

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

K.O. Steel Foundry & Machine, A Division of Tic United Corporation and International Union of Electronic, Electrical, Salaried Machine and Furniture Workers, AFL-CIO. Cases 16-CA-21170 and 16-CA-21182

December 16, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On April 1, 2002, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

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

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

Our dissenting colleague contends that we should remand this case to the administrative law judge for further consideration. We disagree.

The dissent states that this case "implicates credibility determinations." In our view, credibility is the essential basis for resolving this case. In essence, there was a series of incidents about which a number of witnesses testified. The testimony of employee Portillo or Ruelas, if credited, would support the finding of violations. The judge, however, declined to credit that testimony. In each instance, he set forth his reasons, including demeanor, for crediting the testimony of the Respondent's witnesses. After review of the record, we are satisfied that those reasons are logical and supported by the weight of the evidence. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

For example, on the issue of whether Portillo resigned or was discharged, the judge chose to credit the testimony of four witnesses whose testimony was consistent with a resignation, and to discredit the contrary and uncorroborated testimony of Portillo, who claimed that he was discharged. The judge observed all five witnesses as they testified and he chose to credit the four and to discredit Portillo.

With further respect to the issue of discharge versus resignation, our colleague says that the judge did not acknowledge testimony that Portillo was escorted from his workstation. However, such escorting is consistent

with termination of employment, whether that termination be voluntary or otherwise. Indeed, given the photographing incident involving Portillo (see below), it would be reasonable for the Respondent to escort Portillo out of the building, irrespective of whether he quit or was fired.

Further, Portillo also testified that he brought his camera to work because he wanted a photograph of the heat-treat process as "a souvenir for my family." The judge, observing that Portillo did not work in that area of the plant, disbelieved the statement, and he reasonably took account of it in assessing Portillo's credibility.¹

As to the issue of warnings, the Respondent asserts that it issued warnings to Portillo and Ruelas for taking unauthorized photographs. Our colleague posits that the Respondent may not have confiscated the film, and this asserted lapse indicates that the warnings were unlawfully motivated. In response, we note that no one contends that the taking of the photographs was protected activity, and the judge found that the warnings were for that conduct. The fact that the film was not confiscated does not itself undermine that finding. Obviously, there can be a myriad of reasons as to why an employer may choose not to confiscate an employee's private property.

Finally, we disagree with the dissent's assertion that the judge's refusal to permit the General Counsel to file a posthearing brief raises doubts about the judge's resolution of the case. In fact, no party was permitted to file a brief, although the judge permitted each party to present oral argument. Whether to permit the parties to file posthearing briefs is a matter committed to the sound discretion of the administrative law judge. See Board Rules and Regulations Section 102.42. In part because the General Counsel has had the opportunity, in its brief to the Board, to raise any and all arguments in its behalf, we do not view the judge's refusal to permit posthearing briefing as support for a remand.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ Chairman Battista notes that the dissent suggests that it is likely that the judge's assessment of Portillo's credibility is based on an error in the transcript. But whether or not the transcript was accurate, Portillo's application for unemployment benefits was at least misleading. Either he lied about the identity of his last employer, as the judge found, or he named as his last employer a friend, for whom he worked a day at most, in a collusive effort to avoid having his application challenged by the Respondent. In either event, the Chairman is satisfied that Portillo's application for unemployment benefits reflects adversely on his credibility. Member Schaumber finds it unnecessary to rely on this basis in adopting the judge's credibility resolutions given the numerous additional reasons set out by the judge for discrediting Portillo.

Thus, except in regard to the basis set forth in this footnote, the Chairman and Member Schaumber agree with the judge's credibility resolutions and the bases therefor.

Dated, Washington, D.C. December 16, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

This case implicates credibility determinations, and the Board should be hesitant to reverse an administrative law judge in such a case. Here, however, the judge's credibility determinations rested in large part on his view of the inherent probabilities, as opposed to the demeanor of the witnesses, and the judge failed to address evidence that casts doubt on his findings. In addition, despite the factual complexity of the case, he did not permit the General Counsel to file a post-trial brief. For those reasons, I would remand the case to the judge for further consideration.

By the time of the events at issue, the Union had unsuccessfully tried, twice, to organize the Respondent's workplace. The campaigns were hard fought, and employee Jose Portillo played a prominent role in both of them. In the spring of 2001, the 1-year ban to a new election was about to expire. Portillo was the only member of the original organizing committee still employed by the Respondent. The Respondent knew that employee Rudy Ruelas was also a union supporter.

On May 16, 2001, the Respondent issued warnings to employees Portillo and Ruelas, ostensibly for taking photographs of the Respondent's heat treat operation. (Portillo took the pictures from Ruelas' workstation, which Ruelas had left to get water.) On May 25, according to the General Counsel, the Company fired Portillo; the judge accepted the Respondent's contention that the veteran welder quit.

With respect to the events of May 16, the judge discredited Portillo and Ruelas, who testified that Vice President Hatley cursed the Union and accused the employees of taking the photos on its behalf. The judge did not, however, attempt to determine what became of Portillo's film. That omission is curious, given the Respondent's explanation for the warnings.

Human Resources Director Rapoza testified that he confiscated the camera when he observed Portillo using it, but that he gave it back to Portillo later that same day. In the interim, he testified, he gave the camera to Supervisor Engel for safekeeping, but he claimed that he gave Engel no instructions about the film and did not know

whether Engel had the film developed. Engel did not testify. Portillo testified that when the camera was returned to him the roll of film had been removed. He further testified that on the next day (May 17), he was confronted at his workstation by the owner's son, who brandished a photograph of the son's car, which he stated had been printed from Portillo's film and given to him by Rapoza. Three other witnesses corroborated aspects of Portillo's account, but the judge did not acknowledge their testimony and never addressed the alleged May 17 encounter, which in its own right is suggestive of animus toward Portillo, even if not alleged as a violation.

The Respondent defended its issuance of the warnings to Portillo and Ruelas (who seems to have been an innocent bystander) by claiming that the industrial process Portillo photographed was confidential.¹ If, however, the Respondent had truly been concerned about confidentiality, it stands to reason that it would have confiscated Portillo's film instead of being indifferent to its disposition. Thus, the Respondent's own explanation seems self-contradictory. The balance of probabilities suggests that its explanation for the discipline was pretextual and that it actually issued the warnings because it believed the photography to be union activity. If the discipline was pretextual, that, in turn, supports the General Counsel's contention that Portillo was subsequently discharged for his union activity. Given the significance of the issue, I do not believe that we do justice to this case without answering the question of what became of the film.²

Similarly, the judge's analysis of whether Portillo resigned or was discharged failed to take account of important evidence. Portillo testified that on May 23, he was summoned to the office and asked to resign. Another employee testified that he saw Portillo escorted away from his workstation. In his decision, the judge did not acknowledge that testimony.³

¹ The Respondent has not shown that the heat treat process was proprietary. Following the incident, the Respondent did not communicate a no-photography policy to employees generally.

² The judge also failed to consider discrepancies in the Respondent's witnesses' testimony concerning the disciplinary meeting, among other matters. For example, Vice President Hatley testified that he was simply a passive observer at the meeting, listening over the intercom. Superintendent Fancki testified that Hatley participated in the discussion and that another manager translated Hatley's statements for the employees.

³ Employee Ruelas testified that, a few days before May 23, he was interrogated about the "troublemakers" by Human Resources Director Rapoza. The judge discredited Ruelas, in large part because, in his testimony, he confused the father-son relationship of two employees, James and Jeff Fancki. But this was obviously a slip of the tongue, and an irrelevant one. Had Ruelas been credited, it would have supported the General Counsel's contention that the Respondent was targeting union supporters, among whom Portillo figured prominently.

The inherent probabilities of the situation strongly suggest that Portillo did not resign, but that the Respondent discharged him. Portillo had been with the Respondent for 26 years, he was the highest paid welder at the plant, and he was the sole support of a large family. It seems unlikely that he simply quit.

The judge discredited Portillo's statement that he was fired primarily because Portillo also testified he had named in his application for unemployment benefits "a person for whom I had not a job," which the judge took as an admission of fraud. As the General Counsel showed in his brief to the Board, it is likely that that quotation was a transcription error, and should have read, "a person for whom I last had a job"—a true statement. Portillo, notably, was not fluent in English. Contrary to the judge, moreover, Portillo might well have good reasons for seeking benefits from his last employer—a friend unlikely to contest his entitlement—as opposed to the Respondent, who likely would have done so.

The judge did not have the opportunity to consider the General Counsel's argument on this or other issues, because he refused counsel for the General Counsel's request to file a posttrial brief. I believe the judge should have permitted briefing of this factually complex case, and that his failure to do so is another reason why we should remand the case to him for further consideration.

Unlike my colleagues, then, I am not prepared to dismiss the General Counsel's complaint in its entirety, at least at this point. Accordingly, I dissent.

Dated, Washington, D.C. December 16, 2003

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Edward B. Valverde, Esq., for the General Counsel.
Steve Kardell, Esq., of Dallas, Texas, for the Respondent.
Santos Hernandez, Esq., of San Antonio, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. In this case, the Government alleges that Respondent unlawfully discriminated against two of its employees by issuing written warnings to both of them and by discharging one of them. I find that credible evidence fails to establish the violations alleged, and recommend that the complaint be dismissed.

I. PROCEDURAL HISTORY

This case began on June 4, 2001, when the International Union of Electronic, Electrical, Salaried Machine and Furniture Workers, AFL-CIO (the Union or the Charging Party) filed an

unfair labor practice charge against K.O. Steel Foundry & Machine, A Division of TIC United Corporation (the Respondent) in Case 16-CA-21170. On July 8, 2001, the Union filed another charge against Respondent, in Case 16-CA-21182. The Union later amended these charges.

After an investigation, the Regional Director (the Director) of Region 16 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint, and notice of hearing (the complaint) on August 3, 2001. In taking this action, the Director acted for the Board's General Counsel (the General Counsel or the Government). Respondent filed a timely answer to the complaint (the answer) on August 22, 2001.

A hearing before me opened on January 17, 2002, in San Antonio, Texas. The parties presented evidence on January 17, 18, 22, 23, and 24, 2002. On January 31, 2002, counsel for the General Counsel and Respondent presented oral argument.

II. FINDINGS OF FACT

UNDISPUTED FACTS

Based on the admissions in Respondent's answer, I find that the government has proven the allegations in complaint paragraphs 1, 2, 3, 4, 5, 6, 9, and 10. More specifically, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Additionally, I find that the individuals listed in Complaint paragraph 6 are Respondent's supervisors and agents within the meaning of Section 2(11) and (13) of the Act. Moreover, I find that on about May 16, 2001, Respondent issued written warnings to employees Rudy Ruelas and Jose Portillo.

DISPUTED ALLEGATIONS

A. *The Events of May 16, 2001*

The complaint alleges that on May 16, 2001, Respondent violated Section 8(a)(1) of the Act by interrogating an employee about his union activities and violated Section 8(a)(1), (3), and (4) of the Act by issuing written warnings to employees Rudy Ruelas and Jose Portillo.

More specifically, complaint paragraph 7 alleges that on May 16, 2001, Respondent's vice president, Harold Hatley, interrogated an employee about his union activities. Complaint paragraph 18 alleges that this conduct violated Section 8(a)(1) of the Act. Respondent denies these allegations.

Respondent's Answer admits the allegations, in complaint paragraphs 9 and 10, that on May 12, 2001, it issued written warnings to Ruelas and Portillo. However, Respondent denies the allegations in complaint paragraphs 13 and 14 that it issued the warnings because Ruelas and Portillo had been subpoenaed to testify in a Board proceeding. Respondent's answer further denies that these written warnings violated the Act.

Portillo and Ruelas worked for Respondent as welders. They had separate workstations in the same general area of the plant.

On May 16, 2001, Ruelas left his workstation for water. When he returned, he found Portillo in his work area taking a photograph of a process called "heat treat."

On this occasion, Portillo had no work-related reason to be away from his own work area. Although sometimes he performed

duties either as a trainer or coordinator, on this day he was not engaged in such activities.

About the time Ruelas discovered Portillo taking the photograph, he also noticed that Respondent's human resources director, Alfred T. Rapoza, was standing nearby and watching. Ruelas attracted Portillo's attention and pointed towards Rapoza.

Rapoza told both Portillo and Ruelas to go with him to the office. Along with Portillo, Ruelas, and Rapoza, Cleaning Room Superintendent Jeffrey Fancki also was present in the office during this meeting. The parties have stipulated that Jeffrey Fancki is a supervisor and agent of Respondent. Rapoza telephoned Respondent's vice president, Harold Hatley, who participated in the conversation by speakerphone. Respondent has admitted that both Rapoza and Hatley are its supervisors and agents.

Conflicting witnesses provide very different versions of what happened next. Rapoza is bilingual. According to Portillo and Ruelas, Rapoza translated Hatley's comments into Spanish. Rapoza denied making such a translation.

Rapoza told Hatley that he saw Portillo and Ruelas taking pictures of "heat treat." According to Ruelas, a voice from the speakerphone replied, "I've had it with this fucking union. I'm fed up with these sons of a bitches and other things like that." Ruelas testified that during the meeting, Rapoza identified the voice on the speakerphone as Hatley's.

Ruelas further testified that Hatley asked Portillo if he were taking pictures for the Union. According to Ruelas, Portillo replied that he wasn't taking pictures for the Union, but was taking them for his "personal use" and for his family.

Portillo gave similar testimony. The words he and Ruelas attributed to Hatley—and which Hatley denied—form the basis for the allegations in complaint paragraph 7. Portillo testified as follows:

(A) What I understood from what Mr. Hatley was saying, I heard him as though he was angry. And as I understand a little bit of English, I did hear him say two or three cusses. But Mr. Rapoza was translating into Spanish for my benefit. Then he told me that what Mr. Hatley was saying, was that the pictures that I had taken, were they for the Union or for Mr. Jaime Martinez (phon.) who was the IUE organizer.

(Q) Did you respond to that?

(A) Yes.

(Q) What did you say?

(A) What I said to him was that the photos that I was taking were a souvenir for my family, that I had no intention of harming the Company. Then Mr. Rapoza translated into English to Mr. Hatley.

Both Ruelas and Portillo testified that Hatley then asked Portillo if he would be willing to take a lie detector test, and that Portillo answered affirmatively. Also during this conversation, both Ruelas and Portillo made clear that Ruelas had not taken any part in the photography.

Ruelas testified that Hatley said, "you fucking guys are supposed to be working, not taking fucking pictures." Then, Hatley told Rapoza to write them up and keep an eye on them.

The testimony given by Rapoza, Hatley, and Fancki contradicts that of Ruelas and Portillo. These three managers denied making any comments about the Union. They also denied that Hatley

used vulgar language. Further, they denied that Hatley asked Portillo to take a lie detector test.

Hatley also denied instructing Rapoza to issue written warnings to Ruelas and Portillo. Hatley's testimony on this point contradicts Rapoza's account. In Rapoza's version, Hatley gave Rapoza the instruction to write up Portillo and Ruelas.

In any event, Rapoza issued written warnings to both Ruelas and Portillo. The warning given to Portillo stated the following explanation for the discipline:

Taking unauthorized photos of plant operation during company time. Next similar violation will result in suspension and up to termination within the next six months from this date.

The warning given to Ruelas explained that the discipline was for

Allowing fellow co-worker (Jose Portillo) to use workstation to take unauthorized photos of plant during company time.

Rapoza testified that he predicated the discipline on Respondent's "Standard of Conduct Policy" dated June 1, 1990. That policy does not specifically prohibit an employee from taking photographs within the plant. However, Rapoza considered the photography to fall within two provisions of the Standard of Conduct Policy:

Performance which, in the Company's opinion, does not meet the requirements of the position.

Engaging in such other practices as the Company determines may be inconsistent with the ordinary and reasonable rules of conduct necessary to the welfare of the Company, its employees or clients.

For reasons discussed below, I do not have confidence in the accuracy of Portillo's testimony. Additionally, based on my observations of the witnesses, I do not credit the testimony of Ruelas where it conflicts with that of Rapoza, Hatley, and Fancki.

Credited evidence does not establish that Hatley asked Portillo if he had been taking photographs for the Union or the union organizer. I find that he did not make that statement and did not ask Portillo about his willingness to take a lie detector test.

However, it should be noted that even if Portillo had photographed the "heat treat" process for the union—which Portillo denied—such activity would not be protected by the Act. Respondent produced parts for the military and also had entered into confidentiality agreements with some of its civilian customers. Therefore, it had a legitimate and substantial interest in shielding its manufacturing processes from industrial espionage.

In these circumstances, even if Hatley had asked Portillo if he had taken the photograph for the Union, I would be reluctant to conclude that the question violated Section 8(a)(1). Certainly, a question about an employee's *protected* activity has obvious potential to interfere with the exercise of statutory rights, but a question about an employee's *unprotected* activity has no such obvious potential.

In sum, I conclude that the General Counsel has not proven the allegations in complaint paragraph 7, and recommend that these allegations be dismissed.

During this same meeting, Rapoza issued written warnings to Ruelas and Portillo. The complaint alleges that this discipline violates Sections 8(a)(1), (3), and (4). Although Respondent has admitted issuing the warnings, it denies that doing so violated the Act. I will consider the lawfulness of these disciplinary actions under the framework established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

Clearly, the evidence establishes that Portillo engaged in protected activity. In 2000, Portillo helped the union conduct an organizing campaign at Respondent's plant. When the Board conducted an election on July 21, 2000, Portillo served as one of the union's two observers.

The other observer was Nazario Limon. Later, Limon and the Respondent were involved in civil litigation in state court. The parties have stipulated that the union subpoenaed to testify in this proceeding. Pursuant to this subpoena, Ruelas came to the hearing on September 8, 2000. However, he did not have to take the witness stand in that proceeding.

I conclude that these activities—helping the union in its organizing campaign, serving as the union's election observer, and appearing as a potential witness for another employee associated with the union—are protected by the Act. Therefore, the government has established the first *Wright Line* element.

The General Counsel also has proven the second *Wright Line* element, that Respondent knew about the protected activities. Service as an election observer publicly identifies the employee's affiliation with the union's organizing effort. Moreover, when Ruelas received a subpoena to testify on behalf of the union's other observer, he showed the subpoena to Respondent's plant superintendent, James Francki. I find that Respondent knew about the protected activities of Portillo and Ruelas.

The government also has established that Respondent took adverse employment action against Portillo and Ruelas. The written warnings constitute such adverse employment action.

The General Counsel has not proven the fourth *Wright Line* element, a link between the protected activities and the adverse employment actions. If Hatley had made the statements attributed to him by Portillo and Ruelas, the words would disclose an unlawful motivation and establish the nexus between the employees' union activity and the written warnings they received. However, based on the credited evidence, I have found that Hatley did not make the statements in question.

Almost 10 months had elapsed between Portillo's service as the Union's observer at the July 21, 2000 election and the discipline Portillo received on May 16, 2001. Eight months had passed between the time Ruelas appeared at state court on behalf of the Union's other election observer, and the day Ruelas received the written warning. No relationship of cause and effect may be inferred from the timing.

The General Counsel presented evidence that other employees had taken photographs within the plant without receiving discipline. If Respondent only disciplined known union supporters for taking photographs, while allowing other employees to do so, such disparate treatment would form a basis for inferring anti-union animus.

However, to prove disparate treatment, the General Counsel must also show that Respondent's management knew that certain employees were snapping pictures, yet decided not to give them warnings. Except for one instance when a supervisor, Mario Rangel, allowed an employee to photograph him, the evidence does not establish such knowledge.

More fundamentally, the other instances of photography within the plant involved pictures of employees. When Rapoza saw him, Portillo was not taking a picture of a fellow employee but rather of a manufacturing process. Friendship might well motivate an employee to snap a shot of another, but photographing only equipment raises the specter of industrial espionage.

Even a showing that Respondent had knowingly allowed employees to take snapshots of each other would not establish that Portillo had been treated disparately, because Portillo was photographing a manufacturing process, "heat treat," not another worker. This action potentially could cause greater harm to the Respondent and reasonably could result in more severe discipline.

In sum, I conclude that the General Counsel has not established the fourth *Wright Line* element. Therefore, Respondent did not assume the burden of demonstrating that it would have issued the warnings to Portillo and Ruelas even in the absence of protected activity.

Nonetheless, had I reached this issue, I would have concluded that Respondent established such a good-faith business justification. Respondent had entered into agreements with various customers to keep certain processes confidential. Additionally, it manufactured parts for the military. Therefore, Respondent had a legitimate business interest in making sure that its manufacturing processes were not photographed.

Indeed, the action of Ruelas suggests that employees knew they should not be photographing the manufacturing processes. When Ruelas saw the management official, Rapoza, watching Portillo take the photograph, Ruelas pointed out Rapoza's presence to Portillo. It seems unlikely that Ruelas would have taken this action if Portillo's conduct had been authorized.

As already noted, I have concluded that the General Counsel has not proven the fourth *Wright Line* element, and therefore, it is not necessary to examine Respondent's asserted business justification. However, had I reached this step, I would have concluded that Respondent would have issued the discipline to Portillo and Ruelas even in the absence of protected activities.

B. The Events of May 18, 2001

Complaint paragraph 8 alleges that on or about May 18, 2001, Respondent, by Plant Superintendent James Fancki, solicited an employee to engage in surveillance of other employees' union activities. Complaint paragraph 15 alleges that this action violated Section 8(a)(1) of the Act.

As discussed above, on May 16, 2001, Ruelas received a written warning for "[a]llowing fellow coworker (Jose Portillo) to use work station to take unauthorized photos of plant during company time." The next day, according to Ruelas, Human Resources Director Rapoza watched him closely.

The following day, May 18, 2001, Ruelas told Clean Room Superintendent Jeffrey Fancki that he wanted to transfer to the night shift. Fancki said that he would get back to Ruelas.

Ruelas testified that later that same day, Jeffrey Fancki took him to an office where Human Resources Director Rapoza also was present. Ruelas explained to them that he wanted to transfer to night shift "because they wrote me up for nothing, for no reason at all, and I didn't feel comfortable any more working days."

According to Ruelas, Rapoza "said I was in deep shit, and I told him, well what do you want me—he goes, if you want me to leave, I'll leave right now. I'll quit." Ruelas further testified that Rapoza told him that "James Fancki was disappointed in me, because of the day I went to court for Limon." Ruelas replied that, "all I was going to do was go up there and tell the truth at what really happened."

For clarity, it should be noted that James Fancki, the father of Jeffrey Fancki, was not present at this meeting. At one time, James Fancki was plant superintendent.

Ruelas testified that Rapoza responded by repeating that Ruelas was in "deep shit." Ruelas replied, "if you want me to leave, I don't want no more trouble. I'll leave right now . . ."

According to Ruelas, at this point Rapoza repeated that they did not want Ruelas to leave and Jeffrey Fancki added, "we want you to stay and tell us who all the troublemakers are." This statement—"we want you to stay and tell us who all the troublemakers are"—forms the basis for the allegation in complaint paragraph 8, that James Fancki solicited an employee to engage in surveillance of other employees' union activities.

Ruelas replied, "I still want to go nights." According to Ruelas, Fancki told him to think it over during the weekend. At this point, Ruelas' immediate supervisor, Emiliano Martin, came in and told them that Ruelas was a good worker. The meeting then ended.

Fancki testified that he recalled an instance in mid-May 2001 when Ruelas came to the office. Alfred Rapoza also was present.

Although Fancki did not give a precise date when this meeting took place, he testified that it was on a Friday. May 18, 2001, fell on a Friday, so Fancki's testimony is consistent with Ruelas' concerning the date of the meeting.

In other respects, Fancki's account of this meeting differs significantly from that of Ruelas. Although Ruelas had approached Fancki earlier about the possibility of transfer to the night shift, Fancki's testimony indicates that a shift change was not the focus of discussion during the meeting in Fancki's office. Rather, when Ruelas came to Fancki's office, he raised the possibility of resigning.

Specifically, Fancki testified that Ruelas walked into his office at a time Rapoza also was present, and told them he was "tired of

all the stuff that's going on, and he wanted to quit." Fancki quoted Ruelas as saying that "he was tired of all the shit, and tired of people hounding him. . . ." Fancki replied that if Ruelas would tell him "the peoples' names that were harassing him, that me and Al would take care of it, because you can't do that. Can't harass another employee."

Fancki further testified that during this meeting, Rapoza did not tell Ruelas that James Fancki was upset because Ruelas had been a witness in the Limon litigation. In that respect, Fancki's testimony is similar to that of Rapoza, who denied making such a statement to Ruelas. However, in other respects, the testimony of Rapoza differs significantly from both the testimony of Fancki and the testimony of Ruelas.

Rapoza recalled that Ruelas asked to be transferred to the night shift. However, Rapoza further testified that Ruelas gave no reason for the requested transfer. According to Rapoza, Ruelas did not say that he sought the shift change because he had received a warning he believed unfair, or because of how he had been treated. Rapoza testified that Jeffrey Fancki told Ruelas that he would take Ruelas' request under advisement.

As noted above, Rapoza specifically denied telling Ruelas that James Fancki was upset with Ruelas because he had appeared at the Limon hearing. In fact, Rapoza testified that he did not say anything during this meeting.

For several reasons, I conclude that Fancki's account is more reliable than that of either Ruelas or Rapoza. The testimony of Ruelas was not entirely clear. At one point, Ruelas identified James Fancki as "the son of Jeff Fancki" but at another point, Ruelas identified Jeff Fancki as the "son of James Fancki."

In Fancki's account, Ruelas began the May 18 meeting by stating that he was "tired of all the stuff that's going on, and he wanted to quit." In fact, Ruelas did resign 4 days later. This subsequent and drastic action would not be taken without reflection, so Ruelas may well have been preoccupied with the idea of quitting when he met with Fancki and Rapoza.

Ruelas testified that Fancki told him that they did not want him to quit, but wanted him "to stay and tell us who all the troublemakers are." It does not appear clear, from Ruelas' account, why Fancki would interject such a statement at that particular point in the conversation. In Ruelas' version, the conversation had been focused on Ruelas being "in deep shit," not on some other people being "troublemakers."

On the other hand, a reference to "troublemakers" might well arise naturally and logically in the discussion described by Fancki. In Fancki's account, Ruelas had stated he was "tired of people hounding him" and Fancki had replied that if Ruelas would identify the people harassing him, that he and Rapoza would take care of it."

Unlike the version provided by Ruelas, which leaves unexplained why Fancki would mention "troublemakers" or to whom the term referred, the conversation described by Fancki leaves little doubt why he would ask Ruelas to identify certain people or why he might refer to them as "troublemakers." Ruelas had reported that he was being "hounded," which Fancki took as an employee's complaint of harassment. Logically, he would ask Ruelas to identify these harassers so that he and Rapoza could tell them to stop.

For these reasons, I credit Fancki's testimony, rather than that of Ruelas or Rapoza. Based upon the credited evidence, I find that Fancki did not solicit an employee to engage in surveillance of other employees' union activities, as alleged in complaint paragraph 8.

One other matter may be noted. There is a discrepancy between the allegation in complaint paragraph 8, which attributes the allegedly violative statement to *James* Fancki, and the testimony of Ruelas, which attributes the statement to *Jeffrey* Fancki. The General Counsel argues that this difference does not matter, because the parties have stipulated that Jeffrey Fancki is also Respondent's supervisor and agent. In view of my finding that Jeffrey Fancki did not make the statement in question, it is not necessary to address this disparity between the pleading and the proof.

In sum, I find that the credited evidence fails to establish the violation alleged in complaint paragraph 8, and recommend that the Board dismiss this allegation.

C. The Events of May 25, 2001

Complaint paragraph 11 alleges that Respondent discharged Jose Portillo on about May 25, 2001. Subsequent complaint paragraphs allege that this discharge violated Section 8(a)(1), (3), and (4) of the Act. Respondent denies that it discharged Portillo. It maintains that he quit.

According to Portillo, on May 25, 2001, Supervisor Emiliano Martin came to Portillo at his workstation and escorted him to the office, where he saw Alfred Rapoza and Jeffrey Fancki. Rapoza told Portillo that this would be his last day at work.

Portillo testified that when he asked the reason for his discharge, Rapoza "answered by saying that he already was very tired, that there wasn't any co-worker who wanted to work with me, that I was a liar, that I was a snake, and that he didn't want me there." Portillo further testified

Q. Did Mr. Rapoza say what he was tired of?

A. That I was involved with the Union.

Other witnesses do not corroborate Portillo's testimony. Rapoza testified that Portillo came into the office on his own while Rapoza was talking on the telephone. Portillo waited until Rapoza hung up. According to Rapoza, Portillo said in Spanish that he had had enough of K.O. Steel, and resigned.

Another Spanish-speaking witness, Production Control Manager Leonard Garza, corroborated Rapoza. According to Garza, Portillo appeared at the office and told Rapoza he was "tired of all the bullshit around here and was quitting."

A third person present, Clean Room Superintendent Jeffrey Fancki, does not speak Spanish. However, Fancki's testimony is consistent with the accounts of Rapoza and Garza, rather than that of Portillo. Fancki reported that Portillo came into the room, stood near Rapoza until Rapoza ended his telephone conversation, and then spoke with Rapoza in Spanish. Rapoza then asked Fancki to contact Supervisor Emiliano Martin. When Martin arrived at the office, Rapoza asked him to bring Portillo's personal belongings to the office.

Martin's testimony also corroborates Rapoza, Garza, and Fancki rather than Portillo. Martin's account does not support Portillo's assertion that Martin came to Portillo's workstation and

escorted Portillo to the office. Rather, Martin testified that he received a call from Fancki to come to the office.

In one respect, Martin's account differs from that of Fancki. According to Martin, Fancki, not Rapoza, told Martin that Portillo had resigned and Fancki, rather than Martin, asked Martin to get Portillo's things and bring them to the office. However, I do not believe this minor discrepancy affects the weight to be accorded Martin's testimony, which failed to corroborate any aspect of Portillo's account.

There are other reasons, besides lack of corroboration, to be skeptical about Portillo's testimony. On about June 1, 2001, Portillo filed a claim for unemployment insurance benefits with the Texas Workforce Commission. On this application, Portillo did not list the Respondent as his last employer. Instead, he informed the Commission that his last employer was a "Mr. Lozano."

At hearing, Portillo admitted that in applying for unemployment benefits, he had named as the employer "a person for whom I had not a job." (tr 789) For two reasons, this action greatly damages Portillo's credibility.

Typically, only employees who lose their jobs involuntarily are eligible for unemployment insurance benefits. Employees who quit do not qualify. If Portillo resigned from employment with Respondent, presumably he could not claim benefits based upon his 26 years of employment with Respondent. Thus, if Portillo had, in fact, resigned, he would have a motive to list the name of a different employer on the unemployment benefits application.

Moreover, if Portillo really had been discharged, it seems likely that he would be motivated to claim unemployment benefits which would be credited against the insurance premiums Respondent had paid. He would not want to give Respondent a "break" by listing some other entity as his employer. In sum, if Portillo has resigned, he would have reasons not to list the name of Respondent on the unemployment applications, but if he had been discharged, those same reasons would not exist.

Additionally, it concerns me that Portillo would make an apparently false statement on a form submitted to a government agency. A willingness to bend the truth on this occasion certainly reflects on the weight to be accorded his testimony at trial.

Still another aspect of Portillo's testimony proves troubling. On May 16, 2001, when Hatley and Rapoza asked why he had been taking a picture of the "heat treat" process, Portillo answered that he had taken the pictures "as a souvenir for my family." But Portillo also testified that he wasn't working in heat treat: "I had nothing to do with that."

Testimony suggests that the "heat treat" process can be colorful, so perhaps Portillo simply wanted to show his family a picture of it, even though he had nothing to do with it. However, the process was not automatic, like an assembly line might be, and the employee who operated it, Ruelas, was not present when Portillo began to take the photograph. Ruelas had taken a break to get water, and arrived back only in time to see Portillo already engaged in the photography. Therefore, it is difficult to believe he was simply taking a picture of the "heat treat" process because it happened to be a beautiful sight.

Additionally, at face value, another part of Portillo's testimony requires a hefty portion of credulity to be accepted. As noted above, Portillo claimed that Human Resources Director Rapoza

first announced Portillo's discharge and then told Portillo he was tired of Portillo's involvement with the union. Typically, managers experienced in labor relations do not tell employees they are being fired for union activity even when that is the case. Training in labor relations makes managers more cautious in what they say, not less. Considering the other inconsistencies in Portillo's testimony, I simply do not believe that Rapoza made the statement Portillo attributed to him.

Further, the timing of Portillo's separation from employment is somewhat problematic. Portillo's photographing the heat treat process precipitated the May 16 warning. However, one must ask what other activity—either protected or unprotected—would have triggered a management decision to discharge Portillo on May 25. The record does not establish that management had learned of any new protected activity and it also does not indicate that Portillo had made any job-related error warranting disciplinary action.

The record does indicate that Portillo was good at his job. It is difficult to believe that management would suddenly decide to terminate his employment unless it had some new reason—either lawful or unlawful—to take that action. No such reason is obvious.

The General Counsel argues that Respondent should have called a witness, Mario Rangel, who allowed employees to take a photograph of him. According to the General Counsel, Respondent's failure to call this witness should give rise to an adverse inference. However, even were I to draw such an adverse inference, it would not overcome the very persuasive evidence, discussed above, that Portillo was not testifying accurately, and, more specifically, that he was not fired but quit.

Moreover, the fact that a supervisor may have allowed employees to take his picture does not establish that management permitted employees to photograph the manufacturing process. Presumably, the confidentiality agreements Respondent had entered into with customers, would not be breached by a photograph of a supervisor's face. Similarly, although it might cause a security problem to photograph how Respondent was making parts for the military, a picture of a supervisor would disclose no secrets of state. For these reasons, I decline to draw the adverse inference sought by the General Counsel.

The General Counsel also contends that an adverse inference should be drawn from Respondent's failure to call a supervisor named Benavides and the son of one of Respondent's vice presidents. Presumably, they would have testified regarding an encounter with Portillo after Portillo had been warned about taking photographs inside the plant.

However, the complaint does not allege that this particular encounter violated the Act in any manner, and the conversation itself bears marginal relevance to the central events in this case. Therefore, I decline the General Counsel's invitation to draw an adverse inference.

In view of my conclusion that Portillo's testimony should not be credited, I do not find that Respondent discharged him. Rather, the credible evidence establishes that Portillo quit his job on May 25, 2001, and I so find. Therefore, I recommend that the Board dismiss these allegations in the complaint.

III. CONCLUSIONS OF LAW

1. K.O. Steel Foundry & Machine, A Division of TIC United Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electronic, Electrical, Salaried Machine and Furniture Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended¹

ORDER

The complaint is dismissed.

Dated Washington, D.C. April 1, 2002

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.