

**Industrial Wire Products, Inc. and Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, AFL-CIO**

**Industrial Wire Products, Inc. and Anthony C. Thurston, Petitioner and Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, AFL-CIO.** Cases 14-CA-22235 and 14-UD-231

April 28, 1995

DECISION, ORDER, AND DIRECTION OF  
THIRD ELECTION

BY MEMBERS BROWNING, COHEN, AND  
TRUESDALE

On April 6, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and the General Counsel filed cross-exceptions and a supporting brief. The Petitioner filed exceptions, a supporting brief, and an answer to the General Counsel's exceptions.

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 to the extent consistent with this decision and to adopt the recommended Order as modified.

The judge found that the Respondent promulgated and maintained an overly broad rule restricting employees' union activities during their nonworktime. The judge, however, dismissed the further complaint allegation that the Respondent had discriminatorily enforced the rule. The General Counsel excepts to this latter finding, and we find merit in this exception.

In dismissing this allegation, the judge found that there was no evidence that antiunion employees and pronion employees were treated differently. He therefore found no disparate treatment. In reaching this result, he described the rule as "a ban on talking about union matters or other matters." Yet the credited evidence does not show that talking about *other matters* was similarly restricted.

Respondent's executive vice president, Mohammed Massoudnia, testified that employees may talk at work

<sup>1</sup>The Respondent and the Petitioner each have 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.

In his decision, the judge stated that Plant Manager Oberhaus had, on several occasions, told employee Wilson that any time employees were on the clock they were on company time. The record shows only that Oberhaus had on one occasion told this to Wilson.

as long as the talk does not interfere with work. This is consistent with the testimony of employees Wilson, Wideman, and Thurston concerning the freedom to talk while working.

The record shows, however, that employees were told that they could not talk about the Union on company time. Moreover, Plant Manager Oberhaus conceded that there was a company directive forbidding *union* campaigning on worktime. There is no evidence, however, of such a directive against talking about other subjects while working. We find that this is disparate treatment and that it interferes with employees' Section 7 rights in violation of Section 8(a)(1). *Sage Dining Service*, 312 NLRB 845 (1993); *Litton Systems*, 300 NLRB 324, 325 (1990).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Industrial Wire Products, Inc., Sullivan, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(a) Promulgating and maintaining any rule that prohibits employees from discussing or soliciting support for the Union during nonworktime."

2. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

"(b) Disparately enforcing its no-solicitation rules against union activity."

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

IT IS FURTHER ORDERED that the election held on December 11, 1992, in Case 14-UD-231, is set aside and that this case is severed and remanded to the Regional Director for Region 14 for the purpose of conducting a new election.

[Direction of Third Election omitted from publication.]

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 or maintain any rule prohibiting our employees from discussing or soliciting support for the Union during nonworktime.

WE WILL NOT disparately enforce our no-solicitation rules against union activities.

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

WE WILL advise our employees in writing that they are free to discuss or solicit support for the Union during nonworktime.

INDUSTRIAL WIRE PRODUCTS, INC.

Mary J. Tobey, Esq., for the General Counsel.
Timothy K. Kellett, Esq., for the Respondent Employer.
Brian A. Spector, Esq., for the Charging Party Union.
John C. Scully, Esq., for the Petitioner.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated proceeding was litigated before me at St. Louis, Missouri, on January 28, 1994, pursuant to charges timely filed and the complaint issued on January 14, 1993, alleging that Industrial Wire Products, Inc. (Respondent Employer) has violated Section 8(a)(1) of the National Labor Relations Act (the Act) by orally promulgating, maintaining, and enforcing a rule prohibiting employees from discussing or soliciting support for Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, AFL-CIO (the Union) on company time while permitting employees to discuss matters unrelated to the Union while working.1 On January 15, 1993, the National Labor Relations Board's Acting Regional Director for Region 14 issued an order consolidating Case 14-UD-231 with Case 14-CA-22235 for hearing because objections to the election in Case 14-UD-231 had been filed by the Union and are concerned with the same matters alleged as unfair labor practices in Case 14-CA-22235. Respondent Employer disputes the allegations of unfair labor practices and the objections to the conduct of the election.

After considering the evidence of record, the comparative testimonial demeanor of the witnesses appearing before me, and the posttrial briefs of the parties, I make the following

FINDINGS AND CONCLUSIONS

I. BUSINESS OF THE RESPONDENT EMPLOYER

Respondent Employer is a Missouri corporation with an office and place of business in Sullivan, Missouri, and is engaged in the manufacture and nonretail sale of steel wire

1 An additional allegation of an 8(a)(1) violation appeared in the complaint but was withdrawn by General Counsel at hearing.

products. During the 12-month period ending December 31, 1992, Respondent Employer, in conducting its business operations described above, sold and shipped from its Sullivan, Missouri facility goods valued in excess of \$50,000 directly to points outside the State of Missouri. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. BACKGROUND

On August 12, 1968, the Union was certified as the collective-bargaining representative of the employees in a unit of Respondent Employer's production employees. Thereafter, the Employer and the Union were signatory to a number of contracts, including a contract effective from June 1, 1988, to June 1, 1991. On September 21, 1991, employees commenced an economic strike which continued until July 17, 1992, when the terms of a strike settlement agreement and new contract were ratified. The current contract is effective from July 17, 1992, to June 1, 1994.

On August 14, 1992, Anthony C. Thurston, a unit employee, filed a petition in Case 14-UD-231 for an election testing whether the unit employees wished to withdraw the Union's authority to require under its contract with the Respondent Employer that said employees make "certain lawful payments" to the Union in order to remain employees. An election was conducted by National Labor Relations Board agents on October 1, 1992. Objections to the election were filed by Thurston, and the Regional Director set the election aside. The tally of ballots made available to the parties immediately upon the conclusion of the rerun election shows the following results:

Table with 2 columns: Description and Count. Rows include: Approximate number of eligible voters (117), Void ballots (0), Votes cast in favor of withdrawing the authority of the bargaining representative to require, under its agreement with the Employer, that employees make certain lawful payments to the Union in order to retain their jobs (66), Votes cast against the above proposition (39), Valid votes counted (105), Challenged ballots (2).

The Union filed objections to conduct effecting the results of this election on December 16, 1992, together with the charge in Case 14-CA-22235. So matters stood when the Regional Director consolidated the matters presently set for hearing.

IV. SUPERVISORS AND AGENTS

At all times material, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Sec-

tion 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:<sup>2</sup>

Mohammad Massoudnia	Executive Vice President
Fred Oberhaus	Plant Manager
Raymond Phegley	Personnel Manager
Pat Ray	Supervisor
Mike Shibley	Supervisor
Gary Bemis	Supervisor
Dale Edwards	Supervisor

#### V. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges as follows:

A. About October 1992, Respondent orally promulgated and since that time has maintained and enforced a rule prohibiting employees from discussing or soliciting support for the Union on "Company time."

B. Since about October 1992, Respondent has permitted employees while working to discuss matters not relating to the Union, while prohibiting employees from discussing the Union while working.

C. Respondent engaged in the acts and conduct described above in subparagraphs 6A and 6B to discourage its employees from joining and assisting the Union or engaging in other concerted activities.

Although the language of paragraph C suggests a violation of Section 8(a)(3) of the Act, the complaint only alleges the conduct complained of violates Section 8(a)(1) of the Act.

The parties agree the Respondent Employer has no written rules pertaining to solicitation by employees. Mohammad Massoudnia, Respondent Employer's executive vice president, states that employees may talk at work as long as work is not interfered with and safety conditions are adhered to. He does not say whether this has been communicated to all the employees. His statement that some of the work is sensitive, involves dangerous machinery, and therefore no talking is permitted while this work is being performed because careful concentration is required is credited. He concedes that at grievance meetings he has told employees they cannot campaign for the Union on company time, but they can do so on their own time. Massoudnia further testified that the Respondent Employer defines company time as that time devoted to work performance, and that breaks and lunch periods are employee time. He does not say he gave this explanation of company time and employee time to all of the employees aside from those present at grievance meetings.

Petitioner Thurston recalls Mike Shibley, his supervisor, told him not to campaign for the Union on company time, and further recalls Massoudnia had told employees the same thing.<sup>3</sup> Thurston says he knows what company time is, but does not explain who told him what it means. In a pretrial affidavit given to a National Labor Relations Board agent on January 5, 1993, Thurston stated Massoudnia said employees

could not campaign for the Union during company hours, but did not say when they could do so.

Vicki Wilson, the Union's chief shop steward at the Sullivan facility, credibly testified that during her 5 years of employment at the facility employees had been permitted to talk about personal business so long as it did not affect their work performance. She reports an incident that occurred about 5 minutes before she was scheduled to begin work when she received a note from employee Dave Eberhart that he wanted her to bring him a union application. She did so, delivering it to Eberhart about 5 minutes before his shift ended. At the time he received the application, Eberhart was not working but was at the desk of his foreman. Wilson recalls that Raymond Phegley, the personnel manager, was present and asked why Wilson stopped Eberhart from working. Wilson stated that Eberhart had been sitting at the desk and not working. Phegley testified he saw Wilson giving a union application to Eberhart while Eberhart was working and that he told Wilson she could not give Eberhart the union application because Eberhart was still working. Phegley concedes Eberhart was walking away from the supervisor's desk when Phegley came in. Noting that the incident in question took place within 5 minutes of the end of Eberhart's shift, the agreement of Phegley's and Wilson's testimony that Eberhart was at or in the vicinity of the supervisor's desk when Wilson was approached by Phegley, and the total lack of evidence Eberhart was still working, I am persuaded Eberhart more than likely had ceased productive work for the few minutes remaining on his shift. Phegley and Wilson agree that Phegley told Wilson she could not give the union application to Eberhart while he was working. In these circumstances it seems peculiar that Phegley would complain about Wilson giving the union application to Eberhart during the last minutes of Eberhart's shift unless Phegley was attempting to enforce the edict against union campaigning on company time consistent with the statements Fred Oberhaus, the plant manager, made to Wilson on several occasions that anytime employees were on the clock they were on company time. Oberhaus' denial that he made this statement is not credited. He was vague, unconvincing, and the least impressive witness in terms of believability who testified before me.

On another occasion, Wilson was in the lunchroom on her break talking to two other employees when Oberhaus, Phegley, and Dale Edwards entered and approached her. Oberhaus then asked Wilson why she was there and what was she and the other two employees talking about. Wilson replied that she had been on excused union business, which she had, was therefore taking a late lunchbreak, and what she was talking about was none of his business. According to Oberhaus, he told Wilson she could not talk to these employees except during lunchtimes and breaktimes. He concedes there was a company directive forbidding union campaigning on worktime. According to Phegley, who is credited on this point, the supervisors approached Wilson and the two other employees because the other employees had overstayed their lunchbreak and should have been returned to work. On yet another occasion, Oberhaus instructed Wilson not to talk to an employee concerning a grievance while she was working. On the other hand, Gary Bemis, second-shift supervisor, recalls that he had once asked Wilson, when Wilson was on his shift introducing herself to new employees, why she was

<sup>2</sup>It is well settled that the conduct of statutory supervisors, which these named persons are admitted to be, is attributable to their employer. See, e.g., *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986).

<sup>3</sup>All the incidents recited by employees and responded to by supervisors discussed herein occurred between the October and December 1992 elections.

on his shift, and told her that he did not want her introducing herself because he did not want production interrupted, but on another occasion gave her permission to introduce herself on his shift.

Alvin White, a setup man, testified that on two occasions Gary Bemis told him not to talk about the Union on company time. Given White's testimony that once, when he was in an argument with two other employees concerning the Union while he was at their workstation and on another occasion when he was in a similar argument concerning the Union at another employee's workstation, that both times Bemis told the arguers they could not have union discussions on company time but could do so on their own time, I am persuaded that it was the arguments that drew Bemis' attention, not the subject matter, and that this was more than likely the reason for Bemis' intervention. Nevertheless, White's testimony that Bemis said White could not talk about the Union on company time is uncontroverted and credited.<sup>4</sup>

According to Michael Wiedeman, an employee of Respondent for 14 years and presently the Union's secretary, prior to the first election the Company had never objected to private conversations among employees so long as the participants did not stop working and were not delaying production. Like Wilson, he recalls Oberhaus saying he was on company time when he was on the clock and, on another occasion, that anytime he was on company property was company time. Wiedeman credibly states that on November 23, 1992, Oberhaus and Edwards visited his toolroom workstation, had him remove a part from a machine in the wire bending room, and then departed with the part and his tools. While waiting for their return, Wiedeman walked about 25 feet to the machine where Chief Union Steward Wilson was working. Wilson had motioned Wiedeman to join her, they then briefly discussed a grievance. Oberhaus returned within a few moments and, detecting Wilson and Wiedeman in this discussion, told Wiedeman he should not talk to Wilson without supervisory permission. Inasmuch as Wilson was in fact working at her machine, Oberhaus' admonition of Wiedeman in this instance does not seem unreasonable.

On December 10, 1992, after hearing someone had posted material obstructing view of a National Labor Relations Board notice, Wiedeman went to examine it. Oberhaus approached Wiedeman and asked him what he was doing. Wiedeman replied that Phegley had said posting things over a National Labor Relations Board notice was unlawful and he wanted to tell Phegley about this. Oberhaus told Wiedeman that while Wiedeman was out of his work area, as he was at this time, he had no permission to examine the notice, talk to Phegley, or talk to employees.

#### Conclusions

The testimony of Massoudnia, Thurston, Wilson, and White establishes that Massoudnia and Respondent's supervisors and agents, Shibley and Bemis, told employees they could not campaign on company time. Although it may be, as Thurston stated he understood, that some employees understood this broad injunction did not cover their breaks and lunchtimes, there is no persuasive evidence any of Respondent's officers or supervisors explained to the entire work

<sup>4</sup>Bemis' testimony that he does not recall the incidents is not a denial.

force when they could engage in union campaigning. Moreover, the statements by Oberhaus to Wilson that anytime employees were on the clock they were on company time, and to Wiedeman that employees were on company time anytime they were on the clock<sup>5</sup> or on company property emphasizes the message that employees were forbidden to engage in protected activity at anytime during the workday or, as Oberhaus emphasized, at anytime they were on company property. The testimony of White and Wilson establishes that the statements of management purveying this message were disseminated to other employees.

The statements of Respondent's representatives clearly conveyed the message that the phrases "Company time" and "Company property" covered the entire workday, including employees' nonworktime, and the entire plant area, whether work area or not. A rule forbidding discussing union matters on company time and company property, which is what we have here, is far too broad.<sup>6</sup> Respondent's oral promulgation and maintenance of such a rule had a reasonable tendency to interfere with, restrain, and coerce employees in the exercise of rights guaranteed them in Section 7 of the Act and violates Section 8(a)(1) of the Act. 88 *Transit Lines*, 300 NLRB 177, 183 (1990); *Midland Transportation Co.*, 304 NLRB 4, 5 (1991); *Highland Yarn Mills*, 313 NLRB 193 (1993). The mere existence of such rules, even if not enforced, posits a possibility of enforcement against statutorily protected activity and therefore reasonably tends to interfere with and restrain employees in the exercise of their right to engage in such activity and therefore violates Section 8(a)(1) of the Act. See, e.g., *Brunswick Corp.*, 282 NLRB 794, 795 (1987); *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

The evidence of disparate treatment, i.e., the prohibition of talk about the Union while permitting talk on other topics, is not as convincing. The change from a practice of permitting employees to talk about personal business at their workstations so long as it did not affect their performance, as Wilson credibly states was the case and as is consistent with Massoudnia statement that is company policy, to a ban on talking about union matters or other matters on company time or on company premises, which I have found violates Section 7 of the Act, does not in itself constitute disparate treatment. The record simply does not show that union activists were treated any differently than other employees by the application of the unlawful rule on solicitation. That is to say, there is no evidence antiunion employees were treated any better than prounion employees. Accordingly, I conclude by a preponderance of the evidence that General Counsel has not proven the disparate treatment allegation.

#### VI. THE ELECTION OBJECTIONS

Matters occurring between the date of the first election held on October 1, 1992, and the date of the second election held on December 11, 1992, may be considered to be objectionable conduct. *Singer Co.*, 161 NLRB 956 fn. 2 (1966).

<sup>5</sup>There is no evidence employees clock out for breaks.

<sup>6</sup>Massoudnia's credited statement that some of Respondent's work is so sensitive and dangerous that no talking is permitted while it is being performed does not justify a rule that fairly implies no talking about the Union will be permitted at anytime while on company time.

The orally promulgated and maintained employer rules,<sup>7</sup> which prohibited employees in this case from soliciting on company time or property, were too broad and violated Section 8(a)(1) of the Act. In *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962), the Board held that conduct violative of Section 8(a)(1), a fortiori, interfered with the employees' exercise of a free and untrammelled choice in a representation election. This strict policy has been modified to the extent that it will not be applied in cases where "it is virtually impossible to conclude that the misconduct could have affected the election results," and in making the determination whether or not a respondent's misconduct could have affected the results of an election, the Board considered "the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors." See *Gonzales Packing Co.*, 304 NLRB 805 (1991), citing *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). The maintenance of an overly broad rule against solicitation has been found to interfere with free voter choice in an election in company with other violations of the Act. *Midland*, supra. In the instant case the promulgation and maintenance of the unlawful rule stands alone as alleged interference with the conduct of the second election. In reaching this conclusion, I have noted there were approximately 117 eligible voters in the December election and that 66 of the 105 votes counted favored the proposition to withdraw the authority of the Union, under its contract with the Respondent Employer, to require that employees make certain lawful payments to the Union in order to retain their jobs. Thirty-nine opposed. The opposition would have needed 15 more votes to prevail if the 2 challenged ballots were counted and only 14 more if they were not. In addition to the four employees who testified concerning statements by Respondent's supervisors that I have found set forth unlawful restrictions on solicitation, several other employees were made aware of those statements by Wilson and White. In these circumstances, I cannot find that it is virtually impossible to conclude Respondent's violation of Section 8(a)(1) could have effected the election results. Add to this the well known fact that the National Labor Relations Board has always jealously guarded the sanctity of its elections in the interest of assuring employees the opportunity to make a free, secret, and untrammelled choice among the options presented by the ballot. Hence, I conclude that in the interest of ensuring these free and untrammelled choices I must find, and I do find, that Respondent's unlawful conduct interfered with free voter choice in the December 11, 1992 election and that

<sup>7</sup>I say "rules" advisedly because various supervisors phrased the restrictions in different ways when instructing employees.

election must therefore be set aside and a new election conducted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, Industrial Wire Products, Inc., Sullivan, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining any rule that restricts employee union activities during their free time.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the orally promulgated rules on solicitation that have been found unlawful in this decision, and advise all its employees in writing that this has been done.

(b) Post at its Sullivan, Missouri facility copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, 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 RECOMMENDED that the election conducted on December 11, 1992, be set aside, and that Case 14-UD-231 be severed from Case 14-CA-22235 and remanded to the Regional Director to hold a new election when he deems it appropriate.

<sup>8</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>9</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."