

**Garfield Electric Company and Indecon, Inc. d/b/a
Garfield Group and International Brotherhood
of Electrical Workers, Local 212, AFL-CIO-
CLC. Cases 9-CA-35138-2 and 9-CA-35270-2**

September 25, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 21, 1998, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Garfield Electric Company and Indecon, Inc., d/b/a Garfield Group, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Linda Finch, Esq., for the General Counsel.

Dawn Boland, Esq. and *Timothy Reilly, Esq. (Taft, Stettinius & Hollister)*, of Cincinnati, Ohio, for the Respondent.

Mr. Matthew D. Koblinsky, Esq., of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge, International Brotherhood of Electrical Workers, Local 212, AFL-CIO-CLC (the Union) filed charges against Garfield Electric Company and Indecon, Inc. d/b/a Garfield Group (Respondent) in Case 9-CA-35138-2 on July 21, 1997, and in Case 9-CA-35270-2 on September 4, 1997. On January 14, 1998, an order consolidating cases, consolidated complaint and notice of hearing (complaint) issued alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), by ordering the removal of an employee from its specified jobsite because the employee distributed union literature,¹ and Section

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are correct. *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.

¹ It is alleged that Respondent acted through Tom McAfee, Bruce Cameron and Lane Walker. Paragraph 5 of the complaint alleges that all three of these individuals have been supervisors of Respondent within the meaning of Sec. 2(11) of the Act and agents of Respondent within the meaning of Sec. 2(13) of the Act. Respondent admits these allegations, pointing out that Cameron was the General Superintendent and Walker was a foreman.

8(a)(3) and (1) by discharging its employee Steve Sanders and issuing documentation behavior modification reports to its employees Ken Roesch and Bryant Hill because they distributed union literature at a specified jobsite of Respondent and/or encouraged employees to read the literature and consider union representation and/or because they formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Respondent denies violating the Act as alleged. Also in its answer to the complaint Respondent alleges that it took no adverse employment action concerning Roesch or Hill, Sanders was not discharged from his employment, and Respondent did not exercise any authority or make any decisions regarding Sanders' employment status or his removal from the involved jobsite.

A hearing was held on March 2, 1998, at Cincinnati, Ohio. On the entire record in this proceeding including my observation of the demeanor of the witnesses and consideration of the briefs filed by counsel for the General Counsel and the Respondent on April 13, 1998, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, as alleged in the complaint, that Garfield Electric Company and Indecon, Inc. have been corporations with offices and places of business in Cincinnati and have been engaged as electrical contractors in the construction industry performing commercial, residential, and industrial construction; that Garfield Electric and Indecon have been affiliated business enterprises with common offices, ownership, directors, management, and supervision, have formulated and administered a common labor policy, have shared common premises and facilities, have provided services for and make sales to each other, have interchanged personnel with each other, and have held themselves out to the public as single-integrated enterprise; and that Garfield Electric Company and Indecon, Inc. constitute a single-integrated business and a single employee within the meaning of the Act. The complaint alleges, Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Steven Sanders, an electrician, testified that he was initially assigned to the P&G Olestra plant by Tradesmen International (Tradesmen), which is a temporary service for skilled trades, in April 1997; that on June 5, 1997, he was employed at the P&G Olestra plant by the Garfield Indecon Group and his paychecks were issued by Tradesmen; that he believed that Garfield Indecon "contracted" employees from the temporary service; that while at the P&G Olestra site his immediate supervisor was Len Walker, who is an electric foreman employed by the Garfield Indecon group; that he was not aware of Tradesmen having any supervisory or management personnel at the P&G Olestra site; that he was also supervised by Bruce Cameron, who was Walker's supervisor and who is the general foreman. On cross-examination Sanders testified that he first became affiliated with Tradesmen in May 1995; that he was assigned to different construction projects or other work assignments by

Tradesmen and in those situations he worked for different electrical contractors; and that prior to starting the P&G job Tradesmen had referred him to 12 to 15 different jobs.

On June 6, 1997, Sanders distributed some union handbills, General Counsel's Exhibits 4(a), (b), and (c), and provided information with respect to the wage package and total benefits at the P&G Olestra site. More specifically, Sanders, at about 5:55 a.m., distributed union literature with fellow employee Tony Melton and three individuals from the Union's organizing department, namely, Ken Mueller, Bob Lloyd, and Steve Jaeger. Initially Sanders and the others distributed the literature in parking lot 1 by gate B outside the turnstiles which employees have to go through to clock in and to enter into the working area. Before distributing the union literature Sanders had a conversation with Cameron in parking lot 1 outside the turnstiles during which Sanders gave him a letter on the union letterhead, General Counsel's Exhibit 2, which indicates that Sanders and another named individual, Moses McCown, were voluntary members of the Tradesmen International/Indecon organizing committee. When Cameron was informed what Sanders, Melton and the three union organizers were doing he said "okay" and went into work. Subsequently a security guard asked them what they were doing and when they told him they were passing out union literature he told them they could not do that. The guard then went to the guardhouse, which was located just outside the involved turnstile, and made a telephone call. Subsequently the guard said the organizers who were not employees at the site would have to get off the property. Mueller, Jaeger, and Lloyd moved outside the parking lot gate so that they were next to the street. Later the guard told Sanders and Melton that they would have to stand off the property also if they were going to hand out handbills. They complied and continued to hand out the union literature. Sanders testified that while he, Melton and the three organizers were out by the street, two or three guards approached him and one of the guards said to him "I'm supposed to secure you guys badges and confiscate your union literature."² Sanders asked the guard if they were fired. The guard did not reply. Instead the guard took an item out of Sanders' shirt pocket and on realizing that it was not what he wanted he threw it at Sanders hitting Sanders in the chest with it. It was 6:15 a.m. at the time and Sander's and Melton's shift began at 6:30 a.m. Mueller indicated to Sanders and Melton that they should clock in. The guard continued to ask for their I.D. badges and Sanders said "if I cannot clock in I may be fired and if I keep talking to you I may be late." The guard then said "[w]ell I'm supposed to . . . look in your lunch box³ and search you." Sanders testified that he let the guard look in his lunchbox and Melton let the guard look in his lunchbox. Sanders and Melton then used their cards to clock in and headed toward the jobsite. Sanders believed that when the guards approached them outside the fence they were on public property but later he testified that he was not sure. He testified that after they clocked in the guard told them that he wanted the union literature saying, "[y]ou're supposed to turn over your badges and literature to me." Melton turned over his union literature to the guard and Sanders turned and

² On cross-examination Sanders answered "[y]es" when asked "he [the guard] told you that the Fru-Con Safety Department had asked him to take your badges and your union literature . . ."

³ This testimony is corroborated by Mueller who testified that while he was out by the street he saw Sanders, who was by the turnstiles, open his lunch box and the guard looked inside.

walked toward the jobsite with the union literature under his arm with his jacket. Sanders testified that Melton did not turn over his badge. Sanders left the union literature, his jacket and his lunchbox on a picnic table in the break area. At about 9:30 a.m. when Sanders was on his break he was approached by Cameron who wanted him to sign two "Behavior Modification Report[s]," General Counsel's Exhibit 5.⁴ Sanders told Cameron that he, Sanders, did not know what "Behavior Modification" meant and he did not sign. About 10:15 a.m. while he was working Sanders was approached by Cameron, Walker, a Pinkerton security officer and Sanders believed Steve Ward. According to Sanders, Cameron told Sanders "you've been . . . terminated and we want you to turn in your safety gear and any tools you have of ours, and retrieve your belongings, swipe your card to clock out and then the guard will confiscate the I.D. Badge you use to clock in and out." (Emphasis added.) When Sanders picked up his jacket and lunchbox the union handbills were gone. When Sanders asked Cameron if he had something in writing with respect to the termination Cameron at first said that he did not have anything and then he handed Sanders a Pinkerton incident report, General Counsel's Exhibit 6. The report indicates that the client is "FRU-CON (P&G OLESTRA). It refers to Sanders and Melton as suspects #1 and #2, respectively. For the nature of the incident, the box for "OTHER" is checked off and "UNION ACTIVITIES" is written on the blank line provided after this category on the form. Sergeant Joseph Curtin filled out the form. He wrote as follows on the front of the form:

0600 RECEIVED A RADIO CALL FROM OFC. ARCHIBALD UNION
2 CONTRACTORS . . . AT THE TRUNSTILE PASSING OUT
LITERATURE TO EMPLOYEES CLOCKING IN.

0605 CALLED FRU-CONN SAFETY AND MANAGEMENT, MADE
OF POLICY AND RULES, THEN ASKED THEM TO TAKE THE
ACTIVITIES OUTSIDE THE GATE, THE SAFETY DIRECTOR
FOR INDECON ELECTRIC WAS PRESENT AND SAID THAT
THE EMPLOYEES WILL BE REMOVED FROM SITE AND I
SHOULD TAKE THEIR I.D. BADGES.

0607 I INFORMED THE TWO CONTRACTORS OF THE SITUATION
AND ASKED FOR THEIR BADGES. THE UNION REP TOLD
THEM TO CLOCK IN AND GO INTO WORK. BOTH
EMPLOYEES ATTEMPTED TO SMUGGLE IN LARGE
AMOUNTS OF LITERATURE CONCEALED IN JACKETS AND
LUNCHBOXES. REFUSING TO SUBMIT TO A SEARCH. MR.
SANDERS KEPT MAKING . . . REMARKS ABOUT BEING
LATE FOR WORK AND WOULD BE FINED.

On the back of the form Curtin, in filling out the line for "Was Client Notified?"; checked the "Yes" box and wrote the following under "Representative Name": "MILLIS A. POWELL/JIM WHITE." Curtin went on to write as follows:

CALLED P&G PATROL FOR BACKUP, SGT BOHART ONE OF
OFFICERS ASSISTING. HE NOTICED THEY . . . ATTEMPTING TO
SMUGGLE IN LITERATURE. HE CONFISCATED LITERATURE

⁴ The comments section of one of the "BEHAVIOR MODIFICATION REPORT[s]" contains the following: "Refused to allow security to inspect items being brought on P&G property." The other reads as follows: "Violation of project work rules." "Soliciting w/in P&G property" is the "BEHAVIOR DEFICIENCY" specified on the latter form.

FROM MR. MELTON. MR. SANDERS REFUSED TO HALT OR SUBMIT A SEARCH OF CLOTHING HAND OR HIS LUNCHBOX. IT WAS OBVIOUS HE HAD LITERATURE CONCLEALED IN THESE ARTICLES. THEY WENT ON INTO THE PLANT. MR. SANDERS SMARTING OFF ABOUT THE SITUATION.

THE UNION REPS DELIBERATELY ENCOURAGING THE EMPLOYEES TO DISREGARD FRU-CONN AND P&G POLICIES AND . . . TRYING VERY HARD TO ANTAGONIZE AND CONTRADICT SECURITLY POLICIES AND PROCEDURES.

PATROL NOTIFIED CAPT. VOLL AND WILL BE MAKING THEIR REPORTS. SUPERVISING MANAGER FOR INDECON CAME UP TO GET THE NAMES OF EMPLOYEES IN INCIDENTS.

Sanders testified that Cameron and a Pinkerton officer accompanied him to the turnstile and when he swiped his I.D. badge through it registered "Rejected" two times. Sanders gave the badge to the guard. He testified that prior to June 6, 1997, he had never had his lunchbox or toolbox or his person searched before entering the P&G site. On cross-examination Sanders testified that there were not signs posted at the P&G site notifying employees that they were subject to being searched; that he knew that when the employees left the site the guards had the authority to look in the employee's belongings if it was a container or a box of any sort; and that it seemed like every day when the employees came out they showed their boxes to the guard. Subsequently Sanders testified that employees could bring any magazine or newspaper on the P&G site; that he was aware of raffles being held on the P&G site including one for a motorcycle; that he was not sure whether the supervisors of Garfield or Indecon conducted any of the pools or raffles themselves and he could not say for sure that the supervisors witnessed these occurrences; that on April 24, 1997, during orientation at the offices of Garfield Indecon for the P&G job he received a copy of "FGN PROJECT WORK RULES" which includes the following: "16. Solitation [sic] and distribution of literature by employees authorized to enter the site and by all others is prohibited at all times," General Counsel's Exhibit 7 and Respondent's Exhibit 1; and that on April 24, 1997, he signed an agreement, Respondent's Exhibit 2, which reads as follows:

I, Stephen D. Sanders, hereby agree that I understand that I am an employee of ^{Tradesmen/}_{Name of subcontractor} that I am and that although I am not an employee of Garfield Electric Col that I must follow all rules and regulations of Garfield Electric including, but not limited to the following, while working on Garfield Electric jobsites:

- 1 Garfield Electric Employee Information Handbook for Hourly Personnel
- 2 Garfield Electric Safety Policy Manual
- 3 Garfield Electric Hazard Communication Program
- 4 Garfield Electric Prohibited Harassment and/or Discrimination Policy
- 5 No Solicitation, No Distribution Rule
- 6 Production standards

In addition I hereby acknowledge that I have received copies of the above policies, that I have read them, and that I understand them. Further, I understand that as an employee of ^{Tradesmen/}_{Name of subcontractor} that I will receive all pay and benefits from *Trademem* and that no pay or name of subcontractor benefits whatsoever are the responsibility of Garfield Electric.

I agree to follow all instructions from Garfield Electric designated supervisors. I understand that this agreement shall remain in force as long as I am working on a Garfield

Electric jobsite and that it applies to all my theirs, successors and assigns.

Sanders also testified that during the above-described orientation he also received the following, Respondent's Exhibit 3, which is on the letterhead of Garfield Electric:

NO-SOLICITATION, NO-DISTRIBUTION RULE

No solicitation is allowed for any reason except as stated in this policy. Solicitations by Garfield Electric employees shall be permitted only during the employee's non-working time. Distribution of materials or literature of any kind by Garfield Electric employees shall be permitted only in non-work areas, during the employee's non-work time. Persons who may be on non-work time shall not disturb those persons who are on work-time.

All non-employee solicitors are prohibited from soliciting employees of Garfield Electric on company premises at all times, and during working time off company premises if employees are performing services or working off of company premises.

On redirect, Sanders testified that the orientation was conducted by Phil Bower, who is the personnel director at Garfield and two women whose names he did not know.

On June 6, 1997, Sanders telephoned Joe Pettite at Tradesmen and told him what happened earlier that day at the P&G site. Sanders testified that Pettite said that he would get Sanders out somewhere next week and Sanders should call him the following Monday morning; and that when he telephoned Pettite the following Monday morning, June 9, 1997, he had to leave a message since Pettite was not there and Pettite never called him back.⁵

On June 10, 1997, Sanders began working for Luce Electric, a signatory or union contractor. Sanders testified that he learned of this opening from the union organizers; and that he was not guaranteed that job but it was a possibility.

Also on June 10, 1997, union literature was again distributed at the P&G site. Mueller testified that he and other members of the organizing committee, namely, Matt Koblinsky, Jaeger, and Steve Dunaway were present out by the street; that two employees were involved in the organizing activities that morning, Hill and Roesch; that the employees were in the area of the turnstiles and Hill was distributing union literature while Roesch talked to people; that he observed a guard speaking to Hill and then Hill and Roesch went through the turnstile; that Hill took the union literature with him through the turnstile; and that he did not recall a guard inspecting the lunchboxes of the two employees.

Roesch testified that in June 1997 he was employed with Tradesmen as an electrician; that Tradesmen contracted him out to the Garfield Group from April to June 1997 and he worked at the involved P&G site; that Tradesmen did not have any supervisors at the site and he reported to Greg See, who is a Garfield foreman, and he was supervised by Mike Merrit, who he believed was the Garfield general foreman; that on June 10, 1997, he and Hill went to the front of the turnstiles at the P&G site and while Hill passed out union literature he talked to the people about looking at the Union; that Mueller was outside the gates; that he and Hill wore union shirts that day; that a guard told them that they would have to move outside the gate; that

⁵ Sanders testified that he left two or three other telephone messages for Pettite.

since it was so close to their starting time, they packed up their stuff and went in to work; that Hill put the union literature in his toolbox; that it was the policy at the P&G site to inspect only on the way out any box or anything you carried; that the guard did not check his lunchbox or toolbox on the way in to work that day; that he did not see any guard check Hill's lunchbox or toolbox that morning; that a few minutes after clocking in that morning he gave See his letter of intent to become a volunteer organizer for the Union, General Counsel's Exhibit 8; that See said that he would give the letter to Merrit; that at about 1 p.m. Merrit approached him on the job and asked him to sign a disciplinary form which indicated "VIOLATION OF FRU-CON & P&G SOLICITATION RULES, PASSING OUT LITERATURE RULES, PASSING OUT LITERATURE ON COMPANY PROPERTY"; that he refused to sign the form because he had not been handing out literature; and that he signed the form when Merrit wrote "[e]mployee stated that he was not handing out lit[erature] but he has been informed ab[out] the policy" at the top of the form, General Counsel's Exhibit 9. Roesch testified that if his badge had been taken away, he would not have been able to go to work the next morning because he needed the badge to get through the turnstile; and there was a motorcycle raffle conducted by the pipefitters at the P&G site and it was going on in front of supervisors on the project. On cross-examination Roesch testified that he was not removed from the jobsite on June 10, 1997; that the motorcycle raffle was conducted by the pipefitters and a pool was conducted by either the pipefitters or welders; that neither the pipefitters nor the welders work for Garfield Electric; that he did not know whether any Garfield supervisors saw welders or pipefitters doing these things; and that he never saw an employee searched on the way in and he never saw any kind of written policy regarding inspecting only on the way out.

Hill testified that on June 1, 1997, he was employed by Tradesmen and was leased as a journeyman electrician to Indecon Garfield on the P&G Olestra site; that he began his employment with Tradesmen on December 1, 1996; that Tradesmen did not have any supervisors at the P&G site; that he reported to see, who works for either Indecon or Garfield, at the Olestra site; that he is also supervised by Merrit who is the general foreman for Indecon or Garfield; that he and Roesch visited the union hall on two occasions and on the second he was told about Sanders "got terminated at the Proctor and Gamble site; that he did not believe that Sanders was treated fairly since a few days before he saw the pipefitters passing out raffle tickets; that on June 10, 1997, he passed out union literature at the involved P&G site at about 6:30 a.m.; that Roesch, Koblinsky and Mueller were with him; that he passed out the union literature in the parking lot right before the turnstiles; that Roesch spoke to people asking them to at least look at the literature; that he wore a union T-shirt that day; that a guard told him and Roesch that they could not pass out literature on Proctor and Gamble property; that at that point he put the union literature in his lunchbox and went through the turnstiles and proceeded to the cafeteria where he spread the union literature on the table; that later that morning Merrit and a "safety guy" from either Indecon or Garfield approached him and Merrit gave him a verbal documentation for "VIOLATION OF FRU-CON & P&G SOLICITATION RULES, PASSING OUT LITERATURE ON COMPANY PROPERTY"; that he signed the document, General Counsel's Exhibit 10; that the guard's practice with respect to personnel searches or inspection of lunchboxes and toolbags

was that they just check them when we leave the premises through the turnstiles; and that he never had his toolbag or lunchbox searched or inspected when entering the involved P&G site. On cross-examination Hill testified that he was not removed from the jobsite on June 10, 1997, and he continued to work at the site until he left to take another job.

Garfield Hartman, the president of Garfield, was called as a witness by the Charging Party. As here pertinent, he testified that the people who supervised the Tradesmen employees at the P&G Olestra site were Randy Ward, Merrit, and Cameron, all of whom are general superintendents.

The Charging Party also called Ward, who testified, as here pertinent, that at the time of the hearing he was a general foreman employed by Indecon; and that while at P&G's Olestra site he did not see pools going on but he did hear about a pipefitters' pool.

Respondent called one witness, Jeffrey Grove, who was a Pinkerton security manager at the P&G Olestra project during the month of June 1997. Grove testified that Pinkerton was employed at the Olestra site by Fru-Con Construction, which was the general contractor; that he reported to Gary Armstrong at Proctor & Gamble and Ken Campbell, who was the Fru-Con facilities manager; that if an employee did not have a badge, the employee could get on the worksite if the employee could be verified either by looking at a log or calling the supervisor to get it okayed; that there was a policy regarding the inspection of employees or their belongings on the Olestra project, namely, everybody assigned to the P&G Olestra site was subject to being searched on entering, on leaving or anytime while on the property; that most typically the searches occurred on departing the facility; that he was involved in removing Sanders from the site on June 6, 1997; that Fru-Con Construction directed his removal; that between 10 and 10:30 a.m. he discussed the removal of Sanders from the site with Cameron, telling Cameron that the decision had been made that Sanders was to be removed from the site; that he was with Walker and Cameron when Cameron told Sanders that he was being released from the property; and that Melton was not removed from the project on June 6, 1997, because he had not violated any security policies of Fru-Con or Proctor & Gamble in that Melton submitted himself to inspection and generally was cooperative with the security officers on the site. On cross-examination Grove testified that Cameron did not ask why Sanders was being removed; that the reason for searching an employee when they enter the facility is to look for anything which is listed as contraband; that union literature is not considered contraband; that he did not know why the guards instructed Sanders to turn over his union literature; that while there is a prohibition against soliciting on P&G property, just having possession of union literature is not an exact form of solicitation; that "*basically the only part of the conversation I heard was Bruce [Cameron] had told Steve [Sanders] that he was being removed from the facility, and that we had to look in his tools, to make sure it was okay, basically we're looking for any Fru-Con property before he leaves the site, which he didn't have*" (emphasis added),⁶ that Sanders violated policy in that he entered the facility after the guards had requested he not do so, and he refused to be inspected; that he came on the site at 8 a.m. on June 6, 1997, and the involved incident occurred at 6

⁶ Subsequently Grove testified "[t]erminate, to us, means removal off the project."

a.m. that morning; that the Indecon safety director is Thomas McAfee; that the search policy is posted outside B-gate and all employees sign it prior to indoctrination; that the guards took Melton's badge and it was given back to him later; that he received the order to remove Sanders from Fru-Con management, namely, Stacey Chester, who is the Fru-Con safety manager for the site, and Oscar Tanck, who is Fru-Con's electrical discipline manager for the site; that he did not believe that McAfee had the authority to remove someone from the project; and that even though Curtin's report indicates "The Safety Director for Indecon Electric was present and said that the employees will be removed from site, and I should take their badges" that is not exactly what happened and the report is incorrect because both employees were not removed from the site. Subsequently Grove testified that if the guards tried to take Sanders' badge while he was out by the street then they were denying him access before there was a question of his refusing to allow a search. On redirect Grove testified that Indecon Garfield had the authority to remove their own people from the project at any time; and that once you get outside of gate B you are in the street so he believed that would be the city's property. On recross Grove testified that he believed that the approximately 4 foot wide grassy area between the street and the fence is P&G property.

Analysis

Despite the lack of such allegation in the complaint, counsel for the General Counsel urges, with respect to one of the rules given to Sanders during his orientation at Garfield for the P&G job, namely, "[s]olicitation and distribution of literature by employees authorized to enter the site and by all others is prohibited at all times"—that it be found that Respondent violated Section 8(a)(1) of the Act by promulgating, disseminating, and maintaining a no-solicitation/no-distribution rule that prohibits solicitation and distribution of literature by employees at all times. Counsel for General Counsel correctly points out that the issue was presented and fully litigated. This matter is reasonably related to the complaint's other allegations and in my opinion it is proper to make findings as to this issue. Since employees are presumptively privileged to solicit union support in nonworking areas on company property during their break-times, the rule quoted above in this paragraph is unlawful. *Our Way, Inc.*, 268 NLRB 394 (1983). Counsel for the General Counsel correctly points out that there is no evidence that Respondent ever expressly repudiated the overly broad, disseminated, unlawful rule and at least three employees were unlawfully disciplined for violating the unlawful rule.⁷ Also, there is merit in her argument that the simultaneous promulgation and maintenance of a presumptively valid no-solicitation/no-distribution rule by Respondent in no way disavows or modifies the invalid rule which it promulgated and maintained in that the National Labor Relations Board in *MGM Grand-Reno, Inc.*, 249 NLRB 961 (1980), found that the simultaneous maintenance of a valid no-solicitation rule and invalid no-solicitation rule created an ambiguous situation wherein employees could

⁷ When Sanders was standing out by the street, which was before he went through the turnstile, the guard attempted to deny Sanders access to the site when the guard asked for Sanders' badge which he needed to enter the site. Management had already decided to deny Sanders access and so there would not be a question of contacting a supervisor to find out if Sanders could be admitted without a badge.

not clearly know which rule was in effect, and the rules could be read together to give the impression that all solicitation and distribution was prohibited at all times on company property. Respondent violated Section 8(a)(1) of the Act by promulgating, disseminating, and maintaining the no-solicitation/no-distribution rule set forth above in this paragraph.

Paragraph 7 of the complaint alleges that about June 6, 1997, Respondent, by Tom McAfee, Bruce Cameron, and Lane Walker, unlawfully ordered the removal of an employee from its Olestra jobsite because the employee distributed union literature. As found in the next preceding paragraph the no-solicitation/no-distribution rule quoted therein is unlawful. As noted above, the Pinkerton incident report, General Counsel's Exhibit 6, indicates that at 6:05 a.m. "THE SAFETY DIRECTOR FOR INDECON ELECTRIC WAS PRESENT AND SAID THE EMPLOYEES WILL BE REMOVED FROM SITE AND I SHOULD TAKE THEIR I.D. BADGES"⁸ McAfee, the safety director for Indecon, did not testify herein to deny that what is indicated in the Pinkerton incidence report is in any way inaccurate in this regard. Consequently, before Sanders went through the turnstile, before there was any question of a search, Respondent had the guards demand, while Sanders was out by the street, Sanders' badge so that he could not gain access to the worksite. As the incident report indicates, Sanders was being removed from the site. As a matter of law, there was nothing wrong with what Sanders did up to that time. He was not on the clock at the time and the area he was distributing the union literature in was not a work area. Yet Respondent ordered his removal.⁹ Grove was not on site until

⁸ The report was received pursuant to Rule 801(d)(2)(B) of the Federal Rules of Evidence. Sanders asked Cameron if he had something in writing with respect to the termination. Cameron handed Sanders the Pinkerton Incidence Report after initially indicating that he did not have anything. By his action, Cameron was manifesting an adoption of the report. On brief, Respondent argues that neither General Counsel nor the Union laid any foundation on which to base any exception to the hearsay rules within which the document properly could be admitted. Since the document is not hearsay, there is no need to categorize it in terms of an exception to the hearsay rule. For this reason the case cited by Respondent, *Siwik v. Marshall Field & Co.*, 154 LRRM 2510, 2511 fn. 2 (N.D. Ill. 1996), is not applicable. Additionally, that case does not involve a supervisor, in answer to an employee's request to get something in writing about his termination, giving the employee a report of the incident generated by the security firm which was involved. Rather, the cited case involves a handwritten report by the plaintiff himself to the defendant's Loss Prevention Department. The court, in ruling on defendant's motion for summary judgement therein in an action under the Age Discrimination in Employment Act, inter alia, questioned the sufficiency of the handwritten report with respect to getting plaintiff's version of certain events credited for purposes of the ruling on the motion.

⁹ While Cameron and Walker did play a role in the actual removal, the record does not show that they participated in what occurred at 6:05 a.m. Respondent, on brief, argues that the fact that Cameron said "okay" about Sander's distribution of union literature that morning shows that Respondent did not interfere with any action based on that protected activity. Cameron did not testify herein. So he did not answer any questions about what he may have done subsequently. Actions speak louder than words. Depending on the circumstances, "okay" can have different meanings. It may signify approval or endorsement. But how could Cameron approve or endorse conduct which was contrary to a rule which Respondent, as indicated above, promulgated, disseminated and maintained for work at the involved site? If Cameron testified herein that he spoke to McAfee at 6:05 a.m. and explained to McAfee that there was no need to remove Sanders from the site because he, Cameron, had given his approval of the distribution—

almost 2 hours later so his testimony about what occurred before he even came on site must be weighed accordingly. Respondent violated the Act as alleged in this paragraph of the complaint.

Paragraph 8(a) of the complaint alleges that about June 6, 1997, Respondent unlawfully discharged its employee Steve Sanders. Sanders engaged in union activity. Respondent knew that Sanders engaged in union activity. As noted above, the Pinkerton Incidence Report refers to "union activity." And as found above, Respondent ordered his removal from site,¹⁰ which as Grove testified is the equivalent of termination,¹¹ based solely on his distribution of union literature before his worktime began and in a nonwork area. Sanders was discharged within hours of his union activity. Respondent's union animus is demonstrated by its promulgation, dissemination, maintaining, and enforcing of an patently unlawful no-solicitation/no-distribution rule, and the discriminatory treatment of its employees because they were on the organizing committee and engaged in union activity. While Respondent cites its treatment of Melton as a part of its business justification argument regarding its treatment of Sanders, its treatment of Melton raises at least one question. Since no charge was filed alleging that Melton received a behavior modification report and since Respondent did not indicate that Melton received such a report, it appears that Melton did not receive a behavior modification report. That being the case, one must ask why did Melton receive this favorable treatment? Respondent argues that Melton complied with the guards request so he was not removed from the site. And Sanders did not comply fully with the guard's request so he was removed from the site. But Hill and Roesch received behavior modification reports for just distributing and soliciting before their worktime and in a nonwork area notwithstanding the fact that they complied with the guards request. Why didn't Melton receive a behavior modification report? In creating a situation where it could point to the differing treatment of Melton and Sanders as a part of its business justification argument, if Respondent did not give Melton a behavior modification report, it appears that Respondent discriminated in favor of Melton vis-a-vis those on the organizing committee who engaged in union activity.¹² There was no business justification for Respondent's treatment

notwithstanding the fact that it violated an unlawful rule which Respondent promulgated, disseminated and maintained for this site—then one would weigh the merits of such an argument. But Cameron did not testify herein. His "okay" could have meant nothing more than his saying "okay" but thinking "we will see about that" and then taking actions which resulted in Sanders being removed from site.

¹⁰ Again, Grove was not on site until almost 2 hours after the involved incident. What he was told may have been what he was meant to repeat. He was Respondent's only witness herein. His testimony, to the extent that it may be interpreted to conflict with the testimony of the other witnesses about what occurred about 6 a.m. or with the Pinkerton Incident Report, is not credited.

¹¹ With respect to what Cameron actually told Sanders when he was removed from the site, Sanders' testimony that Cameron said he, Sanders, was terminated is credited. Cameron did not testify herein so he did not deny that he said this. Grove testified that he overheard only part of the conversation. Grove did not testify that he overheard Sanders asking for something in writing about the termination and he did not testify that he heard Cameron's response.

¹² Unlike Sanders, Hill and Roesch, Melton was not listed in either of the letters given to the Respondent which gave the names of the employees on the organizing committee. G. C. Exhs. 2 and 8.

of Sanders. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), counsel for the General Counsel has shown that union activity was a motivating factor in Respondent's action in that it has been shown that Sanders engaged in union activity, Respondent knew it, the timing involved, and anti-union animus on the part of Respondent. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove that the alleged discriminatory conduct would have taken place even in the absence of protected activity. The test applies whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). Respondent has not shown that the action it took against Sanders would have taken place even in the absence of protected activity. Respondent violated the Act as alleged in this paragraph of the complaint.

Paragraph 8(b) of the complaint alleges that on June 10, 1997, Respondent unlawfully issued behavior modification reports to its employees Roesch and Hill. As pointed out by counsel for the General Counsel in *Crestfield Convalescent Home*, 287 NLRB 328 (1987), it is stated "[t]he Board has consistently found that an overly broad rule governing solicitation is invalid for all purposes, and that consequently any discipline pursuant to such a rule is unlawful." (Footnote omitted.) It is disingenuous for Respondent to argue on brief that it is not responsible after Respondent promulgated, disseminated, maintained, and enforced the unlawful no-solicitation/no-distribution rule earlier with respect to Sanders. Merrit, who is one of Respondent's general superintendents, had both Hill and Roesch sign the behavior modification reports. Merrit himself made an entry on the behavior modification report to get Roesch to sign it. Merrit did not go to some Fru-Con supervisor and have him or her add to what was written on the behavior modification report. Merrit did not testify here. In fact, Respondent did not call one witness to testify with respect to this paragraph of the complaint. Respondent violated the Act as alleged in this paragraph of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by promulgating, disseminating, and maintaining an unlawful no-solicitation/no-distribution rule and by ordering the removal of employee from a jobsite because the employee distributed union literature in violation of the rule.
4. The Respondent violated Section 8(a)(3) and (1) of the Act by:
 - (a) Discharging Steve Sanders on June 6, 1997.
 - (b) Issuing documentation behavior modification reports to Ken Roesch and Bryant Hill on June 10, 1997.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged Steven Sanders, it must offer him reinstatement and make him whole for any loss of earnings and other benefits computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Garfield Electric Company and Indecon, Inc. d/b/a Garfield Group, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, disseminating, and maintaining an unlawful no-solicitation/no-distribution rule and ordering the removal of an employee from a jobsite because the employee distributed union literature in violation of the rule.

(b) Discharging Steve Sanders on June 6, 1997.

(c) Issuing documentation behavior modification reports to Ken Roesch and Bryant Hill on June 10, 1997.

(d) 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) Within 14 days from the date of this Order, offer Steve Sanders full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Steve Sanders, including the behavior modification reports issued to Steve Sanders on June 6, 1997, and remove the behavior modification reports issued to Ken Roesch and Bryant Hill on June 10, 1997, and within 3 days thereafter notify Steve Sanders, Ken Roesch, and Bryant Hill in writing that this has been done and, with respect to Steve Sanders, that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio copies of the attached notice marked

¹³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

“Appendix.”¹⁴ 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 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 June 6, 1997.

(e) 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.

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 promulgate, disseminate, and maintain an unlawful no-solicitation/no-distribution rule and order the removal you from a jobsite because you distribute union literature in violation of the rule.

WE WILL NOT discharging you if you engage in activities on behalf of International Brotherhood of Electrical Workers, Local 212, AFL-CIO-CLC.

WE WILL NOT issue documentation behavior modification reports to you because you solicit or distribute union literature during nonworktime in nonwork areas.

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, offer Steve Sanders full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Steve Sanders whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Steve Sanders, including the behavior modification reports issued to Steve Sanders on June 6, 1997, and remove the behavior modification reports issued to Ken Roesch and Bryant Hill on June 10, 1997, and WE WILL within 3 days thereafter notify Steve Sanders, Ken Roesch, and Bryant Hill in writing

¹⁴ If this Order is enforced by a Judgment of the 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.”

that this has been done and, with respect to Steve Sanders, that the discharge will not be used against him in any way.

GARFIELD ELECTRIC COMPANY AND INDECON,
INC. D/B/A GARFIELD GROUP