

**Publishers Printing Co., Inc. and General Drivers,  
Warehousemen and Helpers, Local Union No.  
89, an affiliate of the International Brother-  
hood of Teamsters, AFL-CIO. Case 9-CA-  
31638-1**

June 23, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND BROWNING

On April 3, 1995, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply 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,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Publishers Printing Co., Inc., Shepherdsville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(b) Maintaining a rule in its employee handbook that is overbroad and discriminatorily prohibits union solicitation.”

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

“(a) Rescind the last two full sentences of the section of its employee handbook entitled ‘Statement on Unionism’ and advise employees in writing that those sentences have been rescinded.”

3. Substitute the attached notice for that of the administrative law judge.

<sup>1</sup> 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall modify par. 1(b) of the judge's recommended Order so that it conforms to the violations found. In addition, we shall modify par. 2(b) of the judge's recommended Order to order the Respondent to rescind the unlawful portion of its “Statement on Unionism” and to advise employees in writing that it has been rescinded. See, e.g., *Ford Motor Co.*, 315 NLRB 609, 616 (1994). Finally, we shall also substitute a new notice so that it conforms to the Order as modified.

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 instruct our employees through the employee handbook or otherwise to inform management of the identity of union solicitors whose activities they subjectively perceive as offensive.

WE WILL NOT maintain rules in our employee handbook that are overbroad or that discriminatorily prohibit union solicitation.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT coercively question you about your union support or activities or those of other employees.

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 last two full sentences of the section of our employee handbook entitled “Statement on Unionism” and we will advise you in writing that those sentences have been rescinded.

PUBLISHERS PRINTING CO., INC.

*Donald Becher, Esq.*, for the General Counsel.  
*David B. Sandler, Esq.*, of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On a charge filed on March 3, 1994, by General Drivers, Warehousemen and Helpers, Local Union No. 89, an affiliate of the International Brotherhood of Teamsters, AFL-CIO (the Union) the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint and amended complaint on May 12 and October 17, 1994, respectively, alleging that Publishers Printing Co., Inc. (the Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed timely answers denying that it has committed any violation of the Act.

A hearing was held at Shepherdsville, Kentucky, on November 15, 1994, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

## FINDINGS OF FACT

## I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation engaged in the business of printing and distributing magazines at facilities in Shepherdsville and Lebanon Junction, Kentucky.

During the 12-month period preceding October 17, 1994, the Respondent, in conducting its business operations, sold and shipped from its Shepherdsville, Kentucky facility goods valued in excess of \$50,000 directly to points outside the Commonwealth of Kentucky. The Respondent admits, and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

## A. Section 8(a)(1)

## 1. Handbook statement concerning union organizing activities

The handbook that all employees are issued at the start of their employment contains a section entitled "Statement on Unionism" in which the Respondent states that it operates a nonunion plant and that it intends to operate its business so that its employees "will never feel it necessary to belong to a union." The handbook section concludes with the following statement:

Also, if anybody should at any time cause any of our employees any trouble at work or put them under any sort of pressure to join a Union, our employees should let the Company know about it and we will see that this is stopped. Everyone should also know that no person will be allowed to carry on Union Organizing activities on the job and that anyone who does so and thereby neglects his or her own work or interferes with the work of others will be subject to serious disciplinary action.

The General Counsel contends that this handbook provision interferes with employees' rights in violation of Section 8(a)(1) of the Act because (1) it is overly broad and includes within its prohibition lawful attempts by union supporters to persuade other employees to engage in such support; (2) the prohibition of union solicitation "on the job" is overly broad and could reasonably be construed to prohibit such solicitation during nonworktime; and (3) on its face, the prohibition applies only to "union" solicitation and permits other types. The Respondent contends that the provision is not coercive because (1) it offers assistance only to employees who feel coerced by other employees or a union and not by the Company; (2) it should be clear that it applies only to union activities that cause employees to neglect their own work or interfere with the work of others; and (3) another handbook section, entitled "Solicitation Rules and Bulletin Boards"

contains a provision prohibiting solicitations of any kind for any purpose during "working time," which makes it clear that employees should not engage in union solicitations of other employees at times when they or the other employees should be working.

## Analysis and conclusions

The overall language of the "Statement on Unionism" provision is very similar to and the above-quoted portion, which is alleged to be unlawful, is nearly identical to that considered by the Board and found to be unlawful in both *C.O.W. Industries*, 276 NLRB 960 (1985), and *J. H. Block & Co.*, 247 NLRB 262 (1980). As the Board stated in *C.O.W. Industries*, the rule in issue had the "potential dual effect of encouraging employees to report the identity of union solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees and of correspondingly discouraging union solicitors in their protected organizational activities." The same is true here.

In *C.O.W. Industries*, the Board also found the portion of the rule prohibiting carrying on union organizational activities on the job was invalid on its face because it was directed solely against union solicitation, but found it was unnecessary to determine whether the "on the job" limitation was overly broad and impermissible. Here, the Respondent contends that another portion of the handbook, which states that "there shall be no solicitations of any kind for any purpose carried on during working time," clears up any confusion involved in the prohibition against union organizing. While that rule appears to be facially valid,<sup>1</sup> I do not agree that it resolves the matter. The rule under attack here is directed only to union organizing. It appears on page 11 of the handbook in a section entitled "Statement on Unionism" and states that violations of the rule will "be subject to serious disciplinary action." The section dealing with solicitations during working time is found on page 38 and the language is significantly different from that dealing with union organizing. Not only is the prohibition against solicitations limited to those during working time, which is defined as "excluding break periods, meal times, or other specified non-work periods," but there is no threat of serious disciplinary action if a violation occurs. I find there is no reasonable basis to believe that employees would conclude that these two handbook sections must or should be read together or that "on the job" and "working time" must or should be considered synonymous. Accordingly, I find that the rule prohibiting union organizing on the job is invalid on its face and that by continuing to maintain it in its employee handbook, the Respondent violated Section 8(a)(1) of the Act.

## 2. Impression of surveillance

The complaint alleges that the Respondent violated Section 8(a)(1) on February 8, 1994,<sup>2</sup> when a supervisor asked an employee to give him a union authorization card. On February 4, a group of employees, including Scott Maynard, met with Union Representative Timothy Thompson in Louisville, Kentucky, to discuss an organizing campaign at the Respondent's Shepherdsville plant. At that meeting, Maynard signed

<sup>1</sup> See *Willamette Industries*, 306 NLRB 1010 fn. 2 (1992); *Our Way, Inc.*, 268 NLRB 394, 395 (1983).

<sup>2</sup> Hereinafter, all dates are in 1994 unless otherwise indicated.

a union authorization card and was furnished with additional cards and pamphlets for distribution to other employees. Maynard credibly testified that he began soliciting employees to sign cards before and after work and during breaks at the plant and after work at a gas station next to the plant. He distributed 30 to 35 cards, 80 to 90 percent of which were returned to him and turned over to Thompson.

Maynard testified that about a week after he began soliciting employees to sign cards he was approached by Supervisor Wayne Sturgeon while he was on a break and was talking to employees Chris Hopkins and Mark Wilcher at the Weldetron machine where they were working. Sturgeon came over and said to Maynard, "I want one." Maynard asked what he wanted and Sturgeon said "I want a card." Maynard asked what kind of card and Sturgeon replied, "I want a union card." When Maynard did not respond, Sturgeon said, "It's not like I didn't have one in my hands before." Maynard said he didn't have any and Sturgeon walked away. Hopkins testified that he recalled an incident during February when Maynard, who was on his break, was at the machine he and Wilcher were setting up. Sturgeon came up and asked Maynard for a card. When Maynard said that he didn't have any cards, Sturgeon again asked for a card and said that he had seen them before. Hopkins said that he did not hear the word "union" used, but that he did not hear all of the conversation, only about 30 seconds of it, as he was moving around the machine getting ready to take his break. Wilcher testified that while he, Maynard, and Hopkins were standing by the Weldetron machine talking, Sturgeon came over to them and asked Maynard for a union card. Maynard asked what he was talking about and Sturgeon said it wasn't as if he had never had one in his hand before. Wayne Sturgeon testified that he never had a conversation in which he asked Maynard for either a card or a union card. He said he had never seen Maynard with a union card and was never told that Maynard had union cards or was involved with the Union.

#### Analysis and conclusions

An employer creates an unlawful impression of surveillance in violation of Section 8(a)(1) if "employees would reasonably assume from the statement in question that their union activities have been placed under surveillance." *United Charter Service*, 306 NLRB 150 (1992). There is no evidence that Maynard openly distributed cards to the employees he solicited on behalf of the Union or that he informed Sturgeon or any other supervisor about what he was doing. Consequently, if Sturgeon asked him for a union card a short time later, it would be reasonable for him to assume that Sturgeon knew that he had been soliciting cards and that his activities had been under surveillance.

I find the evidence establishes that Sturgeon did ask Maynard for a union card when he was standing by the Weldetron machine talking to Hopkins and Wilcher while on an afternoon break during the second week of February. I found the testimony of Maynard, Hopkins, and Wilcher about this incident to be credible and mutually corroborative. I also find that the minor differences in their versions of what occurred enhance rather than detract from their credibility and that there is no merit to the laborious attack mounted in the Respondent's brief on their testimony or the contention that it amounts to three inconsistent versions of a "con-

cocted" story. On the contrary, if they had fabricated the incident, one would expect their versions to be practically identical, particularly, with respect to Sturgeon asking for a "union card."

Not surprisingly, Maynard, who had been involved in soliciting cards and to whom Sturgeon's comments were directed, had the most detailed recollection of the incident. The fact that he did not relate the incident in the exact same words each time he was asked about it does not, as the Respondent contends, indicate he was not telling the truth. I find that the minor differences in what were essentially similar descriptions of what happened and what was said by Sturgeon and himself cast no significant doubt on the credibility of his testimony about this incident. There is nothing in the testimony of Hopkins or Wilcher that is in any way inconsistent with or contradicts Maynard's testimony about what was said. Their testimony was less detailed, as might be expected, when they were asked 7 months later to recount a conversation that they had observed but were not directly involved in while working. Hopkins readily admitted that he did not hear the word "union" used during the conversation between Sturgeon and Maynard. He also testified that he only heard the first part of the conversation and that more was said after he moved away from the machine.<sup>3</sup> His testimony was consistent with that of Maynard that Sturgeon first asked for a card and, when Maynard demurred, said he wanted "a union card." Wilcher's testimony, which confirmed that Sturgeon did ask for "a union card," did not purport to be a verbatim account of the conversation.

Having observed the demeanor of these witnesses and considered the content of their testimony about this incident, I found that testimony more credible than that of Sturgeon which consisted almost entirely of monosyllabic answers to leading questions posed by the Respondent's counsel. I also find it significant that not only were both Hopkins and Wilcher still employed by the Respondent at the time they testified, but Sturgeon was then Wilcher's immediate supervisor. Under these circumstances, I find it unlikely that either would testify untruthfully. See *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *K-Mart Corp.*, 268 NLRB 246, 250 (1983); *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1961). I find that Sturgeon's comments to Maynard created the impression that his union activities were under surveillance in violation of Section 8(a)(1) of the Act. *Lucky 7 Limousine*, 312 NLRB 770, 771 (1993); *Leather Center*, 308 NLRB 16, 27-28 (1992).

#### 3. Interrogation

Former employee Robert Conner testified that on February 14 he observed his supervisor Wayne Sturgeon giving roses to two female sorters who were working on the machine to

<sup>3</sup> While it is true that Hopkins' testimony about the length of the conversation, that it lasted anywhere from 3 or 4 minutes, 7 minutes, or 10 minutes, clearly establishes that he has no idea how long it lasted, I do not consider that this diminishes his credibility as to what he overheard. He testified that he only listened to the conversation for 30 seconds to a minute before going about his work. Maynard testified that the exchange with Sturgeon lasted only about 30 seconds.

which Conner was assigned that day.<sup>4</sup> As he did so, Sturgeon asked them if they had heard anything about a union in their area. When they did not respond, he told them if they did “hear anything about it,” to let him or someone in management know about it. The complaint alleges that this was an unlawful interrogation in violation of Section 8(a)(1). Sturgeon testified that he did not ask these women if they knew anything about union activities.

#### Analysis and conclusions

I credit Conner’s testimony and find that this incident occurred as he described it. I do not find the fact that Conner was fired by the Respondent or the fact that the Union filed a charge with the Board alleging that he was discriminatorily discharged, which was later withdrawn, without more, are sufficient to discredit his otherwise believable testimony.<sup>5</sup> Unlike the case of the incident involving Maynard, discussed above, Sturgeon did not deny the incident occurred. Instead of describing what was said in his own words, however, his testimony again consisted of little more than a series of negative answers to leading questions posed by the Respondent’s counsel. I find it is entitled to little weight. Conner’s testimony was more credible and that there is no reason to believe that he harbors hostility against the Respondent to the extent that he would commit perjury in a case which would afford him no direct benefit. Both counsel for the General Counsel and for the Respondent contend that a negative inference should be drawn from the other’s failure to call as witnesses the two women to whom Sturgeon directed his questioning. I do not agree. Although they would obviously have direct and pertinent knowledge bearing on this disputed factual issue, given the Respondent’s antiunion philosophy, it cannot reasonably be assumed that they would be favorably disposed toward the Union, on whose charge the complaint was based. As for the Respondent, it did not learn of their identities until after the beginning of what was a 1-day hearing, there was no evidence that they were still employed by it, and there was no basis on which to assume that they would be favorably disposed toward it to the extent that an unfavorable inference would be warranted. Under these circumstances, I decline to draw an unfavorable inference against either side. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Having found that the testimony of Conner establishes that the incident occurred as he described it, the question remains whether it constituted a violation of the Act. All the circumstances surrounding the incident must be considered in order to determine if it was unlawfully coercive under the standards of the Board’s decision in *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984). There is no evidence that either of the women was an open supporter of the Union or that either introduced the subject of a union in the conversation. Sturgeon made no threats or promises to the women

<sup>4</sup> Sturgeon gave the roses as a St. Valentine’s Day gift to all the female sorters and a secretary in his office.

<sup>5</sup> There is no record evidence to support the Respondent’s claim that Conner was “smiling and smirking” throughout cross-examination by its counsel. When counsel suggested this on the record at the hearing, Conner denied it. I found nothing in his demeanor to suggest that he did not take these proceedings seriously or which detracted from his credibility.

during the conversation; however, that is not essential for a violation of the Act to occur. *Advo System*, 297 NLRB 926, 933 (1990). While the incident began as a friendly, generous act of gift giving on Sturgeon’s part, it was followed by an inquiry about the possibility of union activity on the part of the Respondent’s employees and his statement that they should tell him or other members of management if they learned of any such activities, which had no purpose other than to get them to inform on the protected activities of their coworkers. Sturgeon’s action went beyond even the Respondent’s employee handbook provision concerning employees who felt offended by union solicitations, which was found herein to be unlawful. He sought out these employees, questioned them concerning their knowledge of union activity, and told them they they should report any such activity, not limiting it to that which they might find subjectively offensive. I find that Sturgeon’s interrogation would reasonably tend to coerce and interfere with these employees’ rights for the same reasons that the handbook provision would. It had the potential dual effect of encouraging them to inform on other employees who engaged in lawful protected activities, while discouraging them from engaging in such activities. Accordingly, I find that this constituted an unlawful interrogation in violation of Section 8(a)(1).

#### B. Section 8(a)(3) and (1)

The complaint alleges that the Respondent issued a disciplinary warning to Scott Maynard on February 14 and discharged him on February 26 in order to retaliate against him for engaging in protected activity in support of the Union and to discourage other employees from doing so. The Respondent contends that the warning and discharge of Maynard were not discriminatory and were based on good cause. It contends that the warning was issued after Maynard left work at the end of his shift leaving behind a number of unrepaired magazines (referred to as “books”) that he was responsible for fixing and that he was discharged for leaving work at the end of his shift on February 25 without correcting an error involving the number of rows of books in loads placed on skids which he had caused and which he had been specifically directed to correct by his supervisor.

##### 1. The warning issued to Maynard on February 14

Maynard testified that after the incident in which Sturgeon asked him for a union card, he noticed that Second-Shift Plant Superintendent Kelly Reeser seemed to be in his area more often observing his work and that Plant Superintendent Walt Deersing, who rarely came into his area previously, would be there two or three times a week standing with Reeser observing him. During 1994, Maynard’s position was assistant operator on a Perfect Binder machine. Maynard testified that on February 15, during the middle of his shift, he was taken to an office by Supervisor Kevin Hodge, who informed him he was being given a verbal warning for leaving a stack of books unrepaired at the end of his shift on the previous night. He told Hodge that there had been a crew from Lebanon Junction working on the machine until 10:30 that night and when they left there had been a mess to clean up. He cleaned up until the end of his shift but did not get to about 25 or 30 books that needed to be repaired. Despite his explanation, Hodge gave him the warning which had already

been prepared before their meeting started. He was required to sign the warning but was not given a copy. When he asked for a copy during his break, Hodge said he had been told not to give him one. Maynard testified that, ordinarily, the operator who ran the Perfect Binder on the following shift would have repaired the books he left behind and that he has done similar small things for other operators.

#### Analysis and conclusions

The evidence establishes that the incidents on which the Respondent based the disciplinary actions against Maynard did occur and are not pretexts; consequently, the legality of those actions depends on its motivation. In cases where the employer's motivation is in issue, its actions must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of protected activity on the part of its employees.

I find that the General Counsel has made such a prima facie showing here. Direct evidence of unlawful motivation is difficult to obtain and is not essential. Circumstantial evidence and the inferences drawn therefrom may be relied on to establish motivation. *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987); *NLRB v. Pete's Pic-Pac Supermarkets*, 707 F.2d 236, 240 (6th Cir. 1983). There is clear evidence of the Respondent's union animus in the record, consisting of the violations of Section 8(a)(1) found here, which occurred at about the same time as these disciplinary actions, and the Respondent's opposition to union representation of its employees, as stated in its employee handbook and its labor policy statement entitled, "The Open Shop at Publishers Printing Company, Inc.," both of which are distributed to all employees. See *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1477 (6th Cir. 1993).

The evidence shows that Maynard was an active supporter of the Union who attended union meetings, signed a union authorization card, and solicited employees to sign cards at or near the Respondent's plant, beginning in early February. He obtained approximately 30 signed cards before his discharge. As discussed above, the evidence supports the inference that Supervisor Wayne Sturgeon was aware of Maynard's solicitation of cards for the Union. His knowledge of Maynard's union activity is imputed to the Respondent.<sup>6</sup>

There must be a nexus between the disciplinary actions in question and the employer's animus, which must be "strong enough to support a conclusion that the Respondent was will-

ing to violate the law, by discriminating against its employees, in order to keep the Union out." *Raysel-IDE, Inc.*, 284 NLRB 879, 880 (1987). The Respondent contends that this is disproved by evidence that during the spring of 1994 Supervisor Steve Sahloff was informed by employee Mark Wilcher that he was a supporter of the Union and had tried to get it into the plant, shortly before Wilcher was accused of harassment by a coworker. Notwithstanding that knowledge on the Respondent's part, no adverse action was taken against Wilcher, thus, proving it would not discriminate against its employees because of their union activity. I do not find that conclusion follows for three reasons. First, "it is well established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). Second, by the time this accusation was made against Wilcher, the charge in this matter had already been filed and investigated by the Board. Third, at that point, it may well have felt no additional action was necessary to keep the Union out. I find the evidence concerning animus in this record is strong enough to warrant the inference that it would violate the Act in order to keep a union out, as it has in the past. See *Publisher's Printing Co.*, 233 NLRB 1070 (1977).

I find that the evidence is sufficient to establish a nexus between the Respondent's animus and its actions against Maynard. The timing of an employer's actions can be persuasive evidence of its motivation. *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). Here, the warning and subsequent discharge of Maynard, who was employed by the Respondent for over 3 years, occurred within a 3-week period after he began soliciting union authorization cards from employees. Considering all the foregoing, I find it is sufficient to establish a prima facie showing that the Respondent had knowledge of Maynard's union support and activity and that the disciplinary actions it took against him were the result of its union animus.

I also find that the Respondent has carried the burden under *Wright Line*, supra, of establishing that it would have taken the same disciplinary action against Maynard even in the absence of union activity on his part. The record shows that all new employees are given an instruction sheet which provides, inter alia, "If you fall behind on your work, you are responsible to stay over and catch it up." It also shows that the operating procedures for operators and crew in effect at the time provides, inter alia, "Each shift repairs their own bad books." I do not find the testimony of Maynard, that it was not uncommon for operators on different shifts to do small things for each other, is sufficient to establish that his failure to finish repairing all of his books before he left work on the night of February 9 was not a violation of the work rules or that such violations were commonly condoned by the Respondent.<sup>7</sup>

<sup>6</sup> Although Sturgeon was a low-level supervisor, the evidence concerning the interrogation of the two women employees supports the inference that he was interested in finding out if there was union activity going on in the plant and that he would have imparted any knowledge he had to his superiors. Except for Sturgeon, none of the supervisory employees who testified concerning their actions in this matter specifically denied having knowledge of Maynard's union activities at the time those actions were taken.

<sup>7</sup> Similarly, I do not find the generalized testimony by Wilcher, that one shift may have to fix the "screw-ups" of another shift as often as twice a month, sufficient to establish that such "screw-ups" were comparable to Maynard's failure to complete his assigned work on February 9 or that the Respondent commonly condoned such conduct. From all that appears, Maynard made no arrangements to see that the unrepaired books he left behind would be taken care of by the next crew. He simply walked off and left them.

Maynard's testimony concerning the warning was not credible and in any event offered no real excuse for his failure to complete his assigned work. It appears that, although his work was not done at 11 p.m., the normal quitting time, he simply left without finishing it or making arrangements for someone else to do it. He said he was called in by Hodge the following day and given a warning that had already been written up before he was asked for an explanation. If that were true, it might indicate an unlawful motive behind the warning. The Board has considered an employer's failure to conduct a fair investigation and to give employees the opportunity to explain their actions before imposing disciplinary action to be significant factors in findings of discriminatory motivation. E.g., *Burger King Corp.*, 279 NLRB 227, 239 (1986); *Syncro Corp.*, 234 NLRB 550, 551 (1978); *Firestone Textile Co.*, 203 NLRB 89, 95 (1973). That, however, was not the case here. Sahloff credibly testified that, after the shift had ended on February 9, he came on Tony Waldrige, the operator of the Perfect Binder on Maynard's shift, working on the repair books. Waldrige complained that Maynard had left behind a mess that he had to stay over and clean it up. Sahloff directed Hodge to talk with Maynard the next day and find out what happened. After he did so and reported back, Sahloff determined that the warning should be issued.<sup>8</sup> I find that the Respondent did investigate this incident and gave Maynard a chance to explain his conduct before the warning was issued. That explains why the warning was not issued until February 14, 5 days after the incident, and not on the following day, as Maynard claimed.

I also find the evidence fails to establish that Maynard was being closely watched after the incident with Sturgeon. I found Maynard's testimony, that Supervisors Reeser and Deersing seemed to be around his area more often than before and were watching him, too vague to establish that he was under surveillance by the Respondent. I did not believe his testimony that his sister-in-law Pam Alberts, who works in the Respondent's office, asked him about union activity and told him he was on a list, which was obviously meant to support the contention that he was singled out because of his union activities. Alberts credibly testified that after she had heard a rumor from another employee that Maynard was trying to get a union in the plant, she "confronted" him about it and asked him if it were true.<sup>9</sup> There is no evidence that anyone from management spoke to Alberts concerning Maynard or was responsible for her confronting him about being involved with the Union. While I credit the testimony of Wilcher that, about a couple of weeks prior to Maynard's discharge, Sturgeon told him he thought Supervisors Hodge and Sahloff were "screwing" Maynard, it is not clear what he was referring to or meant. Sturgeon did not refer to Maynard's union activity. Given the approximate date of the comment, he was apparently referring to the written warning of February 14. The fact that Sturgeon, who at that time was not Maynard's supervisor, may have felt the warning was un-

justified, without more, does not establish that it was unwarranted or discriminatory.<sup>10</sup>

While, as noted above, the timing of the warning creates an inference that it was related to his union activity, the evidence shows that it was Maynard's poor job performance that resulted in the warning being issued and that the proximity to his union activity was coincidental. There is undisputed evidence showing that he had been criticized about his performance since being assigned to the Perfect Binder machine. On January 6, before his union activity began, he was called to a meeting with Sahloff and Hodge to discuss what they described as his inconsistent performance and lack of motivation while on that job and the possibility of his being removed from that machine. Maynard asked for the opportunity to continue on the machine, but a month later he was in trouble again. The January 6 meeting is referenced in the warning issued for the incident on February 9, which was characterized therein as another example of his unacceptable job performance. I find that the Respondent's action in issuing this warning was not unlawfully motivated and that it would have been issued even if Maynard were not engaged in union activity. I shall recommend that this complaint allegation be dismissed.

## 2. The termination of Maynard

Maynard testified that during his shift on February 25, he misread the directions for the books being run on his machine which resulted in 10 layers of magazines being put on the loads instead of 9 layers. He discovered the mistake during the shift and informed Supervisor Steve Sahloff. Sahloff told him do what he could to correct it by 11 p.m. When he said it was almost 11, Sahloff said, "just do it." He did what he could to correct the error until 11, then left at the end of his scheduled shift expecting that the crew on the following shift would take care of it. When he arrived at work the following day, he was taken to the office where Supervisors Sahloff and Gordon Schaney were present. He had a tape recorder concealed in the pocket of his overalls and recorded the meeting. He said that he had the recorder because, on February 25, Pam Alberts had asked him if he knew anything about union activities and told him to watch out because his name was on a list.

The recording of the meeting shows that Schaney asked him about the problem the previous night and if he was supposed to correct it. Maynard said he was told to do what he could by 11 o'clock. Schaney asked why he did not stay on to help get it corrected and Maynard responded that he had a load of wood to deliver and the person wasn't going to stay up all night waiting for him. He also said that he was not asked to stay over to correct the problem. Schaney told him it was expected of him and that it was his responsibility to correct it. He referred to the prior incident concerning the unrepaired books and said that Maynard's record showed "about four write-ups for those type of problems in the last

<sup>8</sup>Maynard's story about a crew from Lebanon Junction working on his machine that night provided no basis for excusing his failure to complete his work.

<sup>9</sup>Alberts admitted she does not like the Union. After considering her demeanor and testimony as a whole, I find no reason not to credit her testimony.

<sup>10</sup>The record does not show whether Sturgeon was aware of Sahloff's dissatisfaction with Maynard's job performance or their meeting about it on January 6. There was some evidence that part of Maynard's problem was that he was spending time assisting Wilcher, who was under Sturgeon's supervision, on the Weldetron machine that Maynard had previously operated when he was supposed to be working on the Perfect Binder.

year and a half or so," which indicated he did not want to accept responsibility. Schaney said that he was going to relieve him of the responsibility by terminating him and the meeting ended.

#### Analysis and conclusions

For the reasons discussed above, I find that the evidence is sufficient to support an inference that Maynard was discharged because of his union activity and support. I also find that his termination was the result of his own misconduct and would have occurred in the absence of union activity on his part. Sahloff credibly testified that about 10:45 p.m. on February 25, he learned that Maynard had made a mistake in the number of loads from third-shift operator Ricky Martin, not from Maynard, as the latter claimed. Sahloff went to Maynard asked him what had happened and told him he had to get the loads back to the machine and the problem corrected. Maynard responded that he did not have time to do it before the end of the shift. Sahloff said that he did not care, that he should go and get the forklift driver to get the loads back to the machine and that "it had to be corrected." When he returned from his rounds a minute or two after 11 p.m., he found that the problem had not been corrected and that Maynard had left the plant. Contrary to the testimony of Maynard, Sahloff said that he did not tell Maynard to do what he could by 11, but specifically told him to get the problem corrected. He reported the incident to Bindery Superintendent Gordon Schaney the next morning and returned to the plant later in the day to discuss the matter with Personnel Director Larry Hileman.

Schaney testified that after he learned about this incident from Sahloff, he had him return to the plant to tell Hileman about it in person so there would be no miscommunication. After hearing that Maynard had walked off the job without permission and without correcting his mistake and considering the February 9 incident in which he was warned for leaving without completing his work, Schaney recommended that he be terminated. Schaney also testified that, although he had recommended that Maynard be discharged before hearing from him, if he had learned that Maynard had a good reason for leaving, such as family emergency, he would have reconsidered. When Maynard was asked about the incident on February 26, he said he left because he had to deliver wood to somebody. Schaney said that he did not consider that to be a serious emergency that would justify his leaving without completing his work. Maynard also said that he did not stay beyond the end of his shift because no one told him to do so. Schaney testified that it was Maynard's responsibility to complete the job without specifically being told. Hileman testified that he was aware of the meeting Sahloff had with Maynard about his job performance on January 6 and the warning he received on February 9. He was also aware that, during the previous year, Maynard had been suspended for 3 days for a similar error involving incorrect loads. After hearing about the February 25 incident from Sahloff, that Maynard had left without permission without completing a job that he had been instructed by a supervisor to do, he considered it insubordination, and concurred in Schaney's recommendation that Maynard be terminated.

The credible testimony of Sahloff establishes that Maynard was told that he had to correct the problem with the loads before leaving the plant. I did not believe Maynard's self-

serving testimony that he was told to do what he could by 11 p.m. He left the plant without completing the job and without telling Sahloff that he was leaving. He did this a little over a month after being talked to about his poor performance and lack of motivation on the job and 2 weeks after being given a formal warning for not completing his assigned work. I do not agree with the General Counsel's contention that this was simply a matter of miscommunication between supervisor and employee. Sahloff's directions were specific about what Maynard was expected to do and Maynard gave no indication that he did not understand them. He was clearly on notice that his job performance had been found to be unacceptable, but he left the plant without completing the job or getting Sahloff's permission to do so. When he was confronted about his conduct by Schaney and given the opportunity to explain his actions, he not only denied that he was told to correct his error before leaving but clearly indicated that he felt his obligation to deliver wood was more important than his responsibility for completing his assigned work. An employer is entitled to take disciplinary action when warranted against erring employees, even prominent union supporters, so long as its actions are nondiscriminatory and for sufficient cause. *Advertisers Mfg. Co.*, 275 NLRB 100, 133 (1985). Under the circumstances, I find that the Respondent had sufficient cause to terminate Maynard and would have done so even had he not been involved in union activity.

I find that the record does not support a finding that Maynard was treated unfairly or the victim of disparate treatment. This was not simply a matter of an employee leaving work early or failing to work overtime. Here, Maynard was given a specific order to correct his own mistake. He not only did not follow these orders, he walked off the job and left the problem to be corrected by others. The testimony of Hileman, who approved the decision to terminate Maynard, establishes that he considered Maynard's actions to constitute insubordination, which according to the employee handbook rule 10 is punishable by immediate discharge.<sup>11</sup> The record contains several documents taken from employee personnel files which the General Counsel contends establish that there were employees who received lesser punishment for greater offenses than Maynard. I find that these documents alone are insufficient to establish that any of the employees involved had work records comparable to Maynard's or that the situations which resulted in disciplinary action being taken were comparable to his. Basing a finding of disparate treatment on this evidence would be pure speculation. I shall recommend that this allegation be dismissed.

#### CONCLUSIONS OF LAW

1. The Respondent, Publishers Printing Co., Inc., 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. The Respondent violated Section 8(a)(1) of the Act by

<sup>11</sup> It also appears that he was subject to discharge under rule 23 of the handbook. He had been suspended for 3 days in April 1993 for failing to follow orders or procedures and the punishment for a second similar offense within 12 months is termination.

(a) Maintaining a rule in its employee handbook concerning union solicitation which is discriminatory and which encourages employees to report to management the identity of union solicitors.

(b) Creating the impression that the union activities of its employees are under surveillance.

(c) Coercively interrogating employees about union activities and encouraging them to report such activities to members of management.

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

5. The Respondent did not engage in the unfair labor practices alleged in the complaint not specifically found herein.

#### THE REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

#### ORDER

The Respondent, Publishers Printing Co., Inc., Shepherdsville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging employees from engaging in union activities by maintaining a rule in its employee handbook or otherwise encouraging employees to inform the Respondent of the

identity of any union solicitors whose activities they subjectively perceive as offensive.

(b) Maintaining a rule in its employee handbook which discriminatorily prohibits union solicitation.

(c) Creating the impression that its employees' union activities are under surveillance.

(d) Coercively interrogating employees about their union activities or those of other employees.

(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 the following affirmative action necessary to effectuate the policies of the Act.

(a) Correct the provisions of the section of its employee handbook entitled "Statement on Unionism" to conform with the directives set forth above.

(b) Post at its facilities in Shepherdsville and Lebanon Junction, Kentucky, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, 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.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found here.

<sup>12</sup>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.

<sup>13</sup>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."