

Materials Processing, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO. Cases 7-CA-38157(1), 7-CA-38386, 7-CA-38448, and 7-CA-38454

October 14, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On May 20, 1997, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.

1. The Respondent excepts to the judge's finding that it violated Section 8(a)(1) of the Act by prohibiting off-duty employees from distributing union literature on company property.

Plant Manager Sandor testified that a union agent and two or three employees were handbilling on company property, that he approached the union agent and told him he could not be on company property, and that the union agent left with the employees. Sandor testified that he did not direct the employees to leave. Employee Burton testified, "Joe Sandor told me that I had to leave the property because I wasn't allowed to" handbill on company property and that the union agent was not on the company's property.

The judge did not make a credibility finding because he believed that a violation occurred whether he credited the General Counsel's witness or the Respondent's witness. We agree with the judge.

Even if Plant Manager Sandor was credited, his own testimony makes it clear that the union agent and the employees were handbilling together when Sandor approached them. Thus, when Sandor addressed the union agent he was in fact addressing the leader of a group of people that was distributing union literature. He did not specify, either to the union agent or the employees, that he was only asking the union agent to leave. Thus, even accepting Sandor's account of the handbilling incident, we agree with the judge that it was reasonable for the employees to believe that Sandor was also addressing them when he told the

¹The 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.

union agent that he could not distribute union literature on company property. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) by denying access to off-duty employees who were engaging in activity protected by Section 7 of the Act.

2. The Respondent excepts to the judge's finding that it violated Section 8(a)(3) of the Act by disciplining employees because of their union activities. We agree with the judge.

Employees Phipps, Montgomery, Reed, and Meltzer were members of the Union's organizing committee. Phipps, Reed, and Meltzer participated in the attempt to present a petition favoring the Union to Sandor at an employee meeting. Montgomery wore buttons, hats, and shirts displaying his support for the Union on a daily basis.

The Respondent does not dispute in its exceptions that it was aware of the employees' union activity, but instead claims that they were disciplined for creating unsanitary conditions in a room during the showing of a videotape to employees. The judge, however, discredited the Respondent's testimony about the condition of the room after the employees left and credited the employees' testimony that there was not a significant amount of litter left behind in the room.

Based on the judge's credibility resolutions, we agree with his conclusion that the Respondent grossly exaggerated the condition of the room after the employees left as a pretext in order to discipline them because of their union activities.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Materials Processing, Inc., Riverview, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings given Lila Phipps, Mike Montgomery, Derrick Reed, and Dennis Meltzer on March 21, 1996, and within 3 days thereafter notify them in writing that this has been done and that the warnings will not be used against them in any way."

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

MEMBER HIGGINS, dissenting in part.

My colleagues would find a violation in this case even if the testimony of Respondent's agent Sandor is

²We shall modify the judge's recommended Order to provide that the Respondent remove any reference to the discipline from Reed's and Meltzer's files as well as the files of Phipps and Montgomery.

We shall also modify the recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

credited. I would not do so. Instead, I would remand this case for a credibility resolution to ascertain whether Sandor ordered the union agent only to leave the Respondent's property.

According to Sandor, he saw Union Agent White and two or three employees handbilling on Respondent's property. Sandor "went up to *Mr. White* and . . . told *him* that he cannot be on company property." (Emphasis added.) Further, Sandor testified that he gave "no direction . . . whatsoever to the ladies [the employees]." To the contrary, it was White who waved the employees to follow him off the property. Finally, Sandor testified that he "never spoke to the ladies."

If Sandor is credited, it is clear that he was asking only *the union agent* to leave. Under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), he had a right to do this. Accordingly, I would remand to ascertain whether Sandor should be credited.

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 create the impression that employees' union activity is under surveillance.

WE WILL NOT prohibit employees from distributing union literature in nonwork areas on nonworktime.

WE WILL NOT threaten employees with reprisals should they engage in union activity.

WE WILL NOT deny off-duty employees access to company premises without showing a necessity therefor.

WE WILL NOT videotape employees engaged in union or other protected activity.

WE WILL NOT grant wage increases or other benefits in order to discourage employees from engaging in union or other protected activity.

WE WILL NOT discipline employees because they have engaged in union or other protected activity.

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, within 14 days from the date of the Board's Order, remove from our files any reference to the warnings given Lila Phipps, Mike Montgomery, Derrick Reed, and Dennis Meltzer on March 21, 1996, and WE WILL, within 3 days thereafter notify them in

writing that this has been done and that the warnings will not be used against them in any way.

MATERIALS PROCESSING, INC.

Richard Czubaj and *John Ferrer, Esqs.*, for the General Counsel.

Lawrence J. DeBrincat and *Brian M. Smith, Esqs.*, of Troy, Michigan, for the Respondent.

Betsey A. Engle, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Detroit Michigan, on March 3, 4, and 5, 1997, on the General Counsel's complaint which alleged generally that the Respondent committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Respondent denied that it committed any violations of the Act and affirmatively contends the four discharges in issue were for cause and not due to any union activity.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Michigan corporation with a facility at Riverview, Michigan, engaged in painting components for automobiles. In the conduct of this business the Respondent annually derives gross revenues in excess of \$1 million and annually ships from its Riverview facility goods valued in excess of \$50,000 to points outside the State of Michigan. The Respondent admits, and I conclude that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

The Respondent's Riverview facility is one of two it operates. The other is in Dearborn, Michigan, where the employees have been represented for purposes of collective bargaining since 1983 by a local of the Teamsters Union.

The primary business at the Riverview facility is to receive, paint, and ship fuel tanks and axles. The tanks and axles are moved to and from the assembly line by means of forklifts. At the assembly line they are painted. The Re-

spondent apparently operates two shifts and by early 1996,¹ its employee complement had recently increased from about 100 to 300. On December 28, 1995, Joseph Sandor was hired as the Respondent's plant manager.

In early February, the Union began an organizational campaign. The first meeting was held on February 4. Certain employees signed as members of the Voluntary Organizing Committee (VOC) and at a company meeting on February 12 attempted to present this petition to Sandor. He refused to accept it and one of the employees read at least a portion of it.

This meeting was apparently held at the end of the first shift. Thus as employees left the premises they were met by union organizers and they marched and passed out literature. Presumably forewarned, the Respondent had video cameras set up to record this event (claiming, *infra*, that there were rumors there would be violence).

Subsequently, the Union filed a petition for an election, a stipulation was agreed to, and an election held on April 18,² which the Union won. From February 12 to the election, and thereafter, the Respondent's supervisors, including Sandor, engaged in certain acts alleged violative of Section 8(a)(1). Also four union supporters were discharged. These allegations will be treated *seriatim*.

B. Analysis and Concluding Findings

1. The 8(a)(1) allegations

a. Allegations involving Rachel Moore

Rachel Moore has worked for the Respondent 8 years, and has been a supervisor the past 4 years. One of her employees is Stephanie Cade, who testified that Moore called her into the office on February 6 and said, "I hear you guys had a meeting," and "Well, what were you talking about? Were you talking about me? You trying to make me lose my job?" Cade said they were just trying to make things better for the employees and then Moore said, "They got you pegged at [sic] being the one that's in charge of this. If you do have—if you guys get a union, or if you get to talk to Emmett (Windisch, one of the owners) you make sure that you're, you know, in control when you go in there. Don't talk to them like you talk to me."

Then the next day, according to Cade, she asked why Moore was harassing her and Moore responded, "Because you're not suppose[d] to [be] talking union." And, later in Moore's office, Moore said, "Listen, don't be talking union stuff. I'm trying to protect you, and I'm not going to protect you any more in that."

Moore denied telling Cade "that she shouldn't talk about the union that (she) was protecting her."³ However, Moore did not deny the substance of the February 6 discussion.

Since Cade was generally credible, and that Moore did not deny any aspect of the February 6 conversation, I conclude that it happened in substance as testified to by Cade. "In determining whether a respondent has created an impression of

surveillance, the Board applies the following test: whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance." *United Charter Service*, 306 NLRB 150, 151 (1992). I conclude that Moore's statement, about Cade being "pegged" as being the one in charge, at the beginning of the organizational campaign, met the Board's test. I therefore conclude that the Respondent violated Section 8(a)(1) as alleged in paragraph 12 (b) of the complaint.

However, I conclude that the interrogation was not violative of Section 8(a)(1) under the Board's holding in *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel Employees & Restaurant Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Moore was a low-level supervisor. At the time there was no background of other unfair labor practices. The interrogation did not occur in a context of confrontation, as in, for instance, *Stoody Co.*, 320 NLRB 18 (1995). It was the kind of interrogation which the Board finds not unlawful. Accordingly, I will recommend that paragraph 12(a) be dismissed.

The statement by Moore to Cade on February 7 that she was "not supposed to [be] talking union" is alleged to have been a disparate enforcement of the solicitation rule. Moore is alleged to have verbally reprimanded Cade. I conclude that the statements Cade testified that Moore made are too sketchy to base a conclusion that the solicitation rule was unlawfully enforced.⁴ Nor can I conclude that Cade was unlawfully disciplined. Thus, I conclude that the allegation in paragraph 12 (c) has not been proven.

It is further alleged that Moore threatened Cade by telling her that "I'm not going to protect you any more in that," while also telling her not to talk about the Union. In context, I conclude that Moore's statement was a threat in violation of Section 8(a)(1), as alleged in paragraph 12(d).

Lila Phipps testified that on April 16 she was standing at the plant entrance hallway smoking a cigarette and holding some union flyers, when Moore approached her and said, "Put that cigarette out," and "You shouldn't be smoking in the hallway. No one is to smoke in the hallway." And Moore asked, "Are you passing those out?" And, "I hope you're not passing them out." Phipps replied she was not.

In this Moore is alleged to have disparately and more strictly enforced the cigarette smoking policy and disparately enforced the distribution rule by verbally reprimanding Phipps about distributing union flyers in the entrance hallway.

The Respondent had a smoking policy, which went into effect prior to any union activity, prohibiting employees from smoking where Phipps admitted she was. There can be little question that Phipps in fact was violating the policy on April 16; however, the General Counsel seems to contend that since Phipps testified she saw others smoking there, Moore's statement was violative of the Act. I disagree. It may be others also violated the policy. However, there is no evidence that such violations as were known to the Respondent were not dealt with in a manner similar to Moore's statement to Phipps.

The Respondent had a legitimate policy which Phipps disobeyed and Moore told her not to do so. Such was at best

¹ All dates are in 1996, unless otherwise indicated.

² Counsel for the General Counsel represented that there was a delay in counting the ballots, thus the tally of ballots shows the date of the election to have been April 26.

³ The transcript at 401 erroneously refers to Cade as Kay. The transcript is corrected.

⁴ There is no contention that the "Solicitation and Distribution Rules" set forth in the company handbook are unlawful.

minimal discipline and was certainly appropriate. I conclude that Moore did not violate the Act by telling Phipps that she could not smoke in a nonsmoking area. Accordingly, I conclude that paragraph 12(g) should be dismissed.

However, I credit Phipps version of this conversation and conclude that Moore did unlawfully imply that Phipps could not distribute union literature in a nonworking area on nonworking time. Implicit in her questions Moore was telling Phipps not to pass out the flyers that that time and place. In this Moore violated Section 8(a)(1) as alleged in paragraph 12(h). *Saint Vincent's Hospital*, 265 NLRB 38 (1982).

b. *Allegations involving Joe Sandor*

In paragraph 12(e) it is alleged that Sandor promulgated an overly restrictive access rule by prohibiting employees from distributing union leaflets on the front sidewalk of the plant. The facts giving rise to this allegation occurred on February 12 after the employees left the company meeting and gathered outside.

Kathy Burton testified that she was passing out handbills on company property, about half way between the street and the building, and "Joe Sandor told me that I had to leave the property because I wasn't allowed to hand those out there."

Sandor testified that his comments were directed solely to Union Organizer Frank White and not to Burton or any other employee. Sandor testified that after speaking to White, and White stating that he would be hearing from the Union's lawyers, White left the area and motioned to the two or three lady employees to join him at the end of the street. Sandor denied ever talking to the employees.

Whether Sandor actually spoke to employees may be a matter of dispute. Nevertheless, there is no doubt that his statements reasonably had the effect of causing them to leave an area where they generally had the right to be, and handbill at a different location. In effect, as argued by the General Counsel, Sandor denied off-duty employees access without showing a necessity therefor. *Tri-County Medical Center*, 222 NLRB 1089 (1976). I, therefore, conclude that the Respondent violated Section 8(a)(1) as alleged in paragraph 12(e).

On April 19, it is alleged that Sandor disparately enforced the no-solicitation/no-distribution rule by verbally reprimanding Phipps and prohibiting her from leaving union flyers in the employee cafeteria. Phipps testified that as she was putting fliers on a table and Sandor said, "Lila, please don't do that." She said, "Why, Joe? It ain't going to hurt nothing." He said sometime about clutter and papers all over the place and she said, "I'm just laying these down." "I ain't punched in, Joe, you know." She testified that he then shook his head and walked out the door.

As Phipps admitted, in fact Sandor did not prohibit her from passing out literature. He simply asked her not to leave it lying around. In this I do not find a verbal reprimand or a disparate enforcement of a no-distribution rule. She was told, in effect, that leaving the material on the table was littering. She was not told to cease giving flyers to other employees. Accordingly, I conclude that the allegations in paragraph 12(l) have not been proved.

c. *Allegation involving DeWayne Nicks*

According to Burton, on the evening of February 12, a fellow employee asked her for a piece of paper, and she complied. Supervisor DeWayne Nicks approached her and said, "I know that's not union business, is it?" Burton responded, "No, I wouldn't do that on company time."

This is also alleged to have been a disparate enforcement of the Respondent's solicitation-and-distribution rules. Although Nicks denied the statement attributed to him by Burton, this need not be resolved. I find nothing in Burton's rendition of Nicks' statement which could be construed as any kind of enforcement of the rules. Nor do I believe that the mere use of the word "union" by a supervisor is violative of the Act. Accordingly, I will recommend that paragraph 12(f) be dismissed.

d. *Allegations involving Vivian Williams*

It is alleged that on April 17 Supervisor Vivian Williams coercively interrogated an employee about that employee's support for the Union. This allegation is based on the testimony of Lila Phipps.

Phipps recounted that she started the conversation with Williams by asking why Williams was being so hard on her that day. They then went into Williams' office and Williams said that she was hurt by some of the comments made by employees in the union flyer.

Phipps responded, "Well, Vivian, a lot of it doesn't extend to you. I mean, not what I have to say, anyways." Williams then said, "Why do people want the union, Lila?" Phipps told "I want respect . . . I don't get it. Not from Carl, Rachel, nobody."

Williams testified that this conversation started with Phipps asking why Williams did not like her. Williams said she did like her then something was said "about the union and I just told her the reason why I didn't think we needed a union at MPI. And that was the end of the conversation as far as I had."

There is nothing, even in the version of this recounted by Phipps, which amounts to coercive interrogation. There were no threats or promises of benefit. At best a low-level supervisor asked why employees wanted the union in the context of a conversation started by the employee. I cannot conclude that anything Williams said reasonably would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7. *Rossmore House*, supra. Accordingly, I will recommend paragraph 12(i) be dismissed.

According to Phipps, the next day she left the line to get a cup of coffee and Williams "said I couldn't go no more to the coffee, go get any coffee, period. I said, 'Well, why not, Viv?' I said, 'I'll just be right back.' And she said, 'No, we got to go by the handbook now.' And I said, 'Okay. No problem.'"

Though Phipps admitted that as she was leaving the line she did not ask Williams for permission or even say where she was going, in her affidavit she maintained she had asked permission and had been denied. Phipps also admitted that the coffee she intended to get would have been in a container without a lid.

Williams testified that Phipps walked off the line to get a cup of coffee and "I told her she couldn't have a cup on the floor without a proper lid on it because that was the com-

pany decisions because we had paint drop in cups before.” She testified, without contradiction, that no coffee cups were allowed on the floor without proper lids, and that employees were repeatedly reminded of this.

I credit Williams over Phipps. Phipps gave inconsistent versions of this event. That she was prohibited from taking a coffeebreak, or from having coffee on the line, and that this was a change of policy, is the essence of the complaint allegation. Neither is supported by evidence other than her bare assertion. And even Phipps admitted she did not ask permission to leave the line. I conclude that the General Counsel has not sustained the allegation in paragraph 12(k) of the complaint, and I will recommend it be dismissed.

e. Allegations involving Emmett Windisch

Donna Harrington testified that sometime (about April as best she could remember), during a followup conversation with Windisch about his sponsoring her daughter in a beauty contest, Windisch said, “whatever you get here, is from us, it is not from no union. It had better all stop.” And “he said something like, I am not going to listen to the union, with all their commands.”

By these two statements Windisch is alleged to have threatened employees with the elimination of benefits and that it would be futile for the employees to choose the Union as their collective-bargaining representative.

As with so many of the alleged violations in this matter, these allegations are based on limited and vague testimony of employees without any contextual support. There is no evidence that the Respondent mounted much of a campaign against the Union. The threats alleged here were not made in speeches to groups of employees. While the Respondent may have been opposed to the Union, its opposition was limited. Indeed, employees at the Respondent’s other facility have been represented since 1983.

Windisch testified that Harrington did ask him to sponsor her daughter. After consulting with his partner, he decided that such was an undertaking he should not get into, and he so informed Harrington. He did not, however, specifically deny making the statement that “whatever you get here, is from us, it is not from no union. It had better all stop.” Nor did he deny saying anything to the effect that he was not going to listen to the Union.

Notwithstanding that Harrington’s version of her conversation with Windisch is undenied, it is, on balance, insufficient to support the violations alleged. The context relates to her request that the Respondent sponsor her daughter, the denial of which is not alleged a violation. It just does not seem plausible that in such a context, Windisch would make the threats alleged. And, as noted, Harrington’s testimony is, at best, vague. Accordingly, I conclude that the General Counsel has not sustained the allegations in paragraphs 12(m) and (n) and I shall recommend they be dismissed.

f. Prohibiting employees from parking in the employee parking lot

It is alleged that on April 17 or 18, a Merchant security guard, John Laskowski, discriminatorily prohibited Kevin Thomas from parking in the employee parking lot in violation of Section 8(a)(1).

Thomas testified that on the day in question, he had returned to the plant after his shift because he had forgotten his jacket. He parked in the lot across from the plant, got out of his car and the approaching security guard said he could not park in the company employees’ parking lot. Thomas told Laskowski that he was an employee but he did not tell Laskowski that he was just there to pick up his coat. Laskowski responded that “they” told him to tell Thomas they did not want him to park in the lot. There followed an altercation which led to the discharge of Thomas, infra, but which is not relevant to the parking lot issue.

Laskowski credibly testified that the rule had been “[i]f you’re done working, you’re punched out, you are to leave unless you have business there for some reason or if you’re there to pick up somebody or wait for somebody to be picked up, then you’re allowed to stay there.” And Laskowski testified that he had enforced this rule prior to the incident in question.

Under the rule stated by Laskowski, Thomas would have been allowed to park in the lot while getting his jacket. However, Thomas never told Laskowski the purpose of his wanting to park in the lot. Therefore, it cannot be found that the Respondent discriminatorily enforced the parking lot rule. As far as Laskowski reasonably knew, Thomas was an off-duty employee with no reason to park in the parking lot. The General Counsel did not prove otherwise. Accordingly, I shall recommend that paragraph 12(j) be dismissed.

g. Videotaping employees

Following the February 12 meeting, employees left the plant and began picketing outside. The Respondent instructed security guards to videotape this event, which the General Counsel alleged was unlawful surveillance in violation of Section 8(a)(1). I agree.

Citing *Waco, Inc.*, 273 NLRB 746 (1984), the Board has held “that absent proper justification, the photographing of employees engaged in protected activities violates the Act because it has a tendency to intimidate.” *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). Further, proper justification must be more than a mere belief that something “might” happen.

Here the Respondent contended that there were “rumors” of violence, but offered no evidence other than Sandor’s mere assertion. This, under Board law, is insufficient. I conclude the Respondent had no proper justification to videotape the February 12 picketing, and by doing so violated Section 8(a)(1) of the Act.

2. The 8(a)(3) allegations

a. Announcing the wage increase

It is alleged that Sandor violated the Act by announcing to employees a classification change and pay increase at the February 12 meeting. The Respondent argues that such had been in the works for some time, and offered rough notes dated in December, to prove that this announcement was of a benefit previously established. I disagree.

While it may be that the Respondent had been considering a pay increase, there is no evidence that such was settled before the union activity, or was set to be announced in February to take effect in March. Nor is there evidence that such pay raises were regularly given at about this time of year.

Windisch testified that the Respondent does give pay increases annually, but he could not remember when such occurred in 1995 or 1994.

No doubt an employer may lawfully announce an existing benefit during an organizational campaign. *Ideal Macaroni Co.*, 301 NLRB 507 (1991). However, the evidence here is insufficient to persuade me that in fact the Respondent had determined to give the wage increase which was announced on February until it learned of the employees' organization campaign. I conclude that by announcing the wage increase when he did, Sandor violated Section 8(a)(1) of the Act.

b. *The popcorn writeups*

On March 19, the Respondent held a meeting for all employees at which they were shown an antiunion movie. Consistent with the Respondent's policy for such meetings, employees were allowed to bring drinks and snacks. Sandor described the condition of the room afterward:

Shocking, maybe, in that it's the first time I've seen such a large mess at MPI and through, probably, most of my history. I mean, this had popcorn just strewn on the floor, had a couple of smaller bags of other snack food—I can't remember whether they were Ho-Hos or Suzi Qs. There was also a bag of either Fritos or Boritos, one of the personal-size bags you can put in your lunch box. There were also, then, two drink containers—I don't know if they were Pepsi or Coke.

But the janitor on day shift just bitterly complained because he walked into it the next morning.

Sandor testified that he directed Vivian Williams and Ray Tanner to investigate the incident further, after which they agreed to disciplining the offending employees for "throwing food around." Thus on March 21, Lila Phipps, Mike Montgomery, Derrick Reed, and Dennis Meltzer were given written warnings for "contributing to unsanitary conditions or poor housekeeping."

While the four individuals disciplined all testified that there was some litter on the floor after the meeting, they all denied it was substantial. They further denied that they or anyone threw popcorn or other food.

An employer may, of course, discipline employees for littering food. However, an employer may not use such as a pretext for disciplining employees because of their union activity. Which this depends in large extent on whose version is credited. I believe the witnesses for the General Counsel and disbelieve Sandor and the Respondent's witnesses.

Derrick Reed no longer works for the Respondent and has no apparent stake in the outcome of this matter. He testified that people came to the meeting with popcorn and other snacks. Sandor told them to be careful with it and as these snacks were passed around, some was dropped. The next day he got a writeup which "made me mad, because you put down unsanitary housekeeping and I am the janitor. Why would I want to mess up this and I have to clean it up, so what is this?" This testimony suggests there was some litter, but not nearly the extent to which Sandor testified.

Sandor testified that the janitor (unnamed in his testimony) "bitterly complained." Reed, the only janitor, as far as I can tell from this record, did indeed complain. However, his

complaint was for being given the warning, not because employees had littered the meeting room. It appears, and I conclude, that Sandor was being less than candid with regard to this aspect of his testimony. Further, Sandor testified that he witnessed the incident but neither immediately took action himself nor did he tell Tanner who was responsible for the alleged mess. Sandor's testimony in this is not credible.

I conclude that the Respondent grossly exaggerated the condition of the room after the meeting in order to discipline four union activists just prior to the election. Accordingly, I conclude that the written warnings were given in violation of Section 8(a)(3) of the Act.

c. *The warning to Stephanie Cade*

It is alleged that on March 22, Michael Travis unlawfully gave a written warning to Stephanie Cade. According to Cade, after an employee meeting that day (at which they were shown an antiunion movie) she stopped on her way back to the line to make a phone call. Sandor came by, pointed to her and said, "Are you on break?" and she said she was. She continued to talk for a few more minutes then went back to work.

Then Travis and Sandor approached her and Travis said, "Did you not say you were on break"?' She confirmed that is what she said. About 15 minutes later she was called into Sandor's office and given a writeup which stated:

Failure to give satisfactory explanation of whereabouts or presence at unauthorized location.

When asked was she on break by plant manager she said she was on break—which was a lie. Employee was away from line and on [pay telephone in lobby]—while line was operating.

Cade justifies her use of the telephone, and her statement to Sandor that she was on a break, saying that after these meetings her supervisor, Rachel Moore, always gave employees "a couple of minutes to go to the bathroom or either go have a cigarette."

Sandor testified that after he asked Cade if she was on a break and she said she was, he saw the paint line operating. He then saw crew leader Travis and asked him if Cade was on a break and he said she was not. They then asked Cade why she had said she was on a break and she said she did not know. Sandor testified that "there was no reason for her to be on the telephone, so we just labeled it as being away from her work station, in essence, without a good explanation."

Sandor did not address Cade's assertion that after the employee meetings they were given a few minutes; however, he did testify that the paint line was operating, which tends to suggest that other employees had returned directly to work without the few minutes of time to smoke a cigarette or go to the bathroom.

On the evidence of record, it does appear, and I conclude, that Cade in fact was using the telephone without permission, and when confronted by Sandor untruthfully told him she was on a break, suggesting she had permission. Such acts certainly justify the writeup she was given.

In analyzing cases of alleged discrimination where the employee has engaged in protected activity, but also has done something apparently meriting discipline, the Board first con-

siders whether the General Counsel has made out a prima facie case of discrimination. If so, then it is incumbent on the respondent to prove that it would have taken the same disciplinary action in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982). Since the Respondent does in fact give written warnings to employees for various violations of company rules, I conclude that absent the union activity, Cade would have been given this warning. Accordingly, I shall recommend that paragraph 16 be dismissed.

d. The discharge of Robert Smith

Robert Smith testified that he was hired as a temporary employee sometime in October 1995 and then hired permanently in January, though the Respondent's records show his date of hire as November 30, 1995. Smith testified that he was discharged on February 13, because "I had walked off the line before," a fact which he disputes.

Though denying that he had ever received a written warning, the Respondent offered into evidence a warning to Smith dated December 7, 1995, which states:

Failure to be at work area when shift starts.
Overstaying or abuse of relief period.
(Resulting in 2 damaged axles)
WRITTEN WARNING

I do not credit Smith's assertion that this warning was torn up by someone (presumably he was referring to Maureen Boyd, the human resource director). The warning was clearly not torn up, and Smith signed it without comment. Smith may have been referring to a subsequent incident, testified to by DeWayne Nicks, to the effect that Smith was one of several employees discharged for breaking into a vending machine, but after investigation it was decided that there was insufficient evidence to charge Smith and his warning was destroyed.

Nicks further testified that he gave Smith the December 7 warning, because Smith had failed to return on time from his break and as a result an axle fell and was damaged. Then on February 9, Smith was again late returning from break and Nicks warned him verbally, saying, "You know, you're on your probationary period. When breaks are over and everybody else goes back to work, I expect you to come back to work."

Then on February 12, Sandor told Nicks, "I believe one of your guys is down on the telephone. And I went down there and sure, again, it was Robert. He hadn't come back after break and said he went to make a phone call." Sandor asked about Smith. Nicks recounted the previous incidents and Sandor said, "We gave him enough chances. It's time to let him go."

Although an employer may not seize on some infraction of work rules to discipline or discharge employees for their union activity, engaging in union activity does not immunize employees from complying with reasonable rules.

I credit Nicks and conclude that Smith was discharged because he was away from his work area and not because of his or other employees' union activity. Smith had been warned well before any union activity began, but he continued to engage in the same behavior. I conclude that Smith

would have been discharged irrespective of any union activity. Therefore, I shall, therefore, recommend that paragraph 17 be dismissed.

e. The suspension and discharge of Dennis Meltzer

Dennis Meltzer was a forklift operator on the second shift. At about 4 a.m. on April 3 (at the end of his shift) Meltzer ran into a pole, causing damage to both the forklift and the pole, although Meltzer testified that he saw no damage to the forklift at the time. In any event, assuming his supervisor had already gone, Meltzer left work and did not report the accident until returning the next day. He was then suspended by Supervisor Ray Tanner "pending discharge." When the Respondent learned that damage to the forklift would exceed \$1000 and that damage to the pole would be about \$1000, Meltzer was discharged.

The General Counsel argues that Meltzer was a known union activist and that his discharge was, therefore, violative of Section 8(a)(3). The Respondent argues that it has a consistent policy of discharging any employee who causes damage of \$1000 or more.

Witnesses for both sides testified that there are a lot accidents involving forklifts. There are examples in the record of accidents involving less than \$1000 in damage where the employee was not discharged, but given a written warning. And there are examples where, on investigation, it was determined that the operator was not at fault, and no discipline was given. Thus when Meltzer caused about \$4000 damage to a lighting system in late March he was only given a warning, because it was determined that most of the damage was not attributable to him.

On April 2 Jerry Brewer was given a written warning for carelessness when he hit a propane tank. On March 21 Montez Perkins was suspended pending investigation for an accident involving the lights, but was reinstated. On April 20 Peter Dupuis was suspended then recalled for an accident involving \$750-\$800 in damages. And on June 13 Mike Montgomery was suspended, but then returned to work without a writeup, because the investigation revealed that his accident was unavoidable.

The Respondent's treatment of these matters tends to support its argument that its policy, where there is an accident involving damage, is to investigate and then discharge the employee if the damage exceeds \$1000, but to give a lesser discipline if the damage is under \$1000, or none at all if it is determined that the employee was not at fault. This is set forth in the Respondent's Handbook.

Although Meltzer was a known union supporter (as were Dupuis and Montgomery), I nevertheless conclude that he would have been discharged for the accident which caused about \$2500 in damages. Had the Respondent simply been looking for an excuse to discharge him, such was provided with the March accident involving the lights, or an earlier time when he had been cautioned about "bulldozing" with his forklift.

Finally, the General Counsel argues that the asserted reason for Meltzer's discharge was a pretext because the damage was minimal to both the forklift and the pole. Notwithstanding Meltzer's observation, the credible evidence is that there was in fact damage to both. The estimates and invoices appear credible. I conclude that in fact Meltzer did cause damage of about \$2500, and for such he was discharged. Ac-

cordingly, I shall recommend that paragraphs 18 and 19 be dismissed.

f. The suspension and discharge of Kevin Thomas

Kevin Thomas had worked for the Respondent since 1995 as a forklift operator. As noted in section B.1.f, above, on April 17 (or 18) Thomas returned to the plant after his shift and was told by security guard John Laskowski that he could not park in the company parking lot. Thomas testified:

I was actually going to go ahead and walk into the building because I didn't really understand why he was coming towards me like that because I had never had any confrontation at work at all. As I was walking away, he started yelling real loud at me. By the time I turned around, he had his finger in my face, pointing like this telling me that I have to move my car. So, I mean, I kind of got mad about it, because I am a grown man and I didn't appreciate him putting his fingers in my face, yelling at me.

So Thomas told Laskowski "that if he ever talked to me like that again I'd beat his m— f— ass."

The next day, either April 18 or 19, Thomas unloaded 40 racks of gas tanks from a railway car. He apparently misjudged the clearance on the last two racks. The top hit the car causing the gas tanks to fall.

Undisputedly, when gas tanks are dropped, they are considered damaged and are returned to the maker. Thus Thomas' accident resulted in damages in excess of \$1000. He was suspended pending investigation, and on April 24 was discharged for:

TERMINATED DUE TO VIOLATION
OF WORK RULES:

(a) I-C-15-A—Reckless driving of forklift and loss in excess of \$1000.00 For dropping two (2) fuel tank racks and resulting fuel tank damage (safety rule #23)

(b) I-C-7—For threatening a Company employee on April 18, 1996.

The General Counsel does not dispute that Thomas threatened the security guard or had an accident involving more than \$1000 in damage. Rather, the General Counsel argues that these events were seized as a pretext to discharge a union activist following the election—that Thomas was provoked by the guard and that the Respondent does not discharge those for whom mitigating circumstances are found. I reject these arguments.

Unquestionably Thomas threatened Laskowski. Even accepting Thomas' testimony completely, it would be difficult to conclude that Laskowski did anything to provoke the kind of threat Thomas made. However, irrespective of this event, it is clear that Thomas had an accident which caused more than \$1000 of damage and that pursuant to the Respondent's established policy, he would have been discharged.

The General Counsel argues that the Respondent always takes into consideration mitigating circumstances, and its failure to do so here demonstrates its unlawful motive. However, the General Counsel did not suggest what those circumstances might be, and I find none. Unlike the Montgom-

ery accident, where water covered up a hole in the pavement, there are no facts here which would suggest that Thomas was not careless. Indeed, he had already unloaded 38 racks of tanks. Thus he presumably knew how much clearance was involved.

I conclude that the evidence is insufficient to support the General Counsel's contention that the Respondent was motivated to retaliate against Thomas because the union had won the election. Accordingly, I shall recommend that paragraphs 20 and 21 be dismissed.

*g. The warning, suspension, and discharge of
Donna Harrington*

The Respondent paints fuel tanks and axles. Involved in the process, among other things, is the removal of identification tags from the axles prior to painting and then replacing those tags afterward. Since axles are different for different vehicles, it is important that the correct tag be placed on a painted axle. If it is not, then the axle may later be put on the wrong type of vehicle, which fact will only be discovered after final assembly.

Donna Harrington's job was to replace the tags. On May 7 she received a "final warning" because she had mistagged three racks of axles. Then just 10 days later, she was "suspended pending termination" because she had mistagged axles which had been shipped to an assembly plant at Wentzville, Missouri. The mistagging had not been discovered until some of the axles had been put on vehicles. This resulted in charges to the Respondent estimated at \$3500-\$4500, in addition to the Respondent having to send two management people to Wentzville to inspect for mislabeled axles.

The General Counsel argues that the initial warning given to Harrington, as well as the suspension and discharge, were in retaliation for the employees having voted for union representation. The General Counsel argues that in the normal course of events, and absent union animus, the Respondent would not have disciplined or discharged Harrington. Rather, she would have been given a different job. There is no evidentiary support for this argument, nor, as matter of law, is the Respondent required to transfer, rather than terminate, employees who have demonstrated an incapacity for their job.

While the General Counsel seems to dispute the fact that Harrington twice mistagged axles, causing substantial loss to the Respondent, the credible evidence is to the contrary. Harrington was the only tagger on the day shift. The Respondent had in place a system whereby it could determine when axles were painted and on which shift. The Wentzville axles were painted on the day shift at a time when Harrington was working. Nor did she deny that she mistagged the axles. In fact she acknowledged making tagging mistakes. That she was a known union activist did not immunize her from doing her job properly. I conclude that regardless of the employees union activity, on these facts the Respondent would have given Harrington a written warning, and for a second offense 10 days later, would have discharged her. Accordingly, I conclude that paragraphs 22, 23, and 24 should be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Materials Processing, Inc., Riverview, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that employees' union activity is under surveillance.

(b) Prohibiting employees from distributing union literature in nonwork areas on nonworktime.

(c) Threatening employees with reprisals should they engaged in union activity.

(d) Denying off-duty employees access to company premises without showing a necessity therefor.

(e) Videotaping employees engaged in union or other protected activity.

(f) Granting wage increases or other benefits in order to discourage employees from engaging in union or other protected activity.

(g) Disciplining employees because they have engaged in union or other protected activity.

(h) 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) Remove from its files any reference to the warnings given Lila Phipps and Mike Montgomery on March 21, 1996, and notify them, in writing, that this has been done and that the warning will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility in Riverview, Michigan, copies of the notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 14, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

⁵If 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.

⁶If 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."