Ichikoh Manufacturing, Inc. ***and*** **David Branson** ***and*** **Joseph A. Helton.** Cases 9–CA–28922–1, –2

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case present the issues of whether the Respondent, in the context of a union organizing campaign, promulgated and maintained an unlawful no-solicitation rule, discriminatorily imposed stricter adherence to plant rules, coercively interrogated employees, created the impression of surveillance among employees, solicited grievances from employees with the implied promise of rectifying them, directed the removal of union insignia, issued a written reprimand to and subsequently discharged employee Joseph Helton and suspended and subsequently discharged employee David Branson because of their union activities.[1]

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,[2] and conclusions only to the extent consistent with this Decision and Order.

1. The General Counsel excepts to the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) by promulgating and maintaining an overly broad no-solicitation rule. We find merit in this exception.

Since March 16, 1991,[3] the Respondent has maintained the following rule:

> The company prohibits solicitation or distribution of materials by employees or non-employees on company premises or during company business hours except with prior written authorization from human resources.

In the judge's brief analysis of the no-solicitation rule he stated that because, in practice, employees ''have been permitted to solicit fellow employees and distribute campaign materials to employees during their lunch and rest breaks in non-working areas, the presumption of invalidity has been overcome and there is no violation,'' citing *Our Way*, 268 NLRB 394 (1983), and *Broadway*, 267 NLRB 385 (1983).[4]

As the judge apparently recognized, the Respondent's rule is presumptively unlawful on its face. It refers to ''business hours,'' rather than ''working time.'' In addition, it is subject to the reasonable construction that solicitation on company premises, at any time, is prohibited.

The judge reasoned, however, that the maintenance of a presumptively invalid no-solicitation rule is not violative of the Act, absent evidence that the rule had been enforced in an unlawful way. We believe that the judge has misapplied the burden of proof. If the rule is presumptively unlawful on its face, the employer has the burden of showing that it communicated or applied the rule in such a way as to convey an intent clearly to permit solicitation during breaktimes or other nonwork periods. See *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987); *J. C. Penney Co.*, 266 NLRB 1223, 1224–1225 (1983).[5] In this regard, we note that the Respondent has not shown that it has clearly communicated to all the unit employees to whom the presumptively invalid rule was disseminated that the rule did not mean what it said and that employees could in fact engage in solicitations during nonworking time. The fact that some employees ignored the rule and were not disciplined fails to meet the Respondent's burden of establishing that it conveyed to employees ''an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work.'' *Our Way*, 268 NLRB at 395 fn. 6. Accordingly, we find that the presumption of the rule's invalidity has not been rebutted and that by its promulgation and maintenance of the rule the Respondent has violated Section 8(a)(1).

2. The General Counsel urges the Board to find that on August 13, team leader Roy Yount unlawfully interrogated employee Joseph Helton. Although the General Counsel discusses this incident in his brief accompanying his exceptions, he failed to except to the judge's dismissal of this violation in his exceptions. Under these circumstances, we adopt the judge's dismissal without considering the merits of the allegation. See Board's Rules and Regulations, Section 102.46(2).

[1] On November 13, 1992, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

[3] All dates are in 1991 unless otherwise indicated.

[4] In *Our Way*, the Board found that no-solicitation rules using the phrase ''working hours'' were presumptively invalid because ''that term connotes periods from the beginning to the end of the workshifts, periods that include the employees' own time.'' 268 NLRB at 395. In fn. 6, the Board stated that an employer could, however, show that it ''communicated or applied'' the rule in such a way as to convey an intent clearly to permit solicitation during breaktimes.

[5] The judge's reliance on *Broadway*, supra, is misplaced. In that case no exceptions were filed concerning the judge's finding that the respondent had rebutted the presumptive invalidity of the no-solicitation rule. We further note that the no-solicitation rule in that case was found by the judge to be invalid under *T.R.W. Bearings*, 257 NLRB 442 (1981), which was overruled by the Board in *Our Way*.

3. The General Counsel excepts to the judge's dismissal of the complaint allegations that the Respondent violated Section 8(a)(1) by creating the impression of surveillance of the employees' union activities, interrogating employees about their reasons for wanting a union, and soliciting employee grievances with the implied promise of rectifying them. We find merit in these exceptions.

On July 30, several of the Respondent's employees met with a union organizer, and authorization cards were distributed. On August 8, a second union meeting was held and it was attended by several employees. Additional authorization cards were distributed and signed by employees.

On August 14, the Respondent held a series of 12 meetings with employees at which the union organizing campaign was discussed. Susan Kays, the Respondent's human resources manager, was present at all these meetings, and told the employees that the Respondent was against the Union, that she knew the union meetings had been held at the Best Western Hotel and when they had taken place, and that when she heard about the union meetings she was angry. Kays also advised the employees to continue to attend union meetings to learn more about the Union.

During these August 14 meetings, Kays repeatedly asked employees why they wanted a union. She said that the employees did not need a union, that they would be better off with the Company's open-door policy, and that the Respondent would be more lenient than the Union about breaks. Kays predicted that the Union would promise wage increases but that the Company would not be able to afford them until 1994 and that union stewards would not do anything for employees.

Kays also discussed the employees' health insurance benefits. In response to an employee inquiry, Kays stated that although the deductible and medical insurance premiums were going up on the Respondent's present insurance policy, ''we're trying to see if we can find another company, something better to suit our needs.''[6]

Several employees complained that team leaders displayed favoritism toward some employees and were inconsistent in the way they treated employees. Kays admitted that inconsistency was a problem and that the training courses for team leaders begun in the spring of 1991 and the disciplinary procedures outlined in the new employee handbook would correct the situation.

One employee, referring to the ''employment at will'' clause in the July 1991 employee handbook, asked Kays if she could be fired if she was absent and had a doctor's note. Kays initially replied ''yes'' but later said that an employee would not be fired under those circumstances. Another employee asked why some employees would be fired for a certain number of absences while others would not. Kays replied that it would be taken care of in a new employee handbook and that employees would not be automatically terminated for minor offenses.

The judge found that, although Kays told employees that the Respondent knew when union meetings had been held and named the hotel where they had occurred, this did not amount to creating the impression that their union activities were under surveillance because, at the time of the employee meetings, the union campaign was common knowledge among the employees. The judge concluded that Kays was in effect telling the employees that she knew ''what was going on'' and that it was all right. We disagree.

The record evidence established that the union campaign did not become overt until August 15, the day after the employee meetings at which Kays made her alleged unlawful remarks. On that day employees began to wear union buttons and hand out union literature. Prior to that date, the Union had held two off-premise, covert union meetings on July 31 and August 8, about which the Respondent learned the day after they occurred. In light of the fact that at the time of Kays' remarks the employees' union activities were covert, we find that Kays' statement to employees that she knew where and when the union meetings had occurred would reasonably lead employees to assume that their union activities had been placed under surveillance. *United Charter Services*, 306 NLRB 150 (1992). Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act.

The judge found that the questioning of employees about their reasons for wanting a union was not unlawful interrogation but rather was ''either purely rhetorical or designed to elicit communications from the employees.'' We disagree.

Kays' repeated questioning of the employees about their reasons for wanting a union occurred in the context of other unlawful conduct, described in this decision. Further, such questioning was designed to convey to the employees the Respondent's hostility to the Union's organizing campaign. Under these circumstances, we find that such questioning by a high-ranking company official reasonably tends to color the employees' perception of the character and reason for such inquiries and renders such questioning coercive and unlawful. See *EDP Medical Computer Systems*, 284 NLRB 1232, 1264, 1265 (1987). Accordingly, we find that the Respondent interrogated employees in violation of Section 8(a)(1) of the Act.

With regard to the solicitation of grievances, the judge noted that the Respondent had trained all members of management on the ''dos and don'ts of cam-

[6] Two weeks before the election the Respondent introduced a new medical insurance policy with lower premiums. This conduct is not alleged to be unlawful.

paigning,'' including the fact that no promises could be made. He therefore found that Kays made no express or implied promises in the August 4 meetings. We disagree.

At the meetings, Kays, after soliciting from the employees their concerns, stated that the Respondent would be more lenient than the Union about breaktimes, that its employment at will policy would not be used to discharge employees for minor disciplinary infractions, and that the admitted past inconsistency and favoritism by supervisors in their dealings with employees would be rectified. Further, in response to an employee's stated dissatisfaction with the increasing cost of the Respondent's medical insurance, Kays informed the employees for the first time that the Respondent was trying to find a new, less-expensive policy.

We find that, in the absence of any evidence that the Respondent had a past practice and policy of soliciting employee grievances, Kays, by the statements set forth above, at least implicitly promised to remedy several grievances raised in the August 14 meetings. Indeed, in response to employee concerns regarding the Respondent's employment at will policy, the judge found that Kays responded ''the Company would take care of that by working on a new [employee] handbook.'' Under these circumstances, we find that the Respondent solicited grievances with the promise to remedy those grievances in violation of Section 8(a)(1) of the Act. See *Logo 7, Inc*., 284 NLRB 204, 205 (1987).

4. The General Counsel excepts to the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) in his remarks to employee David Branson and another employee about their union buttons. We find merit in the exceptions.

On August 18, Branson and another employee were wearing union buttons, including one which read, ''Organizing Committee.'' Randy Popp, a team leader and supervisor, commented to them that ''if it was up to him, he would take off the button'' because ''it looked like they were trying to organize for the UAW.''

The judge, in dismissing the allegation, found that Popp did not instruct the employees to remove their buttons, and that by his preface to his remarks he implicitly admitted that it was not ''up to him'' and that they could continue to wear the buttons.

It is well settled that the Act protects the right of employees to wear union insignia while at work and, absent ''special circumstances,'' it violates Section 8(a)(1) for an employer to prohibit employees' wearing of such insignia. *Republic Aviation Corp. v. NLRB*, 324 U.S. 794 (1945); *Ohio Masonic Home*, 205 NLRB 357 (1973). Here, we find, contrary to the judge, that Popp's remarks clearly conveyed the impression that management wanted employees to cease wearing the union buttons and thus violated Section 8(a)(1) of the Act. While it is true that, as the judge found, Popp's remarks did not amount to an order that the employees remove their union buttons, those remarks were nonetheless coercive. They conveyed the clear message that it was not a good idea to be perceived as being prounion and that union button-wearers would therefore be revealing themselves as members of a disfavored group. See *Certain-Teed Insulation Co*., 251 NLRB 1561, 1564 (1980).

5. The General Counsel excepts to the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging David Branson. For the reasons stated below, we agree with the judge that the Respondent has shown that it discharged Branson because of his disciplinary record.

David Branson signed a union authorization card on August 9, and he attended a union meeting on August 15. From that date, Branson was a member of the in-plant organizing committee and wore union buttons at work. He passed out union literature at a car wash and told a small number of employees about an August 20 union meeting. Other union activists openly solicited signatures on authorization cards and distributed union literature at the plant. There is no evidence that Branson encouraged others to sign authorization cards, and the record established that many other employees were perceived by the Respondent to be more active in the union campaign.

Branson was hired in February 1990 and company records reflect that he had a long history of disciplinary action. The Respondent introduced disciplinary records showing that on February 12, Branson was counseled about his disciplinary record of absences and tardies during the preceding year. On May 30, Branson was issued a written reminder for tardiness and, because of previous tardies, he was informed that any further tardies would result in a final reminder. On June 25, Branson was issued a written reminder for absenteeism, noting that he had received an oral reminder on May 7, and a written reminder on June 13. Branson was also advised that any future infraction of the absentee policy would result in the issuance of a final reminder.

The employee handbook, which Branson was given when he started to work for the Respondent, included a policy of 48 hours of paid personal time which could be used by the employee for personal or family illness or other personal business which could not be conducted outside of work hours. On August 7, Branson told his group leader Jason Nichols that he would be absent the following day because he had a court appointment. Nichols told him that because he had used all of his personal time, except for 1-1/2 hours, he would not be able to attend court and that he would be issued a written reminder if he did not come to

work. Branson said that it was still necessary to attend court. He was issued a written reminder on August 8 when he did not come to work on that day.

On August 19, Branson told Nichols that he had to return to court on August 22, and was absent from work for 4 hours on that date. Under the Respondent's progressive disciplinary system Branson could have been suspended, but because his absence was caused by an unavoidable court appearance, Kays and Nichols decided to issue him a second final reminder. Nichols counseled Branson that another unexcused absence or failure to notify the Company of an expected absence would result in suspension or discharge.

On August 24, Branson was scheduled to start work at 5 a.m. but failed to report for work and failed to notify the Respondent in advance. At 5:47 a.m. Branson's mother called Mike O'Nan, Branson's team leader, and said that Branson was sick and would not be reporting to work. O'Nan then spoke with Branson and advised him that his absence would be reported to Nichols. On August 26, at a meeting with O'Nan and Nichols, Branson was told that he was being put on suspension with the recommendation that he be discharged. This recommendation was reviewed by Kays and Manufacturing Manger Jim Van Gieson, who concurred. On August 27, Nichols told Branson that he was being discharged based on his disciplinary record and in particular the aggravated nature of the August 24 absence and failure to meet the call-in requirements of the employee handbook.[7]

The judge dismissed the allegation that Branson was suspended and then discharged for his union activities, but failed to provide a *Wright Line*[8] analysis. For the reasons discussed below, we find that under *Wright Line*, the Respondent has shown that it would have suspended and discharged Branson even in the absence of his union activity.

In *Wright Line*, the Board set forth its causation test for cases alleging violations of the Act which turn on employer motivation. The General Counsel has the initial burden of making a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. The burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. In this regard, the employer cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

Applying the principles of *Wright Line*, we will assume for the purposes of this analysis that the General Counsel made the requisite prima facie showing that the Respondent's actions regarding Branson were motivated at least in part by its antiunion animus. We find, however, that the Respondent has shown that it would have suspended and discharged Branson even in the absence of his union activities.

Contrary to the General Counsel's contention, we agree with the judge, for the reasons stated by him, that the record does not support a finding that the Respondent required stricter adherence to plant rules after the advent of the union organizational campaign or applied its disciplinary policies in an inconsistent manner to discharge Branson. To the contrary, the record evidence established, as the judge found, that the Respondent ''historically enforced its rules and disciplined employees who had an excessive number of absences or incidents of tardiness.''[9] Further, the record established that Branson's August 24 failure to report to work was in direct contravention of the Respondent's August 22 warning to Branson that a subsequent violation of the Respondent's rules would result in his discharge. Finally, there is no evidence that any other employee similarly defied such a warning and was not discharged.

Under these circumstances, and given Branson's long history of absenteeism problems and disciplinary writeups, we find that the Respondent has met its *Wright Line* burden of establishing that it would have suspended and discharged Branson even in the absence of his union activities. Accordingly, we dismiss this complaint allegation.[10]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices discussed in this decision, we shall order the Respondent to cease and desist therefrom.

ORDER

The Respondent, Ichikoh Manufacturing, Inc., Shelbyville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[7] The call-in guidelines in the handbook provide:

> In the event an employee must be absent from work, or in the event he/she is unable to get to work on time because of sickness or other reasonable cause, the employee must notify his/her team or group leader an hour before the shift starting time.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 1302 (1984).

[9] The Respondent presented a list of 25 employees who had been terminated for tardiness or absenteeism between November 8, 1989, and January 30, 1992.

[10] We further adopt, for the reasons stated by the judge, the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(3) and (1) by issuing a written reprimand to and subsequently discharging Joseph Helton.

(a) Promulgating and maintaining an overly broad no-solicitation rule in order to discourage its employees' union activities.

(b) Interrogating its employees regarding why they want to be represented by a union.

(c) Creating the impression that its employees' union activities are under surveillance.

(d) Soliciting grievances from employees with the promise of rectifying them for the purpose of discouraging their participation in union activities.

(e) Directing its employees to remove union buttons.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Post at its facility in Shelbyville, Kentucky, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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 Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or maintain an overly broad no-solicitation rule in order to discourage our employees' union activities.

WE WILL NOT interrogate employees about their own or other employees' union activities.

WE WILL NOT create the impression of surveillance of our employees union activities.

WE WILL NOT solicit grievances from our employees for the purpose of discouraging their participation in union activities.

WE WILL NOT direct our employees to remove union insignia to discourage their own or others' union support.

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

ICHIKOH MANUFACTURING, INC.

James E. Horner, Esq., for the General Counsel.
James U. Smith III, Esq. and *W. Kevin Smith, Esq. (Smith & Smith)*, of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was heard in Louisville, Kentucky, on February 25–28 and April 1 and 2, 1992. The charges were filed by David Branson and Joseph Helton, individuals, on September 13, 1991.[1] Complaint issued October 28 alleging that Ichikoh Manufacturing, Inc. (Respondent, Employer, or Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act by discriminatorily imposing strict adherence to its plant rules, issuing a written reprimand to Helton and later discharging him, and suspending Branson and later discharging him, and violated Section 8(a)(1) by issuing an unlawful no-solicitation rule, coercively interrogating employees, creating the impression of surveillance among employees, and soliciting grievances from employees and implying that those grievances would be adjusted. Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. General Counsel and Respondent filed briefs. On the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

Respondent is a Kentucky corporation with offices and manufacturing facilities located in Shelbyville, Kentucky, where it is engaged in the manufacture and sale of automobile mirrors. The Company, a wholly owned subsidiary of Ichikoh Industries Limited of Japan, was formed in 1987 and has been in production since 1988. It employed from 260 to 280 persons during the relevant period in the summer and fall of 1991, 180 to 200 of which were unit employees.

[11] 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.''

[1] All dates are in 1991 unless otherwise indicated.

Sometime in July, certain of Respondent's employees manifested interest in obtaining union representation. On July 30, several of them met with a union organizer. Union authorization cards were distributed at this time.

Respondent learned of the union activity of its employees almost immediately. On August 1, its vice president, Theresa Mills Hinton, was informed about the July 30 organizing meeting which had been held at the Best Western Motel. Human Resources Manager Susan Kays also heard about the meeting the day after it had taken place.

That day, Kays contacted Respondent's attorney, Grover Potts, and made arrangements for him to visit the plant the following day to meet with its supervisory personnel and advise them as to how to conduct themselves during the union organizing campaign.

On August 2, Potts and another attorney from the same firm, Mary Ann Main, met with Respondent's managerial personnel. Potts supplied each supervisor and member of management with a 21-page manual containing information on the rights of employees and of the Company during a union organizational campaign. It contained a list of proscriptions as to what supervisory personnel could and could not do and say in response to Respondent's employees' union organizing activities. Potts reviewed, meticulously for those present, the contents of the manual. He referred to the acronym ''TIPS,'' stating that supervisory personnel were prohibited from threatening, interrogating, promising, or spying in connection with the union activity of employees. Potts also entertained questions. The meeting lasted 2 hours. Similar sessions were held on a weekly basis during the first part of September.

On August 8, the Union held another meeting at the Best Western Motel in Shelbyville. About 6 or 7 employees attended this meeting including alleged discriminatee, Joseph Helton. Union Representative Bill Young distributed additional cards at this meeting and obtained signatures from several of those in attendance, including Helton.

On the evening of August 13, Roy Yount, a second-shift team leader who had previously worked with Helton and had also, at one time, supervised him, approached him and asked him if he could speak with him. Yount, whom Helton considered a friend, then asked him if he had ''heard anything about the Union.'' Helton replied, ''What Union?'' Yount commented that if anyone knew about the Union, he thought it would be Helton. Helton said that he had heard that ''they'' were trying to get one in, but that was all he had heard. Yount remarked that he could probably get in trouble asking Helton that question but he had just wanted to know what was going on. The conversation came to an end at that point. Helton was not wearing a union button or any other insignia identifying him as a union activist when this conversation took place.[2] No employees were wearing union buttons at that time.

In preparation for a series of meetings which management planned to hold with its employees, Potts again met with Hinton and Kays and went over what company representatives could and could not say. He discussed TIPS with them but also told them that they could be candid with employees about their opinions of the union and union representation.

On August 14, Kays conducted 12 meetings with Respondent's employees. Each department on each of the three shifts had its own meeting during which union organizing activity and other matters were discussed. President Tsuruta, Vice President Kitamura, Hinton,[3] and Kays attended the meetings, all of which were conducted primarily by Kays. The first meeting began at 7 a.m. The last one started at 6 p.m. They were all attended by team leaders and group leaders along with the employees in their departments.

During the meetings, Kays covered such topics as wages, benefits, and discipline. She advised employees that Respondent was against union representation and gave reasons for this position. She also advised them, however, that management was limited in what it could do and say about the employees' union activities. She mentioned the acronym ''TIPS'' and explained that, in connection with the employees' union activities, management, personnel, and supervisors were not permitted to threaten or interrogate employees, to make promises of benefits nor surveil such activities.

During these meetings, Kays acknowledged that the employees had a right to union representation if they wanted it and said that the Respondent respected this right. She said that the employees should learn as much as they could about the Union and union representation. She mentioned that she was aware that the Union had held organizational meetings at the Best Western in Shelbyville and that some of Respondent's employees had attended. She urged them to attend future union meetings, especially if they had questions concerning representation.

At the 7 a.m. meeting with the molding and maintenance employees, Kays brought up the matters mentioned above. She also, at one point, raised a blank union card and pointed a finger. She said she knew that someone there had to have started the Union, had to have called the Union and this had made her mad at the time. She continued that the employees did not need a union, that they would be better off with the Company's open-door policy. She added, according to one or two of General Counsel's witnesses, that with a union, the employees' pay scale, benefits, and seniority would all decrease. Kays predicted that the Union would promise them raises and increased benefits but that the Company would not be able to afford wage increases until at least 1994 because it was still financially in the red. She warned the employees about the possibility of large union dues. She stated that the Company would be more lenient than the Union where breaks were involved.

At the meetings, employees were encouraged to respond to Kays' comments and to ask questions concerning the matters under discussion. When the subject of union stewards came up, Kays commented that they would not do anything. This remark drew an objection from one employee who stated that his father was a union steward and there was nothing lazy about him.

Some of the meetings were quiet with few questions being asked. Others, however, were animated, with employees freely expressing their opinions about union representation and working conditions, challenging comments made by Kays who sometimes returned the challenge. At one point, she ac-

[2] Yount denied that this conversation ever took place. However, I credit Helton and find that it occurred as described above.

[3] Hinton attended all the meetings except the 11:30 a.m. meeting with quality assurance and shipping and receiving and the 1:30 p.m. meeting with the office staff.

cused some employees of abusing the medical insurance benefits program. On this subject she told one group that Respondent was going to raise the deductible on the medical insurance plan and the premiums as well. However, Kays assured those present that Respondent would look for another insurance company that would ''suit their needs.''

Kays, after stating Respondent's position with regard to union representation, on several occasions questioned the employees about why they wanted union representation. Several employees, in reply, complained that team leaders were inconsistent in the way they treated employees and that there was some favoritism. Inconsistencies had been discussed on several occasions among members of management before the Union came on the scene. Employees had complained about management also, before the advent of the Union and had been told that training courses for team leaders had begun in the spring of 1991 and it was hoped that the courses would improve their management abilities.

When the question of raises was brought up at several meetings and the Company pleaded poverty, certain employees inquired as to why the Company had money enough to purchase 36 acres of land but no money for raises. Hinton fielded that question for Kays by explaining that the Company had borrowed to purchase the land and was using the rent from tenants on the land to repay the loan.

Another subject brought up at these meetings concerned the need for job protection. The July 91 handbook contained an ''Employment at Will'' clause which led the employees to consider seeking job protection through union representation. At one of the meetings, an employee asked Kays if she could still be fired if she were absent and had a doctor's statement. Kays initially replied affirmatively but later said that she would not be fired under those circumstances. Kays explained that the Company would not fire employees for minor infractions.

''Employment at Will'' was described by one employee witness as ''a big issue'' with employees, and several of them complained to Kays about it during the August 14 meetings. Kays tried to placate them by again assuring them that they would not be fired ''for just anything.'' At one point, an employee asked why certain employees would be fired for a certain number of absences while other employees would not. Kays replied that the Company would take care of that by working on a new handbook.

Employee Larry Miller, at one meeting, complained to Kays about too much overtime. He stated that he had been working 10 to 12 hours per day plus 8 hours on Saturdays ever since January. He reported that the excessive overtime was adversely affecting the relations among the employees because they were ''really stressed out.'' Other employees complained that they were informed too late in the week that they would be expected to work on the weekend, that there was insufficient notice. Kays admitted that the Company had a poor overtime planning process. Hinton testified that, as of the hearing date, there was still a lot of overtime being worked at the plant and still a lot of complaining.

On the morning of August 19, David Branson, one of the two alleged discriminatees in this case, was working outside P-3, a paint booth, with paint department employee, Billy Mitchell. Branson was wearing a white union button inscribed, ''Organizing Committee'' and a yellow button inscribed, ''The UAW is Our Union.'' Mitchell was also wearing the same white button as well as three or four other union buttons.

At about 8 a.m., Randy Popp, the team leader in P-2, walked up to where Branson and Mitchell were working and commented that if it were up to him, he would take off the white button because it looked as though they were trying to organize for the UAW. Neither Branson nor Mitchell replied to Popp's comment. Popp made no further remarks.[4] Neither Branson nor Mitchell removed the buttons but continued to wear them daily throughout the campaign. There is no evidence that any other employees overheard Popp's remark to Branson and Mitchell.

Neither Branson nor Mitchell worked directly for Popp who was the team leader in P-2. Among the employees who did work for Popp was one named Wyatt. Popp testified that although he could not recall Branson wearing any union buttons during the organizing campaign, he could recall that Wyatt was wearing a yellow union button and offered to trade it to Popp in exchange for the company button that Popp was wearing at the time.

Since August 15, many employees throughout the plant wore union buttons. In Popp's paint booth two employees wore white and yellow union buttons and numerous lapel pins. Half of the employees in the paint department wore union buttons on or after August 15. Similarly, half the employees on the first shift wore union buttons. Popp credibly testified to having seen employees on his team actively soliciting employee signatures on union authorization cards, and distributing cards and literature during breaks.

The complaint[5] alleges that Respondent, since on or about the week of August 11, imposed more onerous working conditions on its employees by requiring strict adherence to its plant rules. In support of this allegation, Helton testified that before the union campaign began, Respondent had not been strict with regard to breaktimes, that as long as an employee left and came back roughly when he was supposed to, it was all right. There were no buzzers or signals to advise the employees when the break was to start or finish. Employee Michalene Willis testified that before the union campaign began, things were a little more lax on the third shift, but that when the union talk got started the Company wanted strict 10- and 30-minute breaks. Team Leader Barry Johnson told the molding department employees to watch their breaktimes. Willis admitted that similar warnings had been given before the union campaign. Willis also testified that supervision clamped down on employees standing in groups and talking among themselves, and recounted one incident, during the union campaign, when Johnson came over and broke up a conversation that she was having with another employee.

Still another employee, Harold Bruce Thomas Jr., testified that after the union campaign began, management was ''a little bit more stricter . . . in returning back from break on time.'' Thomas added that during the union campaign, employees were not as free to talk to each other as before. He described how supervisors would patrol the work areas wearing ''No Union'' buttons and testified that they would walk

[4] Popp denied making the statement attributed to him, but I credit Branson.

[5] Pars. 7 and 10.

up and down, every so often, through the plant, ''more than they usually did before all this started.''

Alleged discriminatee David Branson testified that before the union campaign started, ''You could walk in, after somebody else did, a minute later, something like that, and they wouldn't say nothing to you 'cause they would always stand around in the paint rooms and talk for a few minutes right after lunch or break or before we even started working again.'' After the union campaign started, he added, the ''attitude'' changed, and management ''was always on your back, over your shoulder . . . you couldn't stop, say 'hi' to somebody. If you had to go to another department, you had to come right back, and you had to be just on time. Just the whole attitude [of] management had changed.''

Employee Larry Miller testified that after the August 14 meeting with Kays, he observed Team Leader Jeff Kelly with a stopwatch in his hand watching Miller and other employees as they went out the door. He added that this had never occurred before the union campaign and, in fact, before the advent of the Union, employees took at least 15 minutes on their 10-minute breaks. Miller testified that after the union campaign began, ''we was up and out of there in ten minutes.''

Miller agreed with other witnesses for the General Counsel that during the union campaign, supervisors, in particular Thomas and Kelly, clamped down on employees talking to each other. They would come over to employees engaged in conversation and ask, ''What are you talking about? Ain't you got something to do?'' According to Miller, on one occasion, sometime after August 14, he was walking through the plant, at the end of his shift, and stopped to talk to a coworker. Just as he said ''hi'' to her, however, Leo came over to Miller and said, ''She ain't got time to talk to you, and you ain't got time to talk to her. You need to move on.'' He added that after the union campaign began, ''They kept a real close eye on what you was doing then, whether it was absenteeism or whatever, especially if you was wearing a union button.''

The complaint alleges[6] that Respondent violated Section 8(a)(1) by issuing a reprimand to Helton on August 21 based on discriminatory considerations. In his brief counsel for the General Counsel states that the reprimand was just one example of Respondent's stricter enforcement of plant rules.

Respondent takes the position that Helton's reprimand was justified and was issued in accordance with standard procedures. Discriminatory motivation is denied.

On August 20, Helton was scheduled to work the third shift in the molding department. Quitting time was 7:30 a.m., August 21. Since the oncoming first shift was understaffed by two mold changers, molding department employees from the other two shifts were asked to fill in. As Helton was about to clock out, first-shift team leader, Jim Leo, asked him if he would work an additional 4 hours on the first shift. Helton agreed.

The company policy was to give employees who were going to work beyond their normal 8-hour shift a 10-minute break before beginning their overtime. As Helton walked out of the molding department to take his break, Leo was right behind him. As they both left, Leo noticed that it was 7:20 a.m. Leo was on the way over to the assembly department to discuss with other team leaders the production schedule for the day. After completing his task, he returned to the molding department. He then noticed Helton returning from his break. He checked the time and determined that it was 7:38 and that Helton had been gone 18 minutes on his 10-minute break.[7]

Leo reported Helton's tardiness to Rick Rice, molding department group leader. Rice told Leo that corrective action was in order. Leo then reviewed Helton's personnel file and attendance records to determine the appropriate level of discipline. Leo discovered from his analysis of Helton's employee records that he had been issued an oral reminder on June 3 for being 3-1/2 hours late that day and for having two previous incidents of tardiness on his record. This was the proper procedure under the disciplinary guidelines contained in the old handbook, in effect at the time. Leo also discovered that since June 3, Helton had been tardy twice more so that his August 21 tardiness meant a total of six infractions recorded in Helton's employee records.

Leo determined that under the Company's new handbook and stricter disciplinary guidelines, the number of times Helton had been tardy, made him subject to discharge. Leo discussed the options with Rice and together they decided that since Helton had not been counseled with regard to his being tardy on July 23 and 24, he should not be discharged but issued a final reminder. Leo then prepared the necessary document.

Leo and Rice issued the final reminder to Helton at the end of his overtime shift. They explained the reason for the corrective action as well as for the level of discipline. They told him what he had to do to correct his tardiness problem. Helton admitted that he had been late coming back from his break but denied that he had been 8 minutes late. Leo informed Helton that ''a tardy was a tardy whether it was one minute or a hundred minutes.'' Helton also objected to the level of corrective action taken because he questioned how his record could go from three reported instances of tardiness directly to six. Leo encouraged Helton to write his objections to the corrective action in the ''Employee Comments'' section of the form. Helton did not do so but signed the form despite his objections.

Respondent takes the position with regard to Helton's August 21 disciplining that it followed its standard practice and that its practice is well documented. Thus, the policy is that employees are permitted a 30-minute meal period and two 10-minute rest breaks during each 8-hour shift. This policy was set forth specifically in the old employee handbook. The new employee handbook, which was effective as of August 1, contains the same language. As noted earlier, an employee who elects to work overtime following his regular 8-hour shift, is entitled to an additional 10-minute break.

According to the record, the Company has also maintained a policy with regard to employees returning tardy from meals and rest breaks. Both the old and the new employee handbooks reflect this policy by including the following definition:

[6] Pars. 8(a) and 9.

[7] Helton testified that he was only 1-1/2 minutes late, rather than 8 minutes. His testimony is not credited.

> Tardies are defined as unworked time less than four hours, such as being late for work, returning late from a break or lunch, and leaving work early . . . .

In its policy, the Company does not distinguish between being late for work and being late returning from a break. Nor, as Leo told Helton, does it distinguish between lateness of 1 minute and lateness for a much longer period.

The Company, in its old employee handbook, had included a section which reflected guidelines for the enforcement of tardiness rules. These provided for progressive discipline:

> Disciplinary action for unexcused tardies is as follows: Within any consecutive fifty-two week period: Three Tardies: Step 1: Counseling with the team leader. At the fourth tardy: Step 2: Counseling with the team leader.
>
> At the fifth tardy: Step 3: Counseling with the team leader and group leader.
>
> At the sixth tardy: Placement on probation: counseling with the human relations supervisor and written documentation of absences.
>
> At the seventh tardy: Discharge after an exist interview with the human resources supervisor.

In the new employee handbook, promulgated on August 1, the guidelines were made more stringent:

> *Corrective Action for Unpaid Absences and Tardies*
>
> Within any consecutive fifty-two week period:
>
> One unpaid absence/tardy: Step 1: Counseling with the team leader.
>
> Two unpaid absences/tardies: Step 2: Counseling with the team leader and group leader.
>
> Three unpaid absences/tardies: Step 3: Probation: Counseling with group leader and human resources manager. Written documentation of absences/tardies.
>
> At the fourth unpaid absence/tardy: Discharge after an exit interview with the human resources manager.
>
> This sequence of corrective action steps serves only as a guideline. The Company reserves the right to determine the severity of the corrective action or to immediately discharge an employee depending on the nature of the event and its severity.

The day after receiving the final reminder, Helton asked Leo ''why they were coming down on me when they never bothered anybody else.'' He testified, ''I mean, everybody else could stroll in and out and take breaks, even the team leaders.'' Leo replied that it was none of Helton's business what other people were getting done to them.

Respondent maintains an appeals procedure following imposition of corrective action. On August 29, Helton, in pursuance of his rights under the Company's open-door policy, requested a review of the corrective action taken against him on August 21. That morning, Senior Manufacturing Manager Van Gieson met with Helton, Rice, and Leo. During the review, Helton admitted that he had been late returning from break on August 21 but denied that he was 8 minutes late. He stated that he was only about 2 minutes late and that he did not think that corrective action was appropriate. Van Gieson considered the fact that Helton had entered no employee comment on the form when he signed it on August 21, and did not appeal until 8 days later. He decided that the corrective action should stand, primarily because Helton admitted he was tardy. Helton complained that the open-door policy was unfair and did not work. Van Gieson argued that the policy was a good one and invited Helton to pursue the matter further up the ladder with Kays or with Vice President for Manufacturing Ken Kitamura. Helton agreed to do so. Following the meeting, Van Gieson wrote a memorandum describing its content.

Van Gieson contacted Kitamura who joined the meeting. Helton explained his position to Kitamura. After reviewing all of the circumstances, Kitamura sided with the position of lower management. Helton was then offered the opportunity to discuss the matter with the president of the Company but declined the invitation.

Respondent's position is that it has always consistently enforced its policy against employees returning late from breaks. Team Leader Yount and Group Leader Rice both testified in support of Respondent's position and described specific instances where they took corrective action against employees who returned late from breaks. Yount issued a written reminder to employee Anita Sharp on November 13, 1990, after she had been late returning to work on four occasions, including a 2-minute infraction on November 5, 1990, and a 1-minute infraction on November 8, 1990.

Respondent further supported its position by offering into evidence company records which reflect numerous instances of corrective action being taken against employees who returned late from meal periods and rest breaks. Many of the periods of tardiness were extremely short and reflect corrective action taken both before and after the initiation of union activity.

The complaint alleges[8] that Respondent, on August 26 and 27, first suspended, then discharged, David Branson for discriminatory reasons. The record indicates that Branson was hired February 12, 1990, and was assigned to the paint department where he worked until his discharge. Branson was a paint technician on the first shift on the day of his discharge. At the time, he was assigned to paint room 4, supervised by Mike O'Nan, team leader, and Jason Nichols, group leader.

When Branson was first hired he was given a copy of the employee handbook and signed an acknowledgement receipt at the time. He received a copy of the new employee handbook on July 31 and signed a receipt for it the same day. As noted earlier, both books contain a description of Respondent's policies regarding employee tardiness and absenteeism. These policies provided for an annual allowance of 48 hours of paid time for employees with 1 year or more of service with the Company. The allowance was to serve as compensation to employees for prearranged absences due to personal illness, family illness, or personal business which could not be conducted outside the regular workday.

Company records reflect that Branson had a long history of absenteeism and tardiness for which he was disciplined numerous times. On July 14, 1990, Carol Carey, his team leader, issued him a verbal warning for returning tardy from a rest break. This measure was in accordance with step 1 in the disciplinary process of the relevant section of the employee handbook. Branson was required to sign documents

[8] Pars. 8(b) and (c).

which indicated the times he was tardy and absent without excuse. These documents stated that additional absences or instances of tardiness could lead to additional disciplinary action, including termination.

On February 12, Nichols counseled Branson about absenteeism during his performance and development review. Branson, by that time, had already been absent three times and tardy three times. The dates of these absences and times tardy were noted in his personnel file and the category ''Needs improvement'' was checked. Though there was a space for Branson to make any comment he might have on the subject, he did not avail himself of the opportunity. The form was signed by Branson and various members of management.

Nichols, on May 30, issued Branson a written reminder for tardiness. This was in accordance with step 2 of the progressive disciplinary process and was for his having been late on four occasions through May 29. The corrective action form, which both he and Nichols signed, informed him that the next time he was tardy, he would be given a final reminder. Kays and Van Gieson also signed this document.

On June 25, Nichols issued to Branson a written reminder noting that he had received an oral reminder on May 7 and a written reminder on June 13, both for absenteeism violations. At the time, absenteeism and tardiness were considered separate types of violations warranting separate corrective actions. Later, in the new employee handbook, they were treated together in the same section. When Branson received the written reminder, he was advised that any future infraction of the absentee policy would result in the issuance of a final reminder. At the time, Branson was counseled about the problem he was creating for himself under the Company's policy on absenteeism and tardiness. He was also offered the opportunity of making any comment he wished.

On August 7, Branson told Nichols that he would be absent the following day because he had to attend a hearing in court. Nichols advised Branson that he did not have sufficient paid time available to take off the following day and that if he did so he would receive a final reminder. Branson stated that, nevertheless, he would not be to work the next day. Nichols then issued Branson the final reminder. Though he was given the opportunity to comment, Branson chose not to do so. Both he and Nichols signed the final reminder.

On August 9, Branson met employee Larry Miller at a car wash, where he was given and signed a union authorization card. On August 15, Branson attended his first union meeting. He obtained two union buttons at the meeting and subsequently wore them to work. Miller asked Branson to be on the in-plant organizing committee and he agreed. Thereafter, he distributed a union bulletin at a car wash and on August 19, ''passed the word'' to a few first-shift employees about the forthcoming August 20 union meeting.

The union organizing campaign began sometime in July. Branson did not sign a union card until August 9, the day after he received his final reminder on absences. The early organizing campaign was apparently conducted without his assistance.

The number of employees in the unit was approximately 180. To hold a representation election, there must be a showing of interest of 30 percent or more. Thus, more than 50 unit employees must have signed cards. There is no indication that Branson was involved in obtaining signatures. But other employees were engaged in this activity, openly, in the plant in full view of management. Thus, it is apparent that other employees were far more active than Branson.

When Nichols was asked to identify the most outspoken union advocates in the paint department, he named Larry Miller, Tom Wyatt, Charlie Dodd, and Robert Southworth. These four employees are still employed.

Although Branson wore two union buttons to work, so did many of the employees throughout the plant and in the paint shop. One employee wore 200 buttons or more. Literature was passed out at the plant openly by union activists. Branson did not claim to have participated in the distribution and, indeed, his pamphleteering was limited to the car wash and pizza hut.

During the August 14 meetings, many employees were outspoken in explaining to management why they wanted a union. Branson apparently was not one of these. There is no evidence of discrimination against these outspoken prounionists.

On or about August 19, Branson showed Nichols certain legal papers requiring him to appear in court again on August 22. Nichols knew that Branson did not have any paid time available which he could use to take time off to appear in court. However, he also knew that Branson could not just ignore the requirement that he make the court appearance. Nichols agreed to work with Branson to help him make up for the time he had lost. For the previous 2 weeks Branson had voluntarily been reporting to work 2 hours early. In the August 19 conversation, it was agreed that henceforth it would be mandatory for Branson to report 2 hours early to make up for the time he had lost.

On August 22, Branson was absent from work 4 hours. According to the employee handbook, 4 or more hours was regarded as an absence whereas less than 4 hours was regarded as tardiness. Since Branson had been absent and had no paid time available to cover this absence, and since he had a number of previous infractions, he could have been suspended pending review of the circumstances. However, Nichols and Kays discussed the situation and decided to ignore Branson's June 13 absence and merely issue a second final reminder. Nichols made an exception in this case because he wanted to help Branson and because he did not want to discipline him for making a court appearance.

The day after his second court appearance, when Branson was given his second final reminder, Nichols counseled him that another unexcused absence would result in a suspension or discharge. He told Branson that anything short of an Act of God would result in Branson's termination. He stated that failure to notify the Company of an expected absence would likewise end in termination.

At this time, all paint department employees were working a 10-hour day and were required to start at 5 a.m. On August 24, Branson failed to report for work. He was the only employee in the department to be absent on that date. He also failed to call in, in advance, as required by the employee handbook.

At 5:47 a.m. Branson's mother contacted Mike O'Nan, Branson's team leader. She told him that Branson was sick and would not be reporting for work. O'Nan asked to speak to Branson personally, and when he did so, Branson confirmed what his mother had just told him. O'Nan advised Branson that his absence would be reported to Nichols.

On Monday, August 26, at a meeting with O'Nan and Nichols, Branson was told that he was being placed on suspension with the recommendation that he be discharged. The corrective action form, which had already been prepared, was signed by all three, after first being reviewed. It was subsequently reviewed as well by Kays and Van Gieson who concurred in the recommended action. Branson was discharged.

At 9:30 a.m. on August 27, when Branson reported to the plant, he met with O'Nan, Nichols, and Mary Richards. Nichols advised Branson that he was being discharged. Nichols testified that the decision to terminate Branson was based on the aggravated nature of Branson's August 24 absence, in particular Branson's failure to meet the call-in requirements of the employee handbook covering absenteeism, Branson's attempt to have another person call in on his behalf to report his absence, and, of course, the fact that Branson was absent at a time when he had no more paid personal time left.

In order to show that Branson's discharge was pursuant to a long-established policy of terminating employees for excessive absences, Respondent offered into evidence records indicating that between November 8, 1989, and January 30, 1992, it terminated 25 employees for excessive absences and/or tardiness.

The complaint alleges[9] that Respondent discharged its employee Joseph Helton on September 9 in violation of Section 8(a)(1) and (3).

Helton was hired September 10, 1990. During the relevant period, he was a mold changer on the third shift. On Friday September 6, the Company asked for volunteers to work overtime. Several employees volunteered including Helton who reported on that date at 11 p.m.

The overtime volunteers that evening were scheduled to function as mold technicians and operate the presses. Helton was assigned to operate the 450 #1 line press, the 550 #4 line press, and a third press. As a mold changer, he was also expected to assist the other operators in that capacity as well. Helton was the only mold changer working the September 6 overtime shift. When Helton reported at 11 p.m., his presses were already in full production, producing parts of acceptable quality.

During the first hour of the overtime shift, employee Bobby Tindle sustained an on-the-job injury to his hand. At about 12:30 a.m., Barry Johnson announced that he was taking Tindle to the hospital for treatment. Before leaving the plant, Johnson told Helton that the paint group leader would be in charge of the department while he was out of the plant.

When Johnson left, Helton's presses were all functioning properly. When he returned at about 1:50 a.m. they were all shut down and Helton was nowhere around. Johnson questioned the other mold department technicians about Helton's whereabouts. They reported that they had not seen Helton in the area since the 1 a.m. break.[10] Johnson continued to search throughout the molding department trying to find Helton but without success. He broadened his search to include the entire plant. He asked two maintenance employees in the assembly department if they had seen Helton. Both replied that they had not seen him since the 1 a.m. break.

Johnson left the assembly department and entered the quality assurance department. As he did so, he noticed Helton in the shipping and receiving area. He was sitting on the gasoline-powered tow motor with one of his feet propped up, talking to quality assurance employee, Kelley Williams.

Johnson continued to watch Helton talk to Williams for 1 or 2 minutes. During that time, Helton did not attempt to get off the tow motor nor to start it. Johnson then went over to Helton and asked him what he was doing. Helton replied, ''Talking to Kelley.'' Johnson told Helton he did not belong in the warehouse and should be in his own department. Helton drove back to his department with Johnson walking beside him part way. By this time it was about 2:05 a.m. Johnson had spent about 15 minutes looking for Helton.

When Johnson arrived back in the mold department, he asked Helton why the presses were down. Helton replied that the robot on the 450 #1 press was not functioning and the 550 #4 press was not receiving any material. Johnson then asked Helton about the third press. Helton said that he was unaware that there was anything wrong with that press. He told Johnson that he had tried to get the other two presses started but was unable to do so.

Johnson told Helton that he was going to have to write him up for being out of his department. Helton claimed that he was out of his department for a work-related reason. Johnson repeated that Helton was not supposed to be out of his department, apparently rejecting Helton's explanation. At the end of the shift, Johnson asked Helton to sign a written reprimand but Helton refused and left the plant. The reprimand accuses Helton of being out of his area ''15 minutes or more,'' the period of time Johnson had spent looking for him.

Johnson credibly testified that based on the description of the problems and on the various problem indicators on the presses themselves, Johnson was able to diagnose the reasons for the malfunctions. Within 5 or 6 minutes, he had all three presses operational and in production. The problems which caused the three presses to malfunction were common ones which occurred frequently to all of the Company's presses. Getting them into working order required no replacement parts of tools and no expertise in electronics or machine maintenance. They were, according to Johnson, simple problems that any mold changer with a reasonable understanding of the presses could easily solve. Helton had the skill, experience, and ability necessary to get the presses moving.

Johnson considered Helton at fault for the situation that existed in the molding department when he returned from the hospital on the morning of September 7. The matter was a serious one in Johnson's view because the whole purpose of working the overtime shift was for additional production. Yet, Helton's presses were not producing. Further, Helton was being paid a premium rate of pay and was away from his work station for no reason. Finally, the problems that had put down Helton's presses were such that he should have been able to handle, and, if not, should have sought the help of the maintenance men. Johnson determined that disciplinary action was in order.

Later that morning, Johnson prepared a memorandum covering the incident and included in it, other recent incidents involving Helton. To determine the proper level of discipline, Johnson reviewed Helton's file. The file reflected that he had received a final reminder for tardiness and a final reminder

[9] Pars. 8(d) and 10.

[10] Helton's explanation, that the period of time he was out of his work area on the evening of September 6 and 7 was spent looking for more plastic material, is not credited.

for absenteeism. Moreover, Johnson had encountered the problem of Helton being out of his work area on several previous occasions, on one of which he had personally counseled him. Other supervisors had also counseled Helton a number of times with regard to this problem. After giving due consideration to Helton's overall record, Johnson determined that Helton should be suspended from work while the entire situation was investigated and reviewed, with the possibility that discharge might be the eventual result.

About 7 a.m. that day, Group Leader Rice was scheduled to report to work. Johnson decided to discuss the matter with him before making any recommendation regarding Helton's discipline. Rice agreed with Johnson's proposed discipline but suggested that he advise Kays of the incident and seek her advice.

Since Kays was not at the plant, Johnson called her by telephone, described the incident, and informed her of his planned course of action. Kays agreed that suspension pending review, with possible discharge, was the correct disciplinary action to take. Johnson had already prepared the proper form but by the time he had been able to contact Kays, Helton had already left work for the day. Later that day, Jim Leo, team leader, advised Helton by telephone that he had been placed on suspension for the incident of the previous evening. He was told to report to the Company for a meeting on Monday, September 9 at 7:30 a.m.

The followup investigation was conducted by Rice on September 7. He was concerned with the length of time Helton was away from his presses and in the quality assurance department. Rice asked Helen King, team leader in that department, to inquire of the technicians working there on second shift whether a molding department employee had paid an extended visit to the quality assurance department the previous evening. He requested King to report her findings to either Kays or Van Gieson because he was going on vacation. He did not mention Helton's name.

Next, Rice and Leo checked out the 450 #1 press and the 550 #4 press to determine if they had been down on third shift and, if so, how long. Rice, by examining these machines, found them to be operating properly, and producing successfully the same product which they had been producing on Helton's third shift.

Rice then calculated how long each machine was down during the third shift on September 6. He determined that both machines had been down during Helton's shift for an excessive period of time.

On September 7, Rice telephoned Van Gieson and advised him of the Helton situation. He told him that Helton had been suspended pending review, that third shift production had been calculated, and that King would report to him, the result of her investigation.

In accordance with instructions received, King interviewed the three quality assurance employees on September 7 concerning the events of the previous evening. The three employees were Kelley Williams, Karen Kerney, and Lynn La Mar. They had worked their regular shift on September 6 from 3:30 p.m. until midnight, then 2 hours overtime until 2 a.m. To King's questions, all three stated that Helton had visited their work area toward the end of their shift on September 6. When King asked them how long Helton had been there, they estimated from ''20 to 25 minutes'' to ''a long period of time.''[11] When King next asked them what Helton was doing there, they all agreed that he was talking to Kelley Williams and performing no work. Shortly after the conversation, King placed the conversation in memorandum form.

On Monday morning, September 9, prior to the scheduled meeting with Helton, Van Gieson arrived at the plant to review relevant information bearing on the Helton incident. King furnished him with a copy of her memorandum and Rice provided the production information. Van Gieson also obtained from Johnson, his explanation of the events of September 6.

At approximately 7:30 a.m., Van Gieson met with Helton and Johnson. Helton and Johnson each gave his version of the events of September 6. Helton claimed that he had only been out of his work area for 10 or 15 minutes for job-related reasons. He denied engaging in extended conversation with Kelley Williams. He stated that he had tried to fix the presses but was unable to do so.

The discussion turned to the fact that Helton, on previous occasions, had been seen out of his work area and had been counseled by his supervisors about it. Helton took the position that his job required him to be outside the molding department on occasion. Van Gieson conceded this point but insisted that Helton's primary function was to keep his presses running. Van Gieson noted that when Helton was out of his work area, he was not performing his work duties and was interfering with other employees' work performance. Van Gieson rejected Helton's stated position that he had a right to go to other departments and talk to other employees. He told Helton that on September 6, he had abandoned the molding department in a production crisis for an extended period of time for purely personal reasons and that this was the same type of activity about which he had previously been warned. Van Gieson, unable to convince Helton of the position of the Company, decided that he should be discharged for his misconduct of September 6, specifically for using work hours for activities of a personal nature.

Van Gieson said that the Company could not tolerate somebody that would not go by the rules. He told Helton that he was discharged. They reviewed the corrective action form together. Helton added some comments to the form, then signed it. Van Gieson later prepared a memorandum covering the meeting. In it he recorded the content of the meeting and the bases on which the discharge was decided.

Conclusions

The complaint[12] alleges that Respondent violated Section 8(a)(1) of the Act by, since March 16, 1991, promulgating and maintaining the following rule:

> The company prohibits solicitation or distribution of materials by employees or non-employees on company premises or during company business hours except with prior written authorization from human resources. Company resources and property of any kind may not be used to transact personal business.

[11] On the stand, La Mar testified that Helton had been in her department 30 minutes or longer. Later, she testified that he was there from 11:10 p.m. until 2 a.m. talking to Williams. Karen Kerney testified that Helton was in her department at least 45 minutes.

[12] Pars. 5 and 9.

Respondent concedes that it solicitation/distribution rule appears, on its face, overbroad, but since in practice the employees, according to record evidence, have been permitted to solicit fellow employees and distribute campaign materials to employees during their lunch and rest breaks in nonworking areas, the presumption of invalidity has been overcome and there is no violation. I agree with Respondent's position.[13]

The complaint[14] alleges that Respondent, through Roy Yount, on August 13, 1991, interrogated an employee as to his knowledge of the Union's organizing campaign. This allegation, of course, refers to the incident, described above, wherein Yount asked Helton if he had heard anything about the Union. I find that the conversation occurred just as Helton described but was brief, innocuous, isolated, nonthreatening, and therefore did not reasonably tend to restrain, coerce, or interfere with Helton's rights as guaranteed by the Act.[15]

The complaint[16] alleges that Respondent, through Susan Kays, created the impression among its employees that there union activities were under surveillance by Respondent. The reference is to a number of meetings Kays conducted on August 14, the contents of which have been discussed supra.

General Counsel urges that Kays conveyed to the employees the impression that their union activities were under surveillance by telling them that Respondent knew where and when meetings were being held, and who was attending the meetings. Such statements, General Counsel argues, ''were designed to discourage employees from attending future union meetings, lest management find out who had gone to the meetings.''

Although Kays had, in fact, mentioned that a union meeting had been held at the Great Western on a certain date and that Respondent's employees had attended, this statement does not amount to giving the impression of surveillance because it was accompanied by Kays' statement that employees had a right to union representation, that they should learn more about the Union, and that they should attend future union meetings. Moreover, surveillance and giving the impression of surveillance concern covert campaigns where employees may be frightened of having their employer discover their union activity. In the instant situation, the campaign was overt. Everyone knew about it and Kays was, in effect, telling the employees that she knew what was going on and it was all right. I credit witnesses' testimony to the effect that Kays stated that she knew where and when the union meeting took place but do not credit testimony to the effect that Kays stated that she knew who attended the meetings. I recommend that this allegation be dismissed.

The complaint[17] alleges that Respondent, through Kays, solicited grievances from its employees and implied that the grievances would be adjusted. This allegation also refers to the meetings held on August 14.

As noted, Kays held 12 meetings that day and addressed 180 unit members, minus absentees. With that many people listening, there are bound to be a few who hear something that was not said.

It must be recalled that all members of management were given an education by Respondent's labor lawyer. Several meetings were held where it was instilled in their minds what the dos and don'ts of campaigning are. The TIPS acronym was emphasized over and over, both orally and in writing. The P in TIPS was for no promises. After hearing this for the previous 2 weeks, finally Kays addressed the employees. She explained to them what management could and could not do, including the TIPS acronym. After all of the preparation, General Counsel's witnesses would have us believe that Kays told the employees that she was soliciting grievances for the purpose of implying that their grievances would be adjusted, that, in effect, she was making promises in return for their abandoning their organizational efforts. I do not believe that the record supports the General Counsel's position.

With regard to the subject of wage increases, Kays stated that the Company was in the red and there could be no wage increases until, at least, 1994. Clearly, there was no promise here. With regard to medical insurance, Kays stated that the Respondent had been caught off guard, and that premiums were expected to go up, but that the Respondent would look around for another insurance company that wold suit the needs of the employees. Although this statement might be considered a promise, it appears more to be an admission that Respondent had not been as attentive to the medical insurance problem as it might have been, and an apology for the fact that premiums were about to be increased. It would appear again to be an explanation of the status quo rather than a promise that in exchange for employees rejecting the Union, they would be given a new and better medical plan. Another matter brought up by employees, in attendance at Kays' meetings on August 14, was inconsistencies and favoritism on the part of supervisors when dealing with rank-and-file employees. Kays, in attempting to answer these changes, admitted that there were problems in this area but stated that training courses had been undertaken the previous spring to correct the situation. She also stated that the subject would be covered in the new handbook. I do not consider her treatment of this subject as in violation of the Act. The subject of ''Employment at Will'' as treated in the new employee handbook, seems to have given rise to a certain amount of uneasiness among Respondent's employees. Their uneasiness was given voice during the August 14 meetings. Kays, in replying to their questions, merely tried to assuage their obvious discomfort with the subject by assuring them that they would not be automatically terminated for minor offenses. I do not consider her efforts in this direction to be a promise in violation of the Act, but merely an explanation of the meaning of the term, as used in the handbook. Finally, the complaints of a number of employees concerning the excessive overtime, and poor and belated scheduling of that overtime, resulted in Kays admitting that the problems existed. She did not, however, make any promises with regard to overtime and, indeed, the problem was still there at the time of the hearing. I find no violation with regard to the discussion of overtime during the August 14 meetings. In sum, I recommend dismissal of the allegation contained in para-

[13] *Our Way, Inc*., 268 NLRB 394 (1983); *Broadway*, 267 NLRB 385 (1983).

[14] Pars. 6(a) and 9.

[15] *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[16] Pars. 6(b)(i) and (9).

[17] Pars. 6(b)(ii) and (9).

graph 6(b)(ii) dealing with unlawful solicitation of grievances.

As stated in *ITT Telecommunications*:[18]

> The solicitation of employee grievances by an employer is not illegal unless accompanied by an express or implied promise of benefits specifically aimed at interfering with, restraining, and coercing employees in their organizational effort. It does not appear, upon consideration of all attendant circumstances, that the actions of the Respondent were taken with this objective. Therefore, such conduct as taken by the Respondent, we conclude, does not violate Section 8(a)(1) of the Act.

The complaint[19] alleges that Respondent, through Kays, coercively interrogated employees on August 14 regarding their desire for union representation. I find, however, that Kays' question, as to why the employees wanted union representation, was either purely rhetorical or designed to elicit communications from the employees, which management felt had been lacking. Since the question was not attended by any coercive action or language, it did not tend to restrain or interfere with employee rights and did not violate Section 8(a)(1) of the Act.[20]

The complaint alleges[21] that Respondent, through Randy Popp, on August 18, violated Section 8(a)(1) by instructing an employee to remove his union button. The incident giving rise to this allegation is fully described above. The record indicates that Popp did not instruct Branson to remove his union button. On the contrary, when he began his statement, ''If it were up to me,'' he implicitly admitted that it was not up to him, and that Branson was within his rights to continue to wear the button just as the employees had been assured by management. There is no violation here.

The complaint[22] alleges that Respondent, since on or about the week of August 11, imposed more onerous working conditions by requiring strict adherence to its plant rules.

In support of this allegation, Counsel for General Counsel called several witnesses who testified that following the advent of the Union, supervisors were strict with regard to insisting on employees returning from breaks on time, whereas before, they were not. An abundance of company records, however, clearly indicates that tardiness had always been a concern to management and the advent of the Union had nothing to do with the tardiness rules being enforced.

General Counsel's witnesses who testified vaguely to stricter enforcement of rules against gathering in groups and talking were unconvincing, and, in my opinion, General Counsel has failed to support this allegation by a preponderance of the evidence.

The complaint alleges[23] that Respondent violated Section 8(a)(1) by issuing a reprimand to Helton on August 21 based on discriminatory considerations. I find that Helton's reprimand was consistent with past practice, that Respondent had a strict policy against tardiness which it enforced indiscriminately before and after the advent of the Union. It issued the August 21 reprimand against Helton in accordance with this longstanding policy for just cause and not for discriminatory reasons.

The complaint alleges[24] that Respondent, on August 26 and 27, first suspended, then discharged David Branson for discriminatory reasons. I find, however, that Branson was terminated for cause, more particularly, for excessive absences and incidents of tardiness. I reach this conclusion based on record evidence that indicates that Respondent historically enforced its rules and disciplined employees who had an excessive number of absences or incidents of tardiness, and that Branson had not been singled out discriminatorily. Moreover, Branson's union activity was minimal and unlikely was minimal and unlikely to draw the special attention of management, in light of the activities of other more active union supporters whose activities, described above, were well known to supervision.

The complaint alleges[25] that Respondent discharged its employee, Joseph Helton, on September 9, in violation of Section 8(a)(1) and (3). I find, however, that Helton, like Branson, was only minimally involved with the Union and that he was, in fact, terminated for cause. More particularly, I conclude that Helton was terminated for failure to perform his assigned duties and for being out of his work area for an extended period of time in contravention of company rules.

I have found that none of the allegations of violations contained in the complaint are meritorious. I also find that Respondent would have taken the same action even in the absence of protected conduct.[26] Consequently, I shall recommend that the complaint be dismissed in its entirety.

Conclusions of Law

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not committed any of the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[18] 183 NLRB 1129 (1970).
[19] Par. 6(b)(iii).
[20] *Rossmore House*, supra.
[21] Pars. 6(c) and 9.
[22] Pars. 7 and 10.
[23] Pars. 8(a) and 9.
[24] Pars. 8(b) and (c).
[25] Pars. 8(d) and 10.
[26] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).