

Laidlaw Transit, Inc. and Cheryl Wynn. Cases 27–CA–12671 and 27–CA–12743

September 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On May 10, 1994, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

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

The judge found that the Respondent, in mid-February 1993, threatened to take disciplinary action against employee Cheryl Wynn pursuant to an invalid no-solicitation/no-distribution rule if she distributed union materials in the drivers' room again. The General Counsel excepts to the judge's failure to find that this conduct violated Section 8(a)(1), as alleged in the complaint. We find merit in this exception and find that the Respondent's conduct in threatening Wynn violated Section 8(a)(1). We shall modify the Order accordingly.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 2.

“2. By promulgating and maintaining in November 1992 and on January 1, 1994, overly broad no-solicitation/no-distribution rules in order to discourage its employees' union activities, and by threatening to discipline an employee pursuant to the November 1992 rule, the Respondent has violated Section 8(a)(1) of the Act.”

2. Insert the following as Conclusion of Law 3 and renumber the subsequent paragraphs.

“3. By disciplining an employee for engaging in union activity pursuant to invalid no-solicitation/no-distribution rules, the Respondent has violated Section 8(a)(3) and (1) of the Act.”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

¹The General Counsel 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.

The judge neglected to include a conclusion of law for the 8(a)(3) violation that he found. We correct this inadvertent error.

modified below and orders that the Respondent, Laidlaw Transit, Inc., Commerce City, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs.

“(b) Threatening to discipline employees pursuant to an invalid no-solicitation/no-distribution rule for engaging in protected concerted activity.”

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to discipline employees pursuant to an invalid no-solicitation/no-distribution rule for engaging in protected concerted activity.

WE WILL NOT discipline our employees pursuant to invalid no-solicitation/no-distribution rules.

WE WILL NOT promulgate and maintain rules that prohibit employees from soliciting for purposes protected by Section 7 of the Act during nonworking time or from distributing literature for purposes protected by section 7 of the Act during nonworking time in nonworking areas of our Commerce City, Colorado facility.

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 any discipline imposed on Cheryl Wynn pursuant to our invalid no-solicitation/no-distribution rules and make her whole for any loss of pay she may have suffered as a result of the discipline.

WE WILL remove from our files any references to the discipline of Cheryl Wynn imposed pursuant to our no-solicitation/no-distribution rule and notify her in writing that this has been done and that the discipline will not be used against her in any way.

WE WILL rescind or modify the rules appearing in our employee handbook dated January 1, 1994, so that you are not prohibited from soliciting for purposes protected by Section 7 of the Act during nonworking time and so that you are not prohibited from distributing literature for purposes protected by Section 7 during nonworking time in nonworking areas of our Commerce City, Colorado facility and WE WILL distribute

to each of you a copy of the employee handbook with the rules rescinded or modified.

LIDLAW TRANSIT, INC.

A. E. Ruibal, Esq., for the General Counsel.
Larry Besnoff and Steven P. Steinberg, Esqs., of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Denver, Colorado, on January 25, 1994,¹ pursuant to an amended consolidated complaint² issued by the Regional Director for the National Labor Relations Board for Region 27 on September 2, and which is based on charges filed by Cheryl Wynn (Wynn or the Charging Party) on June 15 (Case 27-CA-12671), on July 21 (first amended), and on July 3 (Case 27-CA-12743). The complaint alleges that Laidlaw Transit, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).

Issues

1. Whether Respondent, acting through Frank Engel, a supervisor, violated Section 8(a)(1) of the Act in each instance by promulgating and maintaining two separate invalid no-solicitation rules; one effective in November 1992, the other effective in January 1994 and as to the earlier rule, whether Engel also violated the Act by threatening Wynn with disciplinary action if she continued to violate the invalid rule.

2. Whether Respondent violated the Act by (a) suspending Wynn and by issuing a letter of warning to her and (b) assessing driving points against Wynn, by requiring Wynn to undergo additional driver training and by again suspending Wynn, all because Wynn had engaged in protected concerted activities.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a corporation with an office and place of business located in Commerce City, Colorado. Respondent further admits that annually, in the course and conduct of its business operations, its gross volume exceeded \$250,000 and that annually it purchases and receives goods, materials, and services valued in excess of \$50,000 from points and places outside the State of Colorado. Respondent further admits that annually in the course and conduct of its business operations, that it purchases and receives goods,

materials, and services valued in excess of \$50,000 from other enterprises within the State of Colorado which other enterprises received the goods, materials, and services directly in interstate commerce. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Amalgamated Transit Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Background

Pursuant to an arrangement with the Denver Regional Transportation District (RTD), Respondent furnishes drivers and equipment for bus routes in the city of Denver and surrounding suburbs. One of the drivers employed by Respondent is alleged discriminatee, Cheryl Wynn, witness for General Counsel. Currently employed as a driver/trainer, Wynn began her employment in November 1989. Sometime in 1990 or 1991, Wynn was the initiator and primary in-house organizer of a union campaign seeking to organize Respondent's drivers and related classifications. Wynn's activities such as soliciting employees to sign union authorization cards and distributing union literature were conducted openly and were known to Respondent's management. Despite Wynn's efforts, the Union lost the Board-conducted election.

Shortly after the union defeat, Wynn was promoted from driver to driver/trainer with an increase in pay of \$1 per hour. Then in early January, Wynn became aware of a second union campaign which this time had been initiated by someone else. Due to Wynn's earlier union activities, many employees mistakenly assumed that she was again the primary organizer. Instead, she was only a participant in the campaign engaging in certain activities described below.

Another witness called by the General Counsel was Frank Engel, currently Respondent's division manager. As division manager, Engel supervises about 100 drivers, 10 dispatchers, Operations Manager Steven Ramos, and Manager of Employee Development and Safety Donald Showalter (G.C. Exh. 2). Both Ramos and Showalter were witnesses in this case and I will report their testimony below. For now, I note that before assuming his current duties as of April 26, Engel was operations manager between April 1991 and the time of his promotion.

In early January, while employed as Respondent's operations manager, Engel received a report from a dispatcher named Ray Klomp that Wynn was distributing union materials (authorization cards and literature) to drivers. Although Klomp did not testify, Wynn's activities were allegedly occurring in the drivers' room of Respondent's facility in the early morning hours of a workday. The drivers' room is about 40 feet by 48 feet and is used for both work and recreational activities by employees. It contains a pool table, video machine, soda and sandwich machines, and tables and chairs. In the early morning hours, while on the clock, the drivers receive their assignments from the dispatchers situ-

¹All dates herein refer to 1993 unless otherwise indicated.

²The consolidated complaint was amended by General Counsel on the day of hearing.

ated in a 10-by-12 foot room adjacent to the drivers' room. The drivers then receive supplies, review the assigned routes, punch transfers and perform other predrive preparatory activities in the drivers' room.

After receiving Klomp's report, Engel summoned Wynn to his office and confronted her with the report he had received placing her in violation of a no-solicitation rule allegedly posted on a bulletin board in the drivers' room. According to Engel, Wynn admitted distributing union materials to drivers on company time and company property. Engel asked her to cease her activities and gave her an oral warning, telling her formal discipline would result for a second offense.

Wynn tells a slightly different version. Placing the conversation in February, Wynn testified that she admitted to Engel that she was distributing union materials in the drivers' room, but that she denied that she or the recipients of the material were "on the clock." She further testified that she told Engel she thought she could be on company property while distributing union materials, but Engel said this was not permitted.

On February 23, again in the early morning hours of a workday, Engel received a second report about Wynn engaging in union activities in the drivers' room. The source of this report was Steve Ramos, called as Respondent's witness. Now Respondent's operations manager, Ramos testified that as of February, he was Respondent's lead road supervisor. In that capacity, Ramos was told by Klomp that Wynn was again distributing union materials in the drivers' room. At first Klomp had been given this information by an unidentified driver; then, according to Ramos, Klomp had personally witnessed Wynn handing out materials to drivers in the drivers' room. Upon receiving the report from Klomp, Ramos passed on the information to Engel.

After receiving Ramos' report of what Klomp and an unidentified driver had allegedly seen, Engel ordered Ramos to suspend Wynn immediately pending investigation of the charge. Because Engel had confronted Wynn a few weeks before about her union activities and warned her of potential disciplinary action for a repeat offense, Engel felt it was unnecessary to confront Wynn this time with the charge against her.³ About 4:50 a.m., Ramos told Wynn she was suspended and to leave the premises. As Ramos conveyed this message, to Wynn, Wynn was holding certain materials which Ramos could not identify. He did observe Wynn hand the materials to another employee before Wynn left the area.

According to Wynn, on the day in question, she was on the extra board meaning she came in about 3:45 a.m. and stood by to see whether an assignment would become available. As a standby driver, Wynn was required to remain in the drivers' room and be available for assignment.

According to Wynn, she again was passing out materials in the drivers' room while she and the recipients were not on the clock. Later after 4:30 a.m. on the day in question, when she was on the clock, but waiting for an assignment, she did crocheting and bible reading for a time. When she tired of these activities, she began talking to other drivers about the Union. About 10-15 minutes after she began talk-

³Before Wynn left Engel's office after her first warning, she told Engel, "I just want you to know Frank, I really am not the one who initiated this union organization this time. But I am helping with it." (Tr. 65.)

ing up the Union, Klomp approached her to say that one or more drivers had complained to him that Wynn had been distributing union cards in the drivers' room. Wynn denied the accusations. A while later, Ramos told her she was suspended for a day because she had been seen passing out union cards. Wynn then gathered up her possessions and left.

On or about February 24, Wynn recalls meeting with Engel and Ramos in Engel's office and receiving a letter from him which reads as follows (G.C. Exh. 4):

February 23, 1993

Cheryl Wynn
Laidlaw Transit

Ms. Wynn:

This letter is to notify you of my finding regarding your alleged violation of this division's No Solicitation Policy. After investigating this issue, I have found that you were in violation of the company's policy by handing out literature unauthorized by Laidlaw Transit while on company property and while on company time.

According to my records, we discussed this issue previously; at that time, I had informed you that your actions were in violation of the division's no solicitation policy and issued you a verbal warning. As a result of your further actions, I have decided that you will be issued this warning letter and a one day suspension, retroactive to Monday, February 23, 1993. If you are found to be in violation of this division's No Solicitation Policy again, you will be liable for further disciplinary action up to and including dismissal.

If you have any questions, please see me.

Sincerely,

/s/ Frank Engel
Frank Engel
Operations Manager

cc:
Bob Concienne
To file

I have read and understand the contents of this letter and its associated warning(s) and sanction(s).

/s/ Cheryl L. Wynn
Cheryl Wynn

By signing this I am not admitting to guilt & I reserve the right to attach a statement to this letter. [handwritten]

On election day in June, Wynn was the Union's election observer during the vote and was also present when the ballots were counted. Again the Union lost the election.

On or about June 24, about 12:45 or 1 p.m., Wynn had finished her initial assignment involving an 8-hour run. About 2:30 p.m., Wynn received a second assignment to drive an express bus in and around the streets of Denver. About 4:25 p.m., she had returned to the Market Street Station, an underground bus terminal near downtown Denver. Each bus in the terminal is assigned a gate or space in which to pull into and leave from (R. Exh. 1). Wynn drove her bus into gate 4 where Wynn picked up 20 to 25 passengers. In

accord with a written schedule on a “train card,” Wynn pulled out of gate 4 about 4:26 p.m. and began pulling around the curved driveway to reach the exit at a speed of about 5 mph. Although she saw no bus in her rearview mirror, Wynn testified she heard a bus coming around the curved driveway at a high rate of speed. According to Wynn, as she heard the bus coming, she simultaneously noted a red light flash on her dash indicating hot oil. This meant, Wynn testified, that the bus was about to shut down as it was programmed to do when the hot oil light came on. If this happened, Wynn’s bus would be vulnerable to collision with the bus allegedly approaching from the rear, a bus which Wynn never saw.

Allegedly in her desire to avoid an accident, Wynn drove her bus into gate 5, but she misjudged the location and height of the curb so that the right rear tire of the bus went over it, causing a bump and jar to the bus and passengers. Although no damage occurred to the bus, a passenger named Cheryl Green, who did not testify, claimed later in Wynn’s run that she had reinjured a whiplash injury to her neck which she had originally injured in a prior bus accident.⁴ In accord with standard procedures, Wynn gave Green an accident form, and then supposedly attempted to report the matter to dispatch, but Wynn claimed her radio was not working.

Because of an alleged injury occurring during an accident, Respondent’s accident policy (Jt. Exh. 2) required an investigation to determine whether Wynn’s accident had been preventable or nonpreventable.

The investigating official was Don Showalter, Respondent’s manager of employee development and safety, whose duties include the investigation of driver accidents and assignment of fault, if any. Called as a witness by General Counsel, Showalter testified that since May 1992 when he took over his current assignment, on the average, he made about 20 such determinations per month. In Wynn’s case, Showalter prepared his report and determined that the accident had been preventable. Among the documents reviewed by Showalter was Wynn’s written narrative of the accident (Jt. Exh. 1-E), photos of the area where the bus jumped the curb (Jt. Exhs. 1-H, I), courtesy cards from the passengers on the bus (Jt. Exhs. 1-G), Green’s claim for damages against RTD (Jt. Exhs. 1-K, L, M), and Showalter’s analysis and conclusions, dated June 25 (Jt. Exh. 1-J).

On or about June 25, Showalter met with Wynn and told her that in his opinion, the accident had been preventable.⁵ Accordingly, Wynn was assessed three points on her driving record, suspended for 2 days, and required to undergo 4 hours of retraining. Wynn indicated a desire to appeal Showalter’s findings to Engel, but on or about July 31, the latter affirmed Showalter’s decision, after giving Wynn an opportunity to present any additional material.

⁴Two other passengers told Wynn that they and Green had been laughing on the bus when the tire went over the curb. They also filled out written reports to that effect.

⁵A “preventable accident” is any occurrence involving a company-owned or operated vehicle which results in property damage and/or personal injury, in which the driver in question failed to do everything he or she, as a professional operator, reasonably could have done to prevent the occurrence (Tr. 108–109).

B. Analysis and Conclusions

1. Respondent’s former no-solicitation/no-distribution rule

Both sides agree that the no-solicitation rule pursuant to which Wynn was first warned and then disciplined was initially posted by Respondent in November 1992. This written policy was never produced at hearing, having mysteriously disappeared from a locked bulletin board with a glass cover. According to Engel, the policy provided that “no solicitation or distribution would be allowed on company property, on company time.” (Tr. 38.) At page 12 of its brief, Respondent correctly cites the Board’s leading case *Our Way*, 268 NLRB 394 (1983), for the proposition that policies prohibiting distribution or solicitation during “working time” are presumptively valid. However, Respondent continues on the same page to contend erroneously that “[f]or all practical purposes, the terms ‘company time’ and ‘working time’ are functionally equivalent.” Bans on solicitation during “company time” remain presumptively invalid. I Hardin, *The Developing Labor Law* 88 (3d ed. 1992). Citing *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527 (9th Cir. 1986). The expression “company time” does not clearly convey to employees that they may solicit on breaks, lunch, and before and after work.

I also find that Engel’s phrase “company property” is presumptively invalid because it is overbroad and could be interrupted to restrict solicitation and distribution in breakrooms or cafeterias, places where employees do not perform work activities but technically are “company property.”

At page 14 of its brief, Respondent argues in the alternative that if the General Counsel establishes that Respondent’s policy was presumptively invalid, then Respondent overcame the presumption of invalidity by communicating to its employees that the policy permitted distribution and solicitation during “nonwork time and in nonwork areas.” Before turning to the record to see whether Respondent has accomplished what it claims to, I recite the proper legal standard from *Our Way, Inc.*, supra, 268 NLRB at 395 fn. 4:

Our decision does not create a per se approach. Rather we are returning to the presumption of *Essex International* which concerns the facial validity or invalidity of no-solicitation rules and which can be rebutted by appropriate evidence. . . . an employer could show by extrinsic evidence that, in the context of a particular case, the “working hours” rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work.

In my opinion, Respondent has misapprehended the Board’s Rule for overcoming the presumption of invalidity. Respondent selectively quotes Wynn to show she understood the rule applied only to employees who were not “on the clock.” However, if Wynn were credible here, I note she also testified she told Engel originally she was not in violation of Respondent’s policy because she was soliciting and distributing only to employees who were not on the clock. And this was the case, according to Wynn, on February 23 as well. But regardless of what Wynn knew or how she con-

ducted herself, the Board's Rule quoted above from footnote 4 of *Our Way*, refers to what the employer must do to overcome the presumption of invalidity. I find that Respondent did not communicate or apply its rule in such a way as to overcome the presumption of invalidity as to all employees. See *Ichikoh Mfg.*, 312 NLRB 1022 (1993).

Clarifications of ambiguous rules or narrowing interpretations of overly broad rules must be effectively communicated to an employer's work force before the Board will conclude that the impact of facially illegal rules has been eliminated. I Hardin, *The Developing Labor Law*, supra at 94, citing *Chicago Magnesium Castings Co.*, 240 NLRB 400 (1979), affd. 612 F.2d 1028 (7th Cir. 1980). No evidence of any such clarification or narrowing interpretations has been presented in this case. In fact, I credit Wynn's testimony that no one in management ever explained to her what the meaning of the rule was as described in Engel's letter (G.C. Exh. 4) (Tr. 73).⁶

In light of the discussion above, I find that Respondent failed to rebut the presumed invalidity of the rule in question and I agree with General Counsel (Br. 10), that by Respondent's promulgation and maintenance of the rule, Respondent has violated Section 8(a)(1) of the Act. *NCR Corp.*, 313 NLRB 574 (1993). I further agree with the General Counsel and find that by enforcing its unlawful rule against Wynn for engaging in acknowledged union activity, Respondent has violated Section 8(a)(1) and (3) of the Act. *Our Way*, supra at 395. See also *Automotive Plastic Technologies*, 313 NLRB 462 (1993).

Because Wynn was disciplined pursuant to Respondent's invalid rule, the discipline was invalid and I will recommend below certain relief to which she is entitled. See *Boland Marine & Mfg. Co.*, 225 NLRB 824 (1976), affd. 562 F.2d 1021 LRRM 3239 (5th Cir. 1977).

2. Respondent's new no-solicitation/no-distribution rule

On January 1, 1994, Respondent promulgated and maintained a new no-solicitation/no-distribution rule which reads as follows (G.C. Exh. 3):

In order to prevent disruptions in production and interference with work performance, we have instituted the following "No Solicitation/No Distribution" rule.

Solicitation and the distribution of literature for any purpose by employees during the working time of either the person soliciting/distributing or the person being solicited/distributed to or in any working area at any time, is strictly prohibited. Employees who violate this rule will be subject to disciplinary action up to and including discharge.

Solicitation and/or distribution of literature for any purpose by non-employees in any area of Laidlaw Transit, Inc. premises is strictly prohibited.⁷

⁶An example of the confusion caused by Respondent's rule is Wynn's belief that the working area, where she could not solicit, was the bus (Tr. 118).

⁷This rule ends with "Please see section 11, number 31 for more information." Since sec. 11, number 31 is not contained in this record, I disregard the reference for purposes of deciding whether the rule violates the Act.

In his brief, page 10, General Counsel first states that the rule "'appears facially valid' as it speaks to the working time of both parties to the solicitation or distribution." Then General Counsel opines that the "rules . . . is [also] defective," because it prohibits both distribution and solicitation in "any working area at any time."

Before deciding the issue presented, I must discuss Respondent's threshold contention (Br. 16) that because the policy has not been implemented against any employees so far, there is no basis to find the policy has been applied in an invalid manner. The courts have held that failure to enforce an invalid rule is no defense because the mere existence of an overbroad rule may chill the exercise of the employees' Section 7 rights. *Brunswick Corp.*, 282 NLRB 794, 795 (1987); *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 940 fn. 7 (4th Cir. 1990).

I now proceed to find Respondent's rule is invalid for the reasons urged by General Counsel. In support of this conclusion, I again turn to I Hardin, *The Developing Labor Law* supra, at 89:

The differences between oral solicitation and the distribution of literature have caused the Board to apply somewhat different rules to employer efforts to restrict the two activities. Since *Republic Aviation*,¹⁰⁹ which dealt specifically with oral solicitations, the Board has maintained the position that oral solicitations by employees may be prohibited during working time.¹¹⁰ But the Board has generally allowed employers to forbid distribution of literature by employees both during working time and in working areas.¹¹¹ The difference reflects the Board's view that solicitation can only occur when both the soliciting and the solicited employee have an opportunity for the exchange of views and must presumptively be allowed at any location where both employees simultaneously find that opportunity, that is, when neither employee is on working time. Distribution of literature from employee to employee, however, can be done in an instant and the message preserved for later consideration. But it involves a hazard to employer interests absent from oral solicitation, the threat of litter and other risks to productive order, and may on that account be prohibited in work areas.¹¹²

¹⁰⁹*Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 16 LRRM 620 (1945).

¹¹⁰*Fruehauf Corp., Paceco Div. v. NLRB*, 601 F.2d 180, 102 LRRM 2146 (C.A. 5, 1979); *Keystone Resources v. NLRB*, 597 F.2d 1041, 101 LRRM 2784 (C.A., 5, 1979), on remand, 245 NLRB 512, 102 LRRM 1320 (1979); *Stoddard-Quirk Mfg. Co.*, [138 NLRB 615 (1962)] supra note 94.

¹¹¹*Stoddard-Quirk Mfg. Co.*, supra note 94. In the absence of a no-solicitation rule, an employer may not seize union literature placed on workers' desks prior to the start of working hours. *F. W. Woolworth Co. v. NLRB*, 530 F.2d 1245, 92 LRRM 2240 (CA 2), cert. denied, 429 U.S. 1023, 93 LRRM 3019 (1976); see also *United Aircraft Corp.*, 139 NLRB 39, 51 LRRM 1259 (1962), enforced, 324 F.2d 128, 54 LRRM 2492 (CA 1, 1963), cert. denied, 376 US 951, 55 LRRM 2769 (1964).

¹¹²*Stoddard-Quirk Mfg. Co.*, supra note 94 [133 NLRB 615, 619-621 (1962)]. See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 93 (1964).

Accordingly, because Respondent did not clearly convey to employees that they could solicit in work areas so long as the solicitation was on nonworking time, *Stoddard-Quirk Mfg.*, supra, 138 NLRB at 621, the Respondent's new rule is invalid and its promulgation and maintenance violate Section 8(a)(1) of the Act.

Respondent's rule is also invalid because it is ambiguous and does not clearly convey to employees what is a working area. As noted in the facts, the drivers' room is used both for work and recreational activities by employees. Accordingly, it is impossible for employees to know whether they may properly solicit/distribute in the drivers' room. Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).⁸

3. Wynn's alleged preventable accident and the resulting discipline

No Respondent policy is challenged by General Counsel in this segment of the case. Instead, General Counsel contends that the alleged preventable accident experienced by Wynn was a pretext and that she was really disciplined in whole or in part, for her union activities, including presumably her solicitation and distribution on behalf of the Union, her activities as the Union's election observer, and her filing of charges with the Board on June 15.

General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee[s] protected activities." *Wright Line*, 251 NLRB 1983 (1980), enf. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982).

I begin my analysis by finding that General Counsel has established a prima facie case that Wynn's protected activities referred to above were a motivating factor in her discipline. Motive is a question of fact and the Board may infer discriminatory motivation from either direct or circumstantial evidence. *NLRB v. Nueva Engineering*, 761 F.2d 961, 967 (4th Cir. 1984). Discipline of a union activist tends to give

⁸In light of my conclusions above, it is unnecessary to decide whether Respondent applied the rules to Wynn disparately.

rise to an inference of violative discrimination "timing alone may suggest anti-union animus as a motivating factor in an employer's action." *Norris/O'Bannon*, supra, 307 NLRB at 1242.

To recapitulate relevant facts, Wynn was disciplined pursuant to Respondent's accident policy (Jt. Exh. 2) for an accident causing (claimed) injury to a passenger which Showalter found was preventable. Wynn claimed that a contributing cause of the accident was her hot oil light flashing on the dash. If true, this meant Wynn should have shut the bus off immediately and called for assistance, lest serious damage occur. Instead, after the accident, she continued to drive the bus for several more miles, claiming that the light was no longer flashing. Later, on her run, after learning that Green intended to claim reinjury, Wynn testified that she was unable to report this immediately to dispatch, because the radio was not working. No form was submitted for either the hot oil light or the radio indicating they were in disrepair.⁹ Rather when both were checked out after the accident, they were found to be working properly. This discrepancy costs doubt on Wynn's version of the accident.

I note the accident happened in late afternoon after Wynn had already driven a full 8 hours beginning at 4 or 5 a.m. and was completing a second 4- to 8-hour assignment. She must have been very tired. No evidence was presented to corroborate Wynn's account of another bus which she never saw, approaching at a high rate of speed, allegedly forcing Wynn to take evasive action to prevent a collusion.

It is unnecessary to decide whether Wynn as a driver/trainer should be held to a higher standard of care than other drivers.¹⁰ I find that Showalter performed his duties in substantial accord with Respondent's procedure without deviation from the routine which could indicate that Wynn was being treated differently due to her protected activities. Compare *NLRB v. Comgeneral Corp.*, 684 F.2d 367, 370 (6th Cir. 1982). In fact, I note that Showalter himself was found to have caused two preventable accidents. More specifically, Showalter was hired as a driver on October 5, 1990, and on October 21, he caused about \$400 damage to a bus by hitting a pole. In March 1991, a few days after he was told of his promotion to classroom instructor, Showalter had a second preventable accident causing \$30 worth of damage to the bus (R. Exh. 2). Although the two accidents occurred at a time before Respondent's current point system, Showalter nevertheless was suspended for 2 days and was assigned to retraining.¹¹

⁹Although Wynn testified she prepared both forms, neither was offered into evidence, and I don't believe Wynn on this point. In so finding, I place no reliance on the following colloquy (Tr. 132):

JUDGE STEVENSON: Do we have such a form in evidence here now? [referring to the forms Wynn said she prepared] I haven't been looking at all the documents that have gone in. Is there such a form as that?

MR. BESNOFF: No such form exists.

¹⁰It is not possible to draw any conclusions from the other accident files for other employees submitted by General Counsel (G.C. Exhs. 5-9). Each accident is fact specific and I cannot find any common thread in these files helpful to General Counsel.

¹¹Although Wynn had only a single preventable accident, under Respondent's current accident policy (Jt. Exh. 2) which General Counsel has no specific argument with, if she properly received three points on her driving record, then General Counsel does not contend that Wynn was unfairly treated in any other way (Tr. 174).

In support of his theory in this segment of the case, General Counsel presented testimony from Becky Barron, a bus-driver for Respondent for over 2 years and member of an occupational safety and health committee formed by Respondent shortly before Wynn's accident. Originally, one of the functions of the committee was to review the facts of drivers' accidents presented to the committee by Showalter on a hypothetical basis without names of persons involved. The committee would then advise Showalter whether the accident was preventable or nonpreventable with the ultimate objective of improving driver safety.¹² At some point, according to Barron, apparently after Showalter related the facts of Wynn's accident to the committee and after the committee had decided that Wynn's accident had been nonpreventable, Engel changed the committee's assignment. Barron testified that Engel objected to committee members issuing advisory opinions regarding accidents because such a function might cause animosity between drivers.

Assuming for the sake of argument entirely that the OSHA committee consistent with its primary function, had informally and unofficially decided that Wynn's accident was nonpreventable, I find the evidence entitled to little weight. I cannot be certain exactly what Showalter told the committee and there is no showing that of the 20 or more determinations made by Showalter each month, how many of these accidents were discussed by the committee and whether the informal findings of the committee, if any, were always consistent with Showalter's final determination.

In recommending that this allegation be dismissed, I am more impressed by the fact that Wynn was promoted to a job as driver/trainer with a \$1-per-hour raise in pay after she completed her union activities in connection with the first election. I also am impressed with the regularity of Showalter's investigation. Accordingly, based on all the evidence presented, I find that Respondent has met its burden and proven that Wynn would have been found to have had a preventable accident with the discipline in issue in this case, even absent her protected concerted activities. Accordingly, this allegation should be dismissed.

CONCLUSIONS OF LAW

1. Respondent Laidlaw Transit, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By promulgating and maintaining in November 1992, and on January 1, 1994, overly broad no-solicitation/no-distribution rules in order to discourage its employees union activities, Respondent has violated Section 8(a)(1) of the Act.

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

4. Other than specifically found above, Respondent has committed no other unfair labor practices.

¹²Showalter gave a slightly different version of the committee's function, emphatically denying that a function of the committee had ever been to determine preventable or nonpreventable accidents. Rather, Showalter testified, that the committee only reviewed accidents, and how and why they occurred to work for a safer environment. He also noted the committee met only once a month, so it could not make timely determinations even if that were the committee's function (Tr. 136-37). I credit Barron on this point, but find either account will not affect the final decision.

REMEDY

Having found that Respondent Laidlaw Transit, Inc. engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, I shall recommend that it be ordered to rescind any discipline imposed on Cheryl Wynn pursuant to Respondent's invalid no-solicitation/no-distribution rules, effective November 1992 and January 1, 1994. Any backpay is to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, I shall recommend that Respondent be ordered to rescind or modify the rules appearing in its employee handbook dated January 1, 1994, so that employees are not prohibited from solicitation for purposes protected by Section 7 of the Act during nonworking time and are not prohibited from distribution of literature for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of its premises and, further, to distribute new copies of that handbook, with the rules as rescinded or modified, to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Laidlaw Transit, Inc., Commerce City, Colorado, its officers, agents, successors, and assigns, shall 1. Cease and desist from

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

(b) Disciplining employees pursuant to invalid no-solicitation/no-distribution rules referred to in paragraph 1(a) above.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 any discipline imposed on Cheryl Wynn pursuant to invalid no-solicitation/no-distribution rules dated November 1992 and January 1, 1994, and make her whole for any loss of pay she may have suffered as a result of the discriminatory discipline, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the unlawful discipline of Cheryl Wynn and notify her in writing that this has been done and that the discipline will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records

¹³If 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.

and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Rescind or modify the rules appearing in its employee handbook dated January 1, 1994, so that employees are not prohibited from solicitation for purposes protected by Section 7 of the Act during nonworking time and are not prohibited from distribution of literature for purposes by Section 7 of the Act during nonworking time in nonworking areas of its premises and, further, distribute to all employees a copy of the employee handbook with the rules so rescinded or modified.

(e) Post at its Commerce City, Colorado facility copies of the attached notice marked "Appendix."¹⁴ Copies of the no-

¹⁴If 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

tice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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."