

Cannondale Corporation and Baltimore Regional Joint Board of Amalgamated Clothing & Textile Workers Union, AFL-CIO. Cases 6-CA-23649 and 6-CA-23850

March 26, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On April 22, 1992, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief. The Respondent filed an answering brief to the General Counsel's exceptions and a reply brief to the General Counsel's supporting 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

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

² In adopting the judge's finding that the written warning to employee Cindy Carson for violating the no-solicitation/no-distribution rule violated Sec. 8(a)(3) and (1) of the National Labor Relations Act, we do not rely on the judge's finding that after the union campaign ended, other forms of solicitation went on during worktime and in work areas, and that there was no evidence that the employees involved were punished. The testimony regarding solicitation after the union campaign ended was limited to a few isolated incidents and there was no evidence that the Respondent's management was aware of these incidents. The fact, that the employees involved in those incidents apparently were not punished cannot be used to prove discrimination on the part of the Respondent.

orders that the Respondent, Cannondale Corporation, Bedford, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

Stephanie E. Brown, Esq., for the General Counsel.

Malcolm L. Pritzker, Esq., of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on February 18 and 19, 1992, in Bedford, Pennsylvania. The consolidated complaint before me alleges that Respondent violated Section 8(a)(1) of the Act by impliedly threatening employees with a closure of operations if they selected a union, and by unlawfully promulgating and maintaining a no-solicitation/no-distribution rule because of a nascent union campaign. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by issuing a disciplinary warning to employee Cynthia (Cindy) Carson for violating the above rule, transferring employee Donna King from the third shift to the daylight shift, and by refusing to recall from layoff or reemploy employee Patricia Griffith because of their union activities and to discourage union activities generally. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read and considered.¹

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business in Bedford, Pennsylvania, where it is engaged in the manufacture of bicycles and related products. Respondent has operated its Bedford facility since 1977 and it employs some 450 people at that location. During a representative 1-year period, Respondent sold and shipped, from its Bedford facility, goods valued in excess of \$50,000 directly to points outside Pennsylvania and purchased and received goods valued in excess of \$50,000 directly from points outside Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

¹ The General Counsel also filed an unopposed motion to correct transcript which is hereby granted.

II. THE UNFAIR LABOR PRACTICES

A. *The Facts*

In April 1991, the Union began a campaign to organize the Respondent's employees. A group of about 12 employees was chosen to comprise a union organizing committee. Its members included Patricia Griffith, Donna King, Gayle Oldham, Cindy and Steve Carson, Jay Kaufman (who later transferred his allegiance), and Dennis Stickle. The most active by far were Griffith, Cindy Carson, and Donna King, who attended meetings, passed out union cards and literature, and spoke to other employees on behalf of the Union. Everyone in the plant, from employees to supervisors and managers, knew the identities of the union activists, particularly Griffith, King, and Cindy Carson. The record is replete with evidence of such knowledge and testimony that news, particularly of union activity, traveled swiftly through the plant.

1. The no-solicitation/no-distribution rule

On April 24, 1991, the Respondent posted and distributed to employees a one-page notice which stated two new policies that were being adopted and would shortly be added to a new edition of an existing employee handbook that was being prepared. The first was its so-called labor policy, which amounted to a statement that Respondent was opposed to unions and would "use every legal means to keep our Company free from unions and the trouble they so often cause." The second was a rule that banned nonemployee solicitation and distribution and employee activity described as follows:

2. Employees may not solicit fellow employees for any purpose during the working time of any participant to such conversation. This, may be done during lunch or break times.

3. Employees may not distribute literature for any nonbusiness purpose to other employees in production/work areas at any time, but I may do so in non-work areas during non-work times.

The language of the rule was valid on its face. However, the General Counsel alleges that it was unlawfully promulgated and maintained in order to discourage union activity. Respondent alleges that it was promulgated to meet legitimate production and disciplinary problems. I shall discuss this issue in more detail later in the analysis section of this decision.

2. The Montgomery speech

On April 5, 1991, the day after the above notice was posted and distributed, the Respondent's owner and president, Joseph S. Montgomery, spoke to several groups of assembled employees on worktime. Montgomery lives in Connecticut but travels to Bedford weekly and spends 2 or 3 days there. He spoke to employees about a number of things, including a new evaluation system that he was going to impose, but he also discussed the union campaign and its possible impact on his operation. The General Counsel alleges that the April 5 speech was coercive because it implied that Respondent would close the plant if the employees selected a union to represent them. The Respondent states that Montgomery was simply making lawful predictions of the possible con-

sequences of unionization. The Supreme Court has held that the words in such a speech, as spoken and understood, are crucial to the determination of whether an employer has simply told employees "what he reasonably believes will be the likely economic consequences of unionization that are outside his control"—lawful comment; or has made "threats of economic reprisal to be taken solely on his own volition"—unlawful coercion. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), quoting from *NLRB v. River Togs*, 382 F.2d 198, 202 (2d Cir. 1967).

There was no written documentation or tape recording of the speech. And the testimony of all the witnesses was either confusing or truncated, much too varied to meld into a composite. The testimony is thus not clear enough for me to make specific findings as to what was said. I do not say this because anyone was deliberately dissembling. Rather I think the testimony reflected a lack of accurate recollection.

I do believe that Montgomery said something about unionized firms closing or moving because of high labor costs, and something about his competitors, most of whom operated overseas, having lower labor costs. But I cannot determine what, if anything, more he said about how this might impact the Bedford plant. What he said about higher labor costs and competition would not necessarily be unlawful although it might cause employees some anxiety and to question whether unions can always deliver what they promise. It would be a stretch to imply from this alone that Montgomery threatened to do something within his control—"solely on his own volition"—to move or close the plant. Indeed, it appears that he promised to try to keep the plant operating; certainly there was every indication, and it appears to have been expressed, that Respondent was making money. On the other hand, an employer knows full well, or should, that union demands do not translate into higher labor costs unless it agrees with them and no one knows what a union will demand before it is even selected. Nevertheless, in the context of this record, I cannot make an inference that Montgomery used language that would distort this truism or use it to play brinkmanship with an unlawful threat. Because the General Counsel has the burden of proving not only that what was said was unlawful, but what was said in the first place, any ambiguity in the record or inability on my part, because of that ambiguity, to make adequate findings of fact as to what was said must result in dismissal. That is the state of this record. I shall therefore dismiss the complaint allegation involving the implied threat to close based on Montgomery's April 25, 1991 speech.²

3. The Carson warning

On May 23, 1991, Respondent issued a written document, entitled "counseling statement" and described as "warning decision," to employee Cindy Carson for "soliciting in work areas." It was signed by Plant Manager Rick Hinson. Carson also signed the document indicating that she read and understood the warning and received copy of it. The warning stat-

²Plant Manager Rick Hinson gave a similar speech during shifts when Montgomery could not be present. And a similar theme is echoed in a late April letter distributed to employees urging them not to sign union cards. Neither of these was alleged to be unlawful and neither has any bearing on the legality of Montgomery's remarks.

ed that this was a first offense, but that a second offense would result in a day's suspension and a third would result in discharge.

The circumstances surrounding the issuance of this warning are as follows. That morning, before the beginning of her shift, Carson, a known union leader, walked into the plant—a large room with work stations essentially evenly divided on either side of a 5-foot-wide aisleway framed in part by yellow lines. She walked down the aisleway distributing union leaflets to employees as she walked; she turned left along another aisleway and went over to a group of employees sitting on chairs along a wall waiting to begin work. No one was working; at least no one to whom Carson distributed the leaflets was working. Carson did not solicit anyone to do anything and, although she may have made a brief comment along her route, there is no evidence of any discussions between employees. The literature was accepted; no one objected to its receipt and there was no litter or literature lying around. Carson then punched in at 4:56 a.m., a few minutes before the actual starting time of 5 a.m.³

Shortly thereafter, at about 5:45 a.m., Supervisor Ken Corle⁴ called Carson into his office. Corle did not observe Carson passing out union literature, but received some kind of report—his testimony is not clear on this—that led to his writing up a warning against Carson. When Carson got to the office, Corle handed her a written warning—not that described above—and asked her to read and sign it. The warning apparently stated that Carson had been handing out literature or soliciting on company time. Carson refused to sign the warning because, as she stated, she had done nothing of the sort on company time. At one point during this office visit, Carson tried to call for help from her husband, Steve, who was also employed by Respondent and was walking by the office at the time. He briefly tried to intervene, but Corle told him to desist because he said he was talking to Carson about her evaluation. Corle told Carson that since she had received a favorable evaluation the day before, she should not “be handing out these union papers.” The meeting ended at this point and Carson returned to work without signing anything.

About 15 minutes later, Corle approached Carson at her work station and accompanied her to Plant Manager Hinson's office. At this point, either Hinson or Corle apparently destroyed the warning initially presented to Carson and handed her the document that was described above.⁵

4. The June 2 organizing committee meeting

The Union scheduled an organizing committee meeting for 3:30 p.m. on June 2, 1991, at the Best Western motel in

³ The above is based on Carson's uncontradicted testimony which I credit.

⁴ It was admitted that Corle was a statutory supervisor at all material times. He testified that he was one of the three top managers at the plant.

⁵ The above is based on Carson's truthful, clear, detailed, and entirely reliable testimony. I reject Corle's testimony to the extent that it differs from that of Carson, particularly with respect to their meeting in his office, because he was not a truthful or reliable witness, which I will document elsewhere in this decision, and because his testimony about the meeting was vague. Neither Corle nor Hinson seriously questioned Carson's testimony about the meeting in Hinson's office.

Bedford. That afternoon, three committee members, Griffith, Carson, and King, attended the meeting, along with two union representatives. A group of about 18 or 20 antiunion employees of Respondent heard about the meeting and decided to go to the motel. They met at a local park and carpooled to the motel. When they arrived, they congregated outside the meeting room and tried to enter, yelling, among other things, that they did not want a union. Carson, who had arrived late, had to push her way through the crowd to get into the meeting. Among the antiunion employees present were Rick Fetsko and Wendy Sarver, group leaders or leadpersons who had some authority over other employees, and Karen Corle, the wife of Supervisor Ken Corle. Karen Corle testified that the group of antiunion employees was “very loud and upset,” because they came, although uninvited, to have certain questions answered. Actually, aside from the committee members, only one other employee, thought to be sympathetic to the Union, was invited to the meeting. She did not testify and it is not entirely clear why this group of uninvited people showed up at the motel where a union organizing committee meeting was being held.

At one point, Sarver made her way into the doorway of the meeting room and yelled out to the others that Griffith and King were inside. She said something about them being on a list of names kept by Respondent and something to the effect that “people can get fired for that.” Sarver admitted that she was “very, very angry” and used “bad language.” One of the union representatives eventually calmed things down and prevailed upon the antiunion employees to leave with a promise that he would also meet with them at some time in the future.

After returning home from the motel confrontation, Karen Corle dismissed what had transpired with her husband the supervisor. Thereafter, the meeting and the confrontation were topics of much discussion at the plant. For example, Plant Manager Hinson commented to Sarver about the “bad language” she used during the confrontation at the motel. Based on the above, and all the evidence in this case, I find that, after the June 2 union meeting, Respondent knew that Carson, King, and Griffith—the only prounion employees in attendance—were the leading activists not only of the 12 organizing committee members but of the entire 450 employee work force. Indeed, President Montgomery, who only visits the plant about 2 or 3 days a week, acknowledged that he was aware of about 15 union supporters among the employees, including one, Griffith, whom he mentioned by name.

5. The King transfer

Donna King worked on third shift as a decaler in the paint department; it was her preference and desire to work the third shift. When she reported for work the day after the June 2 committee meeting, she was called aside by Rick Fetsko and criticized for punching in early. Near the end of her shift—at about 5:30 a.m.—King saw Ken Corle, Fetsko, and two other group leaders or supervisors meeting in the office. Shortly thereafter, Corle came to King's work station and told her that she would be transferred to the first shift. She asked “what the problem was,” and Corle replied that she “went to the bathroom too often,” that she was out of her department “too often,” and was talking too much to the welders. When she asked why she, who did not want to transfer, had been forced to do so when another worker, who

had expressed a desire to “go daylight,” was not transferred instead, Corle replied that “it was for the good of the company.” Actually, it is uncontradicted that, 2 weeks before, Corle had asked for volunteers for such a transfer and another employee, not King, had volunteered.⁶

King’s transfer was effectuated on Monday, June 10. The same day, another employee, Adena Feaster, was transferred from the first shift to the third shift. Two days later, a new employee was hired for the third shift, but she was trained for 3 days on the first shift. On June 17, Feaster returned to the first shift and Missy Hilligast moved from the first shift to the third shift. On June 24, Hilligast returned to the first shift. This switch was accomplished because neither Hilligast nor Feaster could work 2 weeks straight on the third shift and each volunteered to do so for 1 week. After the week of June 24 no one worked on third shift because it was abolished and all the employees working on that shift were transferred to the first shift. There is no allegation that the abolishment of the third shift was unlawful. For the period between King’s involuntary transfer and the abolishment of the third shift, King continued to receive the 15-cent-per-hour night differential to which third-shift workers were entitled.

At about this time—actually shortly after the June 2 meeting, the Union suspended its campaign at the Respondent’s Bedford plant. According to Union Representative Georgia McLucas, the employees were “just scared to death” and the Union filed unfair labor practice charges involving some of the events recounted herein with the Pittsburgh Regional Office.

On July 18, 1991, the General Counsel issued the initial complaint in this case dealing with charges that the Carson and King incidents were unlawful.

6. The layoff and refusal to recall Griffith

Patricia Griffith has worked for Respondent for 5 years, most recently in the packing department. On Thursday, August 8, 1991, her immediate supervisor, Bill Ressler, approached her and asked her if she would like to have Friday, the next day, off. She agreed, as did another packing department employee, Gayle Oldham. It appears that this was done because of a lack of work which caused the layoff of a number of other employees at this time. Perhaps 15 employees in all were laid off. Griffith and Oldham actually left work at midday on Thursday with the approval of their supervisor. Oldham was recalled on the following Monday, along with the other employees who were laid off the week before. The only employee not recalled on Monday, or a day or so later, was Griffith.

On Friday, August 9, 1991, Griffith was called at home by Respondent’s personnel director, Margaret McCreary. Griffith was told that Respondent was “having trouble with the forks,” and she would not be coming back to work until “they call you.” Corle testified that he directed McCreary to make this call to Griffith.⁷

⁶The above is based on King’s straightforward and honest testimony. To the extent that Corle’s testimony differs from hers I reject it. He was an unreliable witness generally in this proceeding and, as I show later in this decision, his testimony about the King transfer was unbelievable.

⁷I reject Corle’s testimony that his instructions to McCreary at this time included a statement that Griffith should be told she needed to obtain doctor’s release stating she “could use a stapler.”

Griffith was not recalled to work until January 1992, after a charge was filed with the Board alleging that her failure to be recalled was unlawful and a new consolidated complaint containing such charge issued in late November 1991.

Between Griffith’s layoff and her recall, Respondent moved two employees from other departments into the packing department on a permanent basis. One was Jay Kaufman, who had worked for Respondent for “a little over two years,” and the other was Amy Finnegan, whose commencement date is not in the record. Kaufman was transferred into packing shortly after Griffith’s layoff and Finnegan sometime later, probably in the fall of 1991.⁸

It is uncontradicted that, about 2 weeks after Griffith’s layoff at a meeting of packing department employees, Corle was asked a question about Griffith’s recall. Corle said she would be recalled when “work picked up.” In addition, some time in September 1991, Griffith called the plant to ask about her insurance coverage. On that occasion she talked to Corle. Griffith asked how long she would remain on layoff status. Corle said “work was still slow.” Griffith then asked Corle to give her a call “as soon as you can” and he agreed he would.⁹

On January 13, 1992, Griffith received a certified letter from Respondent, stating that it would be “filling a job opening in the Packing Department” and that she would be recalled if she provided a “medical release from your doctor so that you can perform the packing job.” She was given until January to provide the release. Before her layoff, Griffith had been excused from performing work on the stapler—a small part of the packing job rotated among all the employees in the department—because of a medical release specifically mentioning only her inability to use the rather large stapler which was used to make boxes in which bicycles were shipped. She had never been told by any supervisor or manager that this limited restriction was impairing her overall performance or had anything to do with her layoff or her failure to be recalled, and she never lost any time from work

McCreary was not called by Respondent to corroborate Corle. Whether Griffith was ever told there was any problem with her medical excuse about using the stapler became a significant issue and the underpinning of Respondent’s entire defense as to the Griffith allegation. Therefore the failure of Respondent to call its personnel director, the person who made this call, or at least was instructed to make this call, supports the inference, which I make, that such an instruction was neither given to McCreary nor transmitted to Griffith. It also supports my finding, which is based on many other factors, including his demeanor on the witness stand, that Corle was not a truthful witness.

⁸Finnegan did not testify in this proceeding, but Kaufman did. He was called by the General Counsel. Kaufman had originally been a member of the union organizing committee, but later turned against the Union. He did not attend the June meeting. When he testified he was clearly frightened. He was reluctant to confirm anything in his sworn pretrial affidavit and his testimony consisted mostly of mumbled, incoherent answers suggesting that he would rather be anywhere else but in the hearing room. I do not credit any of his testimony.

⁹The above finding concerning the Griffith-Corle telephone call is based on the credible testimony of Griffith which is compatible with the contemporaneous uncontradicted testimony of the packing department meeting. To the extent that Corle’s testimony about the telephone call can be construed to differ from that of Griffith—and in some ways it was corroborative, I reject it as vague and evasive. It also came from a generally unreliable witness.

because of it. Indeed, in July 1991, she received an evaluation covering the previous 3 months which contained the highest possible marks for 7 of 10 rating categories and the second highest marks for the other 3. She received a total grade of 72 out of a possible 76 points. Nothing was said in the evaluation about the inability to do stapling or all of her job or about medical problems hampering her work or the work of others.

After confirming the requirements set forth in the January 1992 letter with Corle in a telephone conversation, Griffith obtained the required lease and returned to work.

B. Discussion and Analysis

1. The promulgation of the rule

It is settled law that an otherwise valid no-solicitation no-distribution rule violates the Act “when it is promulgated to interfere with the employee right to self-organization rather than to maintain production and discipline.” *Harry M. Stevens Services*, 277 NLRB 276 (1985), citing cases. See also *Mack’s Supermarkets*, 288 NLRB 1082, 1096–1097 (1988).

Here, the evidence shows that Respondent promulgated the April 24 rule in response to the Union’s organizing activities. It was decided on by a management steering committee “a day or two” before it was promulgated, according to Plant Manager Hinson, who was a member of the committee and who alone testified about the promulgation of the rule. Thus, the timing of the promulgation of the rule was closely related to the union campaign which began shortly before. Moreover, announcement of the rule was accompanied by an announcement of an antiunion policy that implicitly explains the reason for the rule. There was no other explanation for the rule, either in writing or orally, at the time it was announced to employees. In these circumstances, it is clear, and I find, that the rule as promulgated to combat the Union and not for any other purpose.

The Respondent has not been able to show that the rule was promulgated to maintain production or discipline. First of all, that reason was not given to the employees at the time the rule was promulgated and announced. Secondly, Hinson’s testimony about the reason for the rule implicates union activity. To the extent that it goes further, his testimony does not withstand scrutiny and conflicts with that of other witnesses, including other Respondent witnesses, in important respects. He testified as follows concerning the reason for the rule:

Q. And what led you or the company to adopt the no solicitation rule dated April 24, 1991?

A. Well, it was a series of events. There were several things that happened. One I saw a lot of litter and it was discussed and it was a problem that hadn’t happened before. Two there were several for instances that I saw where the groups of people or employees got together and were standing around talking about the issues. I know that that is what they were talking about as when I would come up to the group it would typically it would disperse. When I would ask if there was a problem or what is going on, on many occasions someone would tell me they were talking about the union again. Another issue that came up which was

pretty much the final straw was when there were a few physical conflicts about it.

Q. Well, who told you about the physical confrontations?

A. Rick Fetsko.

Contrary to Hinson’s testimony that he was told by lead person and antiunion employee Rick Fetsko about two “shoving matches” between employees during union discussions and that this led to promulgation of the rule, Fetsko testified about only one such shoving match and that he reported this to Hinson *after* the posting of the April 24 rule. This rather serious conflict not only destroys the Respondent’s alleged lawful rationale for the rule, but renders both Hinson and Fetsko unreliable witnesses. Accordingly, I have no confidence in Hinson’s other testimony about a litter problem or his observation of worktime interference that affected production. Although other witnesses saw literature, mostly in the rest rooms none, not even Supervisor Ken Corle, identified this as a litter problem. Moreover, Respondent submitted no documentary support for its contention, suggested by the testimony of both Hinson and Corle, that worktime union discussions were causing production problems prior to April 24 that led to additional overtime. This testimony is simply an exaggeration. Finally, testimony from all three of these witnesses—Hinson, Corle, and Fetsko—about litter and production problems was vague, limited, unspecific as to dates, times, location and, in some cases employees involved. The testimony was very unfocused and conclusory. In these circumstances, I cannot accept as reliable any of their testimony as to what happened prior to the promulgation of the April 24 rule that may have led to its adoption.

Other testimony about alleged problems with the union solicitation distributions in the plant before April 24 was inconclusive. Some witnesses testified there were no problems. Others testified about problems with the distribution of literature or the occasional talking between employees that were isolated or minor and with no placement of these incidents prior to April 24. Nor were most of these incidents shown to have been transmitted to the steering committee before its deliberations on the promulgation of the rule. Thus, this testimony, like that of the management witnesses discussed above, fails to support Respondent’s position and does not rebut the overwhelming evidence that the rule was adopted for a discriminatory purpose.

In sum, Respondent’s asserted reasons for adopting the rule have been shown to be unsupported and pretextual. The real reason was to discourage union activity. I find therefore that Respondent’s promulgation and maintenance of the April 24 rule was violative of Section 8(a)(1) of the Act.

2. The arson warning

As shown in the factual statement, Carson was one of the three top union adherents. She was issued a warning for “soliciting in work areas” several minutes before the beginning of her shift on May 23, at a time when the union campaign was in full swing. This was admittedly an attempt to apply and enforce the April 24 rule. I have previously found that the rule was unlawfully promulgated and maintained. It is clear that warnings implementing such an unlawfully promulgated and maintained rule are themselves unlawful. See

Elston Electronics Corp., 292 NLRB 510, 511 (1989). Thus, the violation here is clearly established on this round alone.

However, in addition, and apart from the above theory of violation the General Counsel alleges that the rule was discriminatorily enforced against Carson. I agree. The evidence amply supports this allegation. First all, Respondent's warning makes clear that it penalized Carson for union solicitation on her own time, albeit in a working area where no one was working. This is a protected concerted activity. Restrictions on nonworktime solicitations in work areas are unlawful. See *Brunswick Corp.*, 282 NLRB 794, 797-798 (1987). The first warning issued to Carson apparently accused her of soliciting on worktime, but it was destroyed when it was made plain that she did whatever she did on her own time, before work began. What she actually did was distribute literature in a work area before work, something which might have literally violated the April 24 rule. But Respondent was so unconcerned about the distribution of literature and so concerned about getting Carson that it accused her of solicitation in a work area—something that she did not do and which is neither proscribed by the April 24 rule nor unlawful. Respondent's penalty jumbles words from two separate rules—"soliciting" from the no-solicitation rule and "in work areas" from the no-distribution rule—to manufacture a new offense. Not only is work area nonworktime solicitation lawful, but Respondent's conduct illustrates that it was concerned about the content of Carson's message rather than any distribution problems which might have justified a valid rule or a valid warning. Thus, it is clear that Respondent's motivation for the issuance of the warning was unlawful.

Since there was no legitimate concern about production or disciplinary matters, Respondent cannot show persuasively that it would have punished Carson notwithstanding its discriminatory motivation. Moreover, Corle did not actually see Carson distributing literature. He engaged in little, if any, investigation of the matter. He apparently received a report about it and had a warning, which was later destroyed, written up and waiting when Carson was called to his office.

In further support of this allegation, it appears that the rule was only enforced once and only against Carson. Uncontradicted evidence shows that both before the union campaign began and after it ended other forms of solicitation, such as the selling of sandwiches and football pools, went on during worktime and in work areas. There is no evidence that management officials punished employees for this activity. It thus appears that the April 24 rule was used for the union campaign and was selectively enforced.

For all the reasons set forth above, I find that the Respondent's May 23, 1991 warning issued to Carson violated Section 8(a)(3) and (1) of the Act.

3. The King transfer

Another union leader, Donna King, was involuntarily transferred from the night shift to the day shift on June 10, 1991. The evidence clearly shows that a reason for the transfer was King's position as a union activist. The Respondent has not shown, in the face of this evidence, that the transfer was effectuated for a lawful reason or would have occurred even absent King's union activity. On the contrary, the reason offered by Respondent at the hearing was a pretext.

Not only was King a known union activist but her involuntary transfer came shortly after the well-publicized June 2 union meeting which was a hot topic of discussion at the plant. She was identified as one of the three employees who attended the meeting. The timing of the transfer in these circumstances supports the inference of discrimination, as does Respondent's animus which is demonstrated not only by its statements against the Union but by its other discrimination, including promulgation and maintenance of the April 24 rule and the discrimination against Carson just a few weeks before the action against King. This is ample evidence supporting a prima facie case of discrimination against King.

But there is more. The transfer was involuntary and, although there was considerable evidence of other transfers at the Bedford plant, none were shown to have been involuntary. Moreover, the uncontradicted evidence shows that 2 weeks before King's involuntary transfer, another employee had agreed to transfer to the day shift, suggesting that not only was there no need for an involuntary transfer at this time, but there was no need to focus on King. This evidence shows that Respondent had prior plans to move an employee from the third shift to the first because a new employee was going to be hired for the third shift. Actually, another third-shift employee—a decaler like King—had asked to be transferred to the first shift. And subsequent events showed that King's departure caused other—voluntary—transfers into and out of the third shift, obviously to fill in for King. Finally, according to testimony which I have credited, Corle gave reasons for King's transfer which sounded much like he wanted to separate her from other employees so she could not solicit them on behalf of the Union. She was basically unsupervised for most of the night shift and there was no evidence that she had any prior problems with wasting time talking to others or going too often to the rest rooms, the substance of the reasons offered by Corle to King for the transfer. The uncontradicted testimony was that these were at most general problems affecting all third-shift employees and King received no prior warnings for such problems. Indeed, King's last evaluation, dated July 1, 1991—after the transfer—was praiseworthy in every respect and mentions nothing about the reasons Corle stated to King at the time of her transfer. King was thus a very good employee whose involuntary transfer would not have been expected absent her union activities.

Respondent's explanation for the transfer—offered by Corle at the hearing—fails completely and such failure not only exposes it as a pretext but strengthens the inference of discrimination. Corle testified that he told King that he was transferring her to the day shift because of her problem with decal bubbles that needed to be resolved by her transfer to the first shift where an employee who had a solution to the problem could train her. The explanation is so preposterous that it confirms my opinion about Corle's complete unreliability as a witness. This so-called bubble problem was a general one affecting all employees. According to Corle, however, King was pinpointed as the source of most of the problem. Putting aside that there was no documentation or other corroboration of Corle's testimony in this respect nothing even close to this appeared in King's last evaluation which was dated after the transfer. Moreover, the bubble problem was hardly difficult of solution. Apparently, the answer was to apply a squeegee to press the decal from one

end to the other, a process which could be learned, even according to Corle, in 1 day. I would say 10 minutes and without need for a transfer. Yet King remained on the first shift for 2 or 3 weeks until the third shift was abolished. She was the only decaler transferred to learn this remarkable solution although, as Corle admitted, others on the third shift had this problem. Corle's explanation for King's transfer is inherently implausible.

In these circumstances, I find that Respondent's involuntary transfer of King in June 1991 was discriminatory and violated Section 8(a)(3) and (1) of the Act.

4. The Griffith allegation

As shown in the factual statement, Griffith was one of the three top union adherents identified as having attended the June 2 meeting. Her union activity was widespread and well known. The Respondent was discriminating against people engaged in union activities and focusing on the leaders. In late May it discriminated against Carson and in early June against King. When, in mid-August, Respondent was faced with whether and when it should recall Griffith from a lawful layoff, it made a personnel decision which I find was motivated by the same discriminatory reasons which prompted it to penalize Carson and King.

The evidence shows that some 15 employees were laid off on about August 8 for lack of work. The layoff was short—a few days for all but Griffith. She alone was not recalled for 5 months. Nothing would explain the failure to recall as an objective matter because there was plenty of work in Griffith's packing department. Two less senior employees were transferred into the department during her absence. And nothing was said to her, according to the credited testimony, about why she was not being recalled, except for lack of work. This, of course, was not accurate. Moreover, Griffith was a highly regarded employee about whom objectively there could not be any other reason for the continued failure to recall. She had a truly commendable evaluation in July 1991 just before the layoff. That evaluation reveals no problems in attitude or work. In these circumstances, Griffith's failure to be recalled from layoff can only be explained by her leadership role in the aborted union campaign. Thus, the General Counsel has clearly established a prima facie case of discrimination.

Respondent's explanation for its refusal to recall Griffith comes from the discredited Corle. The background is as follows. Before her layoff, Griffith had hurt herself using the staple gun which is one of several functions connected with the packing department job, at least after sometime in April 1991. The employees rotated each function. Each employee ordinarily spent 2 hours per rotation on the staple gun. Each of the nine employees in the department would perform the function about once every 2 or 3 days. However, when she was injured in late April, Griffith was working the stapler for 4 consecutive hours. The next day she obtained a note from her doctor restricting her use of the stapler and submitted it to Corle. She submitted two similar notes continuing the restriction thereafter, one in May and one in June. From late April to August 8, when she last worked before her long hiatus, Griffith was not assigned to work the stapler and no one in management or supervision said a word about it. There were no suggestions that she was not carrying her load, that there were any problems with continuing the medical restric-

tion or that she needed to transfer to another job or get further attention. Nothing.

Back to Corle's testimonial explanation for refusing to recall Griffith. He says it was because Griffith could not use the stapler and because she was not a useful team player without a doctor's release stating that she could use the stapler. One perhaps could give some initial credence to this explanation had it been offered to Griffith at any time before she was recalled in January 1992. But it was not. Griffith credibly testified as much and Corle's testimony that he did tell her and, in the alternative, she should have known on her own to provide a release is not believable.

Corle's testimony that he communicated his concern about her inability to use the stapler as the reason for his failure to recall her from layoff is as incredible as the rest of his testimony. He said that, about a month after Griffith's layoff, he received a telephone call from her. Here is his testimony:

Q. Can you describe for us what that conversation was, who said what to who?

A. Yes. She called. I go. paged to answer it and she asked me why was Jay Kaufman moved into the Packing area and she wasn't called back, and it's because he could do all of the steps in the team concept.

Q. And did you tell her that?

A. Yes. And I told her that if something else came up that was available, I would recall her.

I find the testimony itself wishy-washy but, even Corle's own account does not reveal that he told Griffith anything about not using the stapler or getting a doctor's release. Griffith's account of a telephone call between the two at about the same time is much more credible. Indeed, her account is supported by the uncontradicted testimony that, at a packaging department meeting about this time, Corle was asked a question about Griffith's return and he stated that she would be recalled when work picked up. Nothing was said in that meeting about staplers or medical releases. Finally, as I said at footnote 7 of the actual statement, Corle gave no instructions to anyone else to relay to Griffith that she was not being recalled because of her inability to use the stapler or failure to obtain a medical release. Corle's uncorroborated testimony that he did simply highlights his unreliability as a witness.

Thus, it is clear that Respondent told Griffith nothing other than lack of work—which was not true—for the failure to recall her from layoff. Respondent's alternative position—that she should have known on her own that she needed a medical release—is, in view of all the circumstances, unpersuasive. She did not even know that her failure to use the staple was a problem; actually, I am convinced it was not, in view of the lack of any other evidence to corroborate Corle on this point. In any event, although Respondent did require medical releases when an employee came back from a medical leave of absence, that requirement could not apply where the employee, as Griffith, was actually performing her job every day without objection being raised by her supervisors. More importantly, Griffith received an evaluation in July 1991 that mentioned nothing about this requirement. This confirms that her work—even though it did not include using the stapler—was perfectly acceptable and that her attitude about her job was perfectly acceptable. Indeed, the eval-

uation confirms that all aspects of her job were commendable. In these circumstances, it is hard to believe even under Respondent's view of the case, that it would not have recalled Griffith to other jobs, including "light duty" work, absence union discrimination. Accordingly, I find that Respondent's belated explanation for the refusal to recall Griffith was a pretext to ask the real discriminatory reason for its conduct. Respondent found an opportunity to punish Griffith as it had the other two attendees at the June 2 union meeting and it did so.

Respondent makes much of the fact that Griffith was in effect replaced by Kaufman, another union organizing committee member. This does not provide a defense to the discrimination charge Kaufman was not nearly as active as Griffith; nor did he attend the notorious June 2 meeting. More importantly, he turned against the Union at some point. He said that this happened in the fall of 1991, but because conversions of this type rarely occur in a vacuum and because Kauffman was such an unreliable and shaky witness, I believe his conversion occurred earlier, most likely before he was transferred to the packing department. This would be consistent with the end of the union campaign in June 1991. Thus, instead of militating against a violation, Kaufman's conversion supports the violation. Even assuming, however, that Kaufman was viewed as a prounion employee until the fall of 1991 this does not explain why Griffith was not recalled before Finnegan was permanently transferred into the packing department. In any event, the law is clear that an employer cannot defeat a finding of discrimination by asserting that it retained some union supporters while dismissing others. See *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

Finally, Respondent points to a September 6, 1991 letter from its attorney to the Labor Board agent investigating the charge that Respondent had discriminated against Griffith advising him that she had been laid off August 15 following receipt of a letter from her doctor stating that she could not use the stapler and advising further that Griffith would be eligible for recall, based on production needs, if she was able "to perform all duties of her job." The letter cannot provide, indirectly, the notice to Griffith of an alleged problem that the evidence shows was not provided directly. Significantly, the letter was not addressed or sent to Griffith and it was never delivered or communicated to her. Indeed, in the absence of some kind of authorization or instruction, there was no obligation on the part of the Board agent to communicate this information to her. Cf. *Western Cab Co.*, 305 NLRB 578 (1991); *Frank Invaldi*, 305 NLRB 493 (1991).

In any event, it is difficult to see how this letter aids Respondent's case. Counsel's representations in the letter do not amount to evidence even granting the self-serving and adversarial nature of statements from counsel as a general matter, this letter contains several misstatements. For example, the letter states that Respondent had no knowledge of Griffith's union activity. However, both Respondent's president, Montgomery, to whom a copy of the letter was sent, and Supervisor Corle, who was intimately involved in the Griffith matter, clearly testified that they knew of her union activity. Another inaccuracy in the letter is its suggestion that Griffith's August 15 layoff (it actually occurred on August 8) followed closely the receipt of a doctor's letter saying she could not

use the stapler. In point of fact the first such letter was delivered to Respondent in late April, well before the layoff that no one alleges was caused by her inability to use the stapler. Other letters were delivered in May and in June, and Griffith continued to be excused from using the stapler without comment by her supervisors even under their version of the facts. In view of these inaccuracies, I can hardly give this letter any weight. To suggest, therefore, as Respondent does at page 43 of its brief, that this letter somehow supports Corle's testimony that he told Griffith a few weeks after her layoff that she would be recalled when she was medically able to use the stapler presumes considerable naivete on the part of the trier of fact. More likely, in view of his general unreliability as a witness, Corle tailored his testimony to fit Respondent's litigation theory.

In these circumstances, I find that Respondent violated Section 8(a)(3) and (1) of the Act by refusing and failing to recall Griffith from layoff on and after August 8, 1991.

CONCLUSIONS OF LAW

1. By promulgating and maintaining the April 24, 1991 no-solicitation no-distribution rule for a discriminatory purpose, Respondent has violated Section 8(a)(1) of the Act.

2. By applying the above rule in a warning issued to employee Cindy Carson on May 23, 1991, and by issuing it discriminatorily, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By transferring employee Donna King on June 10, 1991, for discriminatory reasons, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By refusing to recall or reemploy employee Patricia Griffith on and after August 8, 1991, for discriminatory reasons, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

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

I shall also recommend that Respondent be ordered to remove from the employment records of Griffith, Carson, and King any notations relating the unlawful action taken against them and to make Griffith whole for any loss of earnings or benefits she may have suffered due to the unlawful action taken against her, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

¹⁰If 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.

ORDER

The Respondent, Cannondale Corporation, Bedford, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, or enforcing no-solicitation/no-distribution, or any other, rules for the purpose of discouraging union activities.

(b) Issuing warning notices to, transferring, refusing to recall or reemploy, or otherwise disciplining or discriminating against, employees because they have engaged in union activities.

(c) 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) Rescind the April 24, 1991 no-solicitation/no-distribution rule and notify all employees that this has been done.

(b) Make employee Patricia Griffith whole for any loss of earnings or benefits she may have suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Remove from its files any reference to the discriminatory actions taken against employees Griffith, Carson, and King, and notify them that it has been done and that evidence of such actions will not be used as a basis for future personnel actions against them.

(e) Post at its facility in Bedford, Pennsylvania, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 6, 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

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT promulgate, maintain, or enforce any no-solicitation/no-distribution, or any other, rules for the purpose of discouraging union activities.

WE WILL NOT issue warning notices to you, transfer you, refuse to recall or reemploy you, or otherwise discipline or discriminate against you because you have engaged in union activities.

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

WE WILL rescind the April 24, 1991 no-solicitation/no-distribution rule and WE WILL make Patricia Griffith whole for any loss of earnings she may have suffered because of our discriminatory treatment of her, with interest.

WE WILL remove from our files any reference to the discriminatory action we took against employees Patricia Griffith, Cindy Carson, and Donna King and notify them that this has been done and that evidence of such actions will not be used against them in the future.

CANNONDALE CORPORATION