

We find accordingly that the following employees constitute an appropriate unit for purposes of collective bargaining, within the meaning of Section 9(b) of the Act.¹¹

All production and maintenance employees at the Employer's Delaware Township, New Jersey, plant, including inspectors, expeditors, and factory clerks, excluding all other employees, including office clerical employees, supervisors, and guards as defined in the Act.

[Text of Direction of Election omitted from publication.]

¹¹The Board has been administratively advised that the Employer now has one individual in its employ who is classified as a general inspector. The Employer contends that he is a supervisor. The Board is unable to conclude from this record whether or not the general inspector is a supervisor. Since we cannot at this time determine his unit placement, we will permit him to vote subject to challenge.

Continental Aviation and Engineering Corporation, Toledo Division and National Industrial Workers Union, National Independent Union Council. Case No 8-CA-1842 December 7, 1959

DECISION AND ORDER

On August 5, 1959, Trial Examiner Phil Saunders issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in certain unfair labor practices as alleged in the complaint and recommending that the complaint be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendation of the Trial Examiner, with the modification set forth below.

We agree with the Trial Examiner that the record does not establish the required preponderance of credible evidence that the Respondent promulgated and enforced a rule prohibiting solicitation by the Union on nonworking time, in violation of Section 8(a)(1) of the Act. In so doing, we do not agree with the Trial Examiner that in certain material respects the testimony of the employees vis-a-vis the foremen is not in conflict. However, the Trial Examiner credited the testimony of the foremen who testified that the employees were pro-

hibited from engaging in solicitation during working time only. It is Board policy not to overrule a Trial Examiner's credibility findings unless a clear preponderance of all the relevant evidence convinces it that such resolutions are incorrect.¹ As we find no basis for disturbing the Trial Examiner's credibility findings here, we adopt his conclusion. Accordingly, we shall dismiss the complaint.

[The Board dismissed the complaint.]

¹ *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 492-497; *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3).

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the duly designated Trial Examiner in Toledo, Ohio, on June 15, 1959, on complaint of the General Counsel, and answer of the Continental Aviation and Engineering Corporation, Toledo Division, herein called the Respondent. The issues litigated were whether the Respondent violated Section 8(a)(1) of the Act. All parties were represented at the hearing by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. At the conclusion of the hearing the parties presented oral argument, but did not file briefs.

Upon the entire record and my observation of the witnesses, I hereby make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent is engaged at Toledo, Ohio, in the manufacturing of aircraft components and engines. The complaint alleges and the answer admits that in the course and conduct of its business operations at its Toledo, Ohio, plant, the Respondent annually ships aircraft components, engines, and other products valued at more than \$100,000 directly to points outside the State of Ohio.

On the foregoing, I find that Respondent is engaged in interstate commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

In the answer, the Respondent avers that it is without knowledge as to whether the National Industrial Workers Union, National Independent Union Council, the Charging Party, and hereinafter referred to as the Union, is a labor organization within the meaning of the Act. The record and evidence reveals that the Union is an organization in which employees participate, has a constitution and officers, and exists for the purpose of dealing with employers concerning grievances, labor disputes, rates of pay, hours, and other conditions of employment. The fact that the Union has never actually bargained with the Respondent is not a controlling consideration.¹ I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

As aforesaid, Respondent is engaged in the manufacturing of aircraft components and turbojet engines. The Respondent's Toledo Division was established on February 1, 1955, and has at the present time approximately 600 hourly rated employees engaged in production work. Most or substantially all of the manufacturing is done for the United States Government. The Respondent's Toledo plant has several departments within it headed by a foreman who is under the direction of a general foreman.

¹ *J. Sullivan & Sons Manufacturing Corporation*, 105 NLRB 549.

The testimony of Respondent's Personnel Manager Steele discloses that in June of 1956, the Respondent signed a 3-year contract with the UAW-AFL-CIO Local 12, and that on February 23, 1959, a new contract was signed with UAW-Local 12, making some modifications from the original contract after negotiation sessions during the period from May 1, 1958, and concluding in February 1959.

B. The events

The primary issue to be resolved is whether the Respondent, as alleged in the complaint, promulgated and enforced a company rule, since on or about August 21, 1958, prohibiting union solicitation at all times *including nonworking time*.²

Ray Keaton, an employee of the Respondent, testified that during the first and second weeks in February,³ Mr. Cleo Danley (a union representative) contacted him and delivered to Keaton between 200 and 250 authorization cards of the Union. Keaton testified, "At that time we were trying to get this National Industrial Workers Union in there, and we were going to get the men to sign the cards." Keaton also testified that "we were going to pass them out in the shop." The evidence and the record discloses that Keaton had the union cards in his toolbox which was located near the machine he was operating. In reply to further questioning on how Keaton was distributing the union cards in his possession, he testified that he did not "go throughout the shop," but, "if they would come by they might want a card or maybe they would want 100 cards," and also that he would give them out whenever anybody wanted a card. Theodore Beck, an employee of the Respondent, testified that he had seen cards passed out in various departments, and that there were cards lying around in different places, but "did not see any being passed out during regular working hours." Employee Standifer testified, "Everybody was talking about them, the whole shop."

The introduction of the cards into the plant, and the distribution of them, then came to the attention of company officials. Respondent's vice president in charge of industrial relations, Raven, testified that Personnel Manager Steele called him on February 9, concerning the solicitation of cards, and stated that in his opinion the work of the Company was being disrupted by these efforts. The record reveals that Raven then called a law firm and was given advice on the matter. Steele testified that after further consultation with Raven, he then gave instructions to the general foremen "and I advised them that because of the complaints and the continuing interruption of the work schedule, that they should advise the employees under them, that this would have to cease during company working hours, because it was causing an interrupted work schedule in our operations." In replying to the question of whether he mentioned anything about distribution of cards on non-work time, such as lunch hours, or time other than company time, Steele answered, "Absolutely not, that is contrary to law."

Respondent's Foremen Papke, Corvin, Smith, Webster, and Barrile each testified with Respondent's assistant personnel manager, Mr. Baker, and relative to that discussion Swope testified "that I was to instruct my people to instruct their people not to pass any literature of any type out during working hours."

Respondent's Foremen Papke, Corvin, Smith, Webster, and Barrile each testified at the hearing as to what they told the employees in carrying out these instructions, and I will discuss their testimony later in the report.

The testimony on behalf of the General Counsel's case was presented by six witnesses, each an employee of the Respondent, and all presently so employed. In addition to Keaton's testimony as aforesaid, he further testified that during the first or second week in February one of his foremen, Papke, had given instructions about distributing cards and on direct examination Keaton testified, "No, he did not say anything to me, directly to me, except that anyone caught with those cards would be fired on the job, or on the spot, or something to that effect." Employee

² Additional 8(a) (1) allegations were as follows:

- a. Threatened its employees with loss of their employment and other reprisals because of their sympathies for, activities on behalf of, and memberships in, the Union;
- b. Threatened its employees with the loss of their employment and other reprisals if they possessed and distributed Union literature or assisted the Union in any other manner;
- c. Threatened its employees with the loss of their employment and other reprisals if they signed Union authorization cards;
- d. Enforced the aforementioned no-solicitation rule by threatening employees with discharge and other reprisals if they violated said rule.

³ All dates are 1959 unless designated otherwise.

Parlin Standifer testified that Foreman Corvin, of department 306, stated to him that "he wanted to tell me the same thing he told the rest of them, that if we get caught, if I were caught with any of the union cards that were floating around there, that we would be fired." Employee Cvetkovich, on direct examination, testified that around February, Respondent's Foreman Corvin "walked up to us and told us that he had orders to fire anybody on the spot that was caught reading any papers or cards or anything of that sort, because he said it would be a slow down in the work." Employee Charles Gaiffe testified that Foreman Smith told him "that anyone caught with one of them in their pocket or working with them, would be fired," and on cross-examination stated that "there was nothing said about working hours or nonworking hours." Employee Robert Funk quoted Foreman Barrile as stating that "he had been instructed that anyone caught signing or passing literature or petitions would be immediately fired—he did not use the exact word fired, I just do not remember the exact wording he used, but words to that effect." Employee Theodore Beck, at the time in question, testified that Foreman Webster told him and a couple of other men that "I don't want to catch anyone passing any literature."

On behalf of the Respondent's case some testimony was produced as to the Company's rule and policy on distribution and solicitation. Personnel Manager Steele testified that the company plant rule number 23 had reference to the soliciting or distributing of literature of any kind on company property and company premises, but that the rule was not intended to cover the solicitation of union cards. Steele testified that all the rules had been posted shortly after the Toledo Division was established in February of 1955. Steele also testified that the Respondent had an established company policy regarding solicitation which policy was to the effect that all matters which employees wished to post or present to the rank-and-file membership in the plant required sanction from the employer.

The Respondent's case also presented the testimony on the instructions given by their foremen to the employees. Foreman Papke testified that "I was asked to go around to all the boys and tell them not to pass out literature during working hours, no literature or cards." In reply to the question of whether he went to each individual employee and related those instructions, Papke replied, "I believe I did." Papke did not remember having any discussion with employee Keaton, and testified that he did not tell any employee that he would be fired for having union cards. Foreman Corvin testified that he told employee Standifer "that there would be no literature, no cards or anything passed out on company time," and if he was caught there would be disciplinary action taken. Corvin stated that he did not remember having any discussions with employee Cvetkovich and did not know him. Foreman Smith stated that he was instructed "to tell all the people that worked for me that they were not to pass out literature or cards during the working hours." In carrying out these instructions Smith stated that he told his people the same thing almost verbatim. He testified that he told employee Gaiffe "the same thing as I told the others," and did not tell Gaiffe that if he was caught with a card he would be fired. Foreman Webster testified that he talked to the employees in his department in a group, and stated, "As best as I can remember, I told them there would be no passing of literature of any kind during the hours that they were working." Webster testified that employee Beck was in the group of employees he talked to. Foreman Barrile testified that he got together the employees in his department, of which employee Funk was one, and "I told them that literature of any type was not to be passed out in the plant during working hours," and "I said disciplinary action would be taken if the order was not complied with."

As to the testimony of the foremen and the General Counsel's witnesses to the no-solicitation instructions, and as to whether, as contended by the General Counsel, they prohibited union solicitation on nonworking time, I do not believe that the testimony as between the foremen and the employees is necessarily inconsistent. At the onset there does appear to be an apparent conflict, but on a review and study of the record there is no real conflict in my opinion. Employee Keaton could not recall the instructions given to him by Foreman Papke with any specific certainty. When Keaton was asked what was said about the distribution of cards, he replied that Papke stated that anyone caught would be fired "on the job, or on the spot, or something to that effect—I believe he said that." I am convinced by the testimony, and any reasonable inferences therefrom, that one must conclude that the foremen's instructions pertained to working time. Keaton's own testimony referred to "on the job," and I credit the testimony of Papke where their testimony cannot be reconciled. Employees Standifer and Cvetkovich testified as to what Foreman Corvin told them. Standifer related that he was not to be caught with union cards floating around. From this testimony I am unable to find that the instructions by Corvin prohibited solicitation on nonworking time, since the record reveals that the union

cards were in the actual working area of the plant and had received considerable distribution therein. The testimony given by Cvetkovich indicates that the no-solicitation instructions he received pertained to working time only. By Cvetkovich's own statements, on direct examination, he testified that Foreman Corvin's instructions were to the effect that he would fire anyone caught reading any papers or cards because "it would be a slow down in the work." This instruction, and the necessary inferences therefrom, certainly cannot be meaningful other than applying to working time, and I can see no real conflict as between the two parties and their relative testimony thereto. Employee Cvetkovich's testimony on cross-examination, in my opinion, also substantiates in part that given by Foreman Corvin to the effect that there was to be no solicitation on company worktime.⁴ Throughout the entire record there is no evidence by any witness and certainly not by Standifer and Cvetkovich, to the effect that employees were instructed or prohibited from the actual distribution or solicitation of union cards on nonworking time such as rest periods or the lunch hour. To substantiate the position of the General Counsel, on the testimony given by Standifer and Cvetkovich, I would be required to completely discredit the testimony of Foreman Corvin and make a conclusion on circumstantial inferences based on no direct evidence in support thereof even by the contending witnesses.

As to whether the conversations of the foremen with employees Gaiffe and Beck specified only working time, Gaiffe testified that he had a union card in his toolbox and further stated that there was nothing said about working hours or nonworking hours. Beck apparently labored under the apprehension that the instructions not to pass literature prohibited no solicitation on nonworking time. From my observations of the witnesses, and in consideration of the testimony given thereof, I am of the opinion that a conclusion that there was a threat of discharge extending to off-duty solicitation would be entirely unwarranted, and I credit the statements of the foremen where the testimony has some apparent conflict. It should be noted also that Gaiffe's own testimony, relative to the instructions given to him, referred to "working with them."

As to the conversation between Foreman Barrile and employee Funk, there is also some apparent difference on what was said. Barrile testified that he told the employees, including Funk, not to pass out literature in the plant during working hours. Funk testified that the foreman told him that anyone caught signing or passing literature or petitions would be immediately fired. From reviewing the record there is no testimony by Funk that the instructions he received from Barrile mentioned anything about nonworking time or union cards. On cross-examination Funk testified that "he did not use the exact word fired, I just do not remember the exact wording he used, but words to that effect." It is difficult for me to credit the testimony of Funk as to what Barrile told him when he himself has such a vague memory as to a part of the conversation. On observations of the witnesses and in the absence of creditable evidence to the contrary, I conclude that the foreman's instructions to employee Funk did not prohibit solicitation on nonworking time.

C. Concluding findings

There is no contradicting evidence whatsoever that Respondent singled out anyone or a particular active adherent for the Union, but on the contrary the record reveals that Respondent made its no-solicitation instructions known to all the employees by the foremen contacting them either individually or in groups. The record is clear and uncontradicted to the extent that there were authorization cards of the Union in the Respondent's plant, and that the cards received considerable distribution throughout the working area of the plant and that the operations of the Respondent were being disrupted by these efforts. As the Board in *Peyton Packing Company, Inc.*, 49 NLRB 828, cert. denied 323 U.S. 730, stated, and reiterated in many later court and Board decisions:

The 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. It is therefore within the province of an employer to

⁴ Cvetkovich testified:

Q. In other words, he said anyone caught passing out or signing cards or papers during the working hours, or was creating a slow down, or something like that, would be discharged, is that right?

A. Yes.

promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.

Since working time is for work an employer may discipline an employee for solicitation or engaging in any other personal activity when he is on the job. And, in the absence of substantial proof of discriminatory departure from a rule or custom, an employer cannot be found to have violated the Act because he has threatened to discharge an employee for doing something other than working while being paid for his labor. It is no violation of the Act to warn an employee against solicitation on company time.⁵

The General Counsel produced considerable testimony to the effect that the Respondent condoned or permitted checkpools, raffles, and the circulation of petitions and other matters on company time as contrasted with its no-solicitation rule on the union cards. The evidence which I credit, however, discloses that the Respondent did not officially sanction such practices, as a general policy, and that foremen were instructed not to permit it. Employee Beck stated that such activities were done on the "Q.T.," and was not sure how the Company felt about it or that they had any knowledge other than "possibly supervisors." In *Carolina Mirror Corporation*, 123 NLRB 1712, the Respondent posted a notice which prevented union organizing during working hours, and at the same time continued in effect a rule permitting other solicitation if permission were granted by a supervisor, and the Board held that the institution of the rule did not violate Section 8(a)(1) of the Act.

On the basis of the entire record, I find that the General Counsel has failed to prove by the required preponderance of the evidence that the Respondent promulgated and enforced a company rule prohibiting union solicitation on nonworking time, and interfered with, restrained, and coerced its employees in violation of Section (a)(1) of the Act. I shall therefore recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in unfair labor practices as alleged in the complaint, within the meaning of Section 8(a)(1) of the Act.

[Recommendations omitted from publication.]

⁵ *Lily-Tulip Cup Corporation*, 113 NLRB 1267.

Indiana Hotel Company (Claypool Hotel) and Local 512, Retail, Wholesale and Department Store Union, AFL-CIO, Petitioner.
Case No. 35-RC-1645. December 7, 1959

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before John H. Rogers, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Jenkins, and Fanning].

125 NLRB No. 68.