

Golub Corporation and United Food and Commercial Workers, District Union Local One, AFL-CIO-CLC. Cases 3-CA-22379-4 and 3-CA-22379-6

November 20, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On January 2, 2001, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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

Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by threatening employee Arthur Crandall with disci-

¹ On October 24, 2001, the Board, by its Associate Executive Secretary, granted the Charging Party's unopposed motion to sever one of the consolidated cases, Case 3-RC-10971, and remanded it to Region 3 for appropriate action. Thus, that case is no longer before the Board, and we do not consider the Respondent's exceptions there.

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 incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In adopting the judge's credibility determinations, we do not rely on the judge's finding that Loss Prevention Specialist Gary Beeble testified that union organizer Stephen Phelan was not present on June 2, 2000, when Beeble threatened employee Arthur Crandall with discipline.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening Crandall with discipline if he were to engage in union solicitation on the Respondent's property, we do not rely on the judge's suggestion that the Respondent had an affirmative obligation to advise Crandall concerning his rights to engage in union solicitation on the Respondent's property.

While there are no exceptions to the judge's recommended dismissal of the allegation that the Respondent violated Sec. 8(a)(1) and (3) when it suspended Crandall, the Respondent has excepted to the judge's finding that the General Counsel established his initial burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). In adopting the judge's recommended dismissal of this allegation, in the absence of exceptions, we find it unnecessary to pass on the judge's finding that the General Counsel established his initial burden.

There are no exceptions to the judge's recommended dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by interrogating employees about their union activities and threatening to retaliate against employees for engaging in union actions.

We note that the judge inadvertently misspelled the name of union organizer Stephen Phelan.

² We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

pline if he were to engage in union solicitation on the Respondent's property.

The facts, in brief, are as follows. On June 2, 2000, at approximately 12:30 p.m., Stephen Phelan, a full-time union organizer, and employee Arthur Crandall positioned themselves on the public side of the line that demarcated the Respondent's property from public property. They sought to talk to employees about the Union as they entered or exited the Respondent's premises during the shift change. Shortly thereafter, Loss Prevention Specialist Gary Beeble walked up to the demarcation line and stated that neither Phelan nor Crandall could come across the line onto the Respondent's property. Phelan replied that, as an employee, Crandall was entitled to solicit for the Union on the Respondent's property. Beeble then stated that if Phelan crossed the line, he would be arrested and if Crandall crossed the line, he would be suspended. In response, Crandall indicated that he was an employee, to which Beeble replied that Crandall was not an employee when he was out there. Over the course of this 2-minute exchange, several drivers refused to stop their cars to speak with Crandall or Phelan. At 1:30 p.m., Crandall stopped soliciting and entered the Respondent's facility to begin work. It is undisputed that the Respondent did not have any rules concerning solicitation on either public or private property.

In *Beth Israel Hospital v. NLRB*,³ the Supreme Court stated that "the right of employees to self-organize and bargain collectively established by Section 7 . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the job-site." It is well established that off-duty employees have the right under Section 7 of the Act to solicit for the Union during nonwork time in nonwork areas. In *Nashville Plastics Products*,⁴ the Board held that an employer violated Section 8(a)(1) of the Act by prohibiting off-duty employees from engaging in union solicitation and distribution of union literature on company property during nonwork time in nonwork areas. The Board stated "an off-duty employee seeking access to his employer's property to distribute union handbills, unlike a non-employee union organizer, falls within the scope of Supreme Court decisions protecting workplace organizing activities."⁵ Moreover, it is settled law that except where justified by business reasons, a rule which denies off-duty employees entry to outside nonworking areas

³ 437 U.S. 483, 491 (1978).

⁴ 313 NLRB 462, 463 (1993).

⁵ See also *New York New York Hotel & Casino*, 334 NLRB 762, 762 (2001).

unlawfully interferes with employees' Section 7 rights and violates Section 8(a)(1) of the Act.⁶

Here, there is no evidence or argument that the Respondent had a no-access rule restricting the solicitation and/or distribution activities of off-duty employees, let alone a rule that was justified by business reasons.⁷ To the contrary, as acknowledged by the dissent, Crandall had previously engaged in solicitation and handbilling for the Union in nonwork areas without any intervention by the Respondent.

In sharp contrast to the Respondent's prior practice, Beeble's threat to suspend Crandall—which was not couched in terms of the Respondent's purported concern about traffic congestion—effectively announced a prohibition against any form of solicitation on the Respondent's parking lot, regardless of the circumstances. In the absence of a legitimate business reason for such an absolute prohibition, Beeble's threat violated Section 8(a)(1) of the Act.⁸ Moreover, even if Beeble had communicated a concern about traffic congestion to Crandall and had limited the prohibition on solicitation accordingly, the record still would not support a finding that his threat was justified by business reasons. Aside from Beeble's conclusory testimony, there was no evidence that traffic leaving and entering the Respondent's facility was impeded by union solicitation activities.⁹

⁶ *Tri-County Medical Center*, 222 NLRB 1089 (1976). See also *Orange Memorial Hospital Corp.*, 285 NLRB 1099 (1987); *Presbyterian Medical Center*, 227 NLRB 904 (1977), *enfd.* 586 F.2d 165 (10th Cir. 1978).

⁷ See *Tri-County Medical Center*, *supra* at 1090 (employer unlawfully prevented off-duty employee from distributing literature on its parking lot where there was no evidence employer had a valid no-access rule).

⁸ *St. Luke's Hospital*, 300 NLRB 836, 837 (1990). In *St. Luke's Hospital*, the respondent's security director ordered an employee to stop distributing union literature on the employees' parking lot. Although the security director testified that the respondent had established a policy of prohibiting literature from being placed on automobiles because of the litter problem it created, he did not mention this policy to the employee. The Board found that because the respondent did not explain that its problem with the employees' handbilling activities was limited to the employee's method of distribution, its no-access rule was overbroad and thus violated Sec. 8(a)(1).

⁹ The Respondent introduced no company records or reports documenting any past problems with traffic as a result of union solicitation/distribution activities nor was any other employee of the Respondent called to testify regarding any past problems. See *Nashville Plastic Products*, *supra* at 466–467 (1993) (adopting judge's finding rejecting plant manager's testimony that employees' handbilling caused traffic congestion because no employee witnesses were aware of any traffic problems caused by their handbilling activity); *St. Luke's Hospital*, *supra* at 837 (employer introduced no company records or reports, and vague, generalized testimony was insufficient to establish legitimate business consideration that would warrant interference with employees' protected right to distribute literature in parking lot); and *Orange Memorial Hospital*, *supra* at 1100 (employer failed to provide

Our dissenting colleague would find that the Respondent did not violate the Act because Beeble's intent in preventing Crandall from soliciting on the Respondent's property was not to interfere with Crandall's union solicitation activities, but rather to prevent traffic congestion.¹⁰ The Board has repeatedly stated, however, that “‘motive’ or ‘intent’ is not the critical element of an 8(a)(1) violation.”¹¹ Rather, the test is whether the employer's conduct reasonably tends to interfere with the free exercise of employee rights under the Act.¹² Thus, irrespective of Beeble's intent, by preventing Crandall, an off-duty employee, from soliciting on the Respondent's property, the Respondent unlawfully interfered with Crandall's Section 7 right to solicit for the Union on nonworking time in a nonwork area.¹³

We also find no merit in our colleague's alternative finding that Beeble's conduct was *de minimis*.¹⁴ First, we cannot agree that Beeble's threat to suspend Crandall if he engaged in any future protected activity can be viewed as a *de minimis* violation. This was an explicit threat of suspension, and that is by no means a “*de minimis*” matter, certainly not to the threatened employee. Second, Beeble's threat clearly had a reasonable

an adequate factual basis for its claim that its access policy promoted patients' security where there was no evidence that patients frequented outside nonwork areas).

¹⁰ We reject the dissent's assertion that Beeble's sole purpose in threatening Crandall not to solicit on the Respondent's property was to prevent traffic congestion on the Respondent's property during a shift change. Restricting Crandall to the public side of the Respondent's property line would not reduce traffic backups because traffic congestion would be the same regardless of which side of the property line Crandall was standing.

¹¹ *Guerdon Industries*, 218 NLRB 658, 661 fn. 23 (1975).

¹² See *Guerdon Industries*, *supra* at 661 fn. 23; *Cooper Thermometer Co.*, 154 NLRB 502, 503 fn. 2 (1965). As the Board held in *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975),

We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.

¹³ We reject our colleague's view that the facts Respondent never interfered with Crandall's solicitation/distribution activities in the past and that there has been no prior allegation that the Respondent interfered with employees' union solicitation/distribution activities support a finding that the Respondent did not violate the Act. In determining whether a respondent has violated the Act, it is of no consequence that the respondent may not have previously engaged in other unlawful acts. *Regency at the Rodeway Inn*, 255 NLRB 961, 961–962 (1981). Thus, that in the past the Respondent has not interfered with employees' union solicitation/distribution activities does not insulate it from responsibility for the interference involved here.

¹⁴ Our colleague has raised this issue *sua sponte*. The Respondent did not argue, either to the judge or in its exceptions to the Board, that Beeble's conduct was *de minimis*.

tendency to chill the future exercise of Section 7 rights not only of Crandall but also of other employees. As a result of Beeble's threat, Crandall was unable freely to engage in union solicitation on the Respondent's property, and several employees declined to stop their cars and speak with Crandall or Phelan during Beeble's conversation with them.¹⁵ We therefore cannot agree that Beeble's threat, even if it was an isolated incident, can be viewed as "de minimis." Third, contrary to our colleague's assertion, it is irrelevant that there have been no other allegations of unlawful interference with an employee's union solicitation/distribution activities.¹⁶ Fourth, that the Respondent did not threaten Crandall pursuant to any preexisting rules prohibiting solicitation/distribution on its property does not make its conduct de minimis. The fact remains that Crandall was threatened with suspension if he engaged in future solicitation on the parking lot and that this conduct reasonably tends to interfere with the free exercise of employees' rights under the Act.¹⁷ Finally, we find the cases cited by our colleague involving de minimis conduct are distinguishable because the unlawful conduct there had been substantially remedied or effectively contradicted by later conduct.¹⁸

¹⁵ In *Ryder Student Transportation Service*, 333 NLRB 9, 11 (2001), the respondent contended that its misconduct in enforcing its unwritten no-access policy was de minimis as employees were not prevented from distributing literature, and that there was only one incident in which the employer interfered with employees' handbilling activities. The judge, who was affirmed by the Board, rejected the respondent's assertion, noting that whether the respondent's conduct succeeded or failed was irrelevant as the test was whether the respondent's conduct reasonably tended to interfere with employee rights. The judge went on to observe that because five employees stopped handbilling after the respondent informed them of its policy, the respondent's conduct caused such interference.

¹⁶ See *Regency at the Rodeway Inn*, supra at 961 (rejecting absence of prior unfair labor practices by employer as support for finding manager's interrogation to be de minimis).

¹⁷ *Ladies Garment Workers (Twin-Kee Mfg. Co.)*, 130 NLRB 614 (1961), cited by our colleague, is distinguishable from this case. There, the remarks at issue constituted only threats of possible retaliation against employees who might cross a picket line. They were also made at the beginning of a strike that had lasted over 2 months without any other unlawful activity. Here, by contrast, Beeble explicitly threatened Crandall that he would be suspended if he violated the policy. This conduct, as we have found, has a reasonable tendency to chill future activity protected by the Act.

¹⁸ See *Bellinger Shipyards*, 227 NLRB 620 (1976) (unlawful no-solicitation rule subsequently replaced by new rule); *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973) (union's threat of "charges" leading to fine or expulsion of employee subsequently withdrawn); *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973) (supervisor's filing of decertification petition found de minimis where employer stated to union that it would continue to bargain with union and thereafter supervisor withdrew petition); and *Square D Co.*, 204 NLRB 154 (1973) (supervisor's comment to union steward that union should stop filing grievances over walk-space obstructions found de

Contrary to our colleague, we therefore find that Crandall, an off-duty employee, had a Section 7 right to solicit for the Union during nonworking hours on the Respondent's parking lot. Thus, we affirm the judge's finding that by threatening to suspend Crandall if he engaged in union solicitation on the Respondent's property, the Respondent violated Section 8(a)(1) of the Act.¹⁹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Golub Corporation, Schenectady, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

MEMBER COWEN, dissenting.

Contrary to my colleagues, I do not find that the Respondent, through Loss Prevention Specialist Gary Beeble, violated Section 8(a)(1) of the Act by instructing employee Arthur Crandall not to stop cars or trucks on the Respondent's property. As set forth below, Beeble's instruction was not directed at Crandall's union solicitation activity, but rather Beeble's sole objective was to prevent traffic congestion on the Respondent's premises.¹

The evidence shows that on June 2, 2000, at approximately 12:30 p.m., Crandall and union organizer Steve Phelan were stopping traffic at the entrance to Respondent's facility and speaking to the employees in the cars entering and exiting the facility. It is undisputed that there was an increase in incoming and outgoing traffic at this time because the shifts were changing. Specifically, during the hour that Crandall and Phelan were at this location, approximately 75 to 100 cars entered and exited the facility. As a result of this increase in traffic, there was a potential for traffic congestion. Moreover, in the past, traffic congestion had been a problem as a result of the Union's solicitation activities, and the Respondent had called the police on prior occasions to deal with this issue.

minimis in view of absence of retaliatory action to union's continued filing of multiple grievances over issue and in view of employer's continued processing of multiple subsequent grievances concerning issue).

¹⁹ See *Valeo Sylvania, L.L.C.*, 334 NLRB 133, 139 (2001).

¹ I join my colleagues in finding that it is not legally necessary to pass on the judge's finding that the General Counsel satisfied his initial *Wright Line* burden of showing that Crandall's Union activity was a motivating factor in the Respondent's decision to suspend him, given the overwhelming rebuttal evidence offered by the Respondent. Nevertheless, I note that the evidence in this case, taken as a whole, does not support even a prima facie case of unlawful motivation.

According to Beeble, who was not discredited on these points, as the Respondent's loss prevention specialist, it was one of his responsibilities to maintain a smooth traffic flow on the Respondent's property. As such, Beeble was dispatched to the entrance of the facility in order to prevent traffic from backing up. Thus, when Beeble told Crandall that he could not cross over onto the Respondent's premises, it was not his purpose to prohibit Crandall's union solicitation activities, and he did not tell Crandall that he could not solicit for the Union. Rather, Beeble's sole objective in ordering Crandall not to stop cars or trucks on the Respondent's property was to prevent traffic congestion on the Respondent's property during the shift change, thereby enabling employees and suppliers to enter and exit the facility without impediment. Indeed, in my view, Beeble's instruction to Crandall had no connection to Crandall's union solicitation activity.

My position is further supported by the fact that it is undisputed that, prior to the incident in question, Crandall frequently engaged in solicitation and handbilling for the Union on the Respondent's parking lot and other nonwork areas. The Respondent was aware of Crandall's union solicitation/distribution activities and never sought to prohibit them. Indeed, the Union engaged in oral solicitation and distribution of literature throughout its organizing drive. Between January and June 2000, the Union had handbilled on the Employer's parking lot two and three times a week, and there is no evidence of any other allegation that the Respondent interfered with these activities. It is nonsensical that the Respondent would suddenly prohibit employees' union solicitation activities, which had previously been permitted, without any good reason. In fact, the Respondent had good reason.

In sum, contrary to my colleagues, I find that the Respondent was legitimately concerned that Crandall's union solicitation activities would cause traffic congestion on the Respondent's property, and its purpose in instructing Crandall not to stop cars on its property was not to interfere with Crandall's Section 7 rights, but rather to insure an uninterrupted traffic flow into and out of its parking lot.

Alternatively, I find that even assuming, *arguendo*, that Beeble's instruction to Crandall was directed at his Section 7 activity, I would still not find an 8(a)(1) violation here as the effect of Beeble's conduct was *de minimis*, and it would not serve the purposes of the statute to find a violation. The Board has previously held that certain conduct, limited in impact, significance, and effect does not rise to the level of constituting a violation, even though the same conduct, if engaged in on a more wide-

spread basis, or under circumstances in which its impact can be anticipated to be significant, would constitute a violation. The Board has often found such cases involve *de minimis* conduct not rising to the level of a violation.²

Here, it is undisputed that the Respondent did not have any rule prohibiting union solicitation/distribution on its property. Moreover, as noted above, prior to the conduct at issue herein, employees, including Crandall, frequently solicited and handbilled for the Union in non-work areas, and there is no evidence of any other allegation that the Respondent sought to prohibit such activities. Thus, this single, isolated incident could not have a reasonable tendency to interfere with protected rights.³ Moreover, the alleged misconduct occurred in circumstances in which its impact did not extend beyond the employee directly involved. Therefore, I conclude that the conduct involved herein is not substantial enough to justify finding a violation and a remedial order based thereon.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT by means of threats of discipline enforce a rule prohibiting employees from engaging in lawful union solicitations on our premises.

² See, e.g., *Bellinger Shipyards*, 227 NLRB 620 (1976); *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973); *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973); and *Square D Co.*, 204 NLRB 154 (1973).

³ In *Ladies Garment Workers (Twin-Kee Mfg. Co.)*, 130 NLRB 614, 616 (1961), the Board held certain remarks too isolated to warrant issuance of a remedial order because they had been the only unlawful ones made during a strike lasting over 2 months, they had been limited to two employees, and there had been no evidence of other unlawful activity. See also *Wichita Eagle & Beacon Publishing*, *supra* at 55.

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.

GOLUB CORPORATION

Robert A. Ellison, Esq., for the General Counsel.
Franklin H. Goldberger, Esq., of Albany, New York, for the Respondent.
Gene M. J. Szuflika, Esq., of New York, New York, for the Charging Party-Petitioner.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on September 11 and 12, 2000,¹ in Albany, New York, pursuant to a consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on July 31. In addition, on August 2, the Regional Director ordered consolidated certain issues arising from the representation election in Case 3-RC-10971. The complaint, based on original and amended charges in Cases 3-CA-22379-4 and 3-CA-22379-6, filed by United Food and Commercial Workers, District Union Local One, AFL-CIO-CLC (the Charging Party or Union), alleges that Golub Corporation (the Respondent or Golub) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Union's representation petition was filed on April 25, and sought an election among certain of Respondent's warehouse employees located in Voorheesville, Waterford, Colonie, and Rotterdam, New York. An election was held on June 22, pursuant to a Decision and Direction of Election issued by the Regional Director on May 24. The tally of ballots prepared at the conclusion of the election revealed that of approximately 590 eligible voters, 492 cast ballots, of which 148 cast ballots for the Petitioner, 325 cast ballots against the Petitioner, and there were 19 challenged ballots, a number insufficient to affect the results of the election. The Union filed timely objections to conduct affecting the results of the election on June 28. In support of Objections 2, 3, and 4 and its unnumbered "catchall" objection, the Union presented evidence that, during the critical period, Respondent engaged in objectionable conduct. In the complaint, the General Counsel alleges that certain conduct described in paragraphs 6, 7, and 8, which is also alleged as objectionable conduct in Objection 2 and the "catchall" objection raise material issues of fact and were consolidated for hearing before an administrative law judge. The Respondent filed a timely answer to the complaint denying that it had committed any violation of the Act.

Issues

The complaint alleges that the Respondent engaged in independent violations of Section 8(a)(1) of the Act by interrogating employees and prohibiting employees from engaging in lawful union solicitation on the Respondent's premises, including the

parking lot. Additionally, the complaint alleges that on May 26, Respondent suspended the employment of leading union adherent Arthur Crandall, in violation of Section 8(a)(1) and (3) of the Act. The objections to the election track the complaint in part or raise similar issues.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the operation of retail supermarkets, with its principal place of business located in Schenectady, New York. It annually derives gross revenues in excess of \$500,000 and purchases and receives at its facilities located within the State of New York goods valued in excess of \$50,000 directly from points located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union commenced its organizing drive at Respondent in January 2000, and continued a campaign of oral solicitation and distribution of literature up to the June 22 election. Shortly after the organizing campaign commenced, the Respondent directed that a line be painted to divide the public thoroughfares from its private property. In January 2000, the Respondent held its regularly scheduled annual meetings with all employees of the facility including the second-shift grocery warehouse employees and addressed the state of the Company. During the course of the meeting, a number of employees asked questions about the union organizing campaign. Crandall spoke and voiced his opinion that the pension and stock bonus plan provided to employees by Golub was inadequate and the Union had a better plan. Claude Sawyer, second-shift grocery supervisor, informed the employees that based on his personal experience, it was very difficult to decertify a union once it was voted into a facility. He described those difficulties during a period of time when he was a member of the Union and employed at Levonian Brothers, a former employer.

At all material times, Tom Bird is the director of warehousing, Wesley Holloway holds the position of manager, associate relations and corporate diversity initiatives in the human resources department, and Shawn Carney and Jason Mitchell serve as line managers on the second shift in the grocery warehouse. In addition to employee and union supporter Crandall, Stephen Phelan is employed as a full-time organizer for the Union.

¹ All dates are in 2000, unless otherwise indicated.

B. The 8(a)(1) Violations

1. Allegations concerning Claude Sawyer

The General Counsel alleges in paragraphs 6(a) and (b) of the complaint that on two occasions in February 2000, Sawyer interrogated employees concerning their union activities and threatened to retaliate against employees who engage in union activities.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is “whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act.” *NLRB v. Aimet, Inc.*, 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.*, 320 NLRB 1082 (1996).

According to Crandall, sometime in early February 2000, while both he and Sawyer were in the warehouse, they engaged in a 90-minute conversation about the Union. Each individual expressed their feelings about labor organizations including whether a union would be right for the employees at Respondent. Crandall told Sawyer that he had not made up his mind about the Union but he was leaning in that direction. Crandall specifically testified that Sawyer did not threaten him in any way and it was a friendly give-and-take conversation between the two of them in which the pros and cons about unions were discussed. There is no dispute that the Respondent knew of Crandall’s participation in the Union and in February 2000, it was common knowledge that Crandall had assumed a leadership role in trying to organize his fellow employees. Indeed, Crandall handed out and received union authorization cards from employees, distributed literature about the Union, and spoke to fellow employees about the benefits of the Union.

Based on the foregoing, and particularly noting the testimony of Crandall that Sawyer did not threaten him in any way during the early February 2000 conversation, I find that Sawyer did not interrogate Crandall about his union activities. Therefore, I recommend that the allegations in paragraph 6(a) of the complaint be dismissed.²

In regard to paragraph 6(b) of the complaint, Crandall testified that on February 21, he had a conversation with Sawyer around 9:30 p.m. at the far end of the 56th aisle in the warehouse.³ Sawyer approached Crandall and informed him that a number of employee associates had told him that Crandall was spreading a rumor about the reasons that he left Levonian Brothers.⁴ Sawyer told Crandall that this was character assassination, it is a lie, and he was offended by it. Crandall denied that he was spreading the rumor. Sawyer said, “I will get a lawyer to clear my name.” Crandall said, “that he heard about the rumor but he did not start it but if it was true, you can not stop it.” Crandall testified that the word “Union” did not come up during the 5-minute conversation. At the end of the conver-

sation, Sawyer told Crandall that he should not be spreading that type of venom.

By letter dated February 23, the director of organizing for the Union sought a meeting with Sawyer to discuss the facts surrounding the rumor (R. Exh. 1). Sawyer did not respond to the letter, as the rumor faded away dying a natural death.

Based on the foregoing, and particularly relying on Crandall’s testimony, I conclude that Sawyer did not interrogate Crandall about his union activities or threaten to retaliate against him because of such activities. Rather, the conversation concerned what Sawyer believed to be the spreading of a malicious rumor and was initiated with Crandall because two associates had attributed its origin to him. The Union was not mentioned during the conversation, Sawyer took no action against anyone including Crandall and the matter ended shortly after it was raised. Accordingly, I recommend that paragraph 6(b) of the complaint be dismissed. *Mid-State, Inc.*, 331 NLRB 1372 (2000).

2. Allegations concerning Gary Beeble

The General Counsel alleges in paragraph 6(c) of the complaint that on June 2, Respondent by means of threats of arrest and discipline enforced a rule prohibiting employees from engaging in lawful union solicitations on the Respondent’s premises, including its parking lot. This conduct was also alleged in the Petitioner’s unnumbered “catchall” objection.

Both Phalen and Crandall credibly testified that on June 2, they met for lunch at 12:30 p.m., and decided to distribute literature and solicit employees about the Union who were entering and leaving the premises during the Respondent’s regularly scheduled shift change. For this purpose, Phalen went to the parking lot and sought to retrieve leaflets kept in his car trunk. Due to inadvertence, Phalen neglected to place any Union leaflets in his trunk. Accordingly, Phalen and Crandall positioned themselves at the end of the divider on Dunnville Road, close to a stop sign on the public side of the line, to talk to employees about the Union as they entered or exited the Respondent’s premises. Both Phalen and Crandall wore union hats and testified that during the hour they were positioned at the stop sign, approximately 100 cars and trucks came in and out of the facility. Around 12:40 p.m., Beeble came up to the line and said, “that neither Phalen or Crandall could come across the line onto private property.” Phalen said, “that since Crandall was an employee, he could cross the line and go onto the private property.” Beeble replied, “that if you cross the line, he would have him arrested and if Crandall crosses the line, he will have him suspended.” Crandall said, “I am an associate.” Beeble said, “you are not an associate when you are out here.” Phalen told Beeble, “that if you cross the line onto the public side, I will call the police if you interfere with our union activities.” During the course of this brief 2-minute conversation, a number of the drivers declined to stop their cars and talk with Phalen or Crandall. At 1:30 p.m., Crandall ceased his solicitation activities and returned to the warehouse to commence work.

Beeble testified that he was aware that the Union handbilled 2–3 times a week between January and June 2000, and often stopped cars to talk to drivers about the Union. He was aware that Crandall often participated in these activities and was an

² The General Counsel concedes in its posthearing brief that he “was unable to present evidence in support thereof.” See fn. 2.

³ Crandall has been employed for approximately 20 years in the Respondent’s Rotterdam grocery warehouse. He is a forklift driver and works on the second shift from 2 to 10:30 p.m.

⁴ The rumor alleged that his prior employer terminated Sawyer because of stealing.

active supporter of the Union. On June 2, Beeble observed that traffic was beginning to backup, both on public and private property, and he approached Crandall to instruct him not to stop cars or trucks on private property. Beeble testified that Phalen was not present on June 2, and he did not have a conversation with him. He also testified that he did not threaten Phalen or Crandall with arrest or discipline.

The promulgation and enforcement of a rule prohibiting union solicitation by employees on company property, outside of working hours, is presumed to violate the Act in the absence of evidence of special circumstances making the rule necessary in order to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–804 (1945); and *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). In the subject case, Beeble testified that the Respondent did not have any rules against solicitation on company property.

Based on the totality of the record, I do not credit Beeble's testimony that he did not threaten to have Phalen arrested or did not threaten Crandall with discipline if he crossed the line onto private property for the following reasons. First, I note that Beeble appeared to be defensive in his responses to questions and somewhat evasive on questioning by the General Counsel and the Charging Party. Second, contrary to Beeble, I credit the testimony of Phalen and Crandall that both of them were present on June 2, and engaged in a conversation with Beeble. Thus, I do not credit Beeble's denials and find that he threatened both Phalen and Crandall with arrest and discipline, at a time when the Respondent did not have any rules in place governing solicitation either on public or private property. Moreover, I find as an employee of Respondent, that Crandall was privileged to engage in solicitation on private property in all nonwork areas and in work areas when he and the person being solicited were not engaged in work. At no time during the June 2 conversation, did Beeble make this clear. Accordingly, I find that when Beeble threatened Crandall with discipline, Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct.

C. The 8(a)(1) and (3) Violations

The General Counsel alleges in paragraph 7 of the complaint, as does the Union in objection 2, that Respondent suspended the employment of Arthur Crandall because of his activities and support on behalf of the Union.

The Respondent argues that Crandall was suspended for legitimate business reasons because he did not receive permission to leave the work area in violation of its work rules, section 2.3 #12 (R. Exh. 2).

About a week prior to May 25, Crandall complained to one of the line supervisors that Respondent was not taking down signs that were posted around the timeclock area that said, "No, not in our house." On May 25 (Thursday), around 2 p.m., Crandall put a "Yes" sign on his forklift truck. Later that afternoon, around 4 p.m., Grocery Superintendent David St. John removed the "Yes" sign from Crandall's truck. Crandall confronted St. John and informed him that there are antiunion posters near the timeclock that have not been taken down. Crandall then proceeded to St. John's office and pointed to the antiunion signs that were posted on the wall by the timeclock. While St.

John initially said he would not take down the signs around the timeclock, they were ultimately removed.

Later that evening, between 7:30 and 9 p.m., Crandall engaged in a conversation with Supervisor Carney in the warehouse. They debated the benefits of the Union with Crandall trying to convince Carney why a union was necessary at Golub and Carney pointing out how efficiently the warehouse was run and a union was not necessary. Around 9 p.m., Crandall informed Carney that if work was slow or not enough equipment was available for the third-shift forklift operators, he would like to leave at 10 p.m., as there was a union meeting scheduled.⁵

Carney informed Crandall that he would have to check on the equipment, and that Crandall should come to the office around 9:30 p.m. to determine if he could leave early. Indeed, Carney testified that there was no doubt in his mind that he told Crandall to come back and check with him after he spoke to the third-shift supervisor and determined if enough equipment was available. Supervisor Mitchell testified that on May 25, he was 10 feet away from the conversation between Carney and Crandall. He also affirmed that he specifically heard Crandall's request to leave early to attend a union meeting and Carney informed Crandall that he must check with him at the office around 9:30 p.m., as to whether he could leave early. The conversation ended around 9 p.m., and as Carney was proceeding to the office to determine how much equipment was needed for the third shift, employee Mitch Hutchinson asked whether he could leave early that evening. Upon arriving at the office and checking with the third-shift supervisor, Carney learned that because there was one vacant forklift that was parked outside the office, only one forklift driver could be released early. Around 9:05 p.m., Rick Wysomski came to the office and inquired if he could leave early. Since he was the senior lift driver, Carney gave Wysomski permission to leave early and he punched out at 9:23 p.m. Crandall, who testified that Carney gave him permission to leave early, punched out at 9:26 p.m.

Around 9:15 p.m., Carney paged Crandall to inform him that he could leave around 10 p.m., as the third-shift supervisor apprised him that his employees needed several additional forklift trucks. Since Crandall did not answer the first page, Mitchell paged him a second time between 9:15 and 9:30 p.m. During this time period, Mitchell located Crandall's lift sheet that showed he stopped work at 9:15 p.m. Both Carney and Mitchell waited until 10 p.m., when the computer timecard system was updated, and verified that Crandall punched out at 9:26 p.m. Carney asked the other supervisors on his shift as well as the third shift whether any of them gave Crandall permission to leave early on May 25. None of the supervisors

⁵ There is a practice at the warehouse that employees including forklift drivers may leave early without pay if there is a shortage of work or not enough equipment available for the third-shift employees who start on staggered shifts at 9:30, 10, and 10:30 p.m. The decision as to which employees may leave early is determined by the designated line supervisor and then is communicated to the employees based on their seniority. In the subject case, Crandall is second in seniority to Rick Wysomski. Crandall admitted that he had to speak louder than normal because the conversation took place near the dock end of the aisle and there was a lot of noise.

informed Carney that permission was given to Crandall to leave early that evening.⁶

Crandall was not scheduled to work on May 26 (Friday) and was off on May 27 (Saturday), May 28 (Sunday), and May 29, Memorial Day Monday. He returned to work on May 30 (Tuesday), and after punching in, was told to report to the office. A number of supervisors including St. John, Sawyer, and Carney were present. St. John informed Crandall that he was being suspended for 2 days because he left more than 59 minutes early last Thursday before the end of his shift without permission. Crandall replied, "that he had permission and that Carney told him he could leave early." Carney denied that he had given Crandall permission to leave early. Carney provided Crandall with the associate documentation form to sign that set forth the infraction and the work rule violated, but Crandall refused to sign (GC Exh. 3). Crandall served the 2-day suspension on May 30 and 31, and returned to work on June 1.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1993). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in suspending Crandall. First, there is no dispute that Respondent knew that Crandall was one of the leading union adherents at the Rotterdam warehouse and supervisors frequently engaged in conversations with Crandall about the Union. Second, on the same day of the suspension, the Respondent removed a "Yes" sign from Crandall's forklift truck and was slow in removing the "No" signs posted around the timeclock. Third, between 7:30 and 9 p.m. on May 25, Carney engaged in a conversation with Crandall, much of which was devoted to the Union.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

⁶ Carney credibly testified that even after May 25 when Crandall requested to leave early, that Crandall had to wait until Carney checked with the third-shift supervisor before he was apprised whether he could leave work.

The Respondent contends that Crandall was suspended for 2 days because he failed to receive permission to leave work. The violation of work rule section 2.13 #12 may be cause for termination of an associate without prior warning. In the subject case, the Respondent determined to suspend Crandall for 2 days.

In agreement with the Respondent, I find that it would have taken the same action even in the absence of Crandall's union activities. First, I find that at the time that Crandall asked Carney for permission to leave early on May 25, Carney had no knowledge whether work or equipment requirements would permit any employee to leave early. It was not until shortly after 9 p.m. that Carney first learned, after checking with the third-shift supervisor, that one lift truck was available. Therefore, he determined that only one employee could leave early on that evening. When Wysomski stopped by the office around 9:05 p.m. and inquired whether he could leave early, that was the first time that Carney was able to communicate with anyone that only one employee could leave that evening. Since Wysomski had the highest seniority, he was the employee that was given permission to leave early. Carney did not see or speak to Crandall since their conversation around 9 p.m., when Crandall had requested permission to leave early. Second, I fully credit the testimony of Carney and Mitchell who both testified that Crandall was told to check at the office around 9:30 p.m. to see if he could leave early. Both of these individuals testified in a clear and concise manner, even under extensive cross-examination, and impressed me as sincere witnesses who were truthfully relating what took place on the evening of May 25. This testimony and the fact that Carney could not have known until sometime between 9 and 9:05 p.m. as to whether any forklift driver could leave early, convinces me that Crandall's testimony that he was given permission to leave early is not accurate.

The Respondent introduced a number of exhibits to support its position that it did not engage in disparate treatment when it issued the 2-day suspension to Crandall. These records show that other employees were treated the same as Crandall for similar infractions that were committed both before and after May 25 (R. Exhs. 3-6). While the General Counsel introduced an exhibit to show that an employee was given a verbal warning for a similar infraction, I am not convinced that the infraction was analogous to leaving work without permission. In this regard, the employee in question was disciplined for extending past one of his 15-minute break periods provided during the workday (GC Exh. 5). In my opinion, extending beyond an allotted work break is different than leaving work altogether without permission. Additionally, extending beyond an allotted work break is not one of the infractions listed in the work rules, that is cause for termination (R. Exh. 2).

Based on the foregoing, I find that the Respondent would have suspended Crandall even in the absence of his union activities, and recommend that paragraph 10 of the complaint and union objection 2 be dismissed.

III. THE UNION OBJECTIONS

The objections not previously discussed above involve threatening employees with loss of their earned vacations and

not receiving wage increases if the Union prevailed in the election.⁷

Chris Rosenthal testified that the Respondent held three separate meetings that encompassed all grocery warehouse employees at the Rotterdam facility wherein the pros and cons of the Union were discussed. The first set of meetings took place on June 6 and 7, the second meetings took place on June 13 and 14, and the last meetings took place on June 19 and 20. The meetings took place in the main auditorium for approximately 1 hour in duration. Rosenthal estimated that in addition to himself, approximately 80–100 employees attended the meeting held on June 13. Warehouse Director Tom Bird and Human Resource Director Wesley Holloway attended the June 13 meeting and Holloway was the principal spokesperson. During the course of the meeting employee Terry Lawson, who was eligible to receive a 5th week of vacation in July 2000, asked whether he would be receiving this benefit. Holloway said, “that everything would be ‘frozen’ if the Union was voted in until after a contract is negotiated and wages could go up and down based on the negotiation process.” Rosenthal also testified that in response to a question from a part-time employee who was scheduled to get a 6-month wage increase, Holloway said that everything would be frozen if the Union won the election. Employee Stephen Robichaud testified similarly to Rosenthal and added that Holloway also stated that no wage increases would be given until after negotiations were completed between Golub and the Union.

After concluding the second meeting on June 13, Respondent’s supervisors including Bird and Holloway convened to review the content of the meeting. All of the supervisors were concerned that the employees might have been confused and misunderstood the term “frozen.” Respondent sought legal counsel and was advised to hold a second set of meetings with those employees that attended the June 13 meeting and clarify what was meant by the term “frozen.” For that purpose, on June 14, approximately 60–65 of the grocery warehouse employees assembled adjacent to the supervisor’s office. Those employees were informed by Bird, that current wages and vacations would be maintained if the Union prevailed in the election on June 22. Bird apologized for any confusion over the use of the word “frozen” mentioned at the previous day meeting. In addition to meeting with the grocery warehouse employees, Bird met individually on and after June 14 with the 18–20 employees in the perishable group that had also attended the June 13 all-employee meeting. As he did with the grocery employees, Bird apprised these employees that current wages and vacations would be maintained if the Union prevailed in the election on June 22, and apologized for the confusion over the use of the word “frozen.”

Based on the foregoing, and particularly noting that group and individual meetings were immediately held with the majority of the employees that attended the June 13 meeting, I conclude that the explanation and apology to employees regarding the use of the word “frozen” was sufficiently unambiguous to clarify the matter. While I agree that Holloway’s initial statement to the assembled employees on June 13 constituted objec-

tionable conduct, the meeting held on June 14 and the subsequent individual discussions with the perishable employees repudiates whatever violation might have occurred. I note that when the June 14 meeting was held with the approximately 60–65 grocery warehouse employees followed closely by individual meetings with the perishable employees, that over a week remained until the election on June 22. Under these circumstances, I am of the opinion that enough time remained for all impacted employees to understand that wages and benefits would not be “frozen” if the Union prevailed in the election. Thus, such conduct acted to restore the laboratory conditions for a fair election. See *Agri-International Inc.*, 271 NLRB 925, 926–927 (1984).

Therefore, I conclude that Objections 3 and 4 should be dismissed. See *Gaines Electric Co.*, 309 NLRB 1077, 1081 (1992).

When an employer violates Section 8(a)(1) of the Act during an election campaign, the usual remedy is to order a second election because such prohibited conduct interferes with the “laboratory conditions” of the first election. See *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). In resolving the question of whether certain employer misconduct is de minimis with respect to affecting the results of an election, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors. See, e.g., *Super Thrift Markets*, 233 NLRB 409 (1977). Here, the conduct complained of in paragraph 6(c) of the complaint and the unnumbered “catchall” objection was isolated and directed toward a single employee in a unit of approximately 590 employees who were employed at four different warehouse locations. Likewise, the conduct took place at the end of an extensive preelection campaign that was devoid of any other objectionable conduct. The record shows that no other employee eligible to vote in the election was present during Beeble’s remarks to Crandall, nor is there evidence that the remarks were overheard or disseminated to any of the employees at the Respondent’s facilities. Moreover, I note that even on June 2, the date of the violative remarks, the Respondent did not prevent the Union from freely engaging in solicitation of employees when they entered and left the premises. It is further noted that both before and after June 2, there is no evidence to establish that the Respondent interfered in any manner with the right of the Union to engage in solicitation or distribution of literature to employees.

In these circumstances, I find that the threats to Crandall, while an unfair labor practice and objectionable conduct, are de minimis and therefore do not justify invalidating the results of the election. *Caron International*, 246 NLRB 1120 (1979). Indeed, the election results show that a substantial majority of the valid ballots were not cast for United Food and Commercial Workers, District Union Local One, AFL–CIO–CLC.

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.

⁷ These objections are listed as objections 3 and 4.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by enforcing a rule prohibiting employees from engaging in lawful union solicitation.

4. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating an employee about his union activities or within the meaning of Section 8(a)(1) and (3) of the Act by suspending the employment of Arthur Crandall.

5. The unfair labor practice described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Golub Corporation, Schenectady, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing by threats of discipline a rule prohibiting employees from engaging in lawful union solicitations on its premises.

⁸ 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.

(b) 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 after service by the Region, post at its facility in Schenectady, New York, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 3 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 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 2, 2000.

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

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

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."