

**ITT Industries, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL-CIO.**  
Case 7-CA-40946

May 10, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On May 5, 1999, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. The General Counsel also filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, except as modified here, and to adopt his recommended Order as modified.

The General Counsel has excepted, *inter alia*, to the judge's finding that the Respondent did not violate Section 8(a)(1) when two of its supervisors prohibited employee Karen Richardson from talking with other employees about the Union during work. We find merit in the exception.

Richardson was an active union supporter and a member of the Union's organizing committee. On May 7, 1998, the Respondent's Tawas City plant manager, Rod Kaschner, summoned prounion employee Karen Richardson to his office. Jeff Binder, Richardson's immediate supervisor, was also present. Kaschner told Richardson that he had received complaints from a few employees about her talking about the Union. He told Richardson that she was not to talk about the Union on the production floor anymore to anyone, that such conversations should be kept outside, in the lunchroom, and on off time. Kaschner and Binder refused to tell Richardson which employees had complained.

Richardson wrote a statement of what had been said at the May 7 meeting and sent it to Kaschner. In a memorandum dated May 8, Kaschner replied, *inter alia*:

You are entitled to your opinion and personal goals and they will not be interfered as long as it does not interfere with production in work areas.

The point again of the whole meeting was if an individual is not interested in talking with you about

union activities, you should respect their wishes and avoid such discussions.

As a result of the May 7 meeting, Richardson stopped talking about the Union for about 7 days. She then felt free to start talking about the Union again. No discipline resulted.

The Respondent has a no-solicitation rule in its handbook. The rule, which is valid on its face, prohibits "all solicitations of any kind by any employee during working time." In practice, however, the Respondent permitted employees and managers to talk about various subjects while at their workstations as long as it did not interfere with production and to engage in a variety of solicitation activities, usually for some charitable cause.

The judge found that Kaschner and Binder did not violate Section 8(a)(1) of the Act when they told Richardson not to talk to employees about the Union on the production floor. He noted that Richardson admitted talking to one employee who said she did not like the Union and that Richardson resumed her union solicitation activities a week after management's admonition without any adverse consequences. The judge concluded that the Respondent "was essentially telling Richardson not to bother her fellow employees at least one of whom had complained and I see at most a *de minimus* or insignificant infringement on Karen Richardson's Section 7 rights." We do not agree.

It is well established that "[w]here an employer forbids employees to discuss unionization on worktime but permits discussion of other subjects unrelated to work, the disparate rule is itself unlawful." *Jennie-O Foods*, 301 NLRB 305, 316 (1991) (citation omitted). In this case, notwithstanding the existence of a rule in the employee handbook banning all solicitations during working time, the Respondent permitted employees and managers alike to engage in discussion and solicitation on the production floor. When some unidentified employees complained about Richardson's union solicitation activities, however, Kaschner and Binder responded by warning Richardson on May 7 not to engage in *any* discussion of the Union with *any* employee on the production floor. This disparate treatment was a clear violation of Richardson's statutory rights.<sup>2</sup>

Furthermore, contrary to the judge, the violation was not *de minimus*. Neither Richardson's subjective reaction to the warning (i.e., her willingness to resume solicitation activities 7 days after the warning) nor the failure of the Respondent to take any further action against her are determinative on this point. In and of itself, a disparate prohibition of union solicitation activity by a prominent

<sup>1</sup> In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by the manner in which its supervisor, Tony Orlando, drove his vehicle near some handbilling employees on May 5, 1998, we do not rely on Orlando's state of mind. Instead, we find that the General Counsel failed to present sufficient objective evidence demonstrating that the employees could reasonably believe that Orlando's reckless driving was directed against union activity.

<sup>2</sup> Nor do we find that Kaschner's memo of May 8 constituted a sufficient clarification or repudiation of the May 7 comments. Indeed, the memo did not alter the disparate nature of the Respondent's treatment of Richardson's union activities. There is no evidence that the Respondent had previously concerned itself with whether employees wished to be subjected to the numerous kinds of nonunion discussion and solicitation freely permitted on the production floor.

prounion employee is an unfair labor practice warranting remedy. Moreover, this disparate no-solicitation rule must be considered in the context of the Respondent's contemporaneous attempts to limit off-duty employees from engaging in solicitation activities in its parking lot. The judge found, and we affirm, that these actions violated Section 8(a)(1). Under these circumstances, we reject the view that any restriction of Richardson's rights was de minimus and does not require Board remedial action.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, ITT Industries, Inc., Oscoda, East Tawas, and Tawas City, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(b) and reletter the subsequent paragraph accordingly.

"(b) Disparately prohibiting employees from talking about the Union."

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT deny our off-duty employees access to our parking lots for the purpose of distributing union campaign materials.

WE WILL NOT prohibit our employees from talking about the Union during work while we permit other kinds of employee discussion and solicitation.

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 permit off-duty employees, whether or not they are assigned to any particular facility, access to our parking lots for the purpose of distributing union campaign materials.

ITT INDUSTRIES, INC.

*Jerry Schmidt, Esq.*, for the General Counsel.  
*Richard Hawkins, Esq.*, of Atlanta, Georgia, and *Robert P. Harris, Esq.*, of White Plains, New York, for the Respondent.

*Kenneth Bieber*, International Representative, of Grand Rapids, Michigan, and *Diana Ketolo*, International Representative, of Traverse City, Michigan, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On May 7 and 13, 1998, a charge and amended charge in Case 7-CA-40946 were filed by the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL-CIO (the Union) against ITT Industries, Inc. (Respondent).<sup>1</sup>

On November 6, 1998, the National Labor Relations Board (the Board), by the Acting Regional Director for Region 7, issued a complaint, which was amended at the hearing before me, which alleges that Respondent violated Section 8(a)(1) of the Act when on April 28 and May 14, 1998, it prohibited employees from engaging in legitimate handbilling activity in support of the Union in the employee parking lot during non-worktime, when on May 5, 1998, one of Respondent's supervisors drove a vehicle recklessly and dangerously close to employees engaged in legitimate handbilling activities in support of the Union, and when on May 7, 1998, two of Respondent's supervisors disparately prohibited a supporter of the Union from talking about the Union.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Tawas City, Michigan, on January 20 and 21, 1999.

Upon the entire record in this case, to include posthearing briefs submitted by the General Counsel and Respondent, and upon my observation of the witnesses and their demeanor, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, Respondent, a corporation with offices and places of business located in Oscoda, East Tawas, and Tawas City, Michigan, has been engaged in manufacturing automotive parts and related products.

Respondent admits, and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

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

##### III. THE UNFAIR LABOR PRACTICES

###### *A. Overview*

Respondent has three facilities in northeast Michigan called the northern plants. They are located in Oscoda, East Tawas, and Tawas City, Michigan.

<sup>1</sup> The name of the Respondent was corrected at the hearing before me from ITT Automotive Division of ITT Corporation to ITT Industries, Inc.

Approximately 600 employees work at the Oscoda plant and approximately 180 employees work at each of the other two plants in East Tawas and Tawas City.

The three plants are within easy commute of one another as reflected in General Counsel's Exhibit 18, a map. In addition, employees have transferred from one plant to another over the years. Indeed in 1998, 18 employees were transferred between the three plants. (See G.C. Exh. 17.)

Back in 1994, the Union began an organizing drive among Respondent's employees. A representational election was held on March 30, 1995, for a unit that included employees at all three plants. The Union lost the election. Thereafter, the Union filed unfair labor practice charges and a complaint issued. A hearing was held before Administrative Law Judge Marion C. Ladwig in February 1996. Judge Ladwig found that Respondent had violated the Act and, among other remedies, ordered that the election results be set aside and a new election ordered. The Board affirmed Judge Ladwig's decision. See *ITT Automotive*, 324 NLRB 609 (1997). The Board agreed with Judge Ladwig that the election results should be set aside and a new election held. Respondent is contesting the Board's decision before the U.S. Court of Appeals for the Sixth Circuit. A decision by the court is pending.

A second election petition was filed on June 10, 1998, and an election scheduled for July 30, 1998. Again, the unit was to be the employees of Respondent employed at all three plants. On July 25, 1998, the Union withdrew the election petition. Prior to the election petition being withdrawn the Union had filed the unfair labor practice charge and amended charge, which resulted in the issuance of the complaint in the instant case.

The allegations in the complaint, as amended at hearing, allege unfair labor practices by Respondent during the union organizing campaign in April and May 1998 prior to the July 30, 1998 second election, which never took place. The election again was to be among the employees at all three plants. In other words, one unit of approximately 960 employees from all three plants. Respondent stipulated that the appropriate unit would be the employees from all three plants.

#### B. Handbilling Activities

On April 28 and May 14, 1998, several employees of Respondent handbilled in support of the Union in the parking lot of the East Tawas plant. The employees were employees of the Respondent who worked at the Oscoda plant. The parking lot at the East Tawas plant is surrounded by a 6-foot high cyclone fence and has approximately 110 parking spaces. The gates to the parking lot are locked on the weekends but not during the week.

On April 28, 1998, a Thursday, approximately seven employees of Respondent, who work at the Oscoda plant, handbilled in the parking lot beginning at approximately 6 a.m. The handbills set out employee rights under the Act and the employees also had a union organizing petition, which they wanted the East Tawas employees to sign.

The superintendent of the East Tawas plant, Jeff Minnick, who previously worked at the Oscoda plant, in the company of Supervisor Bruce Curtis, told the handbillers that they were on private property and had to leave. The handbillers told him that they were employees of Respondent but he said they had to leave the parking lot and do their handbilling outside the fence.

On Thursday, May 5, 1998, a group of approximately seven of Respondent's employees who worked in the Oscoda plant

handbilled outside the parking lot of the East Tawas plant and off of Respondent's property.

On Thursday, May 14, 1998, once again a group of approximately eight of Respondent's employees who worked at the Oscoda plant handbilled on the parking lot at Respondent's East Tawas plant beginning at approximately 6 a.m. Again Plant Superintendent Jeff Minnick told them they had to leave the parking lot even though the handbillers again identified themselves as employees of Respondent.

On April 28 and May 14, 1998, Respondent's employees from the Oscoda plant were accompanied by UAW Field Representative Diana Ketolo. Ketolo credibly testified and was corroborated by several witnesses that only employees of Respondent entered onto the East Tawas plant parking lot. Ketola stayed outside the fence and off the parking lot and off of Respondent's property.

On all three dates, the employees wore union pins, hats, and T-shirts clearly proclaiming that they were part of a union organizing campaign.

On both April 28 and May 14, 1998, the employees were told to leave the parking lot because they were trespassing.

An employer can certainly restrict handbilling and soliciting on its property by nonemployees. See, e.g., *Lechmere v. NLRB*, 502 U.S. 527 (1992). *Lechmere* does not apply to off-duty employees. *Nashville Plastic Products*, 313 NLRB 462, 463 (1993). However, as the Board has held when addressing the issue of no-access rules concerning off-duty employees that such a rule is valid only if it "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid." *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976). Respondent's employees from the Oscoda plant who handbilled on the East Tawas plant parking lot were off duty. In addition, employees of the employer who work at one plant are still considered employees of the employer if they handbill at another of the employer's plants. See, e.g., *Southern California Gas Co.*, 321 NLRB 551 (1996), and *Postal Service*, 318 NLRB 466 (1995).

The business reasons put forth by Respondent to restrict its own off-duty employees from handbilling in the parking lot are woefully inadequate to warrant this limitation on employee protected activity, i.e., claims of possible vandalism, which are negated by Respondent's policy of permitting entry onto the parking lot of spouses, children, or friends to drop off or pick up employees who work at the East Tawas plant. There was also evidence that a few years earlier the window of a car parked in the parking lot shattered but no one knew why and a few years earlier the lug nuts on the right front tire were loosened on a supervisor's vehicle a few weeks after he fired an employee. Respondent, however, never installed security cameras or even requested the police to patrol the area.

Again, off-duty employees of Respondent who worked at the Oscoda plant were banned on April 28 and May 14, 1998, from distributing union literature during a union organizing campaign to their fellow employees in the parking lot of the East Tawas plant. The unit which the union sought to represent and which Respondent conceded was the appropriate unit included employees at the Oscoda plant (where the handbilling employ-

ees worked), the Tawas City and the East Tawas plants (where the parking lot was located). The issue of alternative means of communicating its message such as radio, television, and newspaper ads is relevant only if nonemployees are the handbillers.

Respondent violated Section 8(a)(1) of the Act when it denied its off-duty employees access to its parking lot for the purpose of engaging in the distribution of union campaign literature and the soliciting of signatures on a union organizing petition.

*C. Incident Involving Vehicle Driven by Supervisor  
Tony Orlando*

On May 5, 1998, several of Respondent's employees from the Oscoda plant were handbilling by the gate to the parking lot of the East Tawas plant. It is alleged that Tony Orlando, a supervisor, drove his vehicle recklessly and dangerously close to some handbilling employees.

On May 4, 1998, Tony Orlando, a supervisor at the East Tawas plant, had gone to court with his 15-year-old son who was in trouble with the law. The son was 15 years old.

The court ordered that Orlando's son be taken out of the family home and put in a group home. Orlando went to work that night on his usual 11 p.m. to 7 a.m. shift.

When he got off work on the morning of May 5, 1998, he was not unreasonably very upset because of his son and very tired because he'd had no chance to sleep during the day of May 4 because of his son's situation. He drove in an inappropriate manner. In order to get around a car stopped at the gate he popped the clutch on his vehicle and took off with his tires squealing.

Some of the handbillers thought Orlando, in driving erratically, came close to hitting them. Fortunately no one was hurt.

Orlando admits he drove in an inappropriate manner but did so because of his emotional state occasioned by his problems with his son and not because of any union animus. I believe him. It makes more sense to believe that a man coming off the midnight shift is upset and drives inappropriately risking bystanders because he is distraught about his young son being removed from the family home than to believe he drives in the fashion he drove because some employees were handbilling.

Because of a lack of union animus on Orlando's part on May 5, 1998, I find no violation of Federal labor law based on Orlando's actions. The traffic law may well have been violated but I have no jurisdiction in that area.

*D. Restriction in Talking about the Union*

Karen Richardson is an employee of Respondent who previously worked at the East Tawas plant but transferred to the Tawas City plant close to 10 years ago. She was very active on behalf of the Union and a member of the organizing committee.

It is uncontested that employees are allowed to talk about various subject matters while at their work station provided it doesn't interfere with production. Karen Richardson wore a union T-shirt and union buttons to work and talked in favor of the Union with her fellow employees. Sometimes they approached her and sometimes she approached them.

On May 7, 1998, she had a meeting with Plant Manager Rod Kaschner and her immediate supervisor, Jeff Binder. After the meeting, she wrote down what had occurred. Her statement was received in evidence as General Counsel's Exhibit 7. Her statement of what happened on May 7, 1998, is as follows:

Jeff Binder came to my testing board, F8AH-19C827-AA, and asked me to go speak to Rod Kaschner in Rods office. The time was 9:15 A.M. I asked Jeff if it could wait because I was working with two other people in a cluster. Jeff said it'd take only one minute.

Rod asked me to sit down. He then said he has had a few people on the floor complaining to him about me talking about union related activities and union information to them and they were offended. He told me then that any more conversations about the union were to be kept outside, in the lunchroom and on my off time. He said I wasn't to be talking about the union on the floor any more to anyone.

I said I don't believe that any one has really complained about me and that they were trying to harass me. I said if you really did have a complaint from someone, I have a right to face my accuser. I said I think you are lying about this. I said everyone I have ever talked to about the union has never said or showed any sign of being upset about the conversations. In fact everyone has been pleasant about it.

I tried to leave then and Jeff Binder told me to stay and sit down.

Rod then said there have been some complaints and Jeff said, yes Karen there has been complaints.

I repeated myself about letting me face any accusers. I said if someone really is complaining how am I suppose-to-know not to talk to that person if I don't know who it is? I said I believe this is just your way of harassing me and trying to intimidate me. I said I know I have my rights. I can talk to anyone on the floor as long as they let me and as long as other people are allowed to walk around and talk. I then tried to leave again.

Jeff Binder told me to stay and sit down. I stayed standing at the door. He asked me to sit down again so I did.

Rod then asked me if I was going to shut up for a little bit and let him talk for a change? So I shut up and sat still. Rod said that he wouldn't let me know who made this complaint to protect that person. He said that is what he and Jeff were for. So people who couldn't speak to me had someone to go to and speak for them. Rod said it was his place to bring it to my attention. He said some people are afraid to tell me that I am bothering them.

I said I don't believe them because I haven't been talking to people hardly at all on the floor. I said as long as I don't know who these, suppose of, complaining people are I'm not going to know who not to talk to because everyone I have talked to have been pleased to talk with me or that's the impression they give. I said as long as Tim DeWald can stand at Julies board on Monday morning for 25 minutes and talk I can stand around and talk. I said this is harassment and you're trying to intimidate me. I said I'm very proud for what I'm doing and what I stand for. I also said I was very pleased with how people are dealing with this and I'm glad about the way things are going so far.

Rod and Jeff both said they were not harassing me.

I got ready to leave for the fourth time and knowbody [sic] said anything to stop me. I looked at both of them and waited a second and then left.

Jeff gave Ruth, Mary and I .20 down time for the 10 minute interruption in our production.

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Neither Rod Kaschner nor Jeff Binder testified but the General Counsel moved into evidence as General Counsel's Exhibit 8 a statement of Rod Kaschner commenting about Karen Richardson's memo set out above. Kaschner's statement, dated May 8, 1998, is as follows:

Karen

I received your letter dated May 7, 1998. I basically agree with your quotes of Jeff's, and my statements. We certainly have a difference of opinion about what other employees had said. We have not made up any of these concerns brought to your attention. You are entitled to your opinion and personal goals and they will not be interfered as long as it does not interfere with production in works areas.

The point again of the whole meeting was if an individual is not interested in talking with you about union activities, you should respect their wishes and avoid such discussions.

Thank You

Karen Richardson testified that a few days before her meeting with Rod Kaschner and Jeff Binder that she had spoken about the Union with a fellow employee who told her that he didn't like the Union. She also testified that her encounters with Kaschner and Binder caused her to cease and desist from talking about the Union for about 7 days and then she felt free to say what she wanted. She was not disciplined.

In light of the above I do not find that the Act was violated because management was essentially telling Richardson not to bother her fellow employees at least one of whom had complained to them and I see at most a de minimus or insignificant infringement on Karen Richardson's Section 7 rights.

#### CONCLUSIONS OF LAW

1. 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. By denying off-duty employees access to its parking lot at the East Tawas plant for the purpose of distributing union campaign materials, Respondent has violated Section 8(a)(1) of the Act.

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

#### THE REMEDY

The remedy in this case should include a cease-and-desist order and the posting of an appropriate notice at all three of Respondent's northern plants.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, ITT Industries, Inc., East Tawas, Tawas City, and Oscoda, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying its off-duty employees access to its parking lots for the purpose of engaging in the distribution of union campaign materials.

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

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

(a) Permit its off-duty employees, whether or not those employees are assigned to that particular facility, access to its parking lots for the purpose of distributing union campaign materials.

(b) Within 14 days after service by the Region, post at its facilities in East Tawas, Tawas City, and Oscoda, Michigan, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities 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 April 28, 1998.

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

<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>3</sup> 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 Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."