

**The Mead Corporation, Fine Paper Division and
United Paperworkers International Union, Local
731 AFL-CIO.** Cases 9-CA-32901 and 9-
CA-33447

June 28, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
HURTMAN AND BRAME

On August 8, 1996, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, with a supporting brief and in opposition to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's ruling, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Mead Corporation, Fine Paper Division, Chillicothe, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(b) Furnish the Union with the contractor swipe sheets it requested in connection with a grievance concerning Mead's use of contractors, and other such contractor swipe sheets as the Union may from time to time request."

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

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.

¹ In adopting the judge's findings, like the judge we do not pass on whether the November 29 meeting was within the ambit of *NLRB v. Weingarten*, 410 U.S. 251 (1975), i.e., whether it was an investigatory interview in which employees could reasonably expect that discipline might result. Like the judge, we find that, even assuming arguendo that it was, Bost's conduct was unprotected by the Act.

² We shall modify the judge's recommended Order to require that the Respondent provide the Union with the previously requested contractor swipe sheets, in addition to any that it may request in the future. We shall also modify the notice accordingly.

WE WILL NOT maintain rules that prohibit you from soliciting for purposes protected by Section 7 of the Act during nonworking time or from distributing literature for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of its Chillicothe Mill.

WE WILL NOT refuse to bargain collectively with United Paperworkers International Union, Local 731, AFL-CIO, by refusing to furnish the Union information that it requests that is relevant and necessary to the Union's performance of its functions as the exclusive bargaining representative of employees in the appropriate unit. The unit is.

All production, maintenance, restaurant, and quality assurance employees of the Employer, Chillicothe Operations, Chillicothe Mill, Chillicothe, Ohio, but excluding administrative executive, factory clerical, engineering department, technical or engineering assistants, customer services department, woods department, mail and multilith employees, hospital employees, passenger car chauffeurs, guards, and supervisors as defined in the National Labor Relations Act

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or modify our rules so that they do not prohibit you from soliciting for purposes protected by Section 7 of the Act during nonworking time and so that you are not prohibited from distributing literature for purposes protected by Section 7 during nonworking time in nonworking areas.

WE WILL furnish the Union with such contractor swipe sheets as the Union has requested and as the Union may from time to time request.

THE MEAD CORPORATION, FINE PAPER
DIVISION

Carol Shore, Esq., for the General Counsel.

*Robert J. Brown, Esq. (Thompson, Hine & Flory), of Dayton,
Ohio, for the Respondent.*

Bernard B. Bost, of Chillicothe, Ohio, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, the Mead Corporation, Fine Paper Division (Mead), employs about 1400 production and maintenance employees in its Chillicothe Mill in Chillicothe, Ohio. The employees are represented by the Charging Party, the United Paperworkers International Union, Local 731, AFL-CIO (the Union).¹

¹ All parties agree that Mead is an employer engaged in commerce within the meaning of Sec. 2(2) and (6) of the National Labor Relations Act (the Act), that the Union is a labor organization within the meaning of Sec. 2(5) of the Act, and that the Board has jurisdiction over this matter. The bargaining unit that the Union represents is: All production, maintenance, restaurant, and quality assurance employees of The Mead Corporation, Chillicothe Operations, Chillicothe Mill, Chillicothe, Ohio, but excluding administrative, executive, factory clerical, engi-

The General Counsel contends that Mead, at its Chillicothe Mill, violated the Act by: (1) maintaining rules that unduly restrict employees' solicitation and distribution activities; (2) refusing to provide certain information to the Union; (3) threatening to discipline the Union's chief steward, Butch Bost, because of the advice he gave to another employee; and (4) disciplining Bost because of his behavior during the course of a meeting, which Bost attended as the representative of fellow employees.

For the reasons discussed below, I conclude that Mead's solicitation and distribution rules violate Section 8(a)(1) of the Act, as alleged, and that, also as alleged, Mead violated Section 8(a)(5) and (1) when it refused to provide information to the Union. But I shall recommend that the Board dismiss the complaints to the extent that they allege that Mead's treatment of Bost was unlawful.²

I. SOLICITATION AND DISTRIBUTION RULES

Mead's rules state that the following activities (among others) shall result in discipline:

Engaging in any unauthorized activity during working hours that is not closely related to or a part of the employee's regular job, such as unauthorized solicitation on premises. The privilege of soliciting for charitable purpose shall not be unduly withheld.

Posting, distribution, or circulation of unauthorized notices, posters, and placards on plant premises.

Both rules plainly are overly broad. The first purports to forbid "any unauthorized activity . . . such as unauthorized solicitation on premises" not just during working time, but during working hours. The second forbids the distribution of "notices, posters, and placards" throughout the plant's premises, rather than just in working areas. And the record fails to show that Mead communicated these rules to its employees "in such a way as to convey an intent clearly to permit solicitation during breaktime or other period when employees are not actively at work" (with respect to the first quoted rule) or that Mead "knowingly tolerated distribution in nonwork areas." *Braden Mfg., Inc.*, 315 NLRB 1145 (1994). See generally *Our Way, Inc.*, 268 NLRB 394 (1983).

Mead acknowledges that the rules' prohibitions are too broad. But Mead defends on the grounds that the Union agreed to the rules and that in practice Mead permits employees to engage in solicitations and distributions to an extent at least as broad as that mandated by the Act.

Mead's argument about union agreement is factually correct. The rules quoted above are part of Mead's "Company Rules," which rules have long been incorporated in collective-bargaining agreements between Mead and the Union. (The

neering department, technical or engineering assistants, customer services department, woods department, mail and multilith employees, hospital employees, passenger car chauffeurs, guards, and supervisors as defined in the National Labor Relations Act.

² I held the hearing in Case 9-CA-32901 on December 5, 1995, in Cincinnati, Ohio, and thereafter received briefs from the General Counsel and Mead in that matter. On February 7, 1996, the General Counsel moved to reopen the record in that case and to consolidate that case with Case 9-CA-33447. Mead did not oppose the motion and I granted it by order dated February 23, 1996. I held the reopened hearing on March 21, 1996, and the General Counsel and Mead filed additional briefs.

most recent collective-bargaining agreement expired by its own terms in August 1995.³ As of the hearings here, Mead and the Union were attempting to negotiate a successor agreement. By agreement between the Union and Mead, the terms of the last collective-bargaining agreement remain in force during negotiations.)

But a union may not waive the rights of employees to engage in activities by which employees may seek to change their bargaining representative, to opt for no bargaining representative, or to seek to retain their present bargaining representative. *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, (1974); *Universal Fuels*, 298 NLRB 254 (1990). Accordingly, the fact that the Union agreed to the solicitation and distribution rules at issue does not constitute a defense for Mead.

As for Mead's lack of enforcement of the rules, the only evidence on point (testimony of an employee relations representative in Mead's human resources department) shows only that Mead has not disciplined any employee for violating either the solicitation rule or the distribution rule. But

[F]ailure to enforce an overbroad rule is no defense because the mere existence of an overbroad rule may chill the exercise of the employees' Section 7 rights. [*Laidlaw Transit*, 315 NLRB 79, (1994).]

II. MEAD'S REFUSAL TO PROVIDE INFORMATION

Article XIX of the collective-bargaining agreement authorizes Mead "to engage independent contractors to perform selected service functions and overloads of maintenance work." The collective-bargaining agreement also provides that

Prior to engaging an independent contractor to perform temporary overloads of maintenance work, the Company will notify the Union and will outline the nature of the project or plan.

The Union's concern about Mead's use of contractors to perform maintenance work has led the Union, over the years, to file numerous grievances alleging violation by Mead of article XIX.

All parties agree that Mead routinely provides contractor information to the Union. This information is in the form of anticipated contractor activity (as the collective-bargaining agreement requires). Thus Mead gives the Union a list of contractors that Mead expects to be on site during the following week.⁴ And when the Chillicothe Mill's human resources department learns that the weekly list has not correctly anticipated all contractor work for the week, that department promptly provides corrections to the Union.

Additionally, a form called the "green sheet" provides project-by-project data such as a description of the project to be contracted out, reasons for the contracting out, skills expected to be needed, and the estimated number of man-hours the contractor will need to complete the project.⁵ Mead provides green sheets to the Union upon request by the Union.

But what about retrospective information? That is, information that shows, after the fact, which contractors actually were on site, what they did, and how many man-hours they took to do it. Particularly where the Union is contemplating filing a

³ That collective-bargaining agreement is in the record as GC Exh. 2.

⁴ An example of a weekly contractor list is in the record as GC Exh. 6.

⁵ See GC Exh. 5.

grievance because of suspicions that Mead has violated the collective-bargaining agreement, such retrospective information obviously is useful in order to check the accuracy of the anticipatory information that Mead had supplied to the Union.

To answer that question about retrospective information, we need to examine, of all things, Mead's security arrangements at the Company's Chillicothe site.

Mead operates two paper mills at the Chillicothe site, the Chillicothe Mill and the Chilpaco Mill. The entire site is fenced. Access to the site is controlled by Mead's security personnel. Two gates are available for contractor employees wanting access onto the site. Each of the two gates provides access to both the Chillicothe Mill and the Chilpaco Mill.

Some contractor personnel physically sign a log maintained by security personnel at each of the two contractor gates. When signing in, the individual writes, along with his or her name, the name of the individual's employer, the time, the particular project on which the individual will be working, and the nature of the individual's work (e.g., pipefitter, or laborer). A page from these logs is known as a "contractors check in/out log" or, less formally, as a "gate sheet."⁶ Mead provides gate sheets to the Union upon the Union's request.

Most contractor personnel, however, do not sign any security log. Rather, the recording of their entry and exit is handled electronically.

To that end, Mead issues "swipe cards" to most contractor personnel. To oversimplify somewhat, a swipe card is a plastic card with computer-readable data encoded on it. The data include a reference to the name of the cardholder and the name of the contractor that employs the card holder. To enter or leave Mead's Chillicothe site, the cardholder, at either of the two contractor gates, "swipes" the card through a device that automatically reads the card, notes the date and time of day, and feeds that information to a computer. That computer, if queried, can (in theory) provide, by contractor, for any given day, the names of the contractor personnel who were present at the Chillicothe site, the amount of time each of such individuals was on site, and the total hours on site of the contractor's personnel.

Where the computer spews back that information in the form of a printed page, the output is called a "swipe sheet."⁷

On many occasions in the past, the Union requested particular swipe sheets. Mead honored those requests. But on May 1, 1995, a letter from a Mead official to the Union's president stated that Mead would no longer provide swipe sheets to the Union. The reason for this change in policy, the letter stated, was that Mead did "not have confidence in the accuracy" of swipe sheet information. The letter reads, in part:

Recently, we have become aware that the information recorded on . . . swipe sheets is not always accurate. Specifically, we have found cases in which the contractor for whom the electronic system indicated the employee was working was not correct, and the information often includes contractors and contractor employees working at the Chilpaco Mill.

I am writing to tell you that because we do not have the confidence in the accuracy of this electronic information we will no longer provide this information in this form.⁸

The Union promptly objected to Mead's letter. Subsequently the Union asked for swipe sheets in connection with a grievance concerning Mead's use of contractors. Mead refused to provide them.

The record is clear that swipe sheets are sometimes inaccurate in some important respects and ambiguous in others.

Thus, as the letter indicates, sometimes a swipe sheet will indicate that an individual on site was an employee of one named contractor when in fact the employee was, at the time, in the employ of another contractor. (That occurs when an individual leaves the employ of one Mead contractor, enters the employ of another Mead contractor, and continues to use his or her old swipe card.)

Additionally, the hours-worked information can be wildly inaccurate. The one swipe sheet in the record, for example, purports to show that on August 28, 1994, three different contractor employees each worked considerably in excess of 24 hours.

Also, swipe sheets do not distinguish between supervisors, clerical employees, and hourly employees. Yet the Union's only interest is in contractors' hourly employees.

Finally, as the letter states, swipe sheets include personnel working at the Chilpaco Mill (whose employees are not represented by the Union) as well as at the Chillicothe Mill. (Swipe sheets include data in a column labeled "mill." But the testimony here suggests that, notwithstanding that column, mistakes occur on swipe sheets about at which mill a given contractor employee worked.)

The record, however, shows that, despite the shortcomings of the swipe sheets, access to these documents is important to the Union.

Union suspicions about Mead's overuse of contractors typically are triggered by reports from bargaining unit members that they saw contractor employees doing work that should have been handled by bargaining unit employees. Swipe sheets are an obvious place for the Union to begin its investigation in response to these reports. If the swipe sheets for the relevant days do not tally with the anticipatory information that Mead had supplied, plainly the situation merits more intensive investigation by the Union. That is so even though the swipe sheet alone cannot resolve the question of whether Mead was in fact having bargaining unit work performed by a contractor in a manner that violated the collective-bargaining agreement. And no other type of document is a feasible alternative for the Union.

It is true that, instead of asking for swipe sheets, the Union could simply ask Mead what the contractor in question was doing. But for the Union to rely entirely on an answer by Mead to such a query, the Union would also have to rely on Mead's willingness and ability to provide an accurate answer in circumstances in which the Union had some reason to believe—rightly or wrongly—that the information that Mead had already provided was incorrect. Whatever the problems with swipe sheets, at least they are based on data collected in the normal course of business, as opposed to information collected by in specific response to a Union request by Mead officials, officials whose interests might conflict with the disclosure of the particular information sought.

The Union obviously is entitled to swipe sheets. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) (involving, inter alia, information relevant to the subcontracting clause of a collec-

⁶ A copy of a gate sheet is in the record as GC Exh. 7.

⁷ A copy of a swipe sheet is in the record as GC Exh. 9.

⁸ GC Exh. 11.

tive-bargaining agreement); *Shoppers Food Warehouse*, 315 NLRB 258 (1994).

III. MEAD'S THREATENED DISCIPLINE OF BUTCH BOST

In April 1995 Butch Bost (the Union's chief steward) advised a member of the bargaining unit to disobey two management directives. That advice resulted in Mead's management threatening to discipline Bost. In order to place that threat in context, I turn first to the circumstances that led to the directives about which Bost gave his advice.

The collective-bargaining agreement between Mead and the Union contains two provisions dealing with employees who become physically unable to perform their jobs. One provision covers temporary disabilities; the other covers permanent disabilities.⁹

Jeffrey Roush is a Mead employee. About 2 years before the events in question, Roush hurt his back. That injury prevented Roush from performing his then permanent job in Mead's wood yard. Mead transferred Roush to a light duty position in the plant's hospital. Roush retained his regular pay rate while on this temporary light duty.

Richard Yoke is an employee relations representative at Mead's Chillicothe Mill. On March 30, 1995, Yoke sent a letter to Roush that read:

Based on your work capacity evaluation received on March 8, 1995, Dr. Berling's examination of March 29, 1995 and your physician's work release dated February 2, 1995, your physical condition will allow you to move to a permanent job in the mill. It is the Company's position that these examinations reveal that your restrictions are such that it would not be in the best interest of Health and Safety, nor an act of prudent judgment in placing you on the Woodyard Process Operator and Support Operator jobs.

⁹ Art. XI, sec. 9, of the collective-bargaining agreement reads.

A. Temporary

An employee who is injured on the job and who cannot perform the duties of his regular job shall be transferred to any starting job in his department which he can satisfactorily perform and to which his seniority entitled [sic] him. His regular job will be filled as [a] temporary vacancy and he and all other employees affected by the transfer will be returned to their regular jobs when he is physically able to do so. If the injured employee is unable to perform the starting job in his department his ability and plant seniority shall be given consideration for base rate jobs in other departments.

B. Permanent

An employee who is disqualified from a job because he cannot continue to meet the physical job requirements established by the Company under applicable state and/or federal statutes, or has been injured on the job and cannot perform the duties of his regular job, shall be transferred to any job in his department which he can satisfactorily perform and to which his seniority entitles him. If the disqualified employee is unable to perform any job in his department, he shall exercise previously acquired department seniority to former departments to place himself on a job he can satisfactorily perform and to which his seniority entitles him. If the disqualified employee is unable to place himself exercising previous departmental seniority, his ability and plant seniority shall be given consideration for starting jobs in other departments.

According to Article XI, Section 9(B) [of the collective-bargaining agreement], you must take your bump in the following manner.

Enclosed are seniority lists dated March 21, 1995. Please use these lists as a basis to pick a job in a department to which you are entitled based on your seniority and physical condition. Please contact me . . . by April 7, 1995 with your decision.¹⁰

Mead, that is to say, told Roush that it had concluded that he was permanently unable to meet the physical requirements of his wood yard position, advised Roush that the Company was going to transfer him to a different permanent job, and ordered Roush to select a position that he was physically able to perform and to which his seniority entitled him.

Yoke met with Roush and two officials of the Union and discussed the import of the letter.

Roush then called Bost to say that the Company had ordered Roush to bid on a permanent job. Roush did not tell Bost that Mead had informed other union officials of the planned action. In a second conversation, Roush told Bost that Roush was going to see his physician again about his physical condition. During one of those conversations, Bost told Roush that Roush should not bid on any permanent job. That is, Bost advised Roush not to comply with Yoke's March 30 letter. Bost did not suggest to Roush that Roush grieve Yoke's order. (The collective-bargaining agreement provides for typical grievance and arbitration procedures.¹¹)

The March 30 letter ordered Roush to tell Yoke, no later than April 7, what position Roush wanted to bump into. Roush did not do so. When Yoke did not hear from Roush, on April 18 Yoke sent Roush another letter. The letter read:

On March 30, 1995, I met with you and explained that you needed to select a job in a department which your seniority would allow, based on your physical restrictions. I asked you to select this job and respond to me by April 7, 1995. As of this date, I have not heard from you regarding your decision.

Please take some time to review the seniority lists I provided you, select a job which your seniority will allow and contact me directly with your decision no later than April 25, 1995. If you have any questions, please feel free to call me.¹²

Roush contacted Bost again, telling Bost that Mead had again ordered him to exercise his bumping rights. Bost told Roush that Mead was proceeding improperly and that Roush should not comply with this letter either. Again, Bost did not propose that Roush grieve the Company's order.

On April 25, upon receiving no word from Roush, Yoke contacted Bost to describe the Roush situation and to ask for help in getting Roush to respond. According to Yoke, Bost said that he would not do that and that, in fact, it was he (Bost) who had told Roush not to respond to the letters and not to exercise his bumping rights. (Bost agreed that he had advised Roush not to bump into a permanent position but also testified that he had never told Yoke that he had told Roush that. I credit Yoke on this point, not Bost.)

¹⁰ R. Exh. 2.

¹¹ GC Exh. 2 at 32-34.

¹² GC Exh. 3.

The meeting between Yoke and Bost meeting was followed a day or two later, on April 27 or 28, by a meeting between Yoke and Roush. Yoke again ordered Roush to exercise his bumping rights. In the course of the discussion Roush said that Bost had told Roush not to respond to Yoke's letters and he had followed that advice. (I note that no party chose to call Roush as a witness even though, as of the hearing, Roush remained a Mead employee and a member of the Union.) Yoke told Roush that Roush had no choice in the matter—he had to select a new permanent position. Roush said he would do so. Either at this meeting or one a day or two later, Roush was advised that his past failure to comply with Yoke's letters was a violation of Company rules but that Mead had decided not to discipline him. Roush subsequently did select a new position.¹³

Lewis Eugene Bussa is Yoke's boss. He is the human resources manager in the carbonless business unit at the Chillicothe Mill. Mead denies that Bussa is a supervisor. But Mead admits that Bussa is an agent of Mead and admits that Bussa has the authority to give direct orders to employees and to discipline them.

Yoke told Bussa about the advice that Bost had given to Roush. Bussa responded by calling Bost to his office on about April 28.

Bussa started the meeting by telling Bost that he had a problem with Bost's behavior regarding two different matters. One of those matters does not concern us here. The other had to do with Bost's telling Roush not to respond to an order from management. In respect to the Roush matter, Bost replied that, in the Union's opinion, Mead should keep Roush on temporary duty. Bussa got angry. If Bost disagreed with an order handed down by management, Bussa said, then Bost could file a grievance. But a union steward, Bussa continued, has no right to tell employees that they should not obey a direct order. Doing so amounts to "self-help" (in Bussa's words¹⁴) and that constitutes insubordination. Bost, said Bussa, had accordingly jeopardized the employment of both Bost and Roush. When Bussa continued in this vein, Bost announced that he was unwilling to hear any more of Bussa's criticism and got up to leave. Bussa ordered Bost to stay put and told Bost that he would be fired if he left Bussa's office. Bost stayed put. Bussa then wrapped up the discussion about the Roush situation by saying that if, in the future, Bost again encouraged an employee to ignore a management directive, as Bost had here, Mead would fire him.

As a last matter I note that Mead has two rules pertaining to insubordination. (As is the case with all of the Company's rules, they are a part of the collective-bargaining agreement.) One states that "insubordination (refusal to perform service connected with the efficient operation of the plant as required by a superior, or refusal to obey any reasonable order given by a superior)" is punishable by discharge.¹⁵

The other states that "inducing employees to engage in any practice in violation of Company rules" is punishable by suspension (for the first and second offenses) and discharge (for the third offense).¹⁶

¹³ Mead concluded that Roush's disabilities precluded him from working in the position that Roush first selected. Roush then selected another position. Mead agreed with that selection and assigned Roush to that position. The Union filed a grievance in the matter. The grievance was pending at the time of the hearing.

¹⁴ Tr. 140.

¹⁵ GC Exh. 2, at p. 54. The parenthetical is a part of the rule.

¹⁶ Id. at 52-53.

As noted earlier, my recommendation is that the Board dismiss the complaint's allegation that Mead violated the Act when Bussa threatened Bost with discipline by reason of the advice that Bost gave to Roush.¹⁷

When employees are facing a situation where, in the employees' view, compliance with a supervisor's order would present immediate risks to the employees' health or safety, a refusal by the employees to obey the order will, in many circumstances, constitute protected activity. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); see *Washington Aluminum Co.*, 370 U.S. 9 (1962).

But that kind of situation is the exception. The usual and long-recognized rule is that employees faced with an order that they believe to be in conflict with the terms of a collective-bargaining agreement must "obey now; grieve later." *Specialized Distribution Management*, 318 NLRB 158, (1995); see *Carolina Freight*, 295 NLRB 1080 fn. 1 (1989); *Mead Corp.*, 275 NLRB 323, (1985); *Jos. Schlitz Brewing Co.*, 240 NLRB 710, (1978). And part and parcel of that rule is a steward's obligation to adhere to the grievance process rather than to "advise[e] employees not to comply with a legitimate directive of the Company." *G & H Products*, 261 NLRB 298 (1982), enf. denied on other grounds 714 F.2d 1397 (7th Cir. 1983).

Here there was no urgent issue of health or safety. Management had merely ordered Roush to select a permanent job that he believed his seniority and physical condition permitted him to occupy. (I note that neither Roush's nor Bost's unhappiness with Yoke's directives had anything to do with concerns about Roush's health or safety. In any case, Roush's actual transfer into a new job would come later.) And Mead gave Roush plenty of time to make the selection. In these circumstances Bost's advice to Roush that Roush ignore Yoke's directives amounted to "engaging in the unprotected activity of advising employees to engage in insubordination." *G & H*, supra.

As a last matter, nothing in the record suggests that Bussa's response to Bost was a function of union animus. Nor was Bussa's response aimed at Bost's point of view about the import of the collective-bargaining agreement as it applied to Roush. Rather, what troubled Bussa was "the means of protest" that Bost told Roush to utilize. *Mead Corp.*, supra, 275 NLRB at 323.

IV. MEAD'S DISCIPLINE OF BOST IN DECEMBER 1995¹⁸

Bargaining unit employees Melvin Atwood, Mark Buskirk, and Duane Francis are day-shift maintenance technicians. They work out of the electrical and instrumentation (E&I) shop in the Chillicothe facility's carbonless business unit. Their immediate supervisor is Rick Johnson. Johnson's boss is Maintenance Superintendent Randy Wittkugle.

On November 29, 1995, Wittkugle told Johnson that he wanted to meet with Johnson, Atwood, Buskirk, and Francis at 2:30 that afternoon. Wittkugle was dissatisfied with the three employees' performances and attitudes and had decided to tell

¹⁷ Par. 5(a) of the complaint reads: "About April 27, 1995, Respondent, by Gene Bussa, at its Chillicothe, Ohio, facility, threatened an employee with discharge because he attempted, in his capacity as union steward, to represent a fellow employee in a contractual or work-related dispute."

¹⁸ This facet of this proceeding arose from an unfair labor practice charge filed on December 5, 1995, in Case 9-CA-33447. See fn. 2, supra.

the three precisely what he wanted from them and to make it clear that they had better shape up.

Wittkugle invited the Union to provide a representative at the meeting. Wittkugle issued the invitation to the Union mainly because he felt that there was a good chance that the employees would be unwilling to attend the meeting unless they had a union representative there. And, in fact, when the employees heard about the meeting from Johnson, one of them (Francis) asked Johnson for union representation. Johnson told them that Wittkugle had already taken care of that.

The November 29 Meeting

The meeting began on schedule in the E&I shop, a small room—about 12 feet wide by 15 feet long. Present: Wittkugle, Johnson, Atwood, Buskirk, Francis, and on behalf of the Union, Chief Steward Bost.

Wittkugle had prepared a written list of items he wanted to cover. He immediately began discussing the items, one by one. The employees' deficiencies to which Wittkugle referred included: not handling their maintenance assignments adequately; squabbling among themselves; and attitudes that interfered with the performance of their work.

In the midst of Wittkugle's listing of these problems, Buskirk began to smile. Given the nature of Wittkugle's talk, that was not an altogether appropriate facial expression. Additionally, about a week before, Wittkugle had gotten upset when both Buskirk and Francis had broken out into laughs after Wittkugle had criticized them. In any event, at this meeting on November 29 Wittkugle responded to Buskirk's smile by taking a step toward Buskirk while heatedly saying something on the order of, "what are you laughing at? This isn't a laughing matter."

This was the point at which Bost jumped in. He told Wittkugle that "an employee has the right to snicker," and that "if anyone had a personality problem, an attitude problem," it was Wittkugle.¹⁹ Bost continued by calling Wittkugle "the dumbest supervisor I've ever worked for in my life."²⁰

Wittkugle replied by telling Bost that he was disrupting the meeting and by ordering Bost to leave the shop. Bost refused, saying that he was there to represent the employees. Wittkugle told Bost that he (Wittkugle) would get another union representative to attend the meeting. Bost again refused to leave, referring to the fact that he is the chief steward. Wittkugle then said, "I am giving you a direct order to leave." (At Mead, a supervisor's use of the term "direct order" means that the supervisor is very, very, serious.) Bost refused to leave.

There is a telephone in the E&I shop. Bost, upon rejecting Wittkugle's direct order, moved toward the telephone. What happened was that Bost had decided that the meeting needed the presence of the Chillicothe facility's human resources manager, Darrell Elsemore.

As Bost reached the telephone Wittkugle ordered him not to use the phone in the shop, to use another phone if he wanted to make a call. Bost said that he was going to use the phone in the shop. Wittkugle said, "I'm giving you a direct order not to use that phone." Bost ignored Wittkugle and placed a call to the human resources department. (As it turned out, Elsemore was not available.)

¹⁹ The quotations are from Bost's testimony at Tr. 241.

²⁰ Everyone agrees that Bost said that, or words to that effect. See Tr. 210, 228 (Francis), 241 (Bost), and 318 (Wittkugle).

With Bost speaking on the shop's telephone, Wittkugle resumed the meeting for another couple of minutes, listing what he considered to be additional deficiencies of the employees. Wittkugle concluded the meeting by telling Atwood, Buskirk, and Francis that if they failed to correct the deficiencies he had listed, he would discipline them.

The meeting had lasted, at most, about 10 minutes.

A few days later Mead issued a written warning to Bost based on his behavior at the meeting.

Was Bost's Behavior Protected

I shall proceed assuming, arguendo, that the November 29 meeting was one to which *Weingarten* protections applied.²¹

A union steward's communication to a supervisor on behalf of a fellow employee ordinarily is protected by the Act. In that regard

The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves. Although flagrant, opprobrious conduct may sometimes cause an employee's concerted activity to lose the protection of the Act, impropriety alone does not strip concerted conduct of statutory protection.²²

But the permissible limits of a union official's behavior in *Weingarten* meetings are appreciably narrower than in many circumstances involving protected activity.

The Board had occasion to discuss this distinction at some length in *New Jersey Bell Telephone Co.*, 308 NLRB 277, (1992). There the Board made it clear that a *Weingarten* representative "is free to counsel the employee and "is entitled to object to questions that may reasonably be construed as harassing." But

The Board has long recognized the Supreme Court's intention in the *Weingarten* decision to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by the union representative present at such an interview It is clear from the Court's decision in *Weingarten* that the role of the union representative is provide assistance and counsel to the employee being interrogated The Court specifically declared, however, that the presence of the representative should not transform the interview into an adversary contest or a collective bargaining confrontation, and that the exercise of the *Weingarten* right must not interfere with legitimate employer prerogatives.²³

I turn now to Bost's behavior at the November 29 meeting.

Bost's First Set of Utterances

In the face of Wittkugle's unrelieved criticism of the three employees' performance, Buskirk opted to smile. (The record does not tell us why, since Buskirk did not testify.) When Wittkugle responded angrily, Bost retorted that: "an employee

²¹ The reference is to *J. Weingarten, Inc.*, 420 U.S. 251 (1975). It specifically do not reach any conclusion about whether the meeting was in fact one to which the *Weingarten* protections did apply.

²² *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, (1995) (citations omitted), enf. denied in part 81 F.3d 209 (D.C. Cir. 1996).

²³ 308 NLRB at 279 (citations omitted).

has the right to snicker”; “if anyone had a personality problem, an attitude problem,” it was Wittkugle; and “you’re the dumbest supervisor I’ve ever worked for in my life.”

I will assume (again *arguendo*) that Bost was entitled to say that Buskirk had the “right to snicker.” But the remainder of Bost’s utterance plainly was outside the bounds of protected behavior. Those words were hardly a counseling of any of the employees, or an effort to defuse the situation, or even a claim that Wittkugle was proceeding in an improper way. Rather, in the presence of three employees and another supervisor, Bost opted for an *ad hominem* attack on Wittkugle’s personality, attitude, and intellectual capacity. However serious that would be standing alone, additionally it disrupted the meeting.

Bost’s Refusal to Leave the Shop

Wittkugle responded to Bost’s attack by telling him to leave the shop. Bost refused to leave. Wittkugle again ordered Bost to leave, saying that he would have another union representative join the meeting. Bost refused to leave. Wittkugle then gave Bost “a direct order” to leave. Bost refused to leave.

Since Bost had “exceeded the permissible role of a *Weingarten* representative,” Bost “forfeited his right to remain” in the meeting. *New Jersey Bell* at 280; accord: *Yellow Freight System*, 317 NLRB 115, (1995). Thus each of Bost’s three refusals to obey Wittkugle’s orders to leave the shop was unprotected by any provision of the Act.

Bost’s Telephone Call

It is not the function of a *Weingarten* representative to determine which management representatives should be present. Yet Bost, having decided that the meeting needed Elsemore, chose to call Elsemore in the midst of the meeting from the shop’s telephone. Particularly given the small size of the shop, Bost’s use of the telephone was obviously disruptive. Once again Bost had “exceeded the permissible role of a *Weingarten* representative.” Wittkugle twice told Bost to use a telephone elsewhere. Bost twice refused and did make the call, while the meeting was in progress, from the shop. Both refusals and the telephone call itself were outside the protections of the Act.

I note that, prior to the meeting, Bost had asked Elsemore to attend the meeting. Elsemore refused but said that Bost could call him if necessary. The General Counsel appears to contend that that exchange between Elsemore and Bost entitled Bost to the Act’s protections when Bost made the call from the shop while the meeting was in progress and, therefore, that the Act also entitled Bost to reject Wittkugle’s orders to use another phone. But I consider the pre-meeting Elsemore-Bost exchange to be irrelevant to the issues in this proceeding.²⁴

Mead’s Discipline of Bost

On Thursday, November 30 (the day after the meeting) Wittkugle met with Elsemore and described the events at the meeting. The picture that Wittkugle painted was largely in accord with my description, above. Wittkugle argued to Elsemore that Bost’s actions showed that Bost had deliberately tried to

²⁴ Also prior to the meeting, Bost advised Atwood, Buskirk, and Francis just to listen to Wittkugle, to refrain from responding to him. Mead interprets that advice as an effort on Bost’s part to prevent the meeting from accomplishing anything by having the employees remain silent even when Wittkugle wanted their comments or questions. But I do not understand that to have been Bost’s intent. Rather, the likely reason that Bost so advised the employees was (ironically) to have the employees avoid getting into a confrontation with Wittkugle.

“sidetrack “ the meeting.”²⁵ (I do not find that to be the case. But I also find that Wittkugle honestly believed that that was Bost’s motivation.) Wittkugle opined that Bost’s refusal to obey Wittkugle’s direct orders had “serious implications.”²⁶

Elsemore asked Bussa (the human resources manager in the carbonless business unit) to meet with Atwood, Buskirk, and Francis about what had happened at the November 29 meeting. Bussa did so. (As Francis recounted the November 29 meeting during his session with Bussa, Wittkugle was more aggressive toward the employees and Bost than as I have described. But Francis told Bussa about Bost’s characterization of Wittkugle as dumb and about Bost’s numerous refusals to obey Wittkugle’s orders.)

Bussa gave his report to Elsemore on Monday, December 4. Immediately after receiving that report, Elsemore called Bost. Elsemore told Bost to come to his office along with Melvin McNichols, the Union’s president. When Bost and McNichols arrived, Elsemore told them what Wittkugle had said about the meeting and asked for Bost’s response. Bost denied that he had been disruptive but confirmed that he had refused Wittkugle’s orders to leave the meeting and to refrain from using the shop’s phone.

Still on December 4, Elsemore met with Bussa and Wittkugle about how to respond to Bost’s behavior at the November 29 meeting. All agreed that Bost should be disciplined. Wittkugle urged that Bost receive a suspension. Elsemore decided that the discipline should be limited to a written warning. Elsemore thereupon drafted a letter to Bost that reads, in part:

During the course of the [November 29] meeting, you launched a personal attack at Mr. Wittkugle indicating you knew him; had worked for him and claimed he was the dumbest superintendent we had.

Your behavior was disruptive and after a time you were asked to leave the meeting which you refused to do. You were then instructed to leave the meeting and you refused.

You picked up a telephone in the room where the meeting was held to call me. You were asked to use a phone in a nearby office and you refused to do that as well.

Because of your disruptive, insubordinate behavior which you exhibited at that meeting, this is a Written Warning that such behavior now or in the future is unacceptable.

...

I am hopeful that the unacceptable behavior you exhibited on November 29, 1995 will be corrected and will not occur again. If it does, more severe discipline, up to and including termination of your employment, could occur.²⁷

Generally Mead either delivers disciplinary letters by hand to employees or sends the letters via certified mail. Elsemore took the letter to a local post office, discovered that he was too late to send the letter by certified mail, and sent it by regular mail. Bost received the letter when he returned home from work on December 6. In the meantime, on December 5, Elsemore saw Bost at the Board’s Regional Office in Cincinnati when both attended the first day’s hearing in this proceeding. (See fn. 2,

²⁵ Wittkugle, Tr. 321.

²⁶ *Id.*

²⁷ GC Exhs. 14 and 15.

supra.) Elsemore told Bost that a letter to him was on the way, that Elsemore wanted talk to Bost about it, and that Bost should come to Elsemore's office the next day, December 6.

Bost did meet with Elsemore on December 6. Since Bost had not yet received Elsemore's December 4 letter, Elsemore gave Bost a copy. Bost thereupon filed a grievance.

Did Mead's Discipline of Bost Violate the Act.

The General Counsel contends that all of Bost's conduct at the November 29 meeting was protected by the Act and that Mead, by disciplining Bost for such conduct, violated Section 8(a)(1). The General Counsel also contends that Mead violated 8(a)(3) of the Act in that the reason that the Company disciplined Bost was because of Bost's efforts to represent Atwood, Buskirk, and Francis during the November 29 meeting and because of Bost's other union activities. The General Counsel further contends that the discipline violated Section 8(a)(4) of the Act in that Mead's motivation in issuing the warning was to punish Bost for his part in Case 9-CA-32901.

As for the General Counsel's initial contention, I have found that the behavior for which Bost was disciplined was not protected by the Act.

As for the General Counsel's contentions that Mead's discipline of Bost violated Section 8(a)(3) and 4), they have no support whatsoever in the record.

There is no evidence of union animus on Mead's part. And the fact that the discipline occurred close in time to Bost's appearance at the December 5 hearing is hardly proof that the hearing played a role in Mead's decision to discipline him—particularly since the decision to discipline was made the day before the hearing. The General Counsel refers to the "hasty nature of the decision" to discipline Bost.²⁸ As I understand that contention, it is that Mead took no action in respect to Bost's behavior at the November 29 meeting until late in the day on December 4—i.e., just before the December 5 hearing in this proceeding.²⁹ But that is factually incorrect. On Thursday, November 30—less than 24 hours after the November 29 meeting—Wittkugle notified Elsemore of Bost's behavior. Elsemore thereupon proceeded in an utterly appropriate manner: On the same day that he received Wittkugle's report, Elsemore ordered Bussa to investigate. Bussa did so. Then, on Monday, December 4, Elsemore met with Bost (and with Bost's union representative) and then met to discuss the matter with Bussa and with the supervisor directly involved (Wittkugle).

The General Counsel also contends that Mead treated Bost disparately, further evidence, in the General Counsel's view, of Bost's discipline being a product of Bost's union activities and testimony against Mead. The General Counsel points out that prior to Mead's disciplining of Bost, the Company had never disciplined a steward for the steward's representation of employee; or, at least, Mead had not done so within the memory of either Bost or Elsemore. The General Counsel also refers to

Mead's treatment of other employees who were guilty of insubordination.

But the fact that Mead has not previously disciplined a steward for behavior in connection with the steward's representational duties is without significance, particularly since, with one exception, the record includes no indication that a steward in that situation had ever behaved in a way that caused his words or actions to be unprotected by the Act. (The exception is Bost's representation of Roush, discussed above. But, needless to say, the General Counsel does not contend that Mead's failure to discipline Bost there is evidence of Mead's disparate treatment of Bost in connection with the November 29 meeting.)

As for other incidents involving insubordination, as I read the evidence in point, it proves nothing about possible discriminatory motives on Mead's part. (That evidence shows that Mead's response to employees who refused to comply with supervisors' orders has been to hand out discipline ranging from verbal warnings to a 5 days' suspension.³⁰ Moreover there is no indication that any of those other insubordination situations occurred under circumstances as likely to be damaging to the supervisor's authority as was the case with Bost's attack on Wittkugle.)

Finally, Bost testified that one union vice president regularly got "out of hand" during "grievance meetings" in that he loudly used profanity.³¹ According to Bost, Mead did not discipline that official. But the significant phrase there is "grievance meetings." The Supreme Court's *Weingarten* decision itself makes it clear that the scope of protected behavior in *Weingarten* meetings is narrower than that in grievance meetings.³²

On these findings of fact and conclusions of law and on the entire record, I issue the following³³

ORDER

The Respondent, Mead Corporation, Fine Paper Division, Chillicothe, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules that prohibit employees from soliciting for purposes protected by Section 7 of the Act during nonworking time or from distributing literature for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of its Chillicothe Mill.

(b) Refusing to bargain collectively with United Paperworkers International Union, Local 731, AFL-CIO, by refusing to furnish the Union information that it requests that is relevant and necessary to the Union's performance of its functions as the exclusive bargaining representative of employees in the appropriate unit. The unit is:

All production, maintenance, restaurant, quality assurance employees of The Mead Corporation, Chillicothe Opera-

²⁸ Br. at 10.

²⁹ The General Counsel assuredly does not mean that Mead should have embarked on a more extensive, longer-lasting, analysis of Bost's behavior. For one thing, the collective-bargaining agreement required Mead to have notified Bost of the Company's disciplinary action "within five (5) working days" of the November 29 meeting (GC Exh. 2 at p. 50). For another, on the witness stand Bost complained about how long it took for Mead to tell him of the discipline, not that Mead acted hastily.

³⁰ See GC Exhs. 19, 20, 21 and 23.

³¹ Tr. 259-61.

³² I do not intend to suggest that I have concluded that Bost's behavior at the November 29 meeting would have been protected even had that meeting been called for grievance purposes.

³³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tions, Chillicothe Mill, Chillicothe, Ohio, but excluding administrative, executive, factory clerical, engineering department, technical or engineering assistants, customer services department, woods department, mail and multilith employees, hospital employees, passenger car chauffeurs, guards, and supervisors as defined in the National Labor Relations Act.

(c) 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) Rescind or modify its rules so that employees are not prohibited from soliciting for purposes protected by Section 7 of the Act during nonworking time and are not prohibited from distributing literature for purposes protected by Section 7 during nonworking time in nonworking areas of its premises.

(b) Furnish the Union with such contractor swipe sheets as the Union may from time to time request.

(c) Within 14 days after service by the Region, post at its Chillicothe Mill, in Chillicothe, Ohio, copies of the attached notice marked "Appendix."³⁴ Copies of the notice, on forms

³⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

provided by the Regional Director for Region 9, after being signed by Mead's authorized representative, shall be posted by Mead immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Mead shall take reasonable steps 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, Mead has gone out of business or closed the facility involved in these proceedings, Mead shall duplicate and mail, at its own expense, a copy of the notice to all current members of the above-described bargaining unit and all former members of the bargaining unit who were employed by Mead at the Chillicothe Mill at any time since May 15, 1995.

(d) 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 Mead has taken to comply.

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

tional 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."