Allied Stores of N.Y., Inc., d/b/a Gertz *and* Retail Clerks Local 1500, United Food and Commercial Workers International Union, AFL-CIO. Cases 29-CA-8316 and 29-CA-8429

July 19, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On January 25, 1982, Administrative Law Judge Winifred D. Morio issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed an exception and a supporting brief, and Respondent filed a brief in opposition to the General Counsel's exception.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt her recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Allied Stores of N.Y., Inc., d/b/a Gertz, Massapequa, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Discriminatorily prohibiting its employees from posting union campaign literature and notices on the blackboard at the employees' entrance and on the bulletin board in the employees' cafeteria, both boards being located at its Massapequa store."

2. Substitute the following for paragraph 2(a):

"(a) Rescind any rule or policy which unlawfully restricts the employees' use of Respondent's bulletin board and blackboard that are available for general use by employees at Respondent's Massapequa store."

3. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

The Administrative Law Judge inadvertently listed the dates of the hearing as June 16 and 17, 1981. The hearing actually took place on June 15, 16, and 17, 1981.

[2] The General Counsel has excepted to the Administrative Law Judge's conclusion that Respondent did not have an unlawful no-solicitation rule in effect. He points out that Respondent's assistant store manager, Muriel Rauch, testified that the Gertz employee handbook contained a no-solicitation rule. However, Rauch further testified that the Massapequa store ran out of its supply in early 1980, and all four of the former Gertz employees who appeared as witnesses for the General Counsel equivocably stated that they had never received the employee handbook (this included one employee, Joanne Ferro, who began work at Gertz in October 1977). The General Counsel counters by pointing to Rauch's testimony that, regardless of whether the employee handbook was passed out to employees, there were training sessions in which new employees were verbally informed of the store's rules and regulations. However, Rauch went on to state that she did not know whether the no-solicitation rule was one of those rules verbally conveyed to the employees, and the four ex-employees all testified that no one had ever verbally explained a no-solicitation rule to them. In these circumstances, we agree with the Administrative Law Judge that the record does not contain evidence sufficient to demonstrate that Respondent maintained in effect an unlawful no-solicitation rule here.

[3] Respondent contends that the Administrative Law Judge's Order is too broad because the Order requires that Respondent allow employees to post union campaign literature and precludes it from promulgating a nondiscriminatory rule prohibiting any employee access to the bulletin boards and blackboard for any type of notice. Respondent's contention has merit.

There is no statutory right for an employee or a union to use an employer's bulletin boards or blackboards. The Act's prohibitions come into play only where the employer otherwise assents to employee access to the bulletin board/blackboard but discriminatorily refuses to allow the posting of union notices or messages. *Container Corporation of America*, 244 NLRB 318, fn. 2 (1979). Therefore, Respondent could conceivably promulgate a nondiscriminatory rule denying employees any access to the bulletin boards or blackboard for any purpose. We will modify the Administrative Law Judge's Order to clarify that we are only proscribing a *discriminatory* refusal to allow posting of union campaign literature or notices. See *Axelson, Inc.*, 257 NLRB 576 (1981).

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discriminatorily prohibit our employees from posting union campaign literature or union notices on the blackboard at the employees' entrance and on the bulletin board in the employees' cafeteria at the Massapequa store.

WE WILL NOT maintain or enforce any rule which discriminatorily prohibits our employees from posting union campaign literature or union notices or which discriminatorily re-

quires our employees to seek permission before posting such literature on the blackboard at the employees' entrance or on the bulletin board in the employees' cafeteria at our Massapequa store.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by the Act, to engage in union or concerted activities, or to refrain therefrom, at our Massapequa store.

WE WILL rescind the disciplinary warnings given to Mark Schelz on September 8, 1980, and will expunge from all personnel and other records all reference to said warnings and will notify Mark Schelz in writing of such action.

ALLIED STORES OF N.Y., INC., D/B/A GERTZ

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge: This case was heard before me on June 16 and 17, 1981, in Brooklyn, New York, pursuant to complaints issued by the Regional Director for Region 29 on November 21, 1980, and January 8, 1981, in Cases 29-CA-8316 and 29-CA-8429, respectively. The complaints, based on charges filed by Retail Clerks Local 1500, United Food and Commercial Workers Union, AFL-CIO (Local 1500), were consolidated for hearing by order dated May 28, 1981.[1] In substance the complaints allege violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), in that Respondent maintained in effect a rule which required employees to report solicitations to Respondent; refused, contrary to its past practice of allowing employees to use bulletin boards and blackboards for various types of messages, to permit employees to use these boards when they sought to post union-related messages, and reprimanded, in writing, its employee, Mark Schelz, for placing a union message on a blackboard. Respondent denies that it engaged in such conduct.

All the parties were given a full opportunity to participate in the proceeding, to introduce all relevant evidence, to cross-examine witnesses, to argue orally, and to file briefs. A brief was filed by Respondent.

Upon the entire record in the case, and my observation of the demeanor of the witnesses, and after careful consideration, I make the following:

[1] Various other allegations contained in the charges including allegations of surveillance, interrogation, the discharge of Wayne Centabar, and the denial of full employment to Joanne Ferro, for discriminatory reasons, were dismissed after investigation.

FINDINGS OF FACT

I. JURISDICTION

Allied Stores of N.Y., Inc., d/b/a Gertz, a New York corporation, has maintained a place of business in Sunrise Mall in the city of Massapequa, State of New York, where it is and has been at all times material herein engaged in the operation of a department store for the retail sale of merchandise. During the past year, which period is representative of its annual operations generally, Respondent, in the course of its business operations, purchased and caused to be transported and delivered to its Massapequa store goods and materials valued in excess of $50,000 directly from States of the United States other than the State in which it is located. During the same period Respondent received gross revenues, during the course of its business operations, in excess of $500,000. The parties admit and I find that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties admit and I find that Local 1500 is a labor organization within the meaning of Section 2(5) of the Act.[2]

III. THE BACKGROUND EVENTS

Commencing in or about June 1980 Local 1500 started an organizing campaign at Respondent's store in Massapequa, Long Island.[3] In or about the same time the Union also started similar campaigns at Respondent's stores in Flushing and Bay Shore, Long Island. A representation petition was filed by the Union for the Flushing store on July 17, for the Massapequa store on August 22, and for the Bayshore store on Septemper 23.[4] A hearing was commenced on the petition filed for the Flushing store during the month of August, but thereafter the subsequently filed petition for the Massapequa store was consolidated for hearing with the petition for the Flushing store and hearings were held with respect to both stores beginning about September 3 and continuing thereafter in the month of September. An election was held in the separate stores on December 5. Local 1500 lost the elections at the Flushing and Massapequa stores but won the election at the Bayshore store.

The instant case concerns events alleged to have occurred at the Massapequa store involving Mark Schelz, Carol Schaffer, Joanne Ferro, and Wayne Centabar, all of whom were employed at one point at that store. All four testified that they were members of the Union's organizing committee at the Massapequa store and this fact was known to Respondent's representatives.[5] The inci-

[2] Hereinafter referred to as Local 1500 or the Union.

[3] Unless otherwise stated all dates refer to 1980.

[4] Cases 29-RC-5046, 29-RC-5112, and 29-RC-5152.

[5] Muriel Rauch, the assistant store manager, testified that she was aware that Schelz, Schaffer, and Centabar were members of the Union's organizing committee. Nelson Nutter, the store supervisor, testified that he was aware that Schelz was a member of the organizing committee.

dents which resulted in the issuance of the complaints concern situations involving these employees.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Blackboard and Bulletin Board Issues*

Counsel for the General Counsel contends that Respondent did not have a rule concerning the necessity for employees to seek permission to utilize company blackboards and bulletin boards for personal messages and that the sudden existence of such a rule was the result of the employees' activities on behalf of Local 1500. Respondent contends that such permission was a prerequisite, at all times, to the use of the company boards by employees for personal messages, that such permission was granted for personal messages, but that Mark Schelz failed to seek this permission prior to using a company blackboard and he was disciplined for this conduct and not for the contents of the message he sought to publicize. Respondent further contends that subsequent to mid-September the use of the company boards was restricted even to those who sought permission in an effort to eliminate obscene material from appearing on the company boards.

The evidence establishes that Respondent had several boards which were utilized either to transmit messages to employees by management or to transmit messages from employees to employees. While the record discloses that there were about six such boards, the events in this case center primarily around the use of two of these boards, a blackboard at the employees' entrance and a bulletin board in the employees' cafeteria. A considerable amount of testimony by both parties was devoted to the description of the various boards, their size, color, etc., apparently in support of or against the credibility of the individual witnesses. For reasons set forth below, I do not consider the physical description of the boards to be of significance to the issues involved herein.

1. The Schelz incident

On September 5, Mark Schelz, who was, as noted, a member of the Union's organizing committee and an employee at the Massapequa store from September 1979, wrote a message concerning a union meeting on the blackboard at the employees' entrance during his lunch period, around noontime. Schelz claimed that he was not observed by any supervisor at the time he first wrote this message but later that day, during his break, when he noticed that the message had been erased and he was writing it again he was observed by Nelson Nutter, the store supervisor. Nelson did not speak to him. It is undisputed that Schelz neither sought nor received permission to write this message. Schelz claimed that at this time he was unaware that it was necessary to have permission to write personal messages. On September 8, Schelz was told by his immediate supervisor to report to the office of Muriel Rauch, the assistant store manager. According to Schelz, when he arrived Rauch read to him a prepared statement. The statement reads as follows: "On September 4 you were observed posting a written notice in chalk announcing a Union organization meeting after a similar notice had been since removed. This was done on a company Bulletin Board which is reserved for company notices and announcements. You are now being cautioned that any repetition of that or a similar act will bring about disciplinary action."[6] This apparently became part of Schelz' personnel file. Rauch also told Schelz during this meeting that in the future he needed permission to use the company boards.

The testimony of Nelson Nutter and Muriel Rauch with respect to the incident differs significantly from the testimony given by Schelz. Nutter testified that in early August or September, around lunchtime, he observed Schelz writing on the blackboard, noticed that the message pertained to a union meeting, and questioned Schelz as to whether he had received permission to use the blackboard and was told he had not. Nutter's only comment to Schelz was that he could not use the boards without permission. Nutter then called Rauch, told her he had seen Schelz writing a message about a union meeting, asked her whether Schelz had received permission to use the blackboard, was told by Rauch he had not received permission, and was instructed by Rauch to erase the message. Nutter explained that he questioned Schelz about writing on the board because in his experience messages, other than company-related messages, were posted on the various boards only by members of the personnel department. Nutter claimed that later that day he noticed that the message about a union meeting which he had erased was once again on the board and he called Rauch to ascertain whether permission had been secured, was told that it had not been given, and again erased the message pursuant to Rauch's instructions. Nutter did not know who wrote the message the second time. It was Rauch's testimony that she received two calls from Nutter in early September concerning union messages on the blackboard at the employees' entrance. During the first call Nutter told her that he saw Schelz writing a message about the Union on the blackboard and he asked her if Schelz had permission to do this. She responded that he had not and she told Nutter to erase the message. The second time Nutter called he told her that the message had been rewritten, again he asked her if she had given permission, and again he was told she had not given permission and he was told to erase the message. Nutter did not tell her this time that he had seen the person who wrote the message. Rauch further testified that later that day she had occasion to be in the vicinity of the blackboard and when she observed Schelz writing on the blackboard she asked whether he had permission and when he said he had not she told him to erase the message.[7] On September 8, Rauch met with Schelz in her office. According to Rauch, she did not ask for or receive from Schelz his version of the events, rather she read to him a prepared statement.[8] Rauch ex-

[6] Nutter could not explain why he asked Rauch whether Schelz had received permission when he allegedly knew from Schelz that he had not received such permission.

[7] Rauch was not sure whether she or Schelz actually erased the message.

[8] Rauch admitted that it was customary to get the employee's version of an incident before issuing a reprimand.

plained that in situations involving violations of company rules the usual procedure was to have a representative from the personnel department speak to the employee and then issue a verbal warning, if necessary.[9] If additional violations occurred thereafter the employee received a written warning and if the violations continued the employee could be discharged. These procedures were not followed in the case of Schelz. Although Rauch claims that Nutter had issued a verbal warning to Schelz, Schelz' personnel file does not contain such a warning and Nutter did not testify that he actually warned Schelz. His testimony was that he told Schelz he could not write notices without receiving permission. Nelson admitted that it was his usual practice when a violation of a company rule occurred to warn the employee that future violations would result in the matter being referred to the personnel department. This procedure admittedly was not followed with Schelz; Nutter immediately reported the alleged infraction to Rauch. When questioned as to why he had not followed his usual procedure, Nutter stated that he viewed this infraction as more serious than others.

2. The Schaffer incident

According to Rauch, commencing about the middle of September, greater restrictions were placed on the use of the company boards by employees for personal messages. These restrictions, Rauch claimed, were brought about by the increase in graffiti found both within and without the building and by the amount of obscene and derogatory material being posted on company boards by unknown persons. The witnesses for Respondent, however, did not explain why management was of the belief that restrictions placed on the use of the boards for legitimate purposes would or could control the spread of obscene material by unknown persons. In any event, from some point in September until December permission to use company boards for personal messages could be given only by William McNamara, the store manager.[10] Notwithstanding these alleged restrictions, Rauch testified that personal messages relating to births, deaths, and the like continued to be posted by management representatives.

Schelz, Schaffer, and Ferro all testified that it was sometime in September when they became aware that they had to have permission before posting personal messages. According to Schelz, in late September, McNamara announced the rule at a company meeting. Ferro claimed that she saw a notice to that effect posted on the blackboard and Schaffer testified that she heard about the rule because of an incident involving Wayne Centabar.[11] At any rate in early October, apparently to test the rule, Joanne Ferro sought permission to post a notice concerning her desire to sell/or give away kittens.[12] Ferro claimed that it was her intention when she sought permission to post her notice to speak with Kathy Sullivan, the personnel manager, but due to the fact that Sullivan was not present she made her request to Clara Rivers, a member of the personnel department.[13] According to Ferro, at the time she made her request, Rauch was present and heard the request but said nothing. Rivers authorized the posting of the notice and Ferro in fact posted the notice.[14] Rauch denied that such an incident occurred although she admitted, as noted, that even during this period of time when there was a restriction on the use of the boards, personal notices relating to deaths, births, etc., continued to be posted. Rivers, although employed by Respondent at the time of the hearing, was not called to testify. Carol Schaffer confirmed Ferro's testimony that a notice concerning kittens had been posted. She placed this posting as occurring about a week before she made a request to post a union notice.

Schaffer, employed at various times between November 1979 and December 1980, was, as noted, also a member of the Union's organizing committee.[15] According to Schaffer, about October 17, now aware of the rule, she sought permission from Rauch to post a notice about a union meeting on the bulletin board in the employees' cafeteria. Schaffer claimed that Rauch immediately refused her request, telling her that company boards were for company messages. Schaffer further testified that, although she attempted to show the notice to Rauch, Rauch refused to look at it. Rauch admitted that Schaffer did seek permission to post a notice but she denied that Schaffer mentioned the subject matter of the notice to her. Rauch testified that Schaffer said, "Well I have something I'd like to post on the bulletin board. I said that I can't give permission or I won't give permission." Thus, according to Rauch she refused to allow Schaffer to post the notice notwithstanding that she was unaware of the contents of the notice and notwithstanding that personal messages were still being posted, if approved.

3. The alleged rule concerning the blackboards and the bulletin boards

Schelz, Centabar, Schaffer, and Ferro testified that they were unaware of any rule which required employees to seek managerial approval before posting personal messages on company boards until sometime in September. It is Respondent's position that there always was such a rule and sometime in September greater restric-

[9] At this time it appears that William Tompkins was either a personnel manager or acting in that capacity.

[10] Prior thereto Rauch and the head of personnel also could permit the posting of personal messages by employees. McNamara was not called to testify about these events although he was still employed by Respondent at the time of the hearing.

[11] As noted, the portion of the charge which alleged that Wayne Centabar had been discharged because he wrote a union message on the blackboard without permission was dismissed and was not a part of this proceeding. The Regional Director found that Centabar actually had resigned before he attempted to use a company board to write a union message. According to Schaffer, it was because of this incident, however, that she first became aware that permission had to be secured before personal messages could be posted.

[12] Ferro testified that prior to this attempt there had been discussions at a union meeting in early October about how the employees could post a notice about a union meeting. This notice about the kittens apparently was a first step in their efforts to get union notices posted.

[13] Nutter testified that it was Rivers who frequently posted notices.

[14] Ferro claimed that Rivers asked Rauch if she were interested in having a kitten but Rauch replied she was not interested.

[15] This fact was known to Rauch.

tions were placed on the use of the boards. There is no dispute that the alleged rule was not in written form, although there was a company handbook.[16] Nutter and Rauch also testified that there had not been a general announcement of the rule to employees. In fact, according to Rauch's testimony, employees were made aware of the rule by her only on an *ad hoc* basis. Nutter testified that although he had been employed for 33 years he was unaware of the rule until he became the store supervisor in March 1980. He further testified that he did not disseminate the rule to those employees under his supervision even after he was made aware of it. McNamara, the store manager, was not called to testify. Rauch claimed that prior to about mid-September only three people had the authority to grant permission to place personal notices on company boards: McNamara, the personnel manager, and herself. There is no evidence in this record that this information was relayed to the employees. The record does reveal, however, that personal messages were posted frequently on both the bulletin board in the employees' cafeteria and the blackboard at the employees' entrance. The witnesses for the General Counsel and Respondent both testified that funeral notices, thank you notices, notices concerning the sale of items, notices concerning outside activities arranged by employees for other employees, and those of similar content were posted on both boards, although most of the notices were placed on the bulletin board in the cafeteria. Rauch testified that company procedure required employees to make a request to the personnel department for permission to post the notice and if the notice were considered in "good taste" permission would be granted. However, Rauch also testified that, while she observed notices relating to the Islander victory, a congratulatory notice concerning the birth of a baby, and other items of similar nature on the blackboard at the employees' entrance she did not investigate to see if permission had been granted for these postings, although she knew she had not authorized the postings. At another point in her testimony Rauch admitted that, if she saw a thank you notice, a notice concerning items for sale, or the like she would not check to see if the employee had secured permission to post the notice or write on the blackboard. Rauch apparently never removed a notice or directed the removal of a notice, prior to the Schelz incident, although she claimed that she would do so if she knew the posting had not been authorized. Nutter also testified that he observed notices of a personal nature on the boards and generally did not bother to ascertain whether permission had been granted for such postings.[17] Schelz testified that he had posted the notice concerning the Islander victory without securing permission to do so. Wayne Centabar testified that he posted a notice about a softball game, also without prior approval, on the blackboard at the employees' entrance and observed another employee posting a notice concerning a party and he was aware that this employee had not asked for or received permission to post the notice concerning the party. These various notices remained posted for several days prior to being removed.

[16] G.C. Exh. 4

[17] Nutter did testify that when he observed the notice about the Islander victory he checked to see if approval had been given for that notice.

B. *The Solicitation Issue*

The complaint alleges that the Employer maintained in effect the following rule:

> Solicitations for donations and distribution of literature. Associates are prohibited from soliciting for any purpose and distributing literature of any kind on the premises of the Company during their working time. If any person, fellow Associate or otherwise, attempts to solicit you for any reason, please report this immediately to your supervisor.

The rule is contained in the "Welcome to Gertz" employee handbook.[18] The basis for the alleged unfair labor practice is not the rule itself but the requirement that employees report solicitations to Respondent. Witnesses for the General Counsel credibly testified that they had not received such a handbook. Nor was there evidence offered by the witnesses for the General Counsel to establish that employees at the Massapequa store were made aware of this rule in some other fashion. The undisputed testimony by Muriel Rauch establishes that the employee handbook had not been available in the Massapequa store for about 2 years prior to the time of the hearing. Rauch was not aware if this specific rule was told to employees during employee training sessions, although she did testify that she thought efforts were made to discuss the rules contained in the handbook during training sessions. According to Rauch, employees were told generally that they could not solicit for any purpose on worktime and she expected that the personnel department would be informed if such solicitation occurred. It was also her testimony that if employees were on the work floor but on their breaktime and they were solicited they could bring the matter to her attention if the soliciting upset them. This record fails to disclose that any employee made a report about a solicitation to supervisory personnel or that any employee was disciplined for soliciting or for failing to report solicitations.

Analysis and Conclusions

The Blackboard/Bulletin Board Rule

It is Respondent's position that, by the use of the word "permitting" in the complaints, the General Counsel has conceded that Respondent had, as it contends, always required employees to seek permission before using the various boards for personal messages. I am not persuaded by this argument. It is clear, based on this record, that such a rule did not exist prior to early September, or if it did exist, its existence was not made known to the employees prior to that time. Witnesses for the General Counsel credibly testified that they were unaware of any such rule prior to at least early September. The testimony of these witnesses is supported by the testimony of Respondent's witnesses, Nutter and Rauch. Both testified

[18] G.C. Exh. 4. The issue of the legality of the rule will be discussed below.

that there was no written rule concerning the need to seek permission notwithstanding that there was at one point a company handbook which did contain various other company rules. Nutter, employed for 33 years, further testified that he was unaware of any such rule during those years and he allegedly was made aware of it only when he became a store supervisor in March. It is impossible to believe that an employee with so many years of service could have been unaware of such a rule if it existed. However, assuming that Nutter in fact learned about the rule in March it is clear that he did not consider it of much importance. Thus, he testified that he did not announce the rule to the employees under his supervision, including those employees involved herein, from March through September. According to his testimony the first time he stated the rule to an employee was when he told it to Schelz after he observed him writing a message about the Union. Rauch also testified that, to her knowledge, the rule was not announced generally to employees but was told to them only on an *ad hoc* basis. It is difficult to understand how an employer can discipline employees for an infraction of a rule which it has kept secret from them. An employer may of course, absent contractual provisions to the contrary, limit access to company boards for personal messages, but if it has a rule which limits such access it is the responsibility of the employer to make such a rule known to the employees before disciplining them for violating it.[19] I am not convinced, however, based on testimony of all the witnesses, that there was such a rule prior to September but find rather that Respondent allowed employees to use company boards for personal messages without seeking permission until the personal message related to union business. It is undisputed that the blackboard and bulletin board at issue were used for personal messages. The witnesses for the General Counsel credibly testified that they posted personal messages without obtaining prior permission to do so. Respondent contends that it could not discipline the employees who posted such notices without authorization because it was unaware of the employees involved in the conduct. It may be that Respondent was unaware of the "guilty" party but it is clear that Respondent, prior to the posting of the union message, made no effort to ascertain whether all the personal notices posted were authorized and further it failed to alert employees that unauthorized posting would result in disciplinary action. Both actions naturally would have occurred if in fact there were a rule which was being violated, albeit by unknown persons. The fact is that no action was taken by Respondent about personal messages being posted until the message related to the Union. Rauch and Nutter both testified that prior to the Schelz incident they have on numerous occasions observed personal messages on the company boards and both admitted that they did not investigate to determine whether the postings were authorized. This is particularly strange with respect to Rauch because she testified that at times she knew that she had not authorized a particular posting but she nonetheless did not bother to ascertain if permission to post the particular notice had been granted. This tolerant attitude toward the posting of various personal messages was in marked contrast to the conduct of both in connection with the union message posted by Schelz. Nutter testified that upon observing Schelz he immediately called Rauch to tell her that Schelz was writing a union message and to ask if he had secured permission to do so. However, Nutter already knew, according to his own testimony, that Schelz did not have permission and was therefore allegedly violating a company rule. Aside from the issue of why Nutter would need to ask whether permission had been granted when he knew, according to his testimony, that it had not, the more important aspect to consider is what was there about this incident which caused Nutter to act contrary to his usual practice. Nutter testified that prior to this incident it had been his practice, when an employee violated a company rule, to first discuss the matter with the employee and only if violations continued to occur to refer the matter to the personnel department. He did not do this in the case of Schelz. Rauch's response to Nutter was to remove the message immediately. Rauch did this without ascertaining whether either McNamara or the personnel department had authorized the message, apparently because she was certain authorization for this type of message would not have been given. It is necessary also to consider why Nutter and Rauch failed to testify truthfully about this incident. I make this finding that they did not do so based not only on the demeanor of the witnesses but also on an analysis of the written reprimand and prepared by Rauch. This document was prepared by Rauch only after consultation with McNamara. It was therefore not a hastily prepared document and one would expect therefore that it would refer to all the crucial events which gave rise to the written reprimand. This reprimand contains the statement that Schelz was observed writing the message after a similar notice had been removed. It is clear from these words that whoever observed Schelz writing the message did so the second time Schelz wrote the message. It does not state, as Nutter testified, that he observed Schelz the first time he wrote the message. It confirms rather Schelz' testimony that he was observed the second time he wrote the message. Moreover this written reprimand fails to mention that Schelz had received an earlier verbal warning from Nutter for the same act, a fact testified to by Rauch. In view of the fact that it was company policy, according to Rauch, to issue verbal warnings before issuing written warnings, it is unlikely that this point would have been omitted from the written reprimand if it had occurred. Finally, this document fails to mention Rauch's alleged observation of Schelz rewriting the message. It is difficult to believe that Rauch would have forgotten this blatant disregard of her orders when she prepared the written reprimand. These omissions from this document support the testimony given by Schelz; i.e., that he was not reprimanded by Nutter, that it was Nutter and not Rauch who observed him, and that Nutter did not speak to him about what he was doing. In sum, based on this record, I find that Respondent did not have a rule requiring permission to post personal messages, but rather

[19] *Montgomery Ward & Co., Inc.*, 224 NLRB 104, 109 (1976).

that it had a policy of allowing employees to post personal messages without requiring them to seek prior authorization. There is no statutory right of employees to use company boards.[20] However, where an employer's change of policy coincides with the employees' union activities an inference is warranted that the change was discriminatorily motivated.[21] An employer who has permitted company boards to be used for personal messages without restriction and who thereafter refuses use of the boards or places restrictions on the use of the boards because the messages sought to be placed thereon are union-related messages violates Section 8(a) (1) of the Act.[22] It is clear that Respondent in removing the union-related message was discriminatorily motivated and its conduct therefore is violative of Section 8(a)(1) of the Act.[23] Further, I find that the written reprimand given to Schelz was discriminatorily motivated and violates Section 8(a)(3) of the Act. With respect to the alleged tightening of the rule in mid-September, I am not persuaded that it was the result of the obscene material allegedly placed on the board.[24] However, assuming *arguendo*, that such was the case it is clear that the "tighter" restrictions were applied only to union messages. Thus, Respondent's witnesses testified that birth, death, and similar types of notices continued to be posted, even after mid-September, with management's permission. However, when Schaffer attempted to post a message about the Union, permission was denied. I do not credit Rauch's statement that Schaffer did not tell her that the message she sought to post was union related. However, assuming that I did credit this testimony, I nevertheless find that Rauch was aware that the message Schaffer sought to post was union related and that she refused permission because of this fact. Rauch knew that Schaffer was a member of the Union's organizing committee. When Schaffer made her request Rauch immediately rejected the request without inquiring into the message's contents, notwithstanding that at that time other employees admittedly received permission to post personal messages. This disparate treatment was motivated by Respondent's hostility to the Union and violates Section 8(a)(1) of the Act.[25]

Analysis and Conclusion

The Solicitation Rule

The General Counsel contends that the rule which requires employees to report solicitations to supervisors presently is in effect. He bases this contention on Rauch's testimony that she would expect an employee who was solicited while off duty but on the selling floor to report the incident to her and on the further fact that at some point employees did receive the employee handbook which contained the rule and Respondent has failed to show that employees have been told that the rule is no longer in effect. Moreover, he argues that the requirement to report solicitations is ambiguous because it is subject to an interpretation which could coerce employees not to exercise their statutory rights and it is therefore unlawful unless it can be shown that it was communicated to the employees in such a way as to convey an intent to permit lawful solicitation. There was no such showing made in this case, according to the General Counsel. Respondent contends that the entire rule had not been in effect for at least 6 months prior to the issuance of the instant complaint. Furthermore, Respondent claims that if it is found that the rule was in effect it cannot be considered unlawful because the rule referred to solicitations for donations only, the rule did not require employees to report the solicitation but only requested such reports and finally since the rule is a presumptively valid rule a request to report infractions of the rule is not unlawful. Respondent's argument that the rule had not been in effect has merit.

The witnesses for the General Counsel testified that they had never received the employee handbook.[26] Moreover, although these witnesses testified on both direct examination and extensive cross-examination about their knowledge of company rules they did not mention a rule about solicitation although they did testify about rules concerning dress code, proper identification, and use of employee entrances. There is no evidence in this record that any employee at the Massapequa location ever received a copy of the employee handbook or that they were told about the rule. Although Rauch did mention that the handbook was given to employees at some location, at some time her testimony, as to this point, was vague and indefinite. Her uncontradicted testimony did establish however that the handbook had not been available for some years prior to the hearing.[27] Furthermore, although Rauch did testify that she assumed that employees were told about the rules in the handbook at their training sessions, she admitted that she had no personal knowledge of whether they were told about this rule and the testimony of employee witnesses indicates that the rule was not told to them. In addition and contrary to the General Counsel's contention, Rauch did not testify that she expected employees to report solicitations made to them while they were on their break periods but on the work floor. The word "expectation" was used by her in connection with solicitations made to employees while on worktime on the work floor. While Rauch may have expected such reporting by employees who were solicited she did not testify that they were required to do so. With respect to incidents of solicitation which occurred while an employee was on a break period but on the work floor, Rauch testified that she was available to discuss the matter with any employee if the employee wanted to do so and was upset by the solicitation. The General Counsel failed to produce any evidence that any

[20] *Container Corporation of America*, 244 NLRB 318, fn. 2 (1979).

[21] *Norton Concrete Company of Longview, Inc.*, 249 NLRB 1270, 1276 (1981).

[22] *Arkansas-Best Freight System, Inc.*, 257 NLRB 420 (1981).

[23] *K-Mart Corporation*, 255 NLRB 922 (1981).

[24] In this connection it is interesting to note that the alleged tightening of restrictions coincided with the beginning of the representation hearing in September and continued through until after the Union lost the election in December.

[25] *Arkansas-Best Freight Systems, Inc., supra.*

[26] Joanne Ferro, one of the employees who gave testimony, was hired in 1977.

[27] It is not clear whether Rauch, in making this statement, was referring to handbooks available at this location or at other locations.

employee was reprimanded for solicitation of any kind or that any employee received any type of disciplinary warning for failing to report any type of solicitation. In sum, this record is devoid of any evidence that Respondent maintained, promulgated, or enforced the rule or the reporting requirement of the rule within the 10(b) period. As noted above, the existence of the rule or the reporting requirement at any other location is speculative based on the evidence in this record.[28] Accordingly, on the evidence in this record, I find that the General Counsel has failed to establish that Respondent maintained, enforced, or promulgated the no-solicitation rule and the reporting requirement of that rule within the 10(b) period.[29] In these circumstances a violation of the Act cannot be found.[30] Accordingly, I find this allegation has not been sustained.[31]

Conclusions of Law

1. The Company is an employer 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. By promulgating, maintaining, and enforcing a rule which discriminatorily requires employees to seek permission to post union campaign literature on the blackboard at the employees' entrance and the bulletin board in the employees' cafeteria, both boards being located at Respondent's Massapequa store, contrary to its past practice of allowing employees to use such boards for various messages without requiring them to seek permission to do so, Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By promulgating, maintaining, and enforcing a rule which discriminatorily prohibits employees from posting union campaign literature on the blackboard at the employees' entrance and the bulletin board in the employees' cafeteria, both boards being located at its Massapequa store, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By issuing a written reprimand to its employee, Mark Schelz, for placing a union campaign message on the blackboard at the employees' entrance at its Massapequa store, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

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

7. Respondent did not violate the Act with respect to that portion of the complaint which alleges that Respondent required employees to report solicitations to it.

The Remedy

Having found that Respondent has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act including the posting of an appropriate notice to employees. I shall specifically recommend that Respondent be ordered to rescind its discriminatory policy of requiring employees to seek permission to post union campaign literature on the blackboard at the employees' entrance and on the bulletin board in the employees' cafeteria, both boards being located at its Massapequa store, and to rescind any rule which discriminatorily prohibits its employees from posting union campaign literature on the aforesaid boards.

Having found that Respondent has discriminated against Mark Schelz, as described above, in violation of Section 8(a)(3) of the Act, I shall order Respondent to rescind the disciplinary notice issued to him on September 8, 1980, and expunge it from his personnel and other records and to notify him of such action.

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[32]

The Respondent, Allied Stores of N.Y., Inc., d/b/a Gertz, Massapequa, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing any rule or policy which discriminatorily requires employees to seek permission to post union campaign literature on the blackboard at the employees' entrance and on the bulletin board in the employees' cafeteria, both boards being located at its Massapequa store.[33]

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[28] In making this determination, I have considered that Rauch, in her affidavit to the Board, apparently mentioned that such a rule was in existence. However, it is clear from this record that Rauch, when she gave the affidavit, was not speaking from personal knowledge of the events at this location. Moreover, the maintenance and enforcement of this rule at any other location was not alleged or litigated in this proceeding and it would be therefore inappropriate to consider what may have occurred at another location. *General Motors Corporation, Delco Moraine Division*, 237 NLRB 1509, fn. 3 (1978).

[29] It should be noted that, having found knowledge of a rule by employees to be a necessary element before an employer may impose disciplinary measures, it would be a contradiction now to find a violation when witnesses for the General Counsel deny knowledge of this rule.

[30] *General Motors Corp., supra* at 1515.

[31] As noted it was the requirement to report solicitation to supervisors which was alleged to be unlawful. The parties accepted that the rule itself was a presumptively valid rule. However, it should be noted that in *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981), the Board discarded the distinction between working hours and working time and placed on the respondent the burden of advising employees as to the limitations on their right to solicit. The issue of legality of the rule itself was not litigated in this proceeding and accordingly I have not made a determination on the legality of the rule. However, the holding in that case tends to warrant the conclusion that the requirement to report all solicitations, if it existed, would violate the Act because the requirement is ambiguous on its face.

[32] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[33] The Order has been limited to the Massapequa location in view of the fact that this record fails to disclose evidence of such a rule or policy at any other location.

(b) Prohibiting its employees from posting union campaign literature on the blackboard at the employees' entrance and on the bulletin board in the employees' cafeteria, both boards being located at its Massapequa store.

(c) Maintaining and enforcing any rule or policy which discriminatorily prohibits its employees from posting union campaign literature on the blackboard at the employees' entrance and on the bulletin board in the employees' cafeteria, both boards being located at its Massapequa store.

(d) Issuing written reprimands to its employes because they have been engaged, on behalf of the Union or any other labor organization, in posting union campaign literature on the blackboard at the employees' entrance and the bulletin board in the employees' cafeteria, both boards being located at its Massapequa store, while permitting employees to use the aforesaid boards for non-company-related matters.

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

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Withdraw and rescind its rule and/or policy regarding the requirement for employees to seek permission before posting union campaign literature and which prohibits employees from posting such material on the blackboard at the employees' entrance and the bulletin board in the employees' cafeteria, both boards being located at its Massapequa store.

(b) Rescind the disciplinary warning given to Mark Schelz on September 8, 1980, and expunge all reference to said warning and notify Mark Schelz, in writing, that said action has been taken.

(c) Post at its Massapequa store copies of the attached notice marked "Appendix."[34] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[34] In the event that 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."