**Stead Industries, Inc., d/b/a Hoyt Water Heater Company *and* International Union of Operating Engineers, Stationary Local 39.** Case 32-CA-7554

19 February 1987

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 1 July 1986 Administrative Law Judge Joan Wieder issued the attached decision. The General Counsel filed exceptions and a supporting brief, and 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,[1] and conclusions and to adopt the recommended Order.[2]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Stead Industries, Inc., d/b/a Hoyt Water Heater Company, Stead, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER STEPHENS, dissenting in part.

Contrary to the judge and my colleagues, I find that the General Counsel established a prima facie case that the Respondent engaged in unlawful surveillance of its employees. By prima facie case, I mean both that the General Counsel produced evidence sufficient to permit the critical inference concerning the nature of the activity in question and that, as a judge of the facts, I draw that inference. Thus, I find it more probable than not that the Respondent's managers were not merely coincidentally driving past the house in which the union meeting was held but were looking to see who was in attendance.[1]

The record reveals that on 2 October 1985[2] employee Ronald Bailey walked through the Respondent's facility shouting, "They just fired me for Union activity"[3] and announced, "Union meeting at my house tomorrow at 3:30." Employee Brad Holmquist, who went to the meeting, credibly testified that on 3 October, after parking his car at an intersection with a clear view of Bailey's house, he observed President and Coowner Dan Lannes drive past the house during the meeting. Five minutes later he saw Manufacturing Vice President Jim Bridegum and Industrial Relations Manager David Luther drive past Bailey's house together. All were driving very slowly, Holmquist testified, and were "looking around at homes and parked cars."[4]

The record further discloses that although the three managers were called as witnesses by the Respondent, none testified about the alleged surveillance incident. On the subject of Bailey's termination, however, Bridegum testified that he was concerned about whether employees believed Bailey was discriminatorily discharged and that he met with leadmen and held other meetings with employees in the 2 days following Bailey's termination to ascertain their understanding and to inform them that Bailey quit.

In spite of the foregoing evidence, the judge found that the managers' conduct was "suspect" but that the "General Counsel has failed to sustain the burden of raising the suspicion to proof of un-

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[1] Contrary to our dissenting colleague, we agree with the judge that the Respondent did not engage in surveillance in violation of Sec 8(a)(1) of the Act As found by the judge, the General Counsel failed "to show that more than fortuitous circumstances brought the supervisors to drive past Bailey's premises" and that "[t]hey were not shown to have engaged in suspicious behavior or 'untoward conduct '" We therefore agree with the judge that the mere showing by the General Counsel that the Respondent's management personnel drove down a public road past an employee's house at a speed dictated by the road conditions is not sufficient to establish a prima facie case of surveillance

Our dissenting colleague attempts to distinguish *Serv-Air Aviation*, 111 NLRB 689 (1955), on the basis that the street in that case was a "principal" street, whereas, according to our colleague, the street in the present case was "residential " Such a distinction, however, presumes facts not in the record In the present case no evidence was presented as to the character of the street There is no mention of the street's width, number of lanes, amount of traffic, its location relative to the plant, or even the type of area through which it runs The only thing that is known about the street is that it has speed bumps every fourth or fifth house As the judge observed, "it could be a major thoroughfare often traveled by the supervisors "

Under these circumstances, we find that the General Counsel failed to present sufficient evidence to establish a prima facie case Accordingly, we dismiss this complaint allegation

[2] The General Counsel has requested that the Order include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order Under the circumstances of this case, we find it unnecessary to include such a clause Accordingly, we deny the General Counsel's request

[1] See 9 Wigmore, *Evidence* § 2494 at 378-381 (Chadbourn rev 1981) (distinguishing two meanings of prima facie case) I am using the term in the first sense cited by Wigmore—having looked at all the evidence, I find that the General Counsel is entitled to a ruling in her favor

Since credibility resolutions are not involved here, I am not precluded from drawing the inference by the judge's implicit drawing of a contrary inference *Oil Workers Local 4-243 v NLRB*, 362 F 2d 943, 946 (D C Cir 1966), *NLRB v Lenkurt Electric Co*, 438 F 2d 1102, 1105 fn 3 (9th Cir 1971)

[2] All dates refer to 1985

[3] As noted by the majority, no party excepted to the judge's finding that Bailey voluntarily quit

[4] The street on which Bailey's house is situated has speed bumps which necessitate slow speed driving Holmquist indicated that Lannes' car was going about 5 miles per hour

lawful surveillance."[5] In so finding, she relied on *Elk Brand Mfg. Co.*, 253 NLRB 1038 (1981), and *Gossen Co.*, 254 NLRB 339 (1981). I note that, in the cases cited, the supervisors whose conduct was suspect offered explanations for their presence, and that these explanations were credited. Factually more similar to the instant case, but equally distinguishable, is *Serv-Air Aviation*, 111 NLRB 689 (1955), cited by the Respondent in support of the conclusions. In *Serv-Air*, as here, the setting was a small town, the employer had knowledge of the union meeting, and a supervisor drove by the site at which employees had gathered. No explanation for the supervisor's presence was offered, and his presence was adjudged to be fortuitous. Unlike the instant case, however, the employees had gathered on the steps of the post office, which was located on a "principal street."

In my view, the evidence that Lannes, Bridegum, and Luther drove along this residential street,[6] within a few minutes of one another, and looked at parked cars and houses, during a union meeting that they knew about in advance and that involved a subject about which they were greatly concerned, preponderates against a finding of mere coincidence. It is sufficient to establish a prima facie case of unlawful surveillance and to shift to the Respondent the burden of producing evidence suggestive of a lawful reason for its managers' presence. Because the Respondent did not present any evidence on this issue, I would find the violation.

[5] The judge's statement that the managers' conduct was "suspect" is, in my view, inconsistent with her observation, on which my colleagues strongly rely, that the managers "were not shown to have engaged in suspicious behavior or untoward conduct." To be sure, they were not shown to have engaged in blatant conduct such as taking photographs or parking their cars in order to take a longer look, but the essence of a surveillance violation is that the employer's representatives have spied on union activities. As explained below, I believe there is sufficient evidence of that sort of "untoward conduct." Certainly employee Holmquist, who found himself the object of attention by at least three managers in two cars, driving by within 5 minutes of each other at a speed slower than that required even by the speed bumps, had reason to believe his attendance at the meeting was under surveillance.

[6] My colleagues state that I presume facts not in evidence by characterizing the street as "residential," since no definitive description of Bailey's street was given. In my view, the majority ignores facts that *are* in evidence, namely, employee Holmquist's unrefuted testimony that the managers were "looking around at *homes* and parked cars" and that the street "had speed bumps *every four or five houses*" (emphasis added). If, notwithstanding this evidence of residential character, the Respondent could show that this was in fact a commercial area that the managers had reason to traverse apart from any interest in examining the houses and parked cars, it was up to the Respondent to produce such evidence.

*Raoul Thornbourne, Esq.*, for the General Counsel.
*Kevin P. Block, Esq.* and *Robert M. Lieber, Esq. (Littler, Mendelson, Fastiff & Tichy)*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was heard by me at Reno, Nevada, on 20 and 21 February 1986.[1] The charge was filed on 7 October by the International Union of Operating Engineers, Stationary Local 39 (the Union). A complaint based on this charge was issued on 27 November. The complaint alleges that Stead Industries, Inc., d/b/a Hoyt Water Heater Company (Respondent or the Company) threatened an employee that it would move its facility if the employees selected the Union as their collective-bargaining representative; threatened its employees that it would go out of business or into bankruptcy if the employees selected the Union as their collective-bargaining representative; engaged in surveillance of one employee meeting where they were engaged in union activities; maintained and enforced a rule prohibiting soliciting of any kind on its premises and selectively and disparately prohibited union-related solicitations while permitting other types of solicitations in violation of Section 8(a)(1) of the National Labor Relations Act (Act); and discharged employee Ronald Bailey and failed and refused to reinstate him because he engaged in protected concerted activity, in violation of Section 8(a)(1) and (3) of the Act. The Respondent denies that it has violated the Act.

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

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a Nevada corporation with an office and place of business in Stead, Nevada, where it manufactures and sells water heaters. During the 12 months prior to the issuance of the complaint, Respondent, in the course and conduct of its business, sold and shipped goods and provided services valued in excess of $50,000 directly to customers located outside the State of Nevada. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

#### II. THE UNION

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

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Background*

Respondent, which employs about 325 people, moved its plant and principal place of business from Oakland, California, to a new facility in Stead, Nevada, in 1982.

[1] All dates are in 1985, unless otherwise indicted.

One reason for the move was to take advantage of the lower wage rate prevailing in Stead, Nevada The Company is managed by President Dan Lannes, the owner, Jim Bridegum, manufacturing vice president, David Luther, industrial relations manager, and Norman Wortman, maintenance superintendent. These company officials are admitted statutory supervisors and agents.

At approximately 8:30 a.m. on 2 October, Bailey called the Union to initiate organizing activity. He selected the Union at random and spoke to Michael Magnani, a business agent. Bailey was hired by Respondent in June 1984 as a production worker and paid $4.50 per hour. His employment with the Company ended on 2 October. Bailey was maintenance man on 2 October earning $8 per hour. Bailey's immediate supervisor was Wortman. Bailey claims he was fired for his union activity for the day Respondent asserts Bailey quit.

1. Bailey's work history

The job with Respondent was Bailey's third full-time job. His first job was with Burnup & Sims Cable Company. He quit that job, explaining he was getting married and did not want to travel Bailey then went to work with Leader Stamping & Manufacturing, which is located in Reno, Nevada, and did some work for Respondent. He quit that job, purportedly because one or more paychecks bounced At the time he left, he was earning about $8 50 per hour. The dates he worked for his first two employers are not a matter of record. After leaving Leader Stamping & Manufacturing Company, which is owned by a friend of Bailey's father-in-law, he went to work for Respondent at the much lower wage of $4.50 per hour.

In 1980 Bailey was convicted of burglary. This information was placed into evidence to impeach Bailey who had previously testified in reply to questions asked on cross-examination without objection that he was an honest man who had never committed a dishonest act and had never been convicted of a crime Respondent placed in evidence a judgment finding Bailey guilty of burglary and sentencing him to 4 years' imprisonment. The sentence was suspended, and Bailey was placed on probation for 5 years and required to make restitution

The General Counsel objected to the evidence, arguing that it is inadmissible for impeachment purposes under Rule 609(c) of the Federal Rules of Evidence [2] After Bailey completed probation and made restitution, he received an Order Honorably Discharging Probationer. The General Counsel asserts this order meets the criteria of Section 609(c). The majority of circuit courts of appeals find that such orders do not meet the criteria of Section 609(c), rather they evince a restoration of civil rights. The advisory committee explains

> . . . a pardon or its equivalent granted solely for the purposes of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation, the situation is otherwise The result under the rule is to render the conviction inadmissible

See A.L.J. Proceeding 310 (1961)

The General Counsel had the burden of demonstrating that the conviction for burglary was the subject of a certification of rehabilitation or some other equivalent procedure *U.S. v. Trejo-Zambrano*, 582 F.2d 460 (9th Cir. 1978), cert. denied sub nom *Fierro-Soza v. U.S.*, 439 U S. 1005 (1978) I find that the record does not support a finding that Bailey has been rehabilitated or granted some equivalent. The State of Nevada does not consider its "Honorable Discharge from Probation" to be a pardon or proof of rehabilitation, rather it considers it a restoration of civil rights. See Sections 176.225 and 50 095 of the Nevada Revised Statutes. Nevada law would permit the evidence of the convicted to be used for impeachment purposes. Cf *Yates v. State*, 596 F 2d 239 at 241. In the *Yates* case, id , the court found no requirement that only felonies specifically relevant to the defendant's propensity towards mendacity could be used for impeachment.

I also find that the record does not support a conclusion that the evidence, distinct from the Order, shows that Bailey has been rehabilitated. *U.S. v. Wiggins*, 556 F 2d 944 (5th Cir.) cert. denied 436 U.S 950 (1978). Cf. *U.S. v. DiNapoli*, 557 F 2d 962 (2d Cir ), cert. denied 434 U.S. 858 (1977) *U.S. v. Jones*, 647 F 2d 696 (6th Cir. 1981) There was no indication that Bailey had been rehabilitated by evidence such as undergoing therapy, education, or other assistance, and his work history of quitting his jobs does not demonstrate rehabilitation *U.S. v. Thorne*, 547 F 2d 56 (8th Cir. 1976). Although the order may facially appear to annul Bailey's conviction, the applicable state and Federal law treats the order merely as restoring his civil rights. I therefore conclude that the evidence of Bailey's conviction for burglary is admissible under Section 609(c) of the Federal Rules of Evidence.

Respondent argues that the conviction is also evidence of Bailey's propensity for mendacity. Respondent failed to cite any authority for this position I find this position to be without merit As counsel for the General Counsel notes, burglary is not a crime which establishes a propensity towards mendacity. *U S. v Seamster*, 568 F.2d 188 (10th Cir. 1978), and *Unarco Industries*, 197 NLRB 489 (1972). However, in this case, the conviction is admissible to rebut the witness' claim that he never committed a dishonest act or had been convicted of a crime Although Bailey contended he construed the order as exonerating him from the crime, there was no explanation of why he did not consider his participation in the burglary dishonest I find Bailey's excuse for not anwering the question fully and honestly unconvincing and demonstrative of a tendency to prevaricate.

The General Counsel also argues that the evidence of Bailey's conviction is not admissible under Section 609(a)

[2] Rule 609(c) provides
Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or the equivalent procedure based on a finding of rehabilitation of the person convicted, and that a person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of pardon, annulment, or other equivalent procedures based on a finding of innocence

of the Federal Rules of Evidence.[3] The argument is based on the contention that the evidence of a 5-year-old conviction is more prejudicial than probative of Bailey's credibility. This argument is not persuasive in this case because Bailey was convicted of the crime less than 10 years ago; the crime was a felony that carried a multiyear sentence; the importance of this witness' testimony; and, the centrality of the credibility issue. See *U.S. v. Hawley*, 554 F.2d 50 (2d Cir. 1977). The potential prejudicial effect of the evidence was occasioned by Bailey's ready responses to questions on cross-examination that were not the subject of an objection, i.e., "Have you ever committed any dishonest acts?" to which he replied, "No," and "Have you ever been convicted of a crime?" to which he replied, "No." As the witness' misrepresentations regarding the nature and the existence of the prior conviction raised the need for the rebuttal evidence, it is clearly admissible under this rule. See the Report of the Senate Committee on the Judiciary. Cf. *McGautha v. California*, 402 U.S. 183. *Howard v. Gonzales*, 658 F.2d 352 (5th Cir. 1981). I find that the probative value of this evidence under these circumstances clearly outweighs the prejudice to Bailey. However, even if it is later found that this evidence should have been excluded, the conviction is considered only to resolve credibility. I also find that even absent this evidence, as discussed below, there is ample evidence to support my credibility resolutions.

The General Counsel asserts that evidence regarding an allegation that Bailey falsified a timecard should be excluded under Section 608(b) of the Federal Rules of Evidence, which precludes the use of extrinsic evidence of specific acts of conduct for the purpose of attacking credibility. Bailey denied falsifying his timecard on cross-examination. The falsification of a timecard is clearly an act that concerns the witness' character and is a deceitful act, which may demonstrate the witness' willingness to lie on the witness stand. This evidence was admitted, not as probative of truthfulness, but as relevant to the issue of whether Bailey quit or was fired. Bailey was denied a raise allegedly because he falsified his timecard, and a witness testified that Bailey mentioned the denial of his raise as one reason he considered quitting. Accordingly, this evidence will only be considered as it explains the motives of both Respondent and Bailey regarding the events of 2 October.

On 11 March, while Bridegum was speaking to Bailey about an incident he was involved in, Bailey said he quit. The incident involved a dispute over which of two employees was to have the use of a forklift truck. A supervisor, Paul Esposito, saw Bailey and one of the employees he supervised arguing over who had the right to use a forklift truck. Esposito intervened and instructed Bailey to let White, the other employee, have the forklift. According to Esposito, Bailey had threatened to "kick White's ass"; refused initially to follow Esposito's directive to relinquish the forklift; said he was going to "kick Espositio's ass" also; invited him outside; and commented "that he would get me, or I was going to get mine . . . ." Bailey is a large man, standing 5 feet 11 inches tall and weighing about 275 pounds. He admitted holding a purple belt in karate, which he described as close to a black belt, and reflected considerable expertise in the martial arts. Esposito is considerably older and smaller than Bailey. White is no longer an employee of the Company and did not appear to testify. When Esposito saw Bridegum, he reported the incident and requested Bridegum talk to Bailey to straighten him out because he did not want to be threatened and intimidated by him.

Bridegum was going to have Wortman talk to Bailey about the incident, but he could not readily locate Wortman so he talked to Bailey himself. Bridegum, in unrefuted testimony, said he asked Bailey to "do me a favor. When you need a forklift and a supervisor tells you you can't have one, don't start an argument and don't try to start a fight. Go to your foreman and tell him to get you a forklift." Bailey reacted to the requested by quitting. He was visibly upset and angry. Bailey admitted he told Bridegum he quit and explained his action as one taken because Bridegum was "ragging on me . . . . Coming down—He's always sitting there yelling at somebody over something stupid." Wortman was informed by Bridegum of the event and Bridegum said he was sorry because he knew the maintenance department was shorthanded. Wortman saw Bailey before he left the premises that day and told him he had quit. Wortman told Bailey, who was still visibly upset, to calm down, take a couple of hours to cool off, and then return. Wortman testified without contradiction that Bailey returned to the plant about 2 hours later and told him he made a mistake and that "it would never happen again." Bailey also indicated that he needed the job to support his family. Consonant with established practice, Bridegum placed a memorandum about the incident in Bailey's file about the time of the event. Bailey was permitted to return to work.

As noted above, in August Bailey asked Wortman for a raise to cover certain insurance expenses. Wortman relayed the request to Bridegum. Sometime later, Wortman asked Bridegum if he had reached a decision on the raise request. Bridegum told Wortman that he observed Bailey arriving at work after 7 a.m. that he checked Bailey's timecard, which was not punched by the timeclock, contrary to explicit instructing, but was filled out by hand with an arrival time of 6 a.m. recorded. Bridegum told Wortman that he considered that stealing and testified that if they were not shorthanded, he probably would have fired Bailey but left it up to Wortman to decide. He also told Wortman that there was no way he could give Bailey a raise under the circumstances. Wortman told Bailey his raise request was denied and why. Bailey said he probably had made a mistake and it would not happen again. As noted above, this evidence will only be considered in determining whether Bailey felt he had a reason to quit. Bridegum followed his practice of prepar-

[3] Rule 609(a) provides

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted as elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year or under the law which he was convicted, and the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment

ing a memorandum about the incident at about the time of the events and placed it in Bailey's personnel file.

B. *Events of 2 October*

After talking to the union representative, Bailey was observed going around the plant talking to a variety of employees. As a maintenance man, Bailey's duties required, at times, that he work at different locations throughout the plant and office area On 2 October, he was assigned to work on a punch press. The Company had recently purchased two punch presses that were needed to produce heater parts, and Lannes was very anxious to have them working. There was no showing that Bailey was assigned any other duties on this date. Therefore, I find that there was no demonstrated need for Bailey to work at any location other than at the punch press.

About 8 a m. Bridegum observed Bailey in the receiving department, which is not the area where the punch press was located There was no contention that Bailey was in the receiving area on business. There was no break in progress. The parties stipulated that breaks are at 9 a.m. and 2·30 p m and that lunch was at 11 30 a.m At times Bailey's work required he take his breaks at different times, but this was not shown to have been the case on 2 October. When Bailey saw Bridegum, he immediately returned to the punch press.

Shortly thereafter, also around 8 a.m., James Tidwell, a supervisor in the receiving department, told Bridegum that Bailey had asked him to attend a union meeting he was trying to set up, and Tidwell did not know how to respond. Bridegum told him it was solely Tidwell's decision Tidwell also told Bridegum that Bailey had been observed talking to other employees. Bridegum asked for the locations of these incidents and the time that Bailey approached him. Tidwell said he was working at the time he observed Bailey talking to various employees on several production lines, and the employees approached by Bailey stopped work to converse Bailey did not appear to be working at these times and the conversations did not occur at breaktimes

Bailey claims he talked to many employees at the morning break but admitted that he did talk to others after the break. He also admitted that he lied to Tidwell when he told him that 60 employees were going to attend the meeting the following afternoon at his house after work. Bailey did not deny that he talked to other employees while he was supposed to be working and that there were no repairs or other job-related matters that would have warranted his leaving the punch press he was assigned to install. Also, Bailey did not dispute Respondent's contention that he knew the Company needed the punch press installed quickly and that it held a high priority. Bailey admitted that he talked to employees in the paint department and spot welders, but asserted that they continued to work when he talked to them. He did not controvert Tidwell's testimony that the welders, had on helmets, which they had to raise in order to talk to him and thus could not perform their duties and converse with him at the same time

Another supervisor, Melvin Dinius, foreman in the punch press department, also was approached by Bailey to attend the union meeting and related to the event to Bridegum. Bailey talked to Dinius around 8:30 a.m. while Dinius was working. Dinius also saw Bailey going around the facility talking to other employees, apparently not in the course of his work duties at times when they were not on break He did not hear the conversations Bailey had with the other employees. Several employees later told Dinius that the conversations related to the union meeting Bailey was arranging Shortly after his conversation with Bailey, Dinius related the matter to Bridegum and asked him what to do, should he attend the meeting? Bridegum responded that it was up to Dinius Bridegum asked him if his conversation with Bailey occurred during work hours and Dinius said yes

Bridegum then tried unsuccessfully to contact the Company's attorney. He left a message. Later that morning around 9:30 or 10 a.m., Lannes saw that Bailey was not working on the punch press, he became upset over his absence and confronted Bridegum with the failure to have Bailey working on the machine Bridegum said he would investigate that matter. Respondent's attorney returned Bridegum's call around 1 p.m. Bridegum decided to call Bailey into his office to get him to stop walking around the facility disrupting others and to work on installing the punch press. Wortman was asked to get Bailey. Bridegum also asked Luther, who was recently hired, to be present during the interview

Wortman had been advised by Bridegum about 10 a.m. that day·

> There is a problem with Ron Bailey He is trying to start a Union in this plant . . He is going down through the assembly lines pulling people away from their jobs and disrupting assembly lines as he's going down through the plant from one end of the plant to the other. And he was leaving my area, walking with his tools, and then pulling people off their jobs talking to them . . . . Don't do anthing . . . . I have to further check this out We will probably do something at lunch.

Wortman went to Bailey who was in the press department and told him Bridegum wanted to talk him in his office. According to Wortman's undisputed testimony, Bailey said, "Well, this looks like it." Wortman did not respond to the comment Mary Audiss, a current employee of Respondent, testified that she was at the receptionist's desk when Bailey entered the office area and that he "busted the door open, very upset about something" and said in a very loud voice, "I got in trouble for trying to start a Union. So I'm going to leave." Audiss asked him what was going on, and Bailey replied, "He . was sick of the Company so he was going to quit." Bailey then asked if Bridegum was in his office and "stomped" back there. Bailey could not recall if Audiss was at the receptionist's desk when he entered the office area but denied the conversation she related I credit Audiss based on her demeanor She testified in an open manner and visibly tried to tell the whole story without embellishment or bias.

Wortman corroborated Audiss' testimony. He saw Bailey talking to Audiss and heard him say in a very loud voice, "I quit!"

When Bailey walked into Bridegum's office, according to Bridegum, whose testimony I credit based on his open and convincing demeanor, he told him to "sit down and wait" while he got Luther. After Luther joined them, Bridegum told Bailey he was upset with him because he was wasting a lot of time. "You're walking all over the plant, not only wasting your time, but wasting time of a lot of people. . . . I've got two rules against that. If you look at your manual, you can't go around and do anything that disrupts the work of others . . . . In addition to that, you are soliciting. And I don't know whether you are soliciting for your church or the Community Chest or the Steelworkers, but you are not going to do it on company time." Bridegum held up the employees' handbook, which Bailey said he had, and Bridegum told him to read it.

The employee handbook contains a no-solicitation rule as follows:

> Solicitation of any type by employees on company property is prohibited.
>
> Distribution of literature of any type or description by employees on company property is prohibited.

The employee handbook was to have been distributed to all new employees by their foreman and, as far as Bridegum knew, this practice was followed.

Bridegum then said it was apparent to him why the presses had not been done and mentioned another repair that took too much time to be completed a few weeks ago saying, "It's pretty obvious why things aren't getting done if you're spending time talking to people." Bailey replied by mentioning the failure to give him the 50-cent raise and saying, "I get it. I see what the company is trying to do. I quit, but it will take eight guys that are going to do the job for me after I leave." Bridegum did not accept Bailey's quit at this juncture but said, "Ron, I'm not telling you to quit. I'm telling you to go back out and to do your work. When you are on company time, as far as I'm concerned, you are to do nothing but work. You are not going around to talk to people. You are not wandering about the plant. So you get back out there and do your job." Bridegum also told Bailey that he did not get the raise because of the timecard incident, that he should have been fired for his action, that he stole from the Company.

Bailey rejoined that "I've already given you my answer. I'm not going back anywhere. I told you I quit." Bridegum said, "Ron, I'm not telling you to quit. I'm telling you to go out and do your job like you are supposed to do. You're going to cut out all of this trouble you caused for me." The "trouble" was then detailed. An incident where Bailey claimed he threw out a container full of isocyanate in a manner contrary to the practice required for disposing of the dangerous and expensive chemical was mentioned. Bailey's claim was partly in error, only a partial container of used isocyanate was improperly disposed of by him. This incident occurred about a month before Bailey started soliciting for the Union. Reference was also made to an incident where Bailey told Lannes that a forklift smashed into a piece of equipment called a shear. This incident occurred around August. Lannes became very upset and asked Bridegum to investigate. On investigation, Bridegum found a little speck of yellow paint on the 40-year-old machine and no evidence of a forklift recently smashing into the machine. Bridegum could see every color speck of paint one could think of on the 40-year-old machine, which had many nicks on it. A backstop was out of adjustment on the machine, a state that could have been caused by factors other than being hit by a forklift. Lannes was so upset he indicated he wanted Bridegum to fire the forklift driver responsible for the incident. Bailey was told not "to do these things, that he got everyone excited. After recounting these incidents, Bridegum told Bailey he was to go back and do his job and "I don't want anymore problems from you."

Bailey then stood up, slammed his hand on Bridegum's desk, and said, "You've got my resignation, get Norm [Wortman] up here. I want to check out my tools." Bridegum then obdured, accepted Bailey's quit, and tried to reach Wortman on the telephone without success. Bailey left the office. Bridegum started to follow but then went to try to find Wortman in another area of the plant. Audiss saw Bailey exit the office area alone. Luther, whose testimony corroborates Bridegum, returned to his office. After he left the office area, Bailey told several people that he had been fired.

Bailey claims that Bridegum, after stating the rule against soliciting on company time, went on to say that the Company was losing money, and they moved out of Oakland because of the Union and would move again if they had to. After making that statement, Bailey claims: "Then after he saw I wasn't cooperating with him, he started cutting me down as an individual. He started telling me how I was like a low-life like the rest of the production workers. I shouldn't be paid what I'm being paid, started bringing up a couple of instances of some of the things I've done wrong in the past." Bailey equated Bridegum's "cutting my work performance down" with "cutting me down." Bridegum, according to Bailey, also said he was a "shit-disturbing troublemaker. And he didn't need my kind around there." These incidents, which "cut [Bailey] down," included the improper disposal of isocyanate. Bailey admitted he had made a mistake and at that point in the discussion Bridegum allegedly fired him and told him to get his tools.

Bailey's claims that he was fired and Bridegum threatened to move the plant are not credited. Bailey did not testify with convincing demeanor. He was evasive at times and modified his testimony when confronted with patent inconsistencies. Bailey responded to questions in a manner that did not indicate a willingness and an attempt to be honest and open. At times he appeared to be fencing with counsel rather than trying to present the facts. On occasion he engaged in bravura rather than respond fully to questions, particularly during cross-examination. He tended to engage in exaggeration. For example, he claimed to have $10,000 in medical bills and thus would

not have quit his job When asked to verify this claim, he could present outstanding medical bills totaling only $3808.50.

The General Counsel's attempt to buttress Bailey's claim that he was fired with the testimony of Dave Sneathen is unconvincing. Sneathen, an employee on the assembly line, came into maintenance department while Bailey was getting his tools Bailey told Sneathen he had just been fired. Bridegum and Wortman were present, he claims, and did not say anything, Bridegum then left. There was no showing that Bridegum heard the statement. The record lacks any evidence about where Bridegum and Wortman were standing at the time of the alleged statement or whether there was any background noise that may have interfered with Bridegum overhearing the comment. Thus, any inferences that might have been drawn from Bridegum's failure to comment have not been shown to be warranted in these circumstances. Also, there was no showing that Wortman heard Bailey. The record only indicates that at some time Wortman met up with Bailey, escorted him to his toolbox, and heard him tell Audiss before his meeting Bridegum that he quit. Thus, even if Sneathen's testimony is credited, it fails to corroborate Bailey for it fails to show that either Bridegum or Wortman heard the comment or even observed Sneathen enter the area and speak to Bailey.

Bailey also exhibited a lack of clear recall of events and at times denied events, which he later admitted after being confronted with statements in his affidavit. Also his testimony at times lacked clarity, and the manner in which he testified indicated deliberate attempts to obfiscate some facts. On occasion he did not respond to questions asked during cross-examination, rather he attempted to place into evidence matters he felt were important. This tailoring of testimony indicates lack of credibility. Bailey prevaricated the reason for his leaving either at trial or during his telephone conversation with Leydon of Leader Stamping when he told her he quit his job with Respondent This tendency to prevaricate again surfaced in his job application at Pioneer Equipment where he gave his reason for leaving Respondent as "Unsafe conditions." When questioned about this statement, Bailey initially claimed the statement was true, then reluctantly claimed it was half true and at last admitted that it was "less true."

### C. *Events of 3 October*

The morning of 3 October Bridegum learned that the rumor that Bailey had been fired for union activity was circulating through the plant. In an attempt to stop the rumor, Bridegum held a meeting with the leadmen and supervisors and told them that Bailey had quit but understood that Bailey had been telling people that he had been fired and that "this thing could be dynamite. This could cause us all kinds of labor and morale problems" He told the gathering that they were to inform the employees that Baily quit.

After the workday, the union organizing meeting was held at Bailey's residence. According to Brad Holmquist, a current employee, he parked his vehicle in preparation to attending the meeting in a position where he could clearly see Bailey's house and a nearby intersection. Before exiting the vehicle, he observed Lannes and another person he does not know, drive by Bailey's house very slowly, about 5 miles per hour, looking all around at the parked cars and houses. They saw him. They did not stop. About 5 minutes later, Bridegum and Luther drove by, going the same direction as Lannes and Driving similar manner, looking at the parked cars and houses. They also saw him. The street they drove on had speed bumps every four or five houses and would permit a maximum safe driving speed of about 10 to 15 miles per hour

At the meeting the employees discussed organizing and some authorization cards were distributed.

Also on the evening of 3 October, Bridegum learned that at least some employees believed that he had fired Bailey.

### D. *Events of 4 October*

On entering work on 4 October, Bridegum noticed a cooling in the employees' attitude toward him by the absence of greetings. He remained concerned that the employees believed he fired Bailey, so he decided to call employee meetings to explain the Company's position. During these meetings, of which there were three or four, he said Bailey was lying when he said he was fired, he told them Bailey quit. To buttress his position, he held up Bailey's last paycheck and explained that under Nevada law if Bailey had been fired the Company would have had to pay him the day of his discharge or the next. At one meeting, Sneathen questioned Bridegum about the law, and Bridegum explained that the law had been changed to require quick payment to fired employees. Bridegum's explanation of the law was not challenged on the record nor was there any claim that Bailey filed any claims with the State of Nevada asserting that the Company had failed to comply with state law when it failed to pay him on 2 or 3 October. Bridegum told the employees: "If I wanted the Union, the quickest way is to fire someone because they try to start one. We don't do things like that. We don't fire people for anything but just cause."

Bridegum also told the employees that they could sign authorization cards and solicit them as long as they did so on their own time. He admitted telling them, "that no one can solicit anything on company time." During these meetings, Bridegum indicated that the water heater business was highly competitive and that employees would not just get more money if they signed union authorization cards. He said the only way they could get more money was by increasing productivity. By way of example, he mentioned his former employer, American Appliance Corporation in Santa Monica, California, which pays its employees higher wages because their employees are much more productive. He did mention Respondent used to be located in Oakland and moved to an area of lower wages to be able to compete. He said if Respondent had stayed in the Oakland area where prevailing wages were higher the Company would not be in business today

Bridegum told the employees they were paying them as much as they could and that they should not sign au-

thorization cards in the belief that it would result in higher wages. Bridegum denies telling the employees that if they selected the Union as their representative the Company would move, go bankrupt, or go out of business. He also denies saying the Company left Oakland, California, because of the Union.

Holmquist is the only employee witness that did not clearly corroborate Bridegum. Holmquist testified that Bridegum mentioned the plant the Company had in California and that it moved "or whatever because of the Union." And they said that the Union, "if it came into this plant, it probably would drive them bankrupt or out of business." Holmquist candidly admitted that he could not recall exactly what Bridegum said about the Company's move from California and admitted attending the same meeting as Sneathen, but could not recall Sneathen questioning Bridegum about when a fired employee must receive their paycheck. Holmquist admits he was not paying attention and said he may have been sidetracked at some point during the meeting. Holmquist's candid admissions of lack of recall and inattentiveness lead me to not credit his testimony. In contrast, Sneathen, a schoolmate and long-time friend of Bailey's, testified that Bridegum did say quality of production and productivity would have to improve before the employees got wage increases. Sneathen and the other employee witness did not claim that Bridegum threatened plant closure, relocation, or bankruptcy in the event the employees selected the Union as their collective-bargaining representative.

Steve Henry, a current employee, also corroborated Bridegum by testifying that Bridegum "was trying to explain to everybody that if we had to pay union scale wages at that time, by our current production, we couldn't afford to stay in business." Henry recalled Bridegum comparing them to another manufacturer that paid union scale, but had much higher productivity. He did not hear any threats of plant relocation, plant closure, or the Company filing for bankruptcy if the employees selected the Union as their collective-bargaining representative.

Based on Bridegum's demeanor and demonstrated ability to recall events clearly and accurately, I credit his version of the meetings. Holmquist's version was admittedly the result of poor recall and at least periodic inattention. The other employee witnesses would not likely forget threats of plant closure, relocation, or bankruptcy if they were indeed made during the meeting of 4 October.

### E. *Post 4 October Events*

A few days after his departure from Respondent Bailey called his former employer, Leader Stamping, and asked Barbara Lydon, the secretary-treasurer of the company and the wife of the owner, if they had any openings since he quit his job with Respondent, because he did not receive an expected raise.

On 5 October, Bailey called Lannes about 9:30 a.m. seeking his job and offering to tear up authorization cards as a quid pro quo for his reinstatement. Lannes said he could not rehire him and asked what he would tell the card signers. Bailey said he would tell them they did not have enough cards. Bailey had already sent all the signed cards in his possession to the Union.

A current employee, Valarie Thomsen, had an occasion to converse with Bailey at a bar about 3 weeks after 2 October. Bailey asked if she heard that Respondent fired him. She said no, that she heard he had quit. Bailey then said, "Well, I did, but I'm going to tell everybody that they fired me. And I'm going to get the bastards and everything I've got coming to me." Thomsen asked how he could get anything if he quit, and Bailey said, "I'm going to tell them that they fired me." She asked what he thought he might receive, and he replied he did not know, but thought it would be something.

During the summer, prior to Bailey's departure from the Company, he told Thomsen that he ought to quit because he hated it there. Bailey was not the only employee she heard make such comments, but she heard Bailey make similar statements more than once. Thomsen testified credibly, in a direct and straightforward manner, exhibiting clear recall of the conversations.

Bailey filed for unemployment insurance. The hearing was rescheduled several times. While Respondent's witnesses were waiting for the commencement of one of these scheduled hearings, Bailey took a camera out and took a picture of Esposito and Bridegum and then swung the camera and took a picture of Luther and Dinius. Bailey remarked that he wanted to take pictures of his friends so he could hang them on the wall. Bailey's explanation was that he did not attempt to intimidate the witnesses at the unemployment hearing, but that he had the camera in a pocket, took it out, and while messing around with it, took two pictures accidently and the pictures were of something up in the air. The camera was not described but the claim of accident after taking one picture and swinging the camera around to take the second picture is facially incredible. Bailey failed to explain why he went to the hearing with a camera, how he took two pictures accidently, or his undenied comment about wanting pictures of his friends to hang on the wall. Also, as found above, Bailey is not a credible witness.

There were two other incidents of alleged intimidation by Bailey, which will be discussed solely in consideration of credibility and remedies. One of these incidents involve Dinius who, based on demeanor, is found to be a credible witness. After going to the location for the unemployment hearing, he was told it was postponed. Dinius went to Leader Stamping to unload a die for repair. As he was leaving, he noticed a car quickly pull up behind him and recognized Bailey as the driver. Bailey then passed him and tried to force him to stop. Dinius evaded Bailey who followed him almost to Respondent's door. Bailey followed Dinius past the turnoff to Bailey's house. Dinius asked the guard to call the police. Bailey claimed that it was just a coincidence, he and Dinius were going in the same direction, and Bailey asserts he turned off at his house. Bailey's version is not credited based on the above credibility findings.

Around the same time of the year, after the first scheduled unemployment hearing, Tidwell was taking his stepson out into the desert to shoot a rifle and noticed shortly after they left home that Bailey was tailgating

him. The tailgating continued for 7 to 8 minutes when Tidwell told his stepson to unsheath the rifle which was apparent to Bailey who then stopped tailgating, turned around, and left them. Tidwell immediately went home concerned for his wife and children. Tidwell is found to be a credible witness based on his forthright and open demeanor.

## Analysis and Conclusions

Section 8(a)(1) of the Act prohibits an employer from interfering with, threatening, or coercing employees in the exercise of their Section 7 rights to support or oppose a labor organization, or to engage in or refrain from engaging in concerted activity. This prohibition is tempered by the provisions of Section 8(c) of the Act as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether written, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Supreme Court, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969), balanced the requirements of the two above-stated sections of the Act as follows:

> Any assessment of the precise scope of employer expression, of course, must be made in a context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by Section 8(a)(1) and the proviso to Section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.
>
> . . . .
>
> [An employer] may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take actions solely on his own initiative for reasons unrelated to economic necessity and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, eventuality of closing is capable of proof." 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisals to be taken solely on his own volition." *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (C.A. 2d, 1967).

Accordingly, Respondent's statements will be examined by balancing these interests in the required manner.

### A. *The Alleged Threats*

The General Counsel argues that Respondent moved out of Oakland, California, because of the Union, and when it learned that Bailey was engaged in an organizing effort, it reacted quickly and unlawfully to quash that effort. This argument, regarding the events of 2 October, relies on the testimony of Bailey, which is not credible. While Respondent moved from Oakland admittedly to take advantage of the lower wage scale present in the Reno, Nevada area, there has been no showing of a historical avoidance of unionization.

Similarly, the General Counsel has failed to demonstrate with a preponderance of the credible evidence that Respondent made unlawful threats of plant closure, plant relocation, and bankruptcy on 4 October. The General Counsel's witnesses, Sneathen, and Henry, corroborated Bridegum that he did not threaten plant closure or relocation if the employees selected the Union as their representative. Holmquist, the only witness claiming such threats were made, admitted he had poor recall of the meeting and was inattentive at times. There was no showing that Bridegum's comments exceeded the pale of expression allowed under Section 8(c) of the Act.

Both Henry and Sneaten clearly understood Bridegum's comments to be a prediction that increased wages without a concomitent increase in productivity would result in the Company's entry into bankruptcy because of the competitive situation in the water heater industry. There was no implication that the employer was going to take economic measures solely for reasons unrelated to the economic exigencies or in reprisal for the employees' selection of the Union as their representative. *Tri-Cast, Inc.*, 274 NLRB 377 (1985). Thus, the statements of Bridegum to the assembled employees, which were allegedly threats, are not found to be based on misrepresentation or coercion and are within the protection of Section 8(c) of the Act. They were based on the potentials of changed economic conditions due to increased expenses resulting from unionization that could cause plant closure, plant relocation, or bankruptcy, and Bridegum did point to objective facts, the lower prices of water heaters due to competition with Southern manufacturers, and the low productivity of Respondent's employees compared to those of a competitor. These statements were based on Bridegum's long-term experience in the business and his prior employment with a unionized competitor of Respondent. The General Counsel has not taken issue with

Bridegum's statements that higher wages without an increase in productivity could have dire financial impact on the Company. The message in the speech was clear, unionizing would not automatically result in higher wages; there would have to be improved productivity to permit the increase. These statements do not violate Section 8(a)(1) of the Act. See *Churchill's Restaurant*, 276 NLRB 775 (1985). Accordingly, I find that these allegations in the complaint of unlawful threats should be dismissed.

### B. *The Alleged Unlawful No-Solicitation Rule and Disparate Enforcement*

A corollary to the prohibition against intimidating, coercing, or interfering with employees who are engaging in protected concerted activity is the rule enunciated in *Our Way, Inc.*, 268 NLRB 394 (1983), adopting the findings in *Essex International*, 211 NLRB 749 (1974), which proscribes the prohibition of employees from soliciting on their own time unless justified by a demonstrated need to maintain discipline or production. *Our Way, Inc.*, supra, and *Chicago Metallic Corp.*, 273 NLRB 16 (1975).

Respondent concedes that the employee handbook contains a presumptively invalid no-solicitation, no-distribution rule but argues that it has rebutted the presumption. I find this argument unpersuasive and lacking merit. Bridegum, during the 2 October interview with Bailey, said Bailey's actions breached the rule as set forth in the handbook. Respondent admitted that the employee handbook was to be distributed to all new employees and, even though Luther was in the process of rewritting the book, it was still being distributed in its objectionable form, without any disavowal of the unlawful rule. Respondent argues that it did not enforce the rule. The distribution by the employer of an overly broad no-solicitation, no-distribution rule is in itself "sufficient promulgation to constitute a violation." *General Dynamics*, 253 NLRB 180 (1980); *Gerkin Co.*, 279 NLRB 1012 (1986).

Even if Respondent's argument that it never enforced the rule in the employee handbook was meritorious, Bridegum admittedly told employees during the various meetings on 4 October that the employees could not solicit for the Union or otherwise "on company time," rather than "working time."

Rules prohibiting employees from soliciting "on company time" could encompass both working and nonworking time spent on the Company's premises. These rules are restrictive of employees' Section 7 rights and violate Section 8(a)(1) of the Act. *KDI Precision Products*, 185 NLRB 335 (1970); *QIC Corp.*, 212 NLRB 63 (1974); and *Florida Steel Corp.*, 215 NLRB 97 (1974). The Company's actions failed to apprise the employees of any repudiation of the rule contained in the employee handbook. There was no claim that operating exigencies existed, which required the imposition of an otherwise overbroad rule. Accordingly, I find that counseling Bailey to follow the employee handbook, distributing the handbook to employees, and telling the employees that they cannot solicit on "company time" were violations of Section 8(a)(1) of the Act.

The General Counsel also argues that Respondent disparately enforced the no-solicitation rule because Bailey testified that he ran paycheck and football pools as he was working without comment or censure. This uncorroborated testimony by a witness who was not credited fails to prove a violation. Additionally, there was no evidence that Respondent knew of this activity and condoned or countenanced it. Bailey and another employee also referred to an employee known as Ellen, who was selling cheeses and crackers during worktime. Again, the record fails to prove by credible evidence that such activity was known to Respondent. The failure to show knowledge precludes a finding of disparate application of the rule; and the allegation of disparate enforcement is dismissed.

### C. *The Alleged Unlawful Surveillance*

It is undisputed that Lannes, and then about 5 minutes later Bridegum and Luther, drove past Bailey's house while the union organizing meeting was going on. A slow rate of speed was admittedly required by speed bumps. These admitted supervisors were observed looking at the vehicles and houses in the vicinity. I find that while these observations of Respondent's supervisors driving by Bailey's residence during the organizing meeting rendered their conduct suspect, the General Counsel has failed to sustain the burden of raising the suspicion to proof of unlawful surveillance. The nature of the street was not described; it could be a major thoroughfare often traveled by the supervisors. The reason the supervisors were there was not elicited on the record. They could live close by or frequently take the route home after work. *Elk Brand Mfg. Co.*, 253 NLRB 1038 (1981). Thus, there has been a failure to show that more than fortuitous circumstances brought the supervisors to drive past Bailey's premises. They were not shown to have engaged in suspicious behavior or "untoward conduct." *Gossen Co.*, 254 NLRB 339, 353 (1981). These failures in proof require my finding that the surveillance allegation should be dismissed.

### D. *The Alleged Discriminatory Discharge of Bailey*

I find that the General Counsel has failed to establish with a preponderance of the credible evidence a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by Respondent's discharge of Bailey. After considering all the relevant evidence, I conclude that Bailey quit his job with Respondent. In reaching this conclusion, I have considered the timing of the event, which was the day Bailey commenced a union organizing drive. This conclusion is based on crediting the testimony of Bridegum, Luther, Audiss, Lydon, Wortman, and Thomsen based on their demeanors, which were far more credible than Bailey's demeanor.

This conclusion is buttressed by inherent probabilities. Bailey quit all his other full-time jobs. While employed by Respondent, he quit when Bridegum criticized him because he became upset admitting he was "tired of [Bridegum's] B.S." Bailey defined B.S. as "Coming down—He's always sitting there yelling at somebody over something stupid." The interview of 2 October was a similar incident. When asked if he felt Bridegum was "ragging" him on 2 October, Bailey initially failed to directly re-

spond and then admitted he did feel Bridegum was "cutting him down," that he was "ragging on him." These feelings were sufficient to cause Bailey to quit about 7 months earlier. The earlier quit was admittedly a precipitous act, which Bailey later regretted because he had family obligations. Thus, the existence of family obligations does not render his quitting unlikely or improbable.

Audiss testified Bailey told her he was quitting, and Wortman overheard the statement. Thomsen was told by Bailey that he quit but was claiming he was fired because he wanted to gain from the lie. Bailey told Lydon he quit. The General Counsel arues that it is embarrassing to admit to former coworkers and prospective employers that Bailey was fired and that is why he lied. This argument is unconvincing; it does not explain Bailey's past history of quitting nor does it add to his credibility. Sneathen's testimony that Bailey told him he was fired while Bailey was getting his tools together in Bridegum's presence does not lend credence to Bailey's claim. The circumstances of the event were not described. For example, how far away Bridegum was from the speaker, the tone of voice, and other factors indicative that Bridegum heard the comment, and chose not to refute it because it was true, are absent from the record.

As found in *Robins Federal Credit Union*, 273 NLRB 1352, 1355 (1985):

> Although the sequence of events in this case, particularly the timing of the discharge . . . give rise to a suspicion as to whether Respondent terminated her because of her union activities, mere suspicion is not sufficient to support a violation of the Act. See *Spearin, Preston & Burrows, Inc.*, 248 NLRB 1384 (1980), and *Royal Coach Sprinklers*, 268 NLRB 1019 (1984).

Accordingly, I find that the General Counsel has failed to establish a prima facie case of a violation. I concluded Bailey quit. If it were found that a prima facie case had been made, I find that Respondent has rebutted it by a preponderance of the credible evidence. *Wright Line*, 251 NLRB 1083 (1980).

In sum, I find that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation, no-distribution rule. The other alleged violations of the Act contained in the complaint have not been established by the preponderance of the evidence and are dismissed.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining rules, which prohibit employees from engaging in union solicitation during nonworking time or from distributing union literature in nonwork areas during nonworking time.
4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
5. Respondent did not engage in any other unfair labor practices as alleged in the complaint, and the allegations of other unfair labor practices have been found to lack merit and should be dismissed.

## THE REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

## ORDER

The Respondent, Stead Industries, Inc., d/b/a Hoyt Water Heater Company, Stead, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, or enforcing any rules that prohibit employees from engaging in union solicitation during nonworking time or from distributing union literature in nonwork areas during nonworking time.

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

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

(a) Post at its Stead, Nevada facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not specifically found herein.

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[4] 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.

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

## APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT maintain or enforce any rules that expressly or impliedly prohibit you from union solicitation in the plant during nonworking time or that prohibits you from distributing union literature in nonworking areas during nonworking time.

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

STEAD INDUSTRIES, INC., D/B/A HOYT WATER HEATER COMPANY