Conagra Foods, Inc. *and* United Food and Commercial Workers Union, Local 75. Cases 09–CA–089532, 09–CA–090873, 09–CA–062889, 09–CA–062899, and 09–CA–068198

November 21, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND SCHIFFER

On May 9, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision in Cases 09–CA–089532 and 09–CA–090873, finding that the Respondent engaged in certain unfair labor practices. The Respondent filed exceptions to the judge's decision and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

On May 17, 2013, the General Counsel filed a Motion for Default Judgment and a memorandum in support of the motion in Cases 09–CA–062889, 09–CA–062899, and 09–CA–068198. On the same date, the General Counsel also filed an unopposed Motion to Consolidate the Motion for Default Judgment in Cases 09–CA–062889,09–CA–062899, and 09–CA–068198 with Cases 09–CA–089532 and 09–CA–090873 ("Motion to Consolidate"). The allegations in Cases 09–CA–062889, 09–CA–062899, and 09–CA–068198 were initially resolved when the parties entered into an informal settlement agreement, which was approved by the Regional Director for Region 9 in 2011. Subsequently, the Regional Director set aside the settlement agreement and issued a consolidated complaint reviving the allegations in those three cases, and the General Counsel filed the instant Motion for Default Judgment, on the grounds that the Respondent violated the terms of the agreement by engaging in the postsettlement conduct alleged in Cases 09–CA–089532 and 09–CA–090873.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1] We grant the General Counsel's unopposed Motion to Consolidate. We address first the judge's findings concerning the alleged postsettlement unfair labor practices before considering whether the misconduct, if proven, constitutes a basis for granting the General Counsel's Motion for Default Judgment.

[1] Member Johnson is recused and took no part in the consideration of this case.

I. THE ALLEGED POSTSETTLEMENT UNFAIR LABOR PRACTICES: CASES 09–CA–089532 AND 09–CA–090873

We have considered the judge's decision and the record in Cases 09–CA–089532 and 09–CA–090873 in light of the exceptions and briefs and have decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

1. As more fully explained in the judge's decision, this case arises in the context of a campaign by the United Food and Commercial Workers, Local 75 to organize employees at the Respondent's food processing plant in Troy, Ohio. Janette Haines, who worked the third shift at the Respondent's facility, was an active and open union supporter. In September 2012, Haines encountered second-shift employees Andrea Schipper and Megan Courtaway in the restroom and asked them if they would sign authorization cards; Schipper and Courtaway indicated that they would. A few days later, again in the restroom, Schipper gave Haines the number of the locker that she and Courtaway shared so that Haines could place the authorization cards inside. Subsequently, as Haines walked past Courtaway and Schipper on the production floor, she informed them that she had placed the cards in their locker. According to the credited testimony, Haines did not ask either Courtaway or Schipper to sign authorization cards and had no cards on her person. She merely informed her coworkers that she had done what she told them she would do, i.e., leave cards in a locker.[4] At the time, Schipper was waiting for the production line to start. Courtaway was cleaning, and she stopped cleaning momentarily when Haines spoke to her. Haines made no attempt to have Schipper or Courtaway sign cards at that moment, and the interaction lasted no more than a few seconds. Courtaway reported the exchange to her

[2] No exceptions were filed to the judge's recommended dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by telling employees they could not discuss the Union on working time.

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.

[3] We will modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We will also substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[4] To the extent our dissenting colleague's characterization of the facts implicitly challenges these factual findings, as previously stated, we find no basis for reversing the judge's findings.

leadperson. Thereafter, the Respondent issued Haines a verbal warning for violating its no-solicitation policy.

The judge concluded that the Respondent violated Section 8(a)(3) and (1) by issuing the warning. First, the judge found that the warning was discriminatory, reflecting animus toward earlier protected concerted activity by Haines, a "vocal and active supporter of the Union" in the judge's words. Second, the judge concluded that Haines' conduct did not constitute solicitation under Board law. We agree that Haines' conduct did not constitute solicitation.[5]

The lawfulness of the Respondent's no-solicitation policy is not at issue. Here we are concerned with the Respondent's application of that policy to Haines. A lawful no-solicitation policy, of course, may not be applied for unlawful reasons. See *Heck's, Inc.*, 156 NLRB 760, 761–763 (1966) (finding discharges unlawful where violation of no-solicitation rule was pretext), enfd. 386 F.2d 317 (4th Cir. 1967). We agree with the judge that the Respondent could not lawfully apply its policy to the conduct in which Haines engaged because her conduct did not constitute solicitation. Our dissenting colleague would find that Haines was lawfully disciplined for solicitation. He argues, in effect, that an employer may lawfully discipline employees for *any mention* of union authorization cards during working time, particularly where an employee stops working, however briefly. The Respondent has made no such argument in its exceptions. In any event, as we now explain, our colleague's position is contrary to well-established Board precedent.

The Board has long recognized the principle that "[w]orking time is for work," and thus has permitted employers to adopt and enforce rules prohibiting solicitation during working time, absent evidence that the rule was adopted for a discriminatory purpose. *Peyton Packing Co.,* 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944). But, as our colleague's position demonstrates, the application of those principles requires determining what is, and is not, solicitation. On that point, the Board has consistently held that "'[s]olicitation' for a union usually means asking someone to join the union by signing his name to an authorization card" at that time. *W. W. Grainger, Inc.,* 229 NLRB 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978); *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970) (the presentation of an authorization card is an "integral and important part of the solicitation process"); see also *Wal-Mart Stores*, 340 NLRB 637, 638–639 (2003) (employee did not engage in solicitation by stating she would like coworkers to consider signing authorization card where no card was tendered at the time), enf. denied in relevant part 400 F.3d 1093 (8th Cir. 2005); *Opryland Hotel*, 323 NLRB 723, 731 (1997) (asking employee to attend union meeting not solicitation); *Lamar Industrial Plastics,* 281 NLRB 511, 513 (1986) (asking employee if she had an authorization card not solicitation). As the Board has explained, drawing the "solicitation" line at the presentation of a card for signature makes sense because it is that act which "prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the employees are supposed to be working." *Wal-Mart*, above, 340 NLRB at 639.

In line with this precedent, Haines' statement on the production floor that she had placed authorization cards in her fellow employees' locker did not constitute "solicitation." There was no request, i.e., no solicitation of Schipper and Courtaway to sign cards during this brief interaction, and there were no cards presented for their signature. Instead, Haines simply informed Schipper and Courtaway that the authorization cards *they had already agreed to sign* (in a conversation in the restroom during a break) were in their locker. Cf. *Lamar Industrial Plastics,* above. Unlike the conduct found to be solicitation in prior cases, Haines' comment was not a request to take any action and posed no reasonable risk of interfering with production because it did not call for a response of any kind. Indeed, her information was conveyed in, at most, a few seconds. Accordingly, the Respondent violated Section 8(a)(3) when it issued Haines a verbal warning because she engaged in protected union activity.

There is no support—in case law or in logic—for the dissent's view that merely providing information to coworkers constitutes solicitation.[6] Nor does a momen-

[5] In finding that the warning issued to Haines was unlawful, Chairman Pearce does not rely on the judge's further finding that the Respondent was discriminatorily motivated by animus against Haines' prior union activity. Where the reason an employee was disciplined is in dispute, evidence of antiunion animus is relevant to an analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to determine whether the discipline was unlawful. But where, as here, there is no dispute that the employee was disciplined for engaging in union activity, and the sole issue is whether that activity constituted solicitation subject to lawful prohibition, there is no need to adduce evidence or make findings concerning antiunion animus.

Member Schiffer agrees that evidence of antiunion motivation is not necessary in these circumstances. Nevertheless, in addition to finding that Haines' conduct did not constitute solicitation, Member Schiffer would also find, in agreement with the judge, that the Respondent's real motivation for disciplining Haines was its hostility toward her earlier protected concerted activity and that her October 2 conduct was seized on by the Respondent as a pretext for such retaliation.

[6] We are not convinced to overrule precedent by our colleague's analogies to criminal activities involving drug sales and prostitution

tary interruption in work, or even a risk of interruption, subject employees to discipline for conveying such union-related information. Instead, the Act allows employees to make union-related statements such as the one Haines made, which do not "occupy enough time to be treated as a work interruption in most work settings." *Wal-Mart,* above, 340 NLRB at 639. The balance thus struck between employee and employer rights is more faithful to the principles set forth in *Republic Aviation*[7] than one that turns an informative statement about cards—to employees who had already agreed to sign them—into a solicitation.[8]

We are puzzled by our colleague's suggestion that our view of union solicitations injects uncertainty into a settled area of law. On the contrary, we have described well-established precedent clarifying the distinction between solicitation on one hand, and union-related conversations on the other, and the basis for that distinction. Further, we observe that drawing a line at the actual making of a request, accompanied by the presentation of a card for signature provides much clearer guidance to employees, employers, and unions alike. This approach provides far more certainty than the dissent's position, under which any workplace conversation related to union authorization cards, perhaps even including what such a card is, is potentially subject to discipline as a "solicitation." That view is unjustifiable under any view of the law.[9]

2. In addition, we adopt the judge's finding that the Respondent violated Section 8(a)(1) by posting and maintaining an overly broad rule restricting "discussions about unions." On April 30, 2012, the Respondent posted a letter stating in part: "We also wish to remind employees that discussions about unions are covered by our Company's Solicitation policy. That policy says that solicitation for or against unions or other organizations by employees must be limited to nonworking times."[10]

Under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004), a rule is unlawful if it explicitly restricts Section 7 activity or if (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

In agreement with the judge, we find that the April 30 letter was unlawful because employees would reasonably construe it to prohibit all discussions about unions during working time. The letter singles out "discussions about unions," states that such discussions are "covered by" the Respondent's solicitation policy, and summarizes that policy as restricting solicitation to nonworking time. The letter neither defines "solicitation" nor explains the relationship between "discussions" about unions and "solicitation" for or against unions. Some discussions about unions, indeed, most discussions about unions, are just that—discussions, not solicitations. The unmistakable message of the letter is that such discussions are "covered by" the solicitation policy and hence forbidden during working time. Thus, the letter fails to negate the plain inference that all discussions about unions are "covered by" a policy that prohibits such discussions during working time. Because the rule, as reasonably interpreted, prohibits protected discussions about unions, we agree with the judge that the April 30 letter is unlawfully overbroad.[11] Moreover, the Respondent allows

which, in any event, we do not consider proper analogies to lawful union activity among coworkers.

[7] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[8] Indeed, the Eighth Circuit effectively endorsed this view in its opinion in the *Wal-Mart* case, upholding the Board's determination that issuing an invitation to a union meeting was not solicitation but rather "more akin to a statement of fact" that "did not require an immediate response" and "[did] not occupy enough time to be treated as a work interruption in most settings." *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1099 (8th Cir. 2005). That exactly describes Haines' comment to her coworkers that the authorization cards were in their locker. It was a statement of fact, it did not require an immediate response, and it occupied too little time to be treated as a work interruption.

We reject our colleague's suggestion that we are adopting "specialized definitions" of "solicitation" and "working time." As to the former, we simply construe "solicitation" as our cases have construed it before—i.e., as requiring something more than a bare mention of an authorization card. As to the latter, we do not claim that the employees were not on "working time." Rather, we find it immaterial whether they were or were not, given that the conduct for which Haines was disciplined did not constitute solicitation. We do not inaugurate "a new reality," as our colleague would have it, in which "solicitation is prohibited and permitted at the same time." We do not disturb long-settled precedent holding that solicitation during working time may be prohibited by a valid no-solicitation policy

[9] Our dissenting colleague cites to certain proposals contained in the Board's Notice of Proposed Rule Making ("NPRM") — Representation-Case Procedures, which issued on February 6, 2014. The Board has taken no final action on the NPRM, and speculation regarding the views of the Board or any of its Members as to the issuance and/or contents of a possible final Rule is both premature and outside the proper scope of this adjudication.

[10] The Respondent excepts to the judge's decision to grant the General Counsel's motion to amend the complaint to include an additional allegation based on the April 30 letter, which the Respondent introduced into evidence at the hearing. Although we do not rely on the judge's characterization of the General Counsel's motion to amend as one to conform the pleadings to the evidence, we affirm the judge's decision to grant the motion. The judge properly analyzed the factors relevant to a motion to amend a complaint and did not abuse his discretion in granting the motion. See *Pincus Elevator & Electrical Co.*, 308 NLRB 684, 685 (1992) (observing that under Sec. 102.17 of the Board's Rules and Regulations, an administrative law judge has wide discretion to grant or deny motions to amend a complaint), enfd. mem. 998 F.2d 1004 (3d Cir. 1993).

[11] In his analysis, the judge concludes that the letter is unlawful because it "can" reasonably be construed to prohibit protected activity.

employees to discuss other nonwork-related matters on working time. See *Jensen Enterprises*, 339 NLRB 877, 878 (2003) (an employer violates Sec. 8(a)(1) when it permits employees to discuss nonwork-related subjects during working time but prohibits discussion of union-related matters).

Our dissenting colleague argues that employees would understand the letter as nothing more than a reminder of the Respondent's solicitation policy. The letter does refer to that policy, but that is not all it does. It states, categorically, that "discussions about unions are covered" by that policy[12] In our view, a reasonable employee would read the letter to sweep *all* union discussions within the scope of the Respondent's solicitation policy, especially in light of the Respondent's vigorous efforts to restrict such discussions as detailed herein. See *The Roomstore,* 357 NLRB No. 143, slip op. at 1 fn. 3 (2011) (employer's repeated warnings to employees provided authoritative meaning to its unlawful rule). At the very least, the Respondent's letter created an ambiguity concerning the relationship between its restrictive solicitation policy and union discussions while working. Any ambiguity in the letter must be construed against the Respondent. See, e.g., *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

II. THE GENERAL COUNSEL'S MOTION FOR DEFAULT JUDGMENT: CASES 09–CA–062889, 09–CA–062899, AND 09–CA–068198

Background

Having found that the Respondent committed certain postsettlement violations, we turn to the General Counsel's Motion for Default Judgment. Upon an August 17, 2011 charge, an October 27, 2011 first amended charge, a second August 17, 2011 charge, and a November 4, 2011 charge filed by the United Food and Commercial Workers Union, Local 75, the Charging Party and the Respondent entered into an informal settlement agreement, which was approved by the Regional Director for Region 9 on November 30, 2011. Pursuant to the terms of the settlement agreement, the Respondent agreed, among other things, to refrain from (1) enforcing its solicitation/distribution policy in an overly broad manner by applying it to nonwork areas and nonworktime; (2) advising its employees that they may not discuss and voice their opinions on union-related issues in work areas and/or during working time; and (3) interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights in any like or related manner. The settlement agreement also contained the following noncompliance provision:

> The Charged Party agrees that in case of noncompliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue the complaint that will include the allegations spelled out above in the Scope of the Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that the allegations of the aforementioned complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

Thereafter, the Union filed separate charges against the Respondent in Cases 09–CA–089532 and 09–CA–090873 on September 18 and October 5, 2012, respectively. By email on December 18, 2012, the Regional Director notified the Respondent that by engaging in the conduct alleged in those charges, the Respondent was in noncompliance with the settlement agreement. The letter urged the Respondent to remedy its noncompliance by approving a proposed second settlement agreement. The letter advised that unless the Respondent remedied its noncompliance, a complaint would issue and a motion for default judgment regarding the allegations initially

We clarify that the Board's test under the first prong of the *Lutheran Heritage Village* standard is whether employees "would" reasonably construe the rule to prohibit protected activity. As explained above, we find that they would.

[12] The dissent misconstrues our analysis. We are not saying that "covered" means "prohibited." Rather, using our dissenting colleague's own dictionary definitions, it is clear that the letter specifically says discussions about unions are "dealt" within the Employer's no-solicitation policy, which expressly limits such conduct to non-working time.

resolved by the settlement agreement would be filed. The Respondent did not reply.

Accordingly, on January 17, 2013, the Regional Director issued a consolidated complaint. On May 17, 2013, the General Counsel filed a Motion for Default Judgment and supporting memorandum with the Board. On May 21, 2013, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed an opposition to the General Counsel's motion, and the General Counsel filed a response.

Ruling on Motion for Default Judgment

In its opposition to the General Counsel's motion, the Respondent claims that the conduct alleged in Cases 09–CA–089532 and 09–CA–090873 is not a proper basis for finding a breach of the settlement agreement. The Respondent argues that its discipline of Haines falls outside the agreement's specific prohibition against disciplining employees "for engaging in solicitation/distribution in non-work areas and *during non-work time*" (emphasis added) because Haines was disciplined for conduct occurring on *working time*. That argument is unavailing. The Respondent's unlawful application of its solicitation policy to Haines' protected activity constituted the same type of conduct as previously alleged: enforcing its solicitation policy in an overly broad manner, and consequently disciplining Haines. Moreover, even assuming the discipline of Haines lies outside the precise limits of the agreement's specific prohibitions, the Respondent agreed to cease and desist from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights in any manner "like or related" to those specific prohibitions. The discipline of Haines is at the very least like or related to conduct specifically prohibited under the settlement agreement. Thus, we conclude that the Respondent's unlawful discipline of Haines breached the terms of the settlement agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the consolidated complaint in Cases 09–CA–062889, 09–CA–062899, and 09–CA–068198 are true. Accordingly, we grant the General Counsel's Motion for Default Judgment.[13]

On the entire record, the Board makes the following

[13] Because the Respondent's discipline of Haines constitutes a sufficient basis upon which to grant the General Counsel's motion, we find it unnecessary to reach the Respondent's argument that the unlawful April 30 letter concerning its solicitation policy is an improper basis for granting the motion.

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a corporation with an office and place of business in Troy, Ohio (the Respondent's facility), has been engaged in the business of food processing and distribution. In conducting its business operations during the 12-month period ending December 31, 2012, the Respondent sold and shipped goods valued in excess of $50,000 directly to places outside of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, United Food and Commercial Workers Union, Local 75, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Nikki Fry	–	Production Manager
Todd Setser	–	Sanitation Supervisor
Bo Smith	–	Sanitation Supervisor
Scott Burns	–	Production Supervisor
Mike Speck	–	Maintenance Supervisor

1. At all material times, the Respondent has maintained the following rule (the solicitation/distribution rule):

> In the interest of all associates and [the Respondent], no solicitation or distribution of non-business related material is allowed during work time or in work areas. Solicitation may include solicitation for funds or contributions for organizations from customers, associates, or persons from other firms doing business with [the Respondent], baseball pools, raffles, the sale of cosmetics, etc. In addition, trespassing, soliciting or distributing literature by any non-associate on [the Respondent's] property is prohibited.

2. On various dates, the Respondent enforced the solicitation/distribution rule selectively and disparately. Specifically,

> (a) About August 16, 2011, the Respondent, by Nikki Fry,

(i) prohibited employees from signing authorization cards in the "smoke pad" area;
(ii) removed union literature from the break room;
(iii) prohibited employees from reading union literature in the break room;
(iv) told employees it was against the Respondent's policy for them to read union literature in the break room; and
(v) took union literature from employees in the break room.

(b) The Respondent, by Bo Smith,

(i) about August 16, 2011, removed union literature from the break room and threw the literature in trash containers, and
(ii) about August 22, 2011, removed union literature from the break room.

(c) About August 22, 2011, the Respondent, by Scott Burns,

(i) removed union literature from the break room and threw the union literature in trash containers, and
(ii) attempted to take union literature from an employee in the break room.

3. About September 2011, the Respondent, by distributing to employees and posting on its bulletin boards, promulgated the following rule:

> Employees of [the Respondent] are entitled to discuss and voice their opinions on union-related issues as long as it is not in working areas and/or during work time.

4. (a) About August 16, 2011, the Respondent issued a verbal warning to employee Janette Haines.

(b) About August 17, 2011, the Respondent issued a written warning to employee Janette Haines.

(c) The Respondent engaged in the conduct described above in paragraphs 4(a) and (b) because employee Haines formed, joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONSOLIDATED CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact and the entire record in this consolidated case, we amend the administrative law judge's conclusions of law consistent with our findings herein, as follows.

1. The Respondent violated the terms of the settlement agreement entered into in disposition of Cases 09–CA–062889, 09–CA–062899, and 09–CA–068198 by issuing an unlawful verbal warning to employee Janette Haines on October 2, 2012, because she engaged in union activities. Accordingly, the settlement agreement is vacated and set aside.

2. By the conduct described above in part II, paragraphs 2 and 3, the Respondent violated Section 8(a)(1) of the Act.

3. By the conduct described above in part II, paragraph 4, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. By issuing Janette Haines a verbal warning on October 2, 2012, because she engaged in union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The Respondent violated Section 8(a)(1) of the Act by posting the following rule on April 30, 2012:

> We also wish to remind employees that discussions about unions are covered by our Company's Solicitation policy. That policy says that solicitation for or against unions or other organizations by employees must be limited to non-working times.

6. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully issued verbal and written disciplinary warnings to Janette Haines, we shall order the Respondent to rescind the warnings issued to Janette Haines on August 16 and 17, 2011, and on October 2, 2012. Having found that the Respondent maintained overly broad work rules regarding its solicitation policy, we shall order the Respondent to cease and desist, to rescind the unlawful rules, and to advise employees in writing that the unlawful rules are no longer being maintained.

ORDER

The Respondent, ConAgra Foods, Inc., Troy, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining rules that prohibit employees from discussing union-related issues during working time and/or in work areas.

(b)Removing union literature from nonwork areas.

(c) Prohibiting employees from reading union literature, taking or attempting to take union literature from employees, or informing employees that it is against company policy for employees to read union literature.

(d) Prohibiting employees from signing authorization cards on nonworktime and in nonwork areas.

(e) Disciplining employees because they engage in union activities.

(f) 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 its September 2011 and April 30, 2012 rules prohibiting employees from discussing union-related issues in working areas and/or during worktime, and advise employees in writing that these unlawful rules are no longer being maintained.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings issued to Janette Haines, and within 3 days thereafter, notify her in writing that this has been done and that the warnings will not be used against her in any way.

(c) Within 14 days after service by the Region, post at its Troy, Ohio facility copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 August 16, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 9 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.

Dated, Washington, D.C. November 21, 2014

[14] 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."

Mark Gaston Pearce, Chairman

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

The permissible scope of no-solicitation policies involves one of the most understandable, well-established labor law doctrines applied by the Board and the courts. See, e.g., *Peyton Packing,* 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944) ("Working time is for work."). Conversely, significant confusion has resulted from the Board's treatment of other requirements and policies under the standard articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004) (holding a policy unlawful if "employees would reasonably construe the language to prohibit Section 7 activity"). The present case involves both sets of issues, and as to both, I respectfully dissent from the conclusions reached by my colleagues.

Regarding the first issue, Respondent maintains a no-solicitation policy that lawfully prohibits "solicitation" during "working time."[1] My colleagues recognize (as they must) that this policy is lawful, but they effectively invalidate any enforcement of the policy unless an employee displays or presents a union authorization card. Here, my colleagues adopt narrow, non-dictionary meanings for "solicitation" and "working time" that depart from the decades-old treatment of no-solicitation rules by the Board and the courts. Moreover, the approach adopted by my colleagues will make it impossible for anyone to know in advance whether, where and what type of "solicitation" is prohibited under lawful no-solicitation policies. This is an unfortunate development in an important area that, until now, has been governed by one of the clearest and most workable rules-of-the-road in the case law we administer.

Regarding the second issue, my colleagues find that the Respondent violated the Act by posting a letter that reminded employees about its lawful no-solicitation policy. Although the majority relies on *Lutheran Heritage Village*, which invalidates employer policies and rules if

[1] The no-solicitation policy also prohibits solicitation "in a work area on employee's own time," and by "all non-employees." The General Counsel did not allege that any aspect of the policy was unlawful.

"employees would reasonably construe the language to prohibit Section 7 activity,"[2] my colleagues adopt an interpretation of the disputed letter that is not reasonable. I do not believe an employer violates Section 8(a)(1) by posting a letter that merely reminds employees about a lawful no-solicitation rule.[3]

A. Background

The relevant facts here are straightforward. The Respondent operates a food production facility (where, among other things, "Slim Jim" meat sticks are made). The Respondent maintains a no-solicitation policy that lawfully prohibits "solicitation during working time." In September 2012, employee Janette Haines started soliciting employees Megan Courtaway and Andrea Schipper to sign union authorization cards. As part of this solicitation, Haines placed cards in the locker shared by Courtaway and Schipper.

At some point, Haines approached Courtaway and Schipper at their workstations during working time for all three employees. As to what happened next, the judge "credit[ed] the testimony of Haines and . . . Schipper, and specifically credit[ed] Schipper's testimony to the minimal extent that it conflict[ed] with that of . . . Courtaway."

Haines testified that, at the time, she worked in the "sanitation department" (Tr. 260–261), she had obtained her "cleaning supplies . . . out of the sanitation cage" (Tr. 274), and she encountered Courtaway and Schipper "between two machines" in their work area ("optics") while Haines was going to her work area (the "smokehouse") (id.). Haines' testimony also included the following exchange on cross-examination:

> Q. Ms. Haines, . . . when you talked to them on the production floor . . . at that time you were walking to your work area; isn't that right?
>
> A. Yes.
>
> Q. You were working; isn't that correct?
>
> A. Yes.
>
> Q. Isn't it correct that [Courtaway] was working?
>
> A. Yes.
>
> Q. Isn't it correct that [Schipper] was also working?
>
> A. Yes.

[Tr. 285–286.]

Courtaway's job also involved "cleaning," and Courtaway testified that, when approached by Haines, Courtaway "was cleaning" while "on the production floor" (Tr. 350). She was asked, "Did you have to stop working?" She responded, "Yes." (Id.)

Schipper's work involved "cutting" meat sticks on the production line. She testified that the exchange between Haines and Courtaway (which Schipper observed and heard) occurred "on the production floor" while Schipper was "waiting to cut on the line," although "the line wasn't running yet" (Tr. 358–359).

The record is unclear about precisely what Haines said to Courtaway in Schipper's presence during the production line encounter. Schipper and Courtaway testified that Haines approached them on the production line *before* Haines placed three union authorization cards in the locker shared by Schipper and Courtaway. According to Schipper and Courtaway, Haines said that "she was *going to put* three union cards in [the] locker for [Schipper and Courtaway] to sign, and [Courtaway's] husband to sign" (emphasis added).[4] However, Haines testified that (i) she had *previously* advised Schipper and Courtaway (on two occasions when seeing them in the ladies' room) that the three authorization cards needed to be signed, and Haines would place three cards in the shared locker (Tr. 271–273), and (ii) Haines indicated during the production line conversation that she *had placed* the three cards in the locker as previously promised (Tr. 274). The judge credited the testimony of Haines and Schipper (and, to a lesser degree, Courtaway) without acknowledging this conflicting testimony, but the judge's description tracks Haines' version of events.

This detailed description of the record and the judge's credibility findings makes clear three uncontroverted facts. First, the discussion between Haines and Courtaway (which Schipper observed and heard) was relatively short. Second, the subject of the conversation involved union authorization cards that Haines wanted to have signed by Courtaway, Courtaway's husband, and Schipper. Third, the exchange occurred during the

[2] I have previously expressed my disagreement with this prong of the *Lutheran Heritage Village* standard. See, e.g., *MCPc, Inc.*, 360 NLRB No. 39, slip op. at 1 fn. 4 (2014); *California Institute of Technology Jet Propulsion Laboratory*, 360 NLRB No. 63, slip op. at 1 fn. 1 (2014). Because I believe the Respondent's letter in this case should be deemed lawful even under the *Lutheran Heritage Village* "reasonably construe" test, this case does not provide an opportunity to articulate an alternative standard. However, I hope that the Board will articulate an alternative standard in an appropriate future case.

[3] Because I find that the Respondent did not commit these alleged postsettlement unfair labor practices, I would deny the General Counsel's Motion for Default Judgment. However, I concur with my colleagues regarding our decision to grant the General Counsel's unopposed to Consolidate the Motion for Default Judgment in Cases 09–CA–062889, 09–CA–062899, and 09–CA–68198 with Cases 09–CA–089532 and 09–CA–090873. I also join them in affirming the judge's decision to grant the General Counsel's motion to amend the complaint.

[4] Tr. 362 (testimony of Schipper). Courtaway likewise testified that, when they were on the production line, Haines "told me that she need[ed] me and my husband to re-sign our union cards" and "[s]he said she was going to put them in . . . my locker." (Tr. 351–352.)

"working time" of *all three* employees, and it interrupted or shortened the "work" performed by two employees, Haines and Courtaway.[5]

B. The Warning Received by Haines for Violating Respondent's Lawful No-Solicitation Policy

In my view, the commonsense conclusion that follows from the above facts is that Haines engaged in solicitation during the working time of Haines, Courtaway and Schipper, in violation of the Respondent's lawful no-solicitation policy. After Courtaway reported the encounter to her leadperson, Respondent gave Haines a "verbal warning"—the least onerous form of discipline commonly imposed by employers—for the policy violation. Unlike my colleagues, I believe that the verbal warning in these circumstances was clearly lawful.

Under the National Labor Relations Act, the Board is required to balance "the undisputed right of self-organization assured to employees" with "the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797–798 (1945). The Supreme Court has observed that the "[o]pportunity to organize *and* proper discipline are both essential elements in a balanced society." Id. (emphasis added). Consistent with these principles, the Board has long held that "[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. *Working time is for work*." *Peyton Packing*, above (emphasis added). Consequently, the Board has long held—and parties have long understood—that it is lawful for an employer to prohibit *all* "solicitation" during the "working time" of any employee involved in the solicitation (i.e., whether he or she was doing the soliciting or being solicited), *Essex International*, 211 NLRB 749, 750 (1974), and employees can lawfully be disciplined if they violate such no-solicitation policies.[6]

Applying these principles, I would find that Haines was lawfully given a verbal warning for violating the Respondent's lawful solicitation policy. Haines approached Courtaway and Schipper when it was working time for all three employees. Regardless of whether one looks at Haines' intent or what Courtaway and Schipper understood from their encounter with Haines in the production area, it is beyond dispute that Haines was trying to have Courtaway, Courtaway's husband, and Schipper sign new union authorization cards. This constitutes "solicitation" under any commonsense or dictionary definition of the word.[7] In *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1096 (8th Cir. 2005), denying enf. in relevant part 340 NLRB 637 (2003), the Eighth Circuit held that an employee engaged in prohibited solicitation when he merely stated he would "like [a co-employee] to have a [union authorization] card to sign." 400 F.3d at 1099. The court *rejected* the Board's position that solicitation takes place only when an authorization card is presented during the conversation. Id. at 1099–1100. As to this issue, even though there was no evidence that an authorization card had been placed "directly in front of" the coemployee, the court held there was "little doubt" as to the "intent" underlying the "words" spoken, and the court reasoned that the coemployee "understood the exchange as a request to sign the card, an understanding likely to be reached by the average person in a similar situation." Id. Similarly, in the instant case, the record leaves no doubt as to Haines' intent and what Courtaway and Schipper understood. The purpose was to get union authorization cards signed. The record also leaves no doubt that all three employees were on working time. As noted previously, "[w]orking time is for work." *Peyton Packing,* above.[8] Accordingly, Respondent could (and did) lawfully discipline Haines for this solicitation.

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[5] As noted in the text, Courtaway was doing "cleaning" work in the production area, and her unrebutted testimony was that she stopped working because of the conversation (Tr. 350). Haines also was responsible for "cleaning" and, at the time of the exchange, Haines had just picked up "cleaning supplies" and encountered Courtaway and Schipper in the production area while Haines was walking to her work area in the "smokehouse" (Tr. 274). Only the third employee, Schipper, worked in a production position. The record reveals that Schipper was at her work station and her working time had commenced, but the production line had not yet started when the conversation occurred (Tr. 358–59). Haines admitted on cross-examination that at the time, she, Courtaway, and Schipper were all working (Tr. 285–286).

[6] Equally well established is the principle that a no-solicitation policy that bans solicitation during "working hours" (rather than "working time") is unlawful because a "working hours" prohibition would prevent employees from exercising their lawful right to engage in solicitation during nonworking times like meal periods or breaks. See, e.g., *North Hills Office Services*, 346 NLRB 1099, 1113 (2006); *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983); *Essex International,* above. However, in the instant case, there is no question that Haines received her verbal warning based on a policy that lawfully banned solicitation during "working time."

[7] The Merriam-Webster Online Dictionary defines "solicitation" as "the practice or act or an instance of soliciting," and it defines "solicit" as "to ask for . . . something, such as money or help . . . from people, companies, etc." or "to ask (a person or group) for money, help, etc." See http://www.merriam-webster.com/dictionary/solicitation and http://www.merriam-webster.com/dictionary/soliciting (most recently visited October 30, 2014).

[8] The exchange between Haines and Courtaway interrupted or shortened the performance of work by both employees. Accordingly, Haines' conduct is distinguishable from mere conversations about a union that do not interfere with work, and this renders inapplicable cases holding that such conversations may not be prohibited when other nonbusiness conversations are allowed during working time. See, e.g., *W. W. Grainger, Inc.,* 229 NLRB 161, 166 (1977) (involving remarks such as "support the union" or "there is a meeting tonight"), enfd. 582

I share my colleagues' objective, which is to give employees appropriate protection in exercising their Section 7 rights. However, Board and court cases establish that these rights are not absolute during working time because, when employees are on the job, an employer can reasonably insist that employees focus on work. In this context, clear standards are extremely important because they permit everyone—employees, unions, *and* employers—to understand in advance what is permitted and what is prohibited. Such a purpose is favored by the Act because one of the Board's primary purposes is to foster stability,[9] and the Supreme Court has indicated that Board standards should provide reasonable "certainty beforehand" without fear that "later evaluations" may result in findings of impropriety. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981).

Although decades of Board and court cases uphold no-solicitation policies like the one applied in this case, my colleagues find that Respondent violated the Act by giving Haines a verbal warning for violating Respondent's lawful no-solicitation policy. My colleagues redefine lawful no-solicitation policies in two ways: (i) although a policy states that it *prohibits* "solicitation" during working time, such a policy must be interpreted to *permit* solicitation on working time except when union authorization cards are displayed or presented; and (ii) solicitation, although lawfully prohibited during "working time," is permitted when a production line is not actually in motion or when there is only a "brief" interruption of work.

For several reasons, I believe these exceptions and qualifications are unsupported by the Act and ill-advised.

First, as noted above, longstanding precedent establishes that an employer is entitled to insist that employees work during working time and refrain from conduct that tends to interfere with their own work or the work of others. The law in this area is based on a recognition that solicitation (as opposed to mere conversation) is sufficiently likely to interfere with work that a rule prohibiting it during working time is presumed valid, and employers may lawfully discipline employees who break such a rule, even if work is not interrupted at all. Our cases have held that solicitation encompasses "asking someone to join the union by signing his name to an authorization card," *W. W. Grainger,* above, 229 NLRB at 166, and in *Wal-Mart*, mentioned previously, the Court of Appeals for the Eighth Circuit rejected the Board's prior attempt to suggest, as the majority finds here, that solicitation never occurs in the absence of authorization cards.[10]

Second, my colleagues' adoption of such fact-specific exceptions and qualifications will cause confusion for anyone who attempts to comply with, rely on, or enforce no-solicitation policies. A primary purpose of our decades-old standard in this area (upholding no-solicitation policies that prohibit solicitation during "working time," while invalidating policies that focus on "working hours") was to clearly delineate who can do what and when, *without* an extensive inquiry into questions like (i) precisely what was said and done by the person(s) engaged in working-time solicitation for or against a union? (ii) what, if anything, was shown or displayed by the person(s) attempting to influence others? and (iii) how much work was actually lost, delayed or deferred when the attempted persuasion occurred? If evaluating the enforcement of a lawful no-solicitation policy requires these questions to be asked and answered, nobody will really know whether or when "solicitation" is prohibited unless and until it occurs. Therefore, when employees engage in solicitation, the consequences will become a game of chance. This is illustrated by the following examples:

- In most workplaces, there is no physical "assembly line," and employee work responsibilities are not readily apparent. Under a legal standard that makes a no-solicitation policy's application turn on whether "working time" solicitation *actually* interferes with work to an impermissible degree, any employee engaging in such solicitation would act at his or her peril because he or she will be unable to know if

F.2d 1118 (7th Cir. 1978); *Opryland Hotel,* 323 NLRB 723, 731 (1997) (involving request that employee attend union meeting); *Lamar Industrial Plastics,* 281 NLRB 511, 513 (1986) (asking employee if she had union authorization card, although the Board found employer's conduct unlawful even if exchange constituted solicitation). I note that the finding of no solicitation in *Lamar Industrial Plastics* was mere dicta, since the Board found that the employer in that case violated the Act *even if* the employees engaged in solicitation. See 281 NLRB at 513 ("[I]t is unnecessary to the outcome of this case to decide whether [the disciplined employees] engaged in solicitation on company time. Even assuming arguendo that [they] did technically violate Respondent's rule, a question still remains whether the rule was discriminatorily applied to them. The record leaves no doubt that Respondent strictly enforced the rule in their case solely because the alleged solicitations were on behalf of the Union.").

[9] See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (stating that the "basic policy of the Act [is] to achieve stability of labor relations").

[10] In *Wal-Mart*, the court agreed that an employer may not "prevent conversations about unions that do not interfere with work productivity," 400 F.3d at 1099, but that observation has no application here because Haines engaged in solicitation, not merely a union-related conversation or, as the majority contends, a purely informative statement, and the record establishes that the solicitation interrupted or shortened the cleaning work to be performed by Courtaway and Haines.

their persuasion efforts caused a material negative impact on output or productivity.

- Employees who believe they can engage in solicitation (attempts to persuade others to support or oppose a union) during working time because the intended work interruption will be brief will face potential discipline if their discussions are unexpectedly prolonged or result in unanticipated participation by bystanders that causes a material negative impact on output or productivity.
- If "solicitation" turns on whether authorization cards are displayed or presented, cases may emerge where the employee-recipient of persuasion efforts unexpectedly pulls an authorization card out of a pocket (or displays the card on a smartphone) during the exchange.[11]
- Other questions may arise regarding what constitutes an "authorization card." A variety of materials can be submitted in support of a showing of interest, some cases deal with cards or petitions that the Board declares invalid or insufficient (e.g., authorization cards that are signed but not dated),[12] and the Board has even solicited input regarding potential "electronic" showings of interest in lieu of authorization cards.[13]

Third, although my colleagues' approach requires a fact-specific inquiry to determine whether or when various appeals during working time violate no-solicitation policies (e.g., was an authorization card presented for signature, how long did the exchange continue, what was stated, and to what extent was output or productivity negatively affected), the Act generally *prohibits* employers from undertaking these types of fact-specific inquiries. The Board has held on many occasions, for example, that Section 8(a)(1) prohibits employers from interrogating employees regarding conversations that have taken place regarding potential support for the union,[14] and it prohibits employers from engaging in surveillance or creating the impression of surveillance of union-related discussions.[15] It defeats the purpose of having lawful no-solicitation policies if the Board's standards regarding whether and how the policy can be enforced will require employers to engage in interrogation or surveillance that independently violates the Act. More important, it appears certain that Congress, when it enacted the NLRA, never intended that the Act would include such an incongruous and self-contradictory standard of legality.

Finally, in addition to introducing uncertainty into an area of the law where the rules have previously been clear and understandable, I believe the approach adopted by my colleagues will, in many ways, be absurd in practice. As the result of this case, lawful no-solicitation policies become a new type of Zeno's paradox that produces opposite, irreconcilable results at the same time.[16] My colleagues recognize (as they must) the validity of lawful policies that *prohibit* working time solicitation, but they require employers to *permit* working time solicitation (so long as written authorization cards are not displayed or presented at that very moment). In this new reality, solicitation is prohibited and permitted at the same time. What gets lost is the fact that nobody would reasonably interpret no-solicitation policies in this manner.[17] Indeed, the Board applies a different standard regarding the distribution of written materials, which renders lawful employer rules that bar the distribution of

[11] In this circumstance, my colleagues would presumably find that prohibited "solicitation" occurred. However, their opinion suggests that such a finding and, therefore, the legality of discipline could nonetheless turn on other issues like the length of the exchange, whether production was interrupted, and so on.

[12] See, e.g., *A. Werman & Sons, Inc.*, 114 NLRB 629 (1955) (finding that signed authorization cards were deficient if they were not dated).

[13] The Board has issued a proposed rule regarding representation elections in which the Board majority "specifically seeks comments on the question of whether the proposed regulations should expressly permit or proscribe the use of electronic signatures" in lieu of conventional authorization cards. See 79 FR 7318, 7326 (Feb. 6, 2014). If my colleagues find that prohibited working time "solicitation" occurs only if conventional authorization cards are displayed or presented by the person engaged in the on-the-job persuasion, this might suggest that—even when an employer's lawful no-solicitation policy prohibits working time "solicitation"—such "solicitation" must always be deemed permissible during working time if the Board's rulemaking dispenses with the requirement of written authorization cards to satisfy the showing of interest requirement.

[14] *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[15] *Flexsteel Industries*, 311 NLRB 257, 257 (1993).

[16] The phrase "Zeno's paradox" refers to a series of problems attributed to the Greek philosopher, Zeno of Elea, which redefine observable events to "demonstrate" they are impossible to achieve. According to the "Achilles and the Tortoise paradox," if the tortoise starts out ahead in a footrace, Achilles can never overtake it because "whenever Achilles reaches somewhere the tortoise has been, he still has farther to go." According to the "Arrow paradox," when an arrow is in flight, there are an infinite number of instances when it is not moving, therefore motion is impossible. See, e.g., Wikipedia, Zeno's paradoxes (http://en.wikipedia.org/wiki/Zeno's_paradoxes#Arrow_paradox) (most recently visited October 30, 2014).

[17] I cannot identify any other legal context in which laws *prohibiting* an act are enforced in a way that explicitly *permit* it. Nobody would reasonably argue that laws prohibiting drug dealing must freely permit drug transactions, so long as the money and the illicit substance are exchanged at different times or places. Nor would anyone reasonably argue that the solicitation of prostitution cannot occur unless sexual services are performed at the very moment money changes hands. All of these contexts focus on the *interaction* between two or more people, and it is not relevant where or when other parts of the transaction are completed.

written materials in work areas. This was articulated in *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962), where the Board majority stated that "a real distinction exists in law and in fact between oral solicitation on the one hand and distribution of literature on the other." Id. at 616. The Board has long treated solicitation regarding the signing of authorization cards as coming within the "solicitation" standard, which means employers must permit (i) solicitation regarding authorization cards, *and* (ii) the display of authorization cards in the course of such solicitation, if these occur on nonworking time—even in work areas, within which other forms of distribution can be prohibited. Id. at 620 fn. 6. But it is one thing to say that the presentation of an authorization card constitutes "solicitation" and not "distribution." It is something else to hold that oral solicitation is not even solicitation, and the *only* thing that constitutes "solicitation" is the exchange or display of authorization cards. That is the position my colleagues adopt in today's decision, similar to the position rejected by the Eighth Circuit in *Wal-Mart*.

The far better outcome here is to apply basic dictionary definitions that people understand. In the instant case, the record shows Haines was soliciting Courtaway and Schipper over a period of time. Unfortunately, some of this soliciting occurred during the working time of Haines, Courtaway and Schipper, and this violated Respondent's lawful no-solicitation policy. For the reasons stated above, I believe the verbal warning did not violate Section 8(a)(3) and (1) of the Act.[18]

C. The Letter Describing Respondent's Lawful No-Solicitation Policy

By adopting specialized definitions of the terms "solicitation" and "working time" (as described above), my colleagues find that Respondent violated the Act by giving Haines a verbal warning when she engaged in oral solicitation of Courtaway and Schipper during the working time of all three employees. Additionally, my colleagues find that Respondent committed another violation when it *described* its lawful no-solicitation policy in a posted letter that stated in part:

> We . . . wish to remind employees that discussions about unions are covered by our Company's Solicitation policy. That policy says that solicitation for or against unions or other organizations by employees must be limited to non-working times. Distribution of materials is not permitted during working time or in work areas at any time.

(Emphasis added.) Here as well, the Board would be well served by applying dictionary definitions. Doing so, the above description in my view lawfully accomplishes two things.

The initial sentence accurately states that union-related discussions are "covered by" the solicitation policy. The term "cover" means "to deal with" (e.g., "material covered in the first chapter") or having "sufficient scope to include or take into account" (e.g., "an examination covering a full year's work").[19] In fact, it is true that "discussions about unions" that constitute solicitation—the only "discussions about unions" employees would reasonably read the letter as referring to—are "covered by" Respondent's solicitation policy. My colleagues contend that the term "covered" here means "prohibited" (i.e., they read the phrase "discussions about unions are *covered* by our Company's Solicitation policy" to mean "discussions about unions are *prohibited* by our Company's Solicitation policy" during working time). Alternatively, according to my colleagues, the letter unlawfully stated "discussions" about unions were covered by the solicitation policy, instead of stating "*some* discussions" about unions were covered by the policy. In my view, these interpretations are not only unsupported by the dictionary, they are contradicted by the very next sentence in the letter (see below), in addition to the substance of Respondent's no-solicitation policy.

The second sentence continues by stating, accurately, the lawful parameters set forth in the Respondent's solicitation policy. The letter refers to "that policy," i.e., the "Solicitation" policy, with an explanation what the policy "says," with the following statement: "solicitation for or against unions or other organizations by employees must be limited to non-working times." This description not only accurately sets forth the substance of Respondent's solicitation policy, it precisely describes the standard applied by the Board and the courts.

[18] I also disagree with the judge's finding that the Respondent's discipline of Haines was motivated by animus toward her protected conduct 6 weeks earlier. That theory was not alleged, and it is not supported by the record. As the General Counsel acknowledged in his answering brief, "This is not a case involving a mixed motive or a *Wright Line* defense. There is no dispute that Haines was disciplined for her [encounter with Courtaway and Schipper]. The only dispute . . . is whether Respondent could lawfully discipline Haines because [the encounter] violated a lawful no-solicitation policy." GC Answering Br. at 9. Nor could the General Counsel substantiate a pretext claim. The record is clear that Courtaway immediately reported Haines' solicitation to her leadperson, prompting an investigation that confirmed Haines had, in fact, engaged in solicitation during working time; and the Respondent's disciplinary records establish that it took transgressions of its no-solicitation policy seriously, as evidenced by its discipline of other employees, including a supervisor, for similar violations.

[19] Merriam-Webster Online Dictionary (available at http://www.merriam-webster.com/dictionary/cover) (most recently visited October 30, 2014).

My colleagues are motivated by a well-intentioned desire to prevent employees from misconstruing Respondent's letter. However, Section 8(a)(1) does not empower the Board to prohibit general statements that describe lawful policies; rather, the statute only prohibits statements that "interfere with, restrain, or coerce employees" in the exercise of protected rights.[20] To prevail in this case, the General Counsel has the burden of proving that language contained in Respondent's reminder letter constituted unlawful interference, restraint or coercion under Section 8(a)(1). In my view, the record does not support such a finding.

Moreover, my colleagues conclude that the letter violates Section 8(a)(1) based on the "reasonably construe" test set forth in *Lutheran Heritage Village*, 343 NLRB at 646–647. Under that test, employer policies will be declared violative of Section 8(a)(1) if "employees would *reasonably* construe the language to prohibit Section 7 activity." Id. (emphasis added). Even if one applies the *Lutheran Heritage Village* test, one cannot "reasonably" construe any language in Respondent's letter "to prohibit Section 7 activity." Rather, the letter reminds employees about Respondent's lawful no-solicitation policy, and the letter accurately sets forth the substance of the policy. In these circumstances, I believe finding a violation improperly treats Respondent's lawful no-solicitation policy as if it were unlawful; and a finding of illegality requires unreasonable interpretations of both quoted sentences from Respondent's letter, in addition to the phrase "interfere with" and the words "restrain" and "coerce" used in Section 8(a)(1).[21]

Accordingly, as to the above issues, I respectfully dissent.

Dated, Washington, D.C. November 21, 2014

Phillip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[20] In addition, Sec. 8(c) affirmatively provides that "views, argument, or opinion, or the dissemination thereof" in "written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice" unless there is a "threat of reprisal or force or promise of benefit."

[21] Because we deal here with a facial challenge to the rule, enforcement evidence is irrelevant in determining its legality. See *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (2012) (facial challenges separate from "as applied" violations), enfd. 746 F.3d 205 (5th Cir. 2014). Insofar as cases like *The Roomstore*, 357 NLRB No. 143 (2011), hold otherwise, they cannot be reconciled with the standard established in *Lutheran Heritage Village,* above.

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 promulgate and maintain rules that prohibit employees from discussing union-related issues during working time and/or in work areas.

WE WILL NOT remove union literature from nonwork areas.

WE WILL NOT prohibit you from reading or taking union literature, WE WILL NOT take or attempt to take union literature from you, and WE WILL NOT inform you that it is against company policy for you to read union literature.

WE WILL NOT prohibit you from signing authorization cards on nonworktime and in nonwork areas.

WE WILL NOT discipline you for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our September 2011 and April 30, 2012 rules prohibiting you from discussing union-related issues in working areas and/or during worktime, and after the rescission WE WILL advise you in writing that these unlawful rules are no longer being maintained.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful warnings issued to Janette Haines, and, within 3 days thereafter, WE WILL notify her in writing that this has been done and that the warnings will not be used against her in any way.

CONAGRA FOODS, INC.

The Board's decision can be found at www.nlrb.gov/case/09-CA-089532 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations

Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Jamie Ireland and *Zuzana Murarova, Esqs.,* for the General Counsel.

Ruth Horvatich and *Jennifer Dehloff, Esqs. (McGrath North Mullin & Kratz, P.C.),* of Omaha, Nebraska, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Dayton, Ohio on March 25— 26, 2013. UFCW Local 75 filed the initial charges on September 18, and October 5, 2012. The General Counsel issued a consolidated complaint on January 15, 2013.

The General Counsel alleges that Respondent, Conagra, by its consultant and agent, Phillip Craft, violated Section 8(a)(1) in a series of presentations he made to employees on August 21 and 22, 2012. The General Counsel alleges more specifically that Craft told the employees that they could not talk about the Union while on company time or on the production floor.

The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) in issuing a verbal warning to employee Janette Haines on about October 2, 2012. Respondent issued Haines a verbal warning on that date for soliciting on behalf of the Union.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with a facility in Troy, Ohio where it produces Slim Jims, pizza, breadsticks and similar products. In 2012 it sold and shipped goods valued in excess of $50,000 directly to places outside of Ohio. Conagra 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.

[1] Tr. 102, line 23 should read, "antithetical."

II. ALLEGED UNFAIR LABOR PRACTICES

Complaint paragraph 5: the meetings conducted at Respondent's facility by Phillip Craft

The Union, UFCW Local 75, began an organizing drive at Respondent's Troy, Ohio facility in about August 2011. As of the date of this hearing, the Union had not filed a representation petition.

At some point, Respondent hired the firm of Craft and Barresi to prepare a presentation for its employees about unions. Employees of the consulting firm gathered information from employees at the plant in preparation for these presentations. Phillip Craft, a principal of the firm, conducted 14 meetings with different groups of employees on August 21 and 22, 2012. He conducted six meetings in Building 2 of the plant on August 21 and eight more in Building 1 of the plant on August 22.[2]

Craft made his presentations from a slide show or Power Point demonstration. He generally read from the slides, although at times he talked extemporaneously or responded to questions from the audience.

One slide from which Craft read at every meeting concerned Conagra's "No Solicitation No Distribution Policy." This slide presented the following "bullet points:"

No distribution rule (strictly enforced)
- Prohibit in work areas at all times
- Prohibit in all areas during working time
- Prohibit all non-employees from distributing

No solicitation rule (strictly enforced)
- Prohibit solicitation during working time
- Prohibit solicitation in a work area on employee's own time
- Prohibit all non-employees from soliciting

It is undisputed that Respondent allows employees to talk about nonwork-related subjects while working in working areas.[3] What is disputed in this matter is whether Craft said at several meetings, when speaking extemporaneously, that employees could not discuss the Union or unions during worktime in work areas. However, it is also undisputed that after Craft's presentations, several or many employees discussed the Union on the production floor while working and that nobody was disciplined for doing so with the possible exception of Jan Haines on October 2, 2012.

Scott Adkins, Respondent's plant manager, and Thomas Thompsen, Respondent's human resources manager, attended all 14 of Craft's presentations. They, as well as Craft, himself, testified that he never told employees they could not discuss the Union while working and in fact, in response to questions, said just the opposite. Respondent also presented the testimony of Jesse French, a rank and file employee, and leadperson Ryan

[2] The parties stipulated to the introduction of G.C. Exh. 9 without any discussion or testimony. In the absence of any evidence to the contrary, I find that the meetings took place at the times set forth in that exhibit.

[3] A long line of Board cases holds that an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, e.g., *Jensen Enterprises,* 339 NLRB 877, 878 (2003).

Fields, concerning the 10 p.m. meeting on August 22, to rebut the testimony of the General Counsel's witnesses regarding Craft's presentation. Douglas Hearn and Jane Gambill were called by Respondent to testify about the 0700 meeting which they attended. James Warner, a leadman, testified for Respondent regarding the midnight August 22/23 meeting. Jacqueline Seipel, a rank and file employee, testified for Respondent concerning the meeting which she attended, although it is not clear from the record which session that was.

There are no recordings or notes of anything Craft said other than the slides. Therefore, it is necessary to closely examine the testimony of the General Counsel's witnesses in order to determine whether there is any greater reason to credit their testimony than that of Respondent's witnesses. Another way of putting this would be whether the General Counsel established by a preponderance of the evidence that Craft said the things alleged in the complaint.

Testimony regarding the 1 p.m. meeting on August 21

Rhonda Dross: Dross testified that Craft had a slide show and then, "he talked about soliciting, we wasn't allowed soliciting. Talked—said we was not allowed talking about the Union on our breaks until—unless we was on our breaks and lunches, or outside of work," Tr. 92. On cross-examination, Dross testified that Craft said that no soliciting was allowed during our working hours, but also that he said, "no talking about the Union," Tr. 97.

Paul Jackson: Jackson testified that he was almost 100 percent sure that Craft said that you cannot talk about the Union on company time. I do not credit Jackson's testimony because he clearly had only a sketchy memory of what was said at the meeting, and his testimony is obviously inaccurate in some respects, see Tr. 114, 119–120, 125, 133.

Julie Strader: Strader testified that Craft stated the employees were not allowed to talk about the Union on the production floor, Tr. 146.

After the meeting, Strader saw Jan Haines, one of the most outspoken union supporters, in the ladies room. Strader told Haines that Craft had stated that employees could not talk about the Union on the production floor.

Testimony regarding the meeting at 5 a.m. on August 22

The General Counsel presented only one witness to testify about the 5:00 meeting on August 22. Cynthia Bowling came to 5:00 meeting prepared to take notes. She testified that Craft stated that employees are not allowed to talk about the Union in a work area. Tr. 16. Bowling testified that she challenged Craft on this statement and that he responded by stating this rule was in Respondent's employee handbook. She testified that she asked him to show the rule to her in the handbook. At some point, according to Bowling, Craft said his slide came right out of the handbook. Bowling's testimony in this respect is unreliable because it is certain that Respondent did not have a rule against union talk on the production floor in its handbook and Craft's slides had no such statement on them.

After the meeting Bowling approached plant manager Scott Adkins and asked him to sign her notes. He declined but accompanied Bowling to talk to Craft. Craft denied he told employees that they were not allowed to talk about the Union on work time and affirmatively stated the opposite, Tr. 20.[4]

Testimony regarding the 7 a.m. meeting on August 22

Employees Bill Stevens, Crystal Lindamood and former employee Robert Adams testified that Craft stated that employees could not talk about the Union, Tr. 37, 58, 73. Lindamood gave an affidavit to the Board Agent stating that Craft told employees that Respondent's handbook prohibited employees from talking about the Union on the production line. At trial, she recanted this testimony, Tr. 78–79. The fact that both Lindamood and Cynthia Bowling either testified or gave affidavits that Craft cited the employee handbook as authority for prohibiting union talk on the production line undercuts the reliability of both witnesses' testimony. Since the handbook contains no such statement, it is highly unlikely that Craft said that it did so.

Testimony regarding the 10 p.m. meeting on August 22

Jan Haines, an early and prominent union supporter, went to the 10 p.m. meeting on August 22, after discussing with other employees, including Julie Strader, what Craft had said at earlier meetings. She testified that:

> And I remember him reading from the slides, and he got to a point where—and I—I feel like he read this from the slide, but he said for sure you cannot talk about the Union during—work time, on the—floor, on the production floor. I don't know his exact words, but he definitely said you couldn't discuss it while working.

Tr. 266.

Haines then took issue with Craft and they engaged in an argument in front of the entire audience. Craft denied that he said that employees could not talk about the Union during work time, Tr. 267. After a while both Craft and another employee expressed anger at Haines. The reliability of Haines' testimony is undercut by her testimony that Craft was reading from a slide when he told employees that they could not discuss the Union on worktime, Tr. 281. Craft had no such slide.

The testimony of Jerry Hoschower, who attended the same meeting, is completely unreliable as he testified that he did not specifically recall what Craft stated about talking about the Union, Tr. 49–50. He did not recall Craft's name and generally seemed not to remember much that transpired during Craft's presentation.

Victoria Harris testified that she was embarrassed by Haines' conduct at the meeting. However, she also testified that Craft stated that you can talk about the Union but not during production, Tr. 163–164. However, Ms. Harris conceded that she was not paying close attention to what was going on at the meeting due to her lack of interest, Tr. 173, 177. Thus, I conclude her testimony has little value.

John Adkins, who also attended the 10 p.m. meeting on August 22, testified that Craft told employees that they were not allowed to discuss the Union on the production floor. He also

[4] Atkins confirmed that Bowling approached him after the meeting with a request to sign her notes. He did not testify regarding her subsequent conversation with Craft. Craft did not discuss any interaction with an employee that corresponds with Bowling's testimony.

testified that Craft denied saying this when challenged by Jan Haines, Tr. 184–185. In his affidavit to the Board agent, Adkins contradicted his trial testimony and also stated he was not paying attention until Haines spoke up. This leaves his testimony as to what transpired beforehand worthless, Tr. 192–193.

Don Burns, a witness called by the General Counsel, testified that he was not paying attention at the meeting until Jan Haines began arguing with Craft. He did not testify as to what Craft said before the argument.

Andrew Golden at first testified that Craft said employees could talk about the Union on their own time, not company time. On cross-examination, he was unsure as to whether Craft said this, Tr. 237–238. Golden recalled almost nothing else about the meeting and did not recall anybody asking questions. It is not clear to me that Golden had any accurate recollection about what transpired.

The General Counsel clearly did not meet his initial burden of establishing that Craft told employees that they could not talk about the Union on the production floor during worktime at the August 22, 10 p.m. meeting.

Testimony about the August 22/23 midnight meeting

The General Counsel called Pamela Cole, a security guard at Conagra, who is hostile to Jan Haines and therefore I assume, unsympathetic to the Union. Cole testified that Craft told employees that they could talk about the Union but that if you were bothering other people you were to leave them alone, Tr. 253. In an affidavit given to a Board agent, Cole stated that Craft told employees that they were not to talk about the Union on the company floor. At trial, Cole denied that she heard Craft say that and testified that she did not read that part of her affidavit closely.

Testimony regarding unspecified meetings

It is unclear which meeting Jacqueline Seipel, called by Respondent, attended. Seipel testified that Craft did not say that employees could not talk about the Union on working time.

It is the General Counsel's burden to prove by a preponderance of the evidence that Craft made the statements alleged in the complaint. He has failed to do so. The General Counsel has not given me any persuasive reason to credit his witnesses over that of Scott Adkins, Thomas Thompsen, and Craft. Many of the witnesses appear to have little recollection of what actually was said at the meetings and with regard to many, it is clear that their testimony is in part inaccurate. For that reason, I dismiss complaint paragraph 5.

Complaint paragraph 6: the verbal warning issued to Janette Haines

As stated previously, Janette Haines, who worked the third shift (10 p.m. to 6:30 a.m.) in Respondent's sanitation department was one of the Union's earliest and most active supporters. She distributed union literature and solicited employees to sign union authorization cards. Haines, as stated before, openly challenged Phillip Craft in the presence of plant manager Scott Adkins and Human Resource Manager Thomas Thompsen on the night of August 22.

On October 2, 2012, Respondent issued Haines a verbal warning for alleging soliciting employees in a working area—apparently on or about September 24, 2012, G.C. Exh. 5. The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) in doing so.

Sometime in September 2012, Haines began to encourage employees who had signed union authorization cards to sign new ones. One day she encountered Megan Courtaway and Andrea Schipper, who worked close to one another on the Slim Jim Packaging line, in the ladies room. Haines asked them if they would sign new authorization cards. Courtaway and Schipper indicated that they would do so.

A few days after that, Haines encountered Schipper in the ladies room again. She asked Schipper if she could put authorization cards in Schipper's locker for the two women and Courtaway's husband, who also worked for Respondent. Schipper agreed and gave Haines the number of her locker, which she shared with Courtaway.

As to the incident for which Haines was disciplined, I credit the testimony of Haines and Respondent's witnesses, Andrea Schipper, and specifically credit Schipper's testimony to the minimal extent that it conflicts with that of Respondent's witness Courtaway. Schipper and Courtaway were at their workstation waiting for their production line to start running when Haines passed them and told Courtaway that she had put authorization cards in their locker. Haines did not have authorization cards on her person and did not ask Courtaway and Schipper to sign authorization cards in a work area.

This conversation lasted a matter of seconds and did not interfere with production, Tr. 364, 355. Haines continued on to do her work duties. A lady named Amanda, who was the leadperson for Courtaway and Schipper's line, came by their workstation shortly thereafter. Courtaway told Amana that Haines had put authorization cards in their locker and that Haines had just advised them of that fact.

Amanda reported this to their supervisor, a man named Ritchie, and sent Courtaway and Schipper, "upstairs" to talk to Ritchie. Ritchie told Courtaway and Schipper to get the cards and bring them to him. Schipper went to her locker, obtained the authorization cards and brought them to Ritchie. Then Ritchie had Courtaway and Schipper fill out a statement about what transpired. Neither Courtaway nor Schipper told anyone that Haines had asked them to sign an authorization card on the production floor, Tr. 350–354, 361.

On about October 2, 2012, in the early morning, Haines' supervisor, Bo Smith, told her to go to the office of Brad Holmes, a senior human resources generalist, who reports to Thomas Thompsen. Haines and Smith attended a meeting with Holmes. Holmes told Haines that "two girls had complained that [she] had solicited them on the gable top," Tr. 277. Holmes told Haines that employees were saying that Haines was offering authorization cards on the production floor for them to sign, Tr. 336.

This, according to Schipper and Courtaway, was not true. Holmes never spoke to Schipper and Courtaway. Their written statements are not in this record, thus there is no evidence as to what information was in them.

Haines told Holmes that "absolutely did not happen." Holmes then presented Haines with the warning which is signed by Holmes, Haines, Smith, and David Stormer, the Pro-

duction Manager, who entered the room at the end of the meeting.[5]

Human Resources Director Thomas Thompsen testified that he made the decision to discipline Haines for solicitation, but it is unclear what his involvement was and when it took place. Thompsen did not attend the October 2, 2012 meeting with Holmes and Haines at which the verbal warning was presented. He testified that "we" took a look at the statements written by Andrea Schipper and Megan Courtaway, Tr. 321. At Tr. 326 Thompsen testified that he read these statements and talked to both employees. I do not credit this testimony.

First of all, neither Schipper nor Courtaway testified to being interviewed by anyone other than their immediate supervisor. Since Holmes, who reported to Thompsen, only reviewed these employees' written statements and did not interview them, I find it highly unlikely that Thompsen interviewed them.

Based on the record as a whole, I conclude that Respondent had no evidence that Haines attempted to have employees sign authorization cards on the production floor. I also conclude that the verbal warning was discriminatorily motivated.

Management knew that Haines was a vocal and active supporter of the Union. I also infer that Respondent bore substantial animus towards her as the result of her conduct at the August 22 meeting. There is no explanation in this record as to why Megan Courtaway felt compelled to report to her line lead that Haines had left authorization cards in Andrea Schipper's locker. There is no explanation as to why the line lead immediately sent the two employees to their supervisor to write out a statement. Given this and the fact that Respondent issued the warning based on inaccurate information (which it apparently did not possess) that Haines was asking employees to sign authorization cards while they were on the production floor, I conclude that Respondent was looking for an excuse to retaliate against Haines for her union activity. I further conclude that Respondent would not have issued Haines the verbal warning on October 2, but for the animus towards her protected conduct on August 22.

Did Haines engage in unprotected solicitation?

A most curious aspect of this case is that Phillip Craft, the consultant hired by Respondent to educate its employees about what they could or could not do, opined that conduct similar to that of Haines does not constitute unprotected solicitation.

At Tr. 228, Respondent's counsel sought to clarify Craft's understanding of what constitutes solicitation. The General Counsel objected on the grounds that the question exceeded the scope of cross-examination. I overruled the objection. Craft stated that if an employee asks another on working time if they can sign an authorization card, it does not constitute solicitation unless the employee has the card in hand for the other employee to sign on the production line, Tr. 229–231. Thus, if an employee tells another on the production line that he or she should get an authorization card from the first employee after working hours in a nonwork area, the employee is not engaged in unprotected solicitation.

Craft's opinion is consistent with Board precedent, *Wal-Mart Stores,* 340 NLRB 637, 638–639 (2003).[6] There the Board stated that "an integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at the time. As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals are supposed to be working. Solicitation is therefore subject to rules limiting it to nonworking time and in the special circumstances of retail stores, to non-selling areas."

The United States Court of Appeals for the Eighth Circuit reversed the Board in part, *Wal-Mart Stores, Inc. v. NLRB,* 400 F.3d 1093 (8th Cir. 2005). The Court of Appeals panel held 2-1 that Wal-Mart employee Shieldnight engaged in unprotected solicitation when he asked another employee, who was on duty, to come to a union meeting and told her that he would like her to sign an authorization card. I am bound by Board precedent even if the Wal-Mart case is indistinguishable from the instant matter. Judges must apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied, *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984).

Furthermore, the instant case is distinguishable from the Wal-Mart case. The panel majority noted that the record in Wal-Mart was silent as to whether Shieldnight had an authorization card on his person. In this case, the record establishes that Haines did not have a card on her person and made it clear to fellow employees Courtaway and Schipper that the authorization cards were in Schippers locker, a nonwork area, not on her person. Thus, Haines' statements to Courtaway and Schipper did not have a significant potential to disrupt the workplace.

Moreover, it is meaningless to say that employees can express their support or opposition to the Union on worktime but cannot tell others how they may demonstrate that support or opposition (assuming they are allowed to discuss nonwork matters at all). If it is protected activity to discuss the union or speak for or against the union, it would follow that an employee may tell other employees about meetings or rallies either in favor or against the Union. It also follows that they have a protected right to tell employees where they may obtain pro or antiunion buttons, or an authorization card or sign an antiunion petition on nonworking time, if located in a nonwork area.

[5] The warning appears to have been drafted prior to Holmes' meeting with Haines. Thus, there is a strong indication that Respondent decided to discipline Haines before it heard her side of the story. Moreover, it declined to tell Haines which employees accused her of solicitation, making it virtually impossible for her to effectively respond to these accusations. This inadequate, inaccurate and biased investigation of Haines' conduct indicates discriminatory motivation, *Midnight Rose Hotel & Casino,* 343 NLRB 1003, 1005 (2004).

[6] Also see *Lamar Industrial Plastics,* 281 NLRB 511, 513 (1986); *Waste Management of Arizona,* 345 NLRB 1339, 1349–1350 (2005), in which the Board affirmed the decision of the administrative law judge. Two Board members, however, stated they found it unnecessary to rely on his comments and case citations regarding the distinction between union solicitation and other employee activity in support of union organizing.

The letter to employees posted by Respondent on April 30, 2012

At the close of the hearing the General Counsel moved to amend the complaint to allege that R. Exh. 4, a letter to employees from plant manager Scott Adkins, violates Section 8(a)(1), Tr. 426–428. This exhibit was introduced into evidence by Respondent through Scott Adkins, Tr. 291–292.

I granted the motion to amend, which I construe as a motion to conform the pleadings to the evidence. Respondent contends that it has been denied its due process rights by virtue of the amendment.[7] In deciding whether to permit a motion to amend, the Board considers a variety of factors, including the identity of the party who first introduced evidence relating to the amendment, whether the issue was fully litigated and whether Respondent has demonstrated that the amendment was prejudicial, *Pincus Elevator & Electric Co.,* 308 NLRB 684 (1992).

I find that the amendment is not prejudicial and does not deny Respondent due process. The April 30 letter was introduced by Respondent through its plant manager and, as explained below, violates Section 8(a)(1) on its face. Given that fact that alleged Section 8(a)(1) violations are adjudicated pursuant to an objective test (whether employees could reasonably interpret the letter as prohibiting protected conduct), no additional evidence could have bearing on the merits of the additional allegation, *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). Respondent's motive in posting the letter and its subjective effect on employees (i.e., whether they were in fact coerced, restrained, etc.) is irrelevant, *Miller Electric Pump & Plumbing,* 334 NLRB 824 (2001).

The letter was posted on April 30, 2012, in conjunction with Conagra's posting of a general notice regarding employee rights under the Act. The letter in pertinent part states:

> We also wish to remind employees that discussions about unions are covered by our Company's Solicitation policy. That policy says that solicitation for or against unions or other organizations by employees must be limited to non-working times. Distribution of materials is not permitted during working time or in work areas at any time.

In equating "discussions about unions" with solicitation, the letter is overly broad and violates Section 8(a)(1). The letter not only does not distinguish between "solicitation" and "discussions about unions," it equates them. Thus the letter violates Section 8(a)(1) in that it is so broad that it can reasonably be construed as encompassing protected conduct, *Cintas Corp.,* 344 NLRB 943 (2005); *Bigg's Foods,* 347 NLRB 425 fn. 4 (2006).

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(3) and (1) by issuing Janette Haines a verbal warning on October 2, 2013, for solicitation.

2. Respondent's letter regarding the NLRA notice, which has been posted at the Troy, Ohio facility since April 30, 3013, violates Section 8(a)(1).

3. The General Counsel has not established that Respondent, by Phillip Craft, violated the Act on August 21 and 22, 2012 as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent shall be ordered to rescind the verbal warning issued to Janette Haines on October 2, 2012, and to revise the letter it posted on April 30, 2013, to clarify that talking about the union during worktime on the production floor does not constitute solicitation that is unprotected by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Conagra Foods, Inc., Troy, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining employees for engaging in protected activities, such as encouraging other employees to sign an authorization card during working time on the production floor so long as they do not attempt to have another employee sign an authorization card while on working time and/or on the production floor.

(b) Posting notices or letters which can reasonably be construed as prohibiting protected conduct, such as merely discussing the union while working.

(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 the verbal warning issued to Janette Haines on October 2, 2012.

(b) Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful verbal warning issued to Janette Haines, and within 3 days thereafter notify her in writing that this has been done and that the warning will not be used against her in any way.

(c) Revise and post the letter posted on April 30, 2013, so as to inform employees that Respondent does not consider discussing the union during worktime to constitute solicitation within the meaning of its Solicitation Policy.

(d) Within 14 days after service by the Region, post at its Troy, Ohio facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Re-

[7] Respondent has not raised a 10(b) defense. Even if it had done so, I conclude that the allegation has a sufficient nexus to the charge filed on September 18, 2012 (since July 2012 the employer has prohibited employees from engaging in union activity on company time), to satisfy the requirements of Sec. 10(b), *Payless Drug Stores,* 313 NLRB 1220 (1994).

[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.

[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 Na-

gional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 October 2, 2012.

Dated, Washington, D.C., May 9, 2013

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.

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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."

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 discharge, discipline or otherwise discriminate against any of you for supporting United Food and Commercial Workers Local Union 75, or any other union.

WE WILL NOT post letters or notices that can be reasonably construed to prohibit protected discussions about unions and/or union activity during worktime in working areas by characterizing such discussions as 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 rescind the October 2, 2012 verbal warning issued to Janette Haines for soliciting during worktime in a work area.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful verbal warning issued to Jan Haines on October 2, 2012, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

WE WILL revise the letter we posted on April 30, 2013, so that it cannot be reasonably construed as prohibiting mere discussion about the Union or unions on working time in work areas and thus make clear that mere discussion of the Union and/or unions does not constitute prohibited solicitation under our solicitation and distribution policy.

CONAGRA FOODS, INC.