Kirkhill Rubber Company *and* United Rubber, Cork, Linoleum and Plastic Workers of America, District 5, AFL-CIO. Case 21-CA-19922

August 31, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On January 22, 1982, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party and the General Counsel filed answering briefs.

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 of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

We agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act by issuing a written reprimand to Michael Masciel on January 15, 1981, and by interrogating Masciel about his union activities on January 16, 1981. Regarding the reprimand, however, the Administrative Law Judge, in his Decision, and Respondent, in its exceptions, devote substantial analysis to the content and purported validity of Respondent's plantwide rules of general application relating to solicitation and distribution of literature. Such analysis, however, misses the basic point. For the simple fact remains that Masciel was issued a written reprimand for "solicitation for union purposes on company time and property." We have consistently held that an employer's statements of this nature violate Section 8(a)(1). *John L. Lutz Welding and Fabricating, Inc.*, 239 NLRB 582, 585 (1978); *S. S. Kresge Company*, 229 NLRB 10, 14 (1977); *Wometco Coca-Cola Bottling Company of Nashville, Inc.*, 255 NLRB 431, 437, 444 (1981). Here, rather than being verbal statements, the restriction took place in the context of a written reprimand. In either case, however, the employer's action interferes with and coerces employees in the exercise of their Section 7 rights. Thus, regardless of the content of the rules of general application maintained by Respondent and their validity under the Act, Respondent's discipline of Masciel, by its own terms, constitutes an unlawful restriction on his exercise of Section 7 rights in violation of Section 8(a)(1). Accordingly, to the extent the Administrative Law Judge's Decision encompasses issues relating to the lawfulness of Respondent's rules of general application, it is hereby disavowed.[2] In all other respects we adopt his Decision and recommended Order.

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 and hereby orders that the Respondent, Kirkhill Rubber Company, Brea, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[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 his findings.

[2] Inasmuch as the complaint does not allege that Respondent's rules are unlawfully overly broad and we need not resolve that issue to dispose of the complaint allegations, we make no finding as to the lawful or unlawful nature of Respondent's no-solicitation and no-distribution rules.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This matter was heard before me in Los Angeles, California, on December 10, 1981. The charge was filed on January 23, 1981, by United Rubber, Cork, Linoleum and Plastic Workers of America, District 5, AFL-CIO (District 5). The complaint issued on March 20, and alleges that Kirkhill Rubber Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act) on January 15, 1981, by reprimanding its employee, Michael Masciel, "because he engaged in union or other protected concerted activities," and again on January 16 by "interrogat[ing] employees concerning their union activities and sympathies."

I. JURISDICTION

Respondent is a California corporation, with two facilities in the community of Brea, engaged in the manufacture and sale of elastomeric rubber products. It annually sells goods of a value exceeding $50,000 directly to customers outside California, and thus is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

District 5 and its parent International (International) are organizations in which employees participate by paying membership dues and electing officers, and exist

for the purpose of representing employees in collective bargaining with regard to wages, hours, and other terms and conditions of employment. District 5 and the International, jointly and severally, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Background: In October 1980, the International began to organize Respondent's approximately 600 production and maintenance employees. On December 22, it filed a petition for election with the National Labor Relations Board.[1] On January 15, 1981, unable to provide a sufficient showing of interest in support of the petition, it requested the petition's withdrawal. The request was approved by the Regional Director on January 16.[2]

Masciel, a mandril builder in Respondent's duct department, was one of several employees active in the organizational effort. He attended a union meeting at the campaign's inception, after which he distributed union authorization cards and other materials to an estimated 80 coworkers. He testified that this activity took place in Respondent's parking lot before his shift, and otherwise "on my time." Albert (Cy) Blanton, an organizer for the Union, had cautioned him not to solicit "on company time." Masciel worked on the second shift, which ran from 3:30 p.m. to midnight.

The reprimand: In the evening of January 14, 1981—the day before the International requested the withdrawal of its petition—the foreman of the duct department, Donald Wyett, an admitted supervisor, came upon Masciel and Greg Gerbais, an inspector for Respondent, in the department's office. Masciel's duties required that he be in the office briefly perhaps three times per shift to check work schedules. Gerbais' duties took him all over the plant from time to time. Neither was on break when Wyett encountered them.

As Wyett approached the office on this occasion, he could see through the office windows that Masciel was talking to Gerbais, but admittedly "couldn't hear any of the conversation." Masciel was seated at a desk, facing Wyett; Gerbais was standing at the desk, back to Wyett. Entering the office, Wyett saw that Gerbais, pencil in hand, apparently was filling out an authorization card, which lay on the desk in front of him. Wyett immediately summoned Gerbais outside the office, where he admonished him not "to be filling out any union material during working hours," and directed that he "go back to" work.

Wyett said nothing to Masciel at the time. He explained that, when he entered the office, Masciel "disassociated himself with Greg [Gerbais] and acted like he was working on something there at the desk"; then quickly "moved out of there."

Wyett shortly reported the incident to his immediate superior, Jack Swindle. Swindle's spoken reaction was that it was "a pretty serious offense," and that he would "have to report this" to his superior, Ben Cannon. The record is silent whether a report in fact was made to Cannon at or around that time. Neither he nor Swindle testified, and Wyett testified that he talked to no one but Swindle about the incident between the time of its occurrence and the next day, early in the second shift.

The next day, January 15, at or about 4 p.m., Gerbais was called before Cannon to describe what had happened. Swindle and Wyett also were present. Gerbais related, according to Wyett,[3] that Masciel previously had told him that 35 more signed cards were needed "to get enough cards to petition for a union"; that he offered to sign "if you need my help"; and that, later, when Gerbais entered the duct department office, Masciel "was sitting at the desk" and a card was "lying on the desk" for him to fill out and sign.

After Gerbais' recital, and without inviting Masciel to give his version, Cannon directed Swindle and Wyett to "write [Masciel] up . . . [for] . . . soliciting union business on company time." Wyett then prepared a written reprimand, using wording prescribed by Cannon, and he and Swindle presented it to Masciel. The reason stated on the reprimand for its issuance was this: "Solicitation for union purposes on company time and property." Masciel was asked to and did sign the document. He was not given a copy.

In the conversation accompanying tender of the reprimand, Swindle stated that Masciel was being written up for "soliciting union." Masciel denied that he had been so engaged, adding that he knew his "rights"—that he could "solicit on [his] time," but not "on company time." Masciel then asked if Wyett had heard him "solicit union." Wyett replied, "No, but I assumed you were." Masciel challenged, "Well, if you didn't hear me, how could you assume that I was speaking union?" Swindle interjected, "Well, Mike, he didn't say he seen you, he assumed you were." Masciel pressed, "How come you are going to write me up when I wasn't soliciting?" Swindle replied that he had "heard" that the Union needed 30 more cards, and that it was "assumed" that Masciel had been soliciting. Swindle also stated during the exchange that Bill Haney, Respondent's president, and Cannon had been "looking for people who are involved in the union"; and referred to Masciel as "an instigator."[4]

The record leaves no doubt that rules against solicitation and the distribution of printed matter were on dis-

[1] Case 21-RC-16612.

[2] Sec. 101.18 of the Board's Statements of Procedure provides that "unless the petitioner has been designated by at least 30 percent of the employees . . . the showing of representation among the employees is insufficient to warrant an election," and the regional director "may request the petitioner to withdraw its petition"; and, "if the petitioner . . . refuses to withdraw the petition, the regional director then dismisses the petition . . . ."

The International filed a new petition on February 5. An election followed on March 19, which it lost by a substantial margin. Case 21-RC-16643.

[3] Gerbais, attending school out of the area, did not testify. As earlier mentioned, neither did Cannon nor Swindle.

[4] Masciel's coherent and convincingly detailed version of this exchange is credited. In contrast, Wyett's testimony on the point—consisting of his saying "there wasn't much conversation that exchanged during that time," and that he could not recall certain particulars—was vague, seemingly evasive, and generally unpersuasive. Again, Swindle did not testify.

play at relevant times, but is scarcely conclusive regarding their content. Thus:

(a) The reprimand indicates that they forbade solicitation "for union purposes," if not distribution, "on company time and property."

(b) Cannon, directing that Masciel be written up, cited "soliciting union business on company time."

(c) Masciel, in receiving the reprimand, declared that he knew his "rights"—that he was not to solicit "on company time."

(d) Respondent's attorney, R. D. Sweeney, informed the NLRB Regional Office, by letter dated February 3, 1981: "[T]he rules of the company forbid solicitation of any kind by any employee on company time and company property."

(e) Wyett testified that, "on the company rules, it says no soliciting in the plant."

(f) Wyett elsewhere testified that the rule for which Masciel was reprimanded was: "Soliciting during company working hours"; and he admonished Gerbais "not to be filling out any union material during working hours."

(g) Donald Finefrock, vice president of manufacturing, testified that the same rules had been posted since May 1980, and that they provided:

> Committing any of the following will be deemed sufficient grounds for discipline up to and including discharge.
>
> * * * * *
>
> 15. Vending, soliciting, or receiving contributions, for any purpose whatsoever during an employee's working time.
>
> 16. Distributing literature, written or printed matter of any description during an employee's working time without permission.

(h) Masciel testified variously that a rule was posted in 1980 forbidding "soliciting . . . on company's premises"; that he first saw a posted rule after the International's January 15 withdrawal of its petition; that a new rule was posted sometime after the February 5 filing of the new petition; that the new rule banned "soliciting, union activities, or signing of cards on company's time and on company premises"; that the rules of which Finefrock testified were not the first to be posted; and that, in 1980, a "whole new list [of rules], a long list," was posted.

It is concluded that the most persuasive evidence of the prohibition on which the reprimand was based is contained in the reprimand itself, as confirmed by attorney Sweeney's letter of less than 3 weeks later—that is, soliciting "on company time and property." It is further concluded that the reference in the reprimand to solicitation "for union purposes" was merely descriptive of Masciel's perceived offense, and does not warrant an inference that the posted rule singled out that form of solicitation.

Gerbais was not reprimanded for his part in the incident. Finefrock explained, "It was deemed that he was not the aggressor." Finefrock testified that Cannon told him at or about 11 a.m. on January 15 that Masciel "had been caught in the office soliciting for the union," and was going to be reprimanded. Finefrock continued that he could have overridden the reprimand, but chose to approve it "after the fact." He further testified that Respondent has a system of "progressive" discipline—consisting of an oral reprimand on the first offense, a written reprimand on the second offense, and then suspension and possibly layoff for succeeding offenses. He qualified, however, that the system is not "absolute," and that the oral warning step was bypassed as concerns Masciel because "the seriousness of this offense was considered to be worth a written warning."

Masciel testified that he gave the card to Gerbais in the parking lot before work on January 14, after Gerbais had told him he was "interested in" signing. Then, just before Wyett came upon them in the office, according to Masciel, Gerbais entered and approached the desk where Masciel was seated, placed the card on the desk, and seemed ready to begin filling it out when Wyett appeared. Masciel testified that the subject of a union did not arise in their attendant conversation; rather, that they talked about Gerbais' plans to go away to school.

Masciel testified that various employees sold such things as candy, crystal, Tupperware, and Avon products in the duct department "during working hours," but that he had not seen this done in the presence of management officials. Masciel also testified that he had seen Wyett participate in baseball and football pools in the plant during worktime in 1980.

The interrogation: On January 16, upon arriving for work, Masciel asked Cannon for a copy of the reprimand. Cannon referred him to the personnel office, where he spoke with Finefrock. Finefrock said that Masciel could not have a copy, but could "look at" the original. After Masciel had done so, Finefrock asked why he wanted a copy. He answered that he "was thinking about going to the Labor Board." To Finefrock's asking why, Masciel stated that he did not want "to get fired because [of] absenteeism, or, you know, doing something wrong." Finefrock protested that Respondent "isn't like that."

Then, referring to the gravamen of the reprimand, Masciel asked, "You tell me I couldn't solicit on property?" Finefrock, ignoring the question, asked one of his own: "Are you involved in the Union?" Masciel responded, "I can't say anything." Finefrock said he understood, then asked how Masciel liked working for Respondent. Masciel said it was "all right," but that he was unhappy with company medical benefits. Finefrock next asked why Masciel would want "a third party"—presumably an allusion to the Union. Masciel answered, "For better pay and benefits."[5]

[5] Masciel's detailed and internally consistent version of this conversation is credited. Finefrock's rendition was confused and sometimes contradictory, and thus, to the extent that its ultimate form conflicted with Masciel's, unworthy of belief. For example, Finefrock testified at one point that the company medical plan was not discussed at the time. He later stated that he explained the plan "at some length" in response to Masciel's question why there were not better medical benefits. Finefrock also testified that "the union" was not mentioned "at any time during that conversation"—"No, sir"; only to concede: "Michael [Masciel] said that if we had a union, there might be more or better benefits."

B. *Conclusions*

The reprimand: It is concluded that the reprimand of Masciel violated Section 8(a)(1) as alleged.

The bases for this conclusion are these:

(a) The underlying no-solicitation rule—banning solicitation "on company time and property"—was invalidly broad. As stated in *Plastic Film Products Corp.*, 238 NLRB 135 (1978):

> The Board has repeatedly condemned the promulgation of rules prohibiting protected activity "on Company time" as unduly ambiguous and reasonably likely to be interpreted by employees as a prohibition against soliciting during nonworking time. . . .

The same can be said, even more so, of bans against solicitation "on company property."

True, such rules are not conclusively invalid. In this case, however, Respondent has made no convincing showing that its rule, in the words of *Plastic Film Products Corp., supra* at 135, "was justified by a need to maintain discipline or production in its plant."[6]

The rule from which it flowed being invalid, and there being no grounds for inferring that Masciel's "assumed" soliciting interfered with his or Gerbais' work, the reprimand—for soliciting "for union purposes"—necessarily violated Section 8(a)(1). *Hambre Hombre Enterprises, Inc., d/b/a Panchito's*, 228 NLRB 136 (1977); *Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores*, 198 NLRB 281 (1972).[7]

(b) Apart from the invalidity of the underlying rule, it is manifest that Respondent's enforcement of it in this instance was motivated by unlawful considerations. While the "offense" perpetrated by Masciel, an ardent union activist, was treated as of a "seriousness . . . to be worth a written [i.e., second-step] warning," his co-equal in its perpetration, Gerbais, received not so much as a first-step reprimand. Moreover, in the conversation incidental to the presentation of the reprimand, Swindle termed Masciel "an instigator" and remarked that Haney, the company president, and Cannon had been "looking for people who are involved in the union."

Additionally, Gerbais, but not Masciel, was given a chance to tell his version of the underlying incident to management. Further, the stated reason for sparing Gerbais—that he "was not the aggressor"—was not warranted by Wyett's perception of the incident, and, again, was without benefit of Masciel's side of the story. This rationale, for that matter, was without Gerbais' side, as well, given Finefrock's testimony that he learned from Cannon at or about 11 a.m. on January 15 that Masciel was going to be reprimanded for "soliciting for the union." Gerbais, it will be remembered, did not tell his story to Cannon until about 4 p.m. on January 15. The rationale, in short, was contrived, and Respondent's depiction of Masciel as "the aggressor" plainly stemmed from an awareness of his organizational activities at times other than the incident in question.

The interrogation: It is concluded, without need for supporting discussion or citation, that Finefrock violated Section 8(a)(1) as alleged by asking Masciel, during their January 16 conversation, if he was "involved in the union" and why he would want "a third party."

Conclusion of Law

By reprimanding Michael Masciel on January 15, 1981, and by interrogating him on January 16, 1981, concerning his union activities and sympathies, as found herein, Respondent in each instance violated Section 8(a)(1) of the Act.[8]

ORDER[9]

The Respondent, Kirkhill Rubber Company, Brea, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Reprimanding any employee because of his union activities or sympathies.

(b) Interrogating employees about their union activities or sympathies.

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

2. Take this affirmative action:

(a) Rescind the reprimand of Michael Masciel given on January 15, 1981, expunge from its records any reference to that reprimand, and notify Masciel in writing that this had been done.

(b) Post as its places of business in Brea, California, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be

[6] Finefrock's testimony that, because the duct department operates "with a minimum amount of employees, it is doubly important that each and every one be doing everything they can towards production every moment of the working day," and that, because Respondent manufactures "very delicate, intricate parts" for military and commercial aircraft, the "attention of the employees" is required "at all times," hardly meets the burden of justification.

[7] The invalidity of the rule makes it unnecessary to address Masciel's testimony suggesting its nonenforcement with regard to sports pools and in-plant vending, and that he in fact was not soliciting in the duct office. *Eastex Incorporated*, 215 NLRB 271, 275, fn. 13 (1974).

[8] Although it has been concluded that issuance of the reprimand was prompted by improper antiunion considerations, a violation of Sec. 8(a)(3) has not been alleged and it would not enhance the remedy to make such a finding. Further, since the no-solicitation rule underlying the unlawful reprimand was not alleged to be unlawful, and since the General Counsel has not otherwise asked that a violation be found in that regard, at least not with a clarity giving Respondent notice that the issue was to be litigated, no such finding will be made. *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981).

[9] All outstanding motions inconsistent with this Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the Naitonal Labor Relations Board, the findings, conclusions, and 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.

[10] 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."

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.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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, and has ordered us to post this notice.

WE WILL NOT reprimand any employee because of his union activities or sympathies.

WE WILL NOT interrogate employees about their union activities or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their exercise of rights under the Act.

WE WILL rescind the reprimand of Michael Masciel given on January 15, 1981, expunge from our records any reference to that reprimand, and notify Masciel in writing that this has been done.

KIRKHILL RUBBER COMPANY