 8, 1998, and notify D'Anella in writing that this has been done and that neither this suspension nor discharge will 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, including an electronic copy of the records if stored in electronic form, 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 Phoenix, Arizona, facility copies of the attached notice marked

"Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 28 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 October 8, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 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.

IT IS FURTHER ORDERED that the complaint allegations found to lack proof or found otherwise not to have violated the Act be, and the same hereby are, dismissed.

²³ 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."