

Braden Manufacturing, Inc. and Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers. Case 26-CA-16050

December 23, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

On August 26, 1994, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Braden Manufacturing, Inc., Fort Smith, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Bruce E. Buchanan, Esq., for the General Counsel.
Richard L. Barnes, Esq., of Tulsa, Oklahoma, for the Respondent.
Mr. Owen J. Bill, of Tulsa, Oklahoma, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD, JR., Administrative Law Judge. I heard the case June 8, 1994, in Fort Smith, Arkansas, on charges filed February 25 and complaint issued March 29, 1994, alleging Respondent's plant rules unlawfully curtail employees from engaging in union solicitation, distribution of union literature, and use of bulletin boards to post union-related literature thereby violating Section 8(a)(1) of the Act; and that Respondent disciplined employee Gail Mangham for supporting the Union violating Section 8(a)(3) and (1) of the Act.

FINDINGS OF FACT

I. JURISDICTION

Respondent manufactures exhaust silencing duct works for gas turbine engines at a plant in Fort Smith, Arkansas, from which it annually sells products valued in excess of \$50,000 directly to customers outside Arkansas. Respondent admittedly is an employer engaged in commerce within the meaning of the Act, and the Union is admittedly a labor organization as statutorily defined.

II. THE UNFAIR LABOR PRACTICES

Respondent's plant rules 16 and 27 respectively prohibit the following:

Bringing printed materials, radios, or other non-work related items in the plant during working hours without authorization.

Solicitation of fellow employees for any purpose, selling tickets, passing petitions, or distributing literature on company premises without authorization of Management.

The rules are enforced beginning with oral or written warnings leading to suspension and discharge. (G.C. Exh. 4.)

Respondent's Fort Smith plant started operations in February 1991 manned by 125 employees on 2 shifts. The plant employees were unrepresented by a union. Beginning sometime in December 1993, the Union began an organizing drive seeking to represent Respondent's employees. It is admitted that the plant rules described above, as well as others discussed below, governed employee conduct at all times relevant here. The Board while finding an employer's plant rules unlawful recently noted as follows:

The judge found that Respondent's plant rule 27, prohibiting solicitation or distribution "[o]n Company premises . . . unless approved by the Company," was presumptively invalid under *Our Way, Inc.*, 268 NLRB 394 (1983). The judge went on to observe, however, that the rule's existence had no apparent restrictive impact on the wearing of union insignia, the distribution of union literature, and the solicitation of union authorization card signatures on the Respondent's premises during the Union's organizational efforts in 1987 and 1988. The judge therefore concluded that the Respondent did not violate Section 8(a)(1) because the rule was applied in such a way as to convey an intent to permit union solicitation or distribution during the employees' nonworking time. We disagree.

At the outset, we note that the rule, on its face, is overly broad, i.e., it is not restricted to working time. It is clear that the maintenance of a rule that is not so restricted is presumptively unlawful. See *Our Way*, supra. However, an employer can avoid the finding of a violation by showing through extrinsic evidence that its rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work. *Our Way*, 268 NLRB at 395 fn. 6, citing *Essex International*, 211 NLRB 749, 750 (1970). We find, however, that Respondent in this case failed to make that showing.

In this regard, we note that Respondent failed to adduce any evidence that it told employees that solicitation during nonworking time was permitted. Nor did Respondent show that it knowingly tolerated solicitation during nonworking time. *MTD Products, Inc.*, 310 NLRB 733.

Respondent in the proceedings before me failed to present any evidence that it drew a distinction between working and nonworking time in the enforcement of the rules so as "to

convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work.” *Essex International, Inc.*, supra, 211 NLRB 749, 750. There is no evidence that the Respondent here told employees that solicitation during nonworking time was permitted or that Respondent tolerated such conduct. It is further clear and undenied that rule 16 governing distribution “is not confined to work areas and that Respondent has not shown that it knowingly tolerated distribution in nonwork areas.” *MTD Products*, supra at 733 fn. 3. Based on the foregoing, Respondent’s overly broad rules prohibited all solicitation and distribution in violation of Section 8(a)(1) of the Act.

A. Bulletin Board Restriction

Employee Gail Mangham testified credibly and without contradiction that about a week prior to February 17, 1994, Plant Superintendent John Stiles called him to a meeting with Foreman John House present and accused Mangham of hanging union papers on a bulletin board in the stainless steel shop. The papers invited employees to a union meeting. Mangham denied doing so and Stiles retorted by claiming he had two witnesses and asking whether Mangham was calling them liars. He then ordered Mangham to read Respondent’s work/conduct rule 26, which prohibits the posting of notices on bulletin boards or in other plant areas without authorization of management. (G.C. Exh. 4.) After asking if the employee understood the rule, Stiles then ordered Mangham “to go on back to work and not put any notices on the board.”

Mangham testified further, still without contradiction by Stiles or House, that the bulletin board in question serves as a board where employees put up for-sale notices to sell cars and boats and where company literature is posted. He further explained there is a covered (or enclosed) board, while others are open where employees tack up notices—and that the board involved in this instance was an “open” board. He testified that antiunion postings continued after Stiles’ admonition against posting union-related notices. Included among such materials is a copy of a note posted where employees pick up their tools by Leadman Clarence Green in the toolcrib. The note reads:

I took my posters down but, a lot of rumors started
goin round so now as you see there no longer down
Roses are red violets are blue now what’s the union
going to do
This box is mine O don’t it shine The union can kiss
my behind
Space for rent must be nonunion Cost free See
owner of this box

CG. [G.C. Exh. 6.]

Employee witness Gary Pruitt testified that he posted a gospel saying on a bulletin board used by employees in the plant without getting permission, that 22 individuals signed it, including Foreman John House, himself, and that the notice remained on the board as of this hearing a month since he posted it. Pruitt credibly testified without denial that Respondent published and posted “Rumor—Fact” bulletins rebutting so-called rumors originating from the Union’s organizing campaign on all the plant bulletin boards.

Respondent did not question Stiles, House, or Green on the corroborated testimony credibly rendered by Mangham and Pruitt. Instead, it called Supervisor Bill Rozell, who replied to leading questions about an incident allegedly occurring “since December of 1993” when he allegedly found and removed union meeting notices on a “restricted” bulletin board in the department but admittedly did not know whether another bulletin board by the bathroom was restricted or not. Rozell corroborated Pruitt and Mangham in fact, admitting that Respondent posts “Rumor—Fact” bulletins on the Company bulletin board regarding alleged rumors the Union is circulating. Moreover, Rozell did not address or connect his account to that rendered by Mangham, leaving the latter’s testimony intact.

The applicable legal standards are well established:

However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or in general any non work related matter, it may not “validly discriminate against notices of union meetings which employees also posted.” Moreover in cases such as these an employer’s motivation no matter how well meant, is irrelevant.

Guardian Industries Corp., 313 NLRB 1275 (1994), and cases cited. The Respondent’s conduct here parallels that prohibited in the cited cases and likewise violates Section 8(a)(1). A further basis for such conclusion rests in the undenied testimony that Stiles ordered employee Mangham not to put any notices on the board after accusing him of posting union meeting notices. Even assuming that Respondent’s bulletin boards consist of glass enclosed ones and open ones—a genuine question given Supervisor Rozell’s inability to identify which ones in his own department are restricted as opposed to open ones—Plant Superintendent Stiles left ambiguous and uncertain whether he was promulgating a new rule against employees putting union-related matter on all the plant bulletin boards or just on restricted ones. As has been noted by the Board:

Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it.

Fruehauf Corp., 237 NLRB 399, 400 fn. 8 (1978). Stiles’ injunction to the employee thus amounts to an unlawful discriminatory blanket prohibition against the use of any plant bulletin board to post any union-related communication to employees.

Although the findings of disparate enforcement of Respondent’s rules concerning use of its bulletin boards was not specifically alleged in the original complaint, the matter was fully litigated at trial without objection by Respondent’s counsel rendering a conclusion thereon appropriate. *Leather Center, Inc.*, 312 NLRB 521 fn. 4 (1993). Accordingly, the General Counsel’s motion on brief to amend the complaint to confirm the pleadings to the proof in such respects is granted, and I find Respondent through Stiles promulgated

and maintained rules governing the use of plant bulletin boards violative of Section 8(a)(1) of the Act.

B. Respondent's Discipline Against Employee Mangham

Employee Gail Mangham began work as a fitter/welder on the first shift under Foreman Ray House in June 1991. He first became actively involved in the Union's campaign to organize employees at the Respondent's facility in December 1993, placing union stickers on his work toolbox, on his truck and lunch bucket, and on his hardhat, which he wore 8 hours a day around the plant. The lettering on the hat reads, "Vote yes for the Union," and when the inscription wore off, he replaced it with a new such slogan. Mangham also held membership on the Union's organizing committee. Foreman House testified he obviously became aware in 1993 that Mangham actively supported the Union, and as noted Plant Superintendent Stiles accused Mangham of engaging in the posting of union meeting notices together with House, Stiles antagonistically attempting to put Mangham on the defensive by suggesting Mangham accused two witnesses to his posting of the union meeting notices of being liars. Plant Manager W. Grant Olcott became aware of the Union's campaign in early or mid-December 1993 and testified the Company sent out letters to employees setting forth its opposition to the Union. Olcott testified he knew Mangham, and was aware in January and February 1994 he was in favor of the Union's representing employees at the Fort Smith plant, that Mangham was up front and forward about it. Foreman House acknowledged in his testimony that he didn't think it was a good idea for the Union to come in.

The timing of the below-described warnings issued against Mangham, February 1 or 2, 14, and 17, 1994, are less than 2 months after the union campaign commenced during which Mangham outwardly displayed his prounion sentiments.

C. The Warnings

Mangham testified he tried to secure a copy of his several pages' long appraisal on numerous occasions. While acknowledging he had signed it in House's presence, he understandably testified he wanted to read it to see if he could improve himself free from the intimidating presence of Foreman House. He recalls that on February 1 or 2, 1994, he asked J. R. Meadows a leadman and admitted supervisor as defined in the Act to get him a copy of the appraisal because the personnel office "don't give you a copy." Meadows told Mangham "they'd not let it out of the office after Meadows tried to secure a copy." Notwithstanding the fact that the employee had directed his request to an admitted supervisor who manifestly could have rejected it, House issued a verbal warning to Mangham for what he had done, yet remarkably conceded the rule, rule 23, which simply states as being prohibited conduct: "Failure to follow production procedures set up by your Supervisor or by Company Management." General Counsel's Exhibit 4 does not really set forth a prohibition of the conduct for which he disciplined Mangham. He failed to explain why Mangham's reliance on Meadows—a supervisor House testifies he relies on for input on the 12 employees under him—did not exculpate Mangham from any blame whatsoever.

On February 14 Mangham went to the office on his lunchtime to see a copy of his evaluation and was told by Linda

Thompson he couldn't see it without House being present. Mangham explained that he didn't want to take it out, just read it there. Although the chronology in later events is left somewhat unclear, it appears that the request on February 14 was rejected and admittedly House told him later during the below-described meeting on February 17, that House verbally warned him regarding Mangham's February 14 visit to the front office. This would make it two verbal warnings so far. On February 17, Mangham asked Meadows for permission to go to the office at lunchtime to see his evaluation and Meadows gave him approval to do so, telling Mangham he had his permission.

D. The February 17 Written Warning

On arrival during lunchtime Mangham's request led Thompson to tell him she would call the Tulsa office and get a ruling, that he should return at 2 p.m. on break. Meadows on the report from Mangham told him that would be fine. Later House called Mangham to his office and issued him a written warning citing rule 16, described and set forth above, viz because the employee brought a camera into the plant without authorization; and a further warning for violating rule 23, by going to the front office without seeing a foreman first. (G.C. Exh. 5.)

Yet rule 23 as noted fails to interdict Mangham's conduct. It reads simply as prohibited conduct: "Failure to follow production procedures set up by your Supervisor or by Company Management." Rule 16 likewise fails to prohibit bringing cameras into the plant, simply stating as prohibited conduct: "Bringing printed materials, radios or other non-work related items in the plant during working hours without authorization."

Mangham had brought a camera into the plant to photograph antiunion notices in Green's toolcrib and the pictures did not develop. The parties agreed that this was the only occasion between January 1, 1992, to the time of the hearing June 8, 1994, that any employee in the Fort Smith plant force was ever given written disciplinary action for violating either rule. Respondent's own Human Resources Manager Sharon Lawrence not only testified that she told Thompson at some point in the chronology of events involving Mangham that an employee should be able to get a copy of the appraisal but significantly also testified that the cited rule 23 would *not* be violated by an employee visiting the office for the purpose Mangham had if it was on breaktime or lunchtime as did Mangham. Even more significantly, Respondent, according to Lawrence dropped this interpretation of the rule altogether and allows employees to have copies, yet would not agree that it was unfair to nevertheless discipline Mangham based on the jettisoned "rule." House originally didn't even know whether or not there was a rule against bringing a camera into the plant. Employee witnesses testified they'd never been informed of such a rule. They testified to past examples where there was use of cameras in the plant without the obtaining of permission and a video camera recording was received into evidence further supporting such a finding. To avoid offending collateral matters and delay to this proceeding, I agreed with respect to a video film to resolve on an assuming arguendo basis the legal significance of whether a two employee video of the plant picked up one asking whether supervision would object. (All Party 1.) The General Counsel and I do not hear such question; Respondent counsel

does. Assuming the question is asked, such does not rise to the level of probative evidence the two employees knew that authorization for the filming was required either then or generally and I so find. Moreover, the record is replete with instances when nonemployee visits occurred at the plant and other picture taking occurred, facts which tend to weaken Respondent's alleged support for the camera rule being based on proprietary concerns for the confidentiality of its products, as well as to militate against there being any rule at all in such regard. Respondent's asserted basis for disciplining Mangham for visiting the front office is even more flimsy and unsupported inasmuch as Lawrence admitted such a visit on breaktime simply didn't violate the work/conduct rule involved, rule 23 which makes no mention whatsoever of conduct which would prohibit what Mangham did. Significant indeed is the abundant and uncontradicted testimony by employees that they routinely visited the front office on personnel matters on many occasions without first securing permission.

Based on clear, abundant evidence of Mangham's union activities, Respondent's knowledge thereof, and animus toward the employee's protected conduct as well as the timing of Respondent's actions against him combined with the remarkably unpersuasive and totally unsupported advanced reasons for the discipline against him together with self-damaging admissions by Respondent agents, I find that the General Counsel has established a clear prima facie case to support the complaint allegations. The burden therefore falls on Respondent to demonstrate that it would have disciplined Mangham in the respects noted even aside from his support for the Union. *Wright Line*, 251 NLRB 1083 (1980), affd. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). This it failed to do. I find the Respondent's actions against Mangham violate Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By maintaining and enforcing overly broad rules that prohibit unauthorized solicitation and distribution at all times, including employees' nonworking time, the Respondent has violated Section 8(a)(1) of the Act.
4. By promulgating, maintaining, and enforcing a policy which prohibits employees from posting union-related materials on bulletin boards that are available for personal use by employees, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. By issuing verbal and written warnings against Gail Mangham on February 1 or 2 and 14 and 17, 1994, Respondent violated Section 8(a)(3) and (1) of the Act.
6. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent violated Sec. 8(a)(1) and (3) of the Act, I recommend an order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Braden Manufacturing, Inc., Fort Smith, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing and maintaining overly broad rules that prohibit unauthorized solicitation and distribution at all times, including employees' nonworking time.

(b) Maintaining or enforcing a policy which discriminatorily prohibits its employees from posting union-related material on bulletin boards which are otherwise available for personal use by employees.

(c) Prohibiting its employees from posting union-related materials on bulletin boards which are otherwise available for personal use by employees.

(d) Issuing verbal and written warnings or otherwise discriminating against any employee for supporting Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers or any other labor organization.

(e) 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 this affirmative action to effectuate the policies of the Act.

(a) Rescind work/conduct rules 16 and 27 which prohibit unauthorized solicitation and distribution at all times, including employees' nonworking time.

(b) Withdraw and rescind any rules or policies which discriminatorily restrict employees' use of Respondent's bulletin boards which are otherwise available for general use by employees.

(c) Rescind the disciplinary warnings against Gail Mangham, remove them from Respondent's files, and destroy any and all writings comprising documenting or referring to the warnings and notify Mangham in writing that this has been done and that those unlawful actions will in no way serve as a ground for or influence future personnel or disciplinary action against him.

(d) Post at its facility in Fort Smith, Arkansas, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² 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."

(e) 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.

WE WILL NOT try to enforce and maintain a rule prohibiting unauthorized solicitation or distribution during employees' nonworking time.

WE WILL NOT prevent you from posting union-related materials on bulletin boards available to you for personal use.

WE WILL NOT issue verbal and written warnings against any employee because of the employee's support for

Shopmen's Local Union No. 620 of the International Association of Bridge, Structural and Ornamental Iron Workers or any other labor organization.

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 work/conduct rules 16 and 27 which prohibit unauthorized solicitation and distribution at all times, including employees' nonworking time.

WE WILL rescind and not try to enforce and maintain any policy which discriminatorily prohibits you from posting union-related materials on bulletin boards which are otherwise available to you for personal use.

WE WILL rescind the disciplinary warnings against Gail Mangham, remove them from our files, and destroy any and all such writings regarding the warnings and notify him in writing that this has been done and that the unlawful discipline will in no way serve as grounds for any future action against him.

BRADEN MANUFACTURING, INC.