

Willamette Industries, Inc. and Graphic Communications Union, Local 388, District Council 2, Communications International Union, AFL-CIO. Case 32-CA-10563

March 31, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On June 11, 1991, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and con-

¹The 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The Respondent excepts, inter alia, to the judge's finding that the record does not support the "Respondent's contention that [employee] Bernard violated a valid rule against solicitation. . . ." The Respondent maintains a rule that provides: "[n]o employee shall solicit or promote support for any cause or organization during his/her working time or during the working time of the employee or employees at whom such activity is directed." It is undisputed that the rule is facially valid. Bernard admitted that he routinely promoted support for the Union in discussions with fellow employees during working time. Thus, we note the probable violation of the Respondent's valid no-solicitation rule. However, the judge went on to find that the Respondent enforced its no-solicitation rule only against persons who were engaged in prouinion solicitation and that the Respondent announced a prohibition against talking about the Union during working time. Thus, the issue is not whether Bernard violated a valid no-solicitation rule, but whether the Respondent disparately enforced its no-solicitation rule against Bernard. In view of the judge's finding that the Respondent enforced its no-solicitation rule by means of an invalid no-talking rule, as alleged in the complaint, we agree that the Respondent's conduct toward Bernard violated Sec. 8(a)(3) and (1) of the Act.

With respect to the 8(a)(1) threat, we note that Plant Manager Galan told employee Garcia that the Union was like a locomotive and that if fuel or coal is removed, the strength of the locomotive will die down. In agreeing with the judge that this statement was unlawful, we note that it occurred in the context of an unlawful interrogation. In these circumstances, we believe that Garcia, the victim of the unlawful interrogation, could reasonably construe the remark as meaning that the Respondent would act to deprive the Union of its supporters.

Contrary to the judge and his colleagues, Member Oviatt finds that Plant Manager Galan's remarks to employee Garcia, comparing "this union thing" to a locomotive train which gets "stronger" unless deprived of "fuel," are too ambiguous to constitute an unlawful threat. Accordingly, Member Oviatt would dismiss the complaint's allegation in this regard.

clusions,² to modify the recommended remedy,³ and to adopt the recommended Order, as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Willamette Industries, Inc., Sanger, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Redesignate paragraphs 1(2) through 1(4) as paragraphs 1(b) through 1(d), respectively.

2. Substitute the following for paragraph 2(1) and redesignate the subsequent paragraphs as paragraphs 2(b) through 2(e):

"(a) Make Raul Bernard whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision, as modified."

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

³We find merit in the Respondent's exception to requiring the Respondent to offer Raul Bernard reinstatement. The complaint did not allege that Bernard had been discharged and, indeed, the record contains no evidence that he was discharged. We shall modify the remedy, Order, and the notice to employees accordingly.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT counsel, warn, suspend, or otherwise discipline employees because they have engaged in activities protected by the Act, including discussing their own or other employees' wages, rates of pay, hours, or other terms and conditions of employment with other employees, or attempting to persuade other employees to join or support any labor organization.

WE WILL NOT warn or otherwise let employees know that they are not permitted to engage in the activity mentioned in the preceding paragraph.

WE WILL NOT call employees into the plant's office and interrogate them about their own or other employees' union activities, sympathies, or leanings, or threaten them should they engage in attempting to persuade other employees to join or support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL make Raul Bernard whole for any loss of earnings and other benefits resulting from his suspension, with interest.

WE WILL notify Raul Bernard that we have removed from our files any reference to his counseling, warning, and suspension and that none of these records will ever be used against him in any way.

WILLAMETTE INDUSTRIES, INC.

Ariel L. Sotolongo, Esq., for the General Counsel.
John D. McLachlan, Esq. (Fisher & Phillips), of San Francisco, California, for the Respondent.
David A. Grabhorn, of La Habra, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Fresno, California, on January 24 and 25, 1990, and is based on a charge filed by Graphic Communications Union, Local 388, District Council 2, Communications International Union, AFL-CIO (the Union) on September 11, 1989. The charge alleged that Willamette Industries, Inc. (Respondent) committed violations of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). On October 31, 1989,¹ the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing. The complaint alleged violations of Section 8(a)(1) and (3) of the Act.² Respondent filed a timely answer to the

¹ Unless otherwise noted, all dates shall refer to the calendar year 1989.

² Sec. 8(a)(1) of the Act provides that, It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

Sec. 7 of the Act provides that, Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a)(3) of the Act provides that, It shall be an unfair labor practice for an employer—

allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing and were given full opportunity to participate, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is an Oregon corporation, with an office and place of business in Sanger, California. There, at all times material, it has been engaged in the manufacture and sale of corrugated paper products. During the 12-month period ending with the issuance of the complaint here, in the course and conduct of its business operations, it sold and shipped goods valued in excess of \$50,000 from its Sanger, California facility directly to customers located outside the State of California.

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

II. THE LABOR ORGANIZATION

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

Counsel for the General Counsel contends that Respondent has, since July 1989, selectively, disparately, and discriminatorily enforced a valid rule prohibiting solicitation in its plant against its employee, Raul Bernard, all on account of his engagement in union or other protected, concerted activities. Respondent asserts that its discipline of Bernard was privileged by Bernard's own disregard for its valid rules.

Counsel for the General Counsel also contends that Respondent unlawfully interrogated and threatened an employee, in preparation for the hearing of this case. Respondent asserts that the circumstances of the questioning demonstrate its lawfulness, and that no threat was made.

B. General Background

Respondent, since opening its plant in Sanger, California, in June 1986, has been engaged there in the operation of a plant to produce and ship corrugated paper boxes. At the time of the trial it employed 71 hourly employees and 9 supervisory personnel, working in 2 shifts. Generally the shifts

. . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

lasted from 7 a.m. until 3 or 3:30 p.m. and from 3 or 3:30 p.m. until 11 p.m. or midnight.

The plant's manager, for its parent group, Western Kraft Paper Group, is Machael Galan. His superior is the plant superintendent, a man named Joel Burmeister. Tom Booth, Jeff Hoff, Ron Smith, Robert Warner, and Leon Climber are all finishing supervisors. Rick Flores is the shipping supervisor. Joe Bowd used to be a salaried planner and scheduler, though not considered a supervisor. Ruben Moreno used to be a corrugator supervisor.

Respondent's employees are not represented by any labor organization for purposes of collective bargaining and have never been. However, an NLRB-conducted election was held on August 26, 1988, based on a petition filed by the Charging Party. The Union lost the election. The record contains no reference to any past violations of the Act by Respondent.

In June or July 1989, Respondent decided to conduct a meeting, split between two shifts, of employees. In September it conducted a second meeting, announcing a picnic, but discussing also the same subject matter as the June or July meeting. It did so in contemplation of the fact that a year had nearly passed since the last election, and it anticipated the possibility of another organizational campaign. Respondent decided, so Galan testified, to "sit everybody down and just generally discuss what the proper rules are when it comes to Union organizing." The meeting was specifically occasioned by the fact that employees had reported to supervisors that they were being talked to about union cards.

Galan testified that he told employees that it was proper to discuss anything at all, including union business, during lunch or breaktime, but not during work hours. He stated that he emphasized the employees' freedom to do anything they wanted, but to do it during breaktime or lunch, and not to disrupt work or production, or cause people not to go to their workplaces. He told employees to be very sure before signing a union card, because the Union would likely ask for recognition based on a mere showing of interest. Galan told employees that if the Union got in employees would not be discriminated against just because they had not signed a union card.

C. Respondent's Rules

Since the plant's opening, Respondent has maintained the following rule pertaining to solicitation:

NON-SOLICITATION

In order to maintain and promote efficient operations and maintain security we have established rules applicable to all employees which govern solicitation, distribution of written material and entry into the building and work areas. Failure to obey these rules may result in disciplinary action up to and including dismissal.

1. No employee shall solicit or promote support for any cause or organization during his/her working time or during the working time of the employee or employees at whom such activity is directed. This policy does not restrict employee activity during meal or break time when conducted in nonwork areas (e.g., lunchroom). Solicitation by employees during nonwork time, which in any way interferes with work, is prohibited.

2. For safety and security reasons, an employee may not enter or remain on Company premises for nonwork purposes during times such employee is not scheduled to work, unless specific permission has been given by plant management.

3. Under no circumstances will nonemployees be permitted to solicit or distribute written material for any purpose whatsoever on Company property.

More generally, Respondent's plant rules also state, *inter alia*, that,

An employee who fails to maintain at all times proper standards of conduct, or who violates any of the following *Plant Rules*, may be subject to disciplinary action, up to and including discharge

3. Solicitation of any kind is not permissible [sic]. This rule is dealt with in more detail on page 10 of your employee handbook; please familiarize yourself with this rule.

Additionally, so Galan testified, in May 1989, after becoming concerned about employees being harassed by other persons in support of a union, it promulgated a rule against verbal harassment. Galan testified that this concern was aroused by two phone calls he received at home one morning from unknown employees about a year earlier. However, in this testimony that prior to May 1989 there was no written rule with respect to harassment of coemployees, Galan was clearly mistaken, for Joint Exhibit 4 bears the date of June 6, 1986, and states, *inter alia*, as follows:

THE FOLLOWING ACTS OF MISCONDUCT ARE PROHIBITED:

4. Physical assault on another, fighting or actions provoking violence.

5. Verbal harassment and or physical intimidation of coemployees will not be tolerated.

Respondent admits that employees are freely permitted to speak to one another at work about a variety of subjects, just so long as they do not disrupt work. Respondent admitted that, while working, employees routinely speak about topics such as sports, politics, religion, the weather, and so forth. Respondent has not disciplined any employee for having done so, and Galan testified that when he explained the no-solicitation rule to employees he did not indicate that discussion of the Union was prohibited.

Respondent, however, interprets its rule against solicitation differently. According to Galan, it would constitute a violation of the rule to do such things as solicit for a football pool, or for a child's school candy sale during worktime, or except at break or in the lunchroom. The only exception Galan could cite to this application of the rule against solicitation was an instance where an employee had been seriously injured, and other employees asked and received permission to solicit a collection.

D. The Discipline of Raul Bernard

Raul Bernard is an employee of Respondent, and has been since the plant's opening in 1986. He works as a die cutter. Respondent concedes, even contends, that Bernard was gen-

erally known throughout the plant, and by management, to be a supporter of the Union during the election campaign of 1988.

Respondent's records demonstrate that Bernard was "counseled" on July 20, and Respondent does not deny that this "counseling" occurred because Bernard solicited for the Union. Indeed, the supervisor's notes about the incident state that he, "Talked to Raul about solicitation for union on company time." Galan testified that this was not a disciplinary action, but only to inform Bernard, but Galan admitted that this counseling served as a predicate for a later warning.

Respondent's records further demonstrate that Bernard was orally warned on September 8. Once again, Respondent does not deny that the warning was occasioned by Bernard's having solicited for the Union. The supervisor's notes of the incident state, "9-8-89 Verbal warning concerning soliciting on Company time."

Respondent's records demonstrate that Bernard was suspended without pay for 5 days on October 5, for what was characterized as "misconduct," and warned that, unless corrective action was undertaken by Bernard, he would be discharged. As in the other instances, Respondent does not deny that this discipline was administered because of Bernard's having solicited for the Union. The supervisor's notes of the incident state, "10-5-89 Suspended for 5 days, misconduct."

Instead, Respondent, in each instance, asserts that its discipline of Bernard was privileged, and lawful, because of the circumstances surrounding each incident. Respondent cites the nonsolicitation rule set out above, where it states that, "No employee shall solicit or promote support for any cause or organization during his/her working time or during the working time of the employee or employees at whom such activity is directed." Respondent also cites plant rule 5, stating that, "Verbal harassment and of physical intimidation or coemployees will not be tolerated."

E. The Incidents Giving Rise to the Discipline

In July 1989 Galan instructed Supervisor Booth to speak to Bernard. He explained to Booth that there'd been rumors coming in from the plant that Bernard was out soliciting during working hours in the plant. He told Booth to go to Bernard and, although not accusing him of anything, to go over and make sure that Bernard understood what the rules were.

Galan testified that on September 8 he called Bernard into his office in the presence of Booth and Burmeister, and handed Bernard a document entitled, "Record of Conversation." The body of the document refers to "misconduct," and also speaks of Respondent's nonsolicitation clause and the rule against verbal harassment and/or physical intimidation of coemployees as activity which would not be tolerated. Galan admitted that Bernard was warned by Booth for having violated both such rules.

On October 5, Booth gave Bernard the 5-day suspension for misconduct, for Bernard's alleged continuation of the activity which had caused the earlier "counseling," and warning. Galan admitted that these were all steps in Respondent's "progressive discipline system," which could lead to more serious disciplinary action, including discharge.

Galan admitted his difficulty in explaining what would constitute "harassment" in Respondent's view. He stated:

I think harassment is kind of on the eye of the beholder. I think some people are harassed a lot differently than other people. Some people have thick skin. Some people do not have thick skin. And I think the way that it's put, or how many times. It could be construed as harassment or it might not be. I think it just depends on the person, to tell the truth.

Asked to explain further, and to state how he checked to see that an employee who reported being harassed was not being merely thinskinned, Galan cited the following instances of employee reports to him.

1. Juan Holguin

Holguin, according to Galan's testimony, stated that he'd witnessed a confrontation, and had been approached several times in the plant by Bernard. He told Galan, so Galan testified, that, from what he'd seen in the confrontation, he didn't want it to happen to him. Galan recalled that Holguin told him of an incident in which Bernard approached another employee and they got into "pretty close to a shouting match," which was heated, and complete with "finger pointing." Galan admitted that he'd determined that it was Bernard who was the culpable party in the "confrontation" because of the report by Holguin that it was Bernard who'd approached the other employee, rather than anything done by Bernard, and not done by the other employee, during the confrontation.

Holguin testified that he is employed as a flexo assistant at Respondent's plant. He stated that he was contacted by Bernard during working hours, apparently during shift changes, about union matters about once or twice a week during late August and early September, and that about two times Bernard asked him to sign a card. He recalled that, as he would go to the machine at shift change time, and while Bernard was preparing to go off work, Bernard would start asking him to think about what the Union could do for him, attempting to persuade him that the Union would be a good thing for him to be in favor of. He recalled that Bernard would ask him about how he felt about the Union, and that he didn't know what to respond. He also recalled, "And he [Bernard] would say well, think about it. And that was the end of the discussion." He testified that Bernard never gave him a union card, or showed one to him. As to the length of these conversations, he testified that, "A couple minutes. It was fast . . . It was real fast."

All the while such conversations were going on, Holguin was laboring under the weight of rumors he'd heard that if one didn't do what Bernard wanted concerning the Union, Bernard might do something to one; he wasn't specific, but he evidently feared retaliation from Bernard. So, he was at pains not to actually refuse Bernard's requests that he think it over, though it is clear that Bernard never did any of the things which he feared. On cross-examination, Holguin testified that his opinion of Bernard was formed by rumors he'd heard about the possibility that Bernard might do something, such as grab him, if he didn't do what Bernard wanted about the Union; yet he admitted that Bernard never did anything bad to him, that all Bernard did was ask how he felt about the Union and tell some of the good things a union could do for him. Indeed, he even admitted that he came to think of Bernard as an "all right guy . . . He never, you know, he never done anything to me."

Holguin also recited that he overheard or observed a conversation between Bernard and employee Candu; he stated that it occurred in the plant, between the die cutter and the flexo machines, at shift change time. Holguin stated that he approached the area and observed that Bernard and Candu were talking, and he heard someone yell. He testified, after some hesitation, that it was Bernard. He heard an obscenity yelled by Bernard, but didn't understand or hear the complete sentence. Holguin didn't go closer, heard nothing more, and continued with the task of collecting dunnage. He said that Bernard appeared "upset," but that Candu looked as though he had a kind of "teasing" expression on his face, sort of "smart alec." He stated that he saw no physical contact between the men, and that he saw no threatening gestures by either man, though the men were gesturing with their hands and arms. He observed that when Candu put his earplugs in Bernard turned and left. Later, Holguin surmised that the men had been talking about the Union. This, in turn, led him to go and speak to his supervisor. Ultimately, this course led him to have contact with Galan. However, Holguin wasn't sure whether or not he told Galan about the incident. He was only sure that he told Galan that he felt pressured by Bernard.

Holguin was asked to, and did, provide Respondent with a written statement, which bears the date of September 7. In this statement, Holguin stated,

I . . . fill [sic] I am being harassted [sic] & intimateded [sic] about the union from Raul Bernard. My reson [sic] for these feeling [sic] are due to the fact that when I coome [sic] to work that if I don't say yes to sign the union card that the employees for the union will start given [sic] me a cold shoulder.

The statement goes on to state a reference to having seen Bernard talk to "Bert," apparently employee Humberto Candu, and become upset while doing so. The statement closes with a recitation of how Holguin might respond with violence if he were approached the same way.

2. Jimmy Moreno

According to Galan, another employee who came to him and reported "misconduct" on Bernard's part was Jimmy Moreno. He recounted that Moreno told him that Bernard had approached him during working hours about signing a union card, that he'd told Bernard each time that he didn't have any interest in signing, but that it happened so continuously that he felt he was being harassed. Specifically, he recalled no report of any conduct by Bernard beyond simply repeatedly asking Moreno to sign a card, with no inference of tempers flaring, or that there'd been a confrontation.

Jimmy Moreno testified that he normally works as Bernard's relief. He stated that Bernard contacted him several times about signing a card while at work, estimated at three or four times a week during the spring and early summer. He recalled that Bernard would ask him if he'd made up his mind about the Union, told him it would be better for him if he joined the Union; after several months of such conversations, Moreno told Bernard that he didn't want to sign a card, and Bernard told him he would be stupid if he didn't. Several times he recalled that Bernard broached the subject of signing a card, and noted that the cards were there in a

cabinet at the machine where they worked; however, he admitted that Bernard never actually gave him a card and solicited his signature at the time.

He stated that he once complained to management, in early August, about an incident involving Bernard and Candu. He amplified that, one day as he walked to his machine as the shifts were about to change, he saw Bernard and Candu, a close friend, and they looked angry. He also observed a third man, Eulogio Melchor, present who appeared to think of the incident as a joke. He admitted that he heard nothing of what was said between the two men. He observed that Bernard "walked out pretty fast." He claimed to have observed Bernard and Candu in this argument or confrontation for about 6 or 7 minutes. (Later he was told by Candu that Bernard had become angry because Candu had refused to sign a card for him.³ During the time he observed the men he saw no move by either as though to strike the other, and neither required restraint. However, he noted that Bernard pointed his finger at Candu (albeit after having first testified that each pointed fingers at the other). He stated that Bernard pointed his finger for 3 or 4 seconds at Candu, then got his ice chest or lunch bucket and walked off. He admitted that he never observed Candu attempt to break off the conversation with Bernard.

Later that day, but before he'd spoken with Candu, Moreno reported the incident to a supervisor named Jeff Huff. At the time, he didn't know the subject of the argument between Bernard and Candu, and made no report about it. The next day, after speaking to Candu, Moreno asked to speak to Galan about the incident, and did so, telling him that the two men had been arguing about the Union when Bernard had tried to get Candu to sign a card.

3. Isaac Garcia

Galan also testified that Garcia came to him, in the presence of his supervisor, Hoff, and reported that he was being approached continuously, that all he wanted to do was come to work, do his job, have an opportunity for promotion and go home to his family. He recounted Garcia stating that he didn't want to be around the drinking fountain or the time-clock, and that he'd actually stay away while Bernard was there. Again, there was no report by Garcia that Bernard had done anything other than ask him to sign a card repeatedly. He admitted that he'd asked Garcia to provide a statement to the effect that Bernard had harassed him, and that Garcia had declined.

Garcia, himself, testified that he was approached once about the Union while at work by Bernard, in early October. Bernard asked him, as he went to break, whether he'd signed his card, and on being told that he hadn't, responded simply that they were available if he'd like to talk after work, or have any questions answered. Bernard made no effort to actually hand Garcia a card at the time. Garcia then went on with his break. Garcia stated there was no anger at all between him and Bernard.

However, while returning to his machine after the break by a circuitous route, he was stopped by his supervisor, Jeff Hoff, and asked why he was going that way, and whether Bernard had approached him. Later, he was called to Galan's

³ As this was obvious hearsay, I have placed little or no credence on this testimony.

office and asked about the matter, without being told why he was being questioned, or assured that he was under no compulsion to answer. He recalled that Galan told him that several people had made complaints against Bernard, and that,

this union thing is like a—it can be looked on as a locomotive train. The more fuel or coal that's put in, you know, the stronger it gets. If that fuel or that coal is removed, you know, the strength of that locomotive dies down . . . with the union, we will always have this problem. New people come in, you know, so they are also confronted with new union things, people are trying to speak to them and saying pro union for them too, so the problem will always be there . . . if you take that fuel or that coal away from that locomotive, it—the strength of it dies down.

Garcia was also asked whether he'd be willing to give a statement in writing. Garcia declined. Specifically, he was asked by Galan whether Bernard had confronted him about signing a card, and he replied that it hadn't happened, that he was just in a bad mood that day and just didn't want any conversation. Galan told him that no needs to be harassed. Garcia responded that he'd not been harassed.

4. Humberto Candu

Employee Humberto Candu, a flexo assistant at the plant, testified that Bernard attempted to get him to sign a card, about three times.

Once was in late May or early June, in the plant near the corrugator office, while Candu was already on the clock, several minutes after shift change. He recalled that Bernard just asked him if he was ready to sign a card, and on receiving a negative response from Candu, walked away. The second, in June, is unclear on the record, but also appears to have involved an effort by Bernard to interest Candu in signing a union card, again without success or controversy.

The other occasion, according to Candu, occurred in September. Again, it was just at shift change time, and he was at Bernard's machine, waiting for Jimmy Moreno to get to his station in order to secure a tool from him. As he waited, he was talking to an employee named Martinez about a swap of motor vehicles, which had been talked about between them for some weeks. He recalled that Bernard, also there, asked him if he was ready to sign a union card. Candu said that he wasn't. Bernard asked why. Candu said he wasn't interested. Bernard asked why, and remarked that it would amount to letting everybody do his thinking for him. Then Bernard started telling him the advantages of joining the Union. Finally, Bernard said something about how if Candu's family ever needed anything, Candu wouldn't be able to get it for them, because it'd be a nonunion plant; Bernard said that if there were a union he'd have everything and more. Candu then asked Bernard why, if unions were so great, the teacher unions were always on strike. He stated that they then started arguing. He recalled that Bernard said that was a different union. Candu admitted that he became angry during this exchange, because he felt that it impugned his ability to provide for his family and the way he took his responsibility seriously. He also admitted that voices were raised by both Bernard and himself, though he stated that the

only person who pointed a finger at the other was Bernard.⁴ On cross-examination, Candu admitted reluctantly that he never attempted to end the conversation, and that he engaged in the conversation with Bernard of his own volition. With equal reluctance, Candu admitted that Bernard apologized to him for saying he'd be dumb.

Candu testified that he told Moreno about the incident several hours later, on Moreno's request. He also had a brief discussion with Holguin, who asked him what was wrong with Bernard; Candu replied that nothing was wrong and left.

Several days later, Candu raised the incident with his supervisor, Smith. That same day, he also spoke to Galan about the matter.

F. Raul Bernard's Version of These Incidents

An employee since shortly after the plant opened. He openly supported the Union in the 1988 campaign, talking it up among fellow employees. Though the Union lost the election, he never really stopped telling others about the virtues of unionism.

Instead, he stepped up his discussions in the summer of 1989, since he hoped to secure another election. He found, during his discussions with fellow employees, that some employees had changed their minds from the previous year, so he entered into the belief that others might do so as well. He began asking people if they'd be willing to sign a union card. Obviously, not all employees welcomed Bernard's approaches, as he admitted that some employees have told him not to talk to them anymore. He claimed that in all such instances he's taken their answer and "that's it." But, when an employee's in doubt, he approached them and talked to them when convenient. He admittedly conducted these discussions both during breaktime and during worktime, sometimes right at his machine. He described such discussions as typically lasting 2 to 5 minutes.

Beginning in June, he distributed union cards to fellow employees. He denied, however, ever distributing such cards during working time, and claimed that he limited such distribution to breaks and lunch, or in the parking lot. He amplified that he was approached several times at his work station and asked for cards. He always responded that he kept the cards in his locker, and he'd see them later. Or he had the one who approached simply go to his locker and take a card.

Bernard, like other employees, witnessed "passionate" discussions of the Union by employees, and participated in several himself. He recalled two in which he was involved.

The first was in the plant's bathroom, with Richard Cox. Bernard was off the clock, around 3:30 p.m., and getting ready to leave. Bernard didn't recall any specifics, or the approximate date. He only recalled Cox saying that unions were no good and that his father had had a bad experience

⁴Although Candu claimed that only Bernard pointed a finger during this exchange, it must be recalled that evidently others had reported to Galan that Candu had also pointed a finger. For Galan testified that he "discussed" the "finger pointing" with the "other guy," apparently Candu, and, "we warned him and such. We said, now, you cool it. Take it easy." However, no record of this exists, and no mention of it was made by Galan, until the seeming inconsistency of warning only one participant in a confrontation was brought to his attention. I do not credit Galan's testimony on this, and infer, based on Galan's poor credibility here and the lack of a record, that only Bernard was warned about the confrontation.

with a union. The entire conversation lasted about 2 minutes. This incident was mentioned at the trial only by Bernard.

The second involved Candu, at Bernard's machine, and occurred at the end of Bernard's workday, in September, as he was filling out his production report. Candu came over, to see Ruben Martinez, his assistant on the machine. Candu wasn't yet on the clock, and both Bernard and Martinez were in the process of going off the clock. Candu and Martinez had a conversation about some motor vehicles they were attempting to exchange with one another. After several minutes of such conversation, Bernard asked Candu how he felt about the Union. Candu said he didn't know. Bernard offered to inform him. Candu repeated that he didn't know. Bernard asked what he didn't know. Candu, according to Bernard, wasn't in a mood to talk, being more interested in the motor vehicle. Finally, Candu snapped at Bernard that he wasn't going to sign a card, saying, "I don't care for the Union." Bernard replied that, "You're dumber than I thought." Then Bernard walked away to finish his report, and Martinez and Candu continued to talk.

Bernard denied that that he and Candu had yelled at one another, but acknowledged that voices had been raised. Bernard also went on to explain that he'd made a point of apologizing to Candu the next day.

Bernard stated that he had a conversation with Tom Booth in July about the Union, when Booth came to him at his machine and said that, "They asked me to talk to you." Bernard asked what about, and Booth replied that it was about the Union, explaining that they didn't want him talking about the Union out here on companytime. Bernard just shook his head and Booth left, and Bernard continued work.

The second time management talked to him about the Union was on September 8, while at his machine. Booth came up and called him into the office. While on the way, Bernard inquired what it was about, and Booth responded that it was about what they'd talked about the other day. When they got to the office, they found Galan and Joel Burmeister there. Galan invited Bernard in and asked him to sit. Galan then read the no-solicitation rule to him, and asked him if he was aware of it. Bernard replied that it was in Respondent's handbook. He was asked if he'd been warned about it, and Booth reminded him that he'd talked to him about it. Bernard replied affirmatively. Then Galan handed him the written warning, and asked him to sign it. Bernard noticed that it referred to "verbal harassment and physical intimidation," and refused to sign it. The meeting concluded shortly thereafter.

On October 5, Bernard had another meeting with Galan and Burmeister, a few minutes before shift was over. He was called to the meeting again by Booth, and he again inquired what it was about, and again was told that it had to do with the Union. Bernard noted that he was busy, and asked to reschedule the meeting, but was denied. Once in the office, he was greeted by Galan, and again read the no-solicitation rule. Bernard replied that was fine, that he was not guilty of it. Galan replied that there were people coming to him and saying he'd been talking to them about the Union. Bernard stated that they were lying. Galan asked why people would come in of their own free will, and Bernard said he didn't know, but maybe they were trying to curry favor. Bernard asked who the people were, and was told that he couldn't be told. At some point, Galan began speaking of intimidation.

Bernard stated that he'd not intimidated anyone, or harassed them. Galan then informed him that they'd decided to suspend him for 5 days, effective immediately. Then Galan handed him a copy of the suspension, and the meeting ended.

Bernard admits that he talked to others about the Union during working time following the first warning, i.e., between September 8 and October 5. But these conversations differed in that they were conversations initiated by others. Also, he spoke fewer times. And he didn't pass any cards during working time, or have any passionate conversations with others after the first warning.

He admitted that shortly before he was suspended, he may have had a conversation with Isaac Garcia. He couldn't recall any particulars, except of a conversation initiated by Garcia, when Bernard went to the flexo machine where Garcia worked to secure some material he needed in his work. Bernard stated that as he secured the material, Garcia leaned over and said that he had a card in his car. Bernard replied that that was fine. Garcia said he'd get it for him, and Bernard said there was no rush. Then Bernard returned to his machine.

Although Bernard admits there were other occasions in which he spoke to Garcia about the Union, the details of which he can't recall, he was certain that Garcia never became upset and never told him that he was harassing him, or that he wasn't going to support the Union. Instead, Bernard testified, Garcia told him that he was for the Union. He denied that he ever had any passionate discussions or heated discussions with Garcia about the Union.

Bernard stated that his production is generally the best of all machine operators, as reflected in his pay, which provides for a "Red Circle Rate." Although he hasn't been evaluated in a long time, whenever he asks his supervisor how he's doing, he's told that he's doing real good, and that occurs at least once a month. There's never been any complaint about his work except as relates to the no-solicitation rule. The production figures show that his productivity is among the highest at the plant, though.

Bernard denied that he'd ever had a heated discussion of the Union with Moreno. He did discuss the Union with him, generally as Moreno came on shift. Although he didn't recall Moreno telling him not to bother him anymore, he does recall Moreno didn't seem interested, so he stopped trying.

Bernard admitted that he'd talked to Holguin about the Union. He recalled only one such occasion. And, even then, he was unsure of what was said, though he denied that it had been heated or passionate in tone.

Bernard also admitted that he was an open union advocate, and that Galan gave him a wage increase after his support was known, before the election. No others got increases. And, during the "second campaign," he got praise from Galan. Respondent conceded that Bernard is a "good employee."

Bernard admitted that he may have discussed the Union with Holguin during worktime, once. However, he was unable to recall the details.

Bernard also admitted that he did speak to Moreno, and perhaps Candu, during the first campaign. He had no such recollection about Holguin.

IV. ANALYSIS AND CONCLUSIONS

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.

Second, on such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB vs. Transportation Corp.*, 462 U.S. 393, 399-403 (1983).

In this case I conclude that the General Counsel has made a strong case that Bernard was involved in protected activity preceding his discipline by Respondent. Bernard's credited testimony shows that he repeatedly spoke of the benefits of unionism with other employees. It cannot be argued that such conduct is unprotected. The Board finds that the right of employees to organize for collective bargaining is a strong Section 7 right, "at the very core of the purpose for which the NLRB was enacted." *New Process Co.*, 290 NLRB 704, 705 (1988). In any litany of the ways in which employees organize themselves for collective bargaining, their day-to-day discussions and interchange of ideas must surely rank very high; for this reason it is regarded as protected activity. Thus, Bernard's efforts to speak with, and convince others of the validity of his ideas and feelings about the cause of unionism, must generally be regarded as protected as well.

Through the years the Board has balanced the rights of employees to organize against the legitimate property right of employers to have their workplaces be as productive as possible. As a consequence, the Board's rule is that an employer may forbid employees to talk about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to all other subjects not associated or connected with their work tasks.

However, an employer violates Section 8(a)(1) when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly then the prohibition is announced or enforced only in response to specific union activities in an organizational campaign. *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986). Where the record shows that an employer tolerates a wide variety of solicitation activities without imposing discipline on any employee involved, the employer may not legitimately prohibit employees from soliciting signatures to union authorization cards, much less prohibit them from merely talking about the union. *K & M Electronics*, 283 NLRB 279 (1987); *F. Mullens Construction*, 273 NLRB 1016 (1984).

And, finally, where an employer disparately enforces even a valid rule against solicitation, it violates not only Section 8(a)(1) but Section 8(a)(3) as well. *South Nassau Communities Hospital*, 274 NLRB 1181, 1182 (1985).

I find that the record in this case supports the conclusion which I draw, that Respondent enforced its rule against solicitation only against persons who were engaged in such conduct on behalf of the Union. Further, I find that the record supports a finding, which I make, that the Respondent an-

nounced a prohibition against talking about the Union during working time.

The atmosphere at the plant and the uneven enforcement of the rule pertaining to solicitation can be best seen by reference to the absolutely credible testimony of employee Reuben Barcamonte.

Barcamonte testified that he attended a meeting of employees in early September. The meeting began at 3 p.m., with both shifts of employees and supervisors present, the second shift having been called in early for the purpose of attending the meeting. Galan and Supervisor Jeff Murray spoke. First the employees were told about the upcoming picnic. Then Galan started talking about how there would be campaigning about the Union going on, told employees not to sign for the Union unless they were sure, and that employees were free to sign cards, but should do so only during lunch or breaks, i.e., while off the clock, or in the parking lot; Galan said that it was not permitted to sign cards, or talk about the Union, on companytime or on the clock. Galan then opened the meeting up for discussion.

Barcamonte stated that employees are generally free to speak about anything at all during working time, including such topics as football, baseball, relatives, and family matters. Employees commonly do so, as do supervisors. Employees also regularly place bets, including baseball or football pools; he testified that he'd seen employees approached about such matters, and that he'd placed such bets himself. For example, he recalled that during a recent World Series, he'd participated in a pool, and that it'd included his supervisor, Rick Flores, who was present during worktime when the pool was organized, drawn up, and bets were placed. In fact, Barcamonte stated that he'd seen the names of supervisors, even Galan's, on pool sheets. He stated that such pools and betting are done openly in the plant, and that it's a well-known occurrence.

Barcamonte further recounted other types of solicitations which go on at the plant, in which supervisors routinely participate, as including candy sales, and sales of other items, walkathons, and a collection for an injured employee. He also stated that he'd seen preaching or discussion of points raised from readings from the Bible during worktime, and that among those who'd participated was a supervisor. In each instance, he stated that such solicitations go on openly, and are general knowledge within the plant. Further, he's never heard of anyone being disciplined for participating in such pools or solicitations.

Barcamonte acknowledged that Respondent's no-solicitation rule was known to him, and had been repeatedly called to employees' attention during the 1988 campaign as well as during the September meeting. He recalled Galan telling groups of employees that the Respondent would not allow employees to talk about the Union during working time.

On cross-examination Barcamonte admitted that Respondent has made no effort to interfere with or curtail the organizational activities which openly occur during breaktime and lunchtime.

Barcamonte testified that during the two union campaigns he's witnessed at Respondent's plant, he's routinely observed that employees come to hold strong opinions both for and against unionization, and that the two sides routinely and commonly debate the merits of their respective positions, sometimes quite passionately and at the tops of their lungs,

in efforts to make the other side see the light. He stated that often such debates include one or the other participant becoming angry, and gesturing vigorously. Indeed, Barcamonte acknowledged having done so himself, in an effort to change the mind of a fellow employee he already knew to be antiunion.

I conclude that the credible evidence in this record as a whole will not support Respondent's contention that Bernard violated a valid rule against solicitation, even if one could find, as is patently impossible, that the rule had been evenhandedly enforced. Bernard's own testimony was to the effect that he'd not done so during the time after July (which is the time period which Respondent limited itself to during the trial), and the testimonies of such employees as Holguin, Moreno, and Candu will not support such a finding. Neither Holguin nor Moreno had first-hand knowledge of what they claimed to have witnessed; neither actually heard the words of either Candu or Bernard. And Candu's own account lacked credibility, in addition to actually supporting the finding that his own discussion and solicitation of the swapping of an automobile, all on companytime, was readily countenanced. Indeed, Galan as much as admitted this, as he testified that Candu had no record placed in his file about the alleged confrontation with Bernard. I find this fact disproportionately inconsistent with the rush to judgment of Bernard, who, after all, wasn't even given an opportunity to explain his version of the incident, despite his denial that he'd harassed anyone.

As to the "harassment," of fellow employees, I find that the record will not support Respondent's contention that Bernard actually did so. First of all, the mere fact that employees may not have wanted to discuss the Union with Bernard, or that they'd heard unsubstantiated rumors about Bernard's response should he meet with refusal on their part, is insufficient to elevate legitimate discussion of the Union by Bernard to the status of "harassment" or intimidation. Second, certainly, Holguin and Moreno were not harassed; their testimonies were to the effect that they'd merely witnessed a fellow employee being harassed. Candu's testimony will not support such a conclusion, for he admitted that he entered into and continued his conversation with Bernard of his own volition, and that his own voice was raised during the encounter. And, finally, Garcia was clear in his testimony that he informed Respondent that he had not been harassed, and merely wanted to avoid Bernard's company due to the fact that he'd had a bad day.

In my consideration of what may or may not have been considered harassment at the workplace of Respondent, I bear in mind the credited testimony of Barcamonte. From that, I infer that employees routinely engaged in "arguments" and "confrontations" without fear that their doing so would result in their being disciplined for having "harassed" or "intimidated" others. The only difference I discern between such arguments or confrontations and that which occurred between Candu and Bernard is the subject matter.

Accordingly, I find that Respondent has failed in its effort to justify its discipline of Bernard by showing that it would have occurred in any event, and that, in disciplining Bernard for his protected activities, Respondent violated Section 8(a)(1) and (3) of the Act, and shall recommend an appropriate remedy.

Finally, I find that the allegation that Galan unlawfully interrogated and threatened an employee, when he spoke to Garcia, is fully supported by the evidence. I credit the testimony of Garcia fully. There was no warrant for Galan to question Garcia without assuring him of the purpose of the questioning and that there would be no reprisals against him should he refrain, as he did, from answering. Having been called to Galan's office, the seat of authority in the plant, and having been apprised of the feelings of Respondent about those who supported the Union as being worthy of being "deprived of fuel," Garcia would reasonably be coerced by Galan's questions and statements. *New Process Co.*, 290 NLRB 704 (1988). I so find and conclude.

CONCLUSIONS OF LAW

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

2. Respondent violated Section 8(a)(1) of the Act by interrogating employee, by advising that employees that employees who raised questions about a union should be "deprived of fuel," and by selectively and disparately enforcing a rule against soliciting fellow employees while working.

3. Respondent violated Section 8(a)(1) and (3) of the Act by "counseling," warning, and suspending its employee, Raul Bernard, because he had discussed the Union with other employees, an activity entitled to protection under the Act.

4. The above unfair labor practices have an effect on commerce as defined in the Act.

THE REMEDY

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

Having found that employee Raul Bernard was unlawfully suspended, Respondent is ordered to offer him immediate reinstatement to his former position, displacing, if necessary, any replacement, or, if not available, to a substantially equivalent position without loss of seniority and other privileges. It is further recommended that Raul Bernard be made whole for lost earnings resulting from his suspension, by payment to him of a sum of money equal to that he would have earned from the date of his suspension to the date of his return to work, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).⁵ Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further recommended that the Respondent expunge from its records any references to the counseling, warning, and suspension mentioned, and provide Raul Bernard written notice of such expunction, and inform him that the Respondent's unlawful conduct will not be used as a basis for further personnel actions against him.⁶

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

⁵ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

⁶ See *Sterling Sugars*, 261 NLRB 472 (1982).

⁷ All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec.

ORDER

The Respondent, Willamette Industries, Inc., Sanger, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing, advising, warning, or otherwise imparting to employees that they should not or may not talk with other employees about their own or other employees' rates of pay, wages, hours of work, or other terms and conditions of employment, or the relative benefits of selecting a union as their collective-bargaining agent.

(2) Suspending, or otherwise disciplining, employees, or otherwise restraining, coercing, or interfering with their exercise of the rights guaranteed by Section 7 of the Act, because they have engaged in talks or discussed with other employees their own or other employees' rates of pay, wages, hours of work, or other terms and conditions of employment, or otherwise attempted to persuade other employees to select a union as their collective-bargaining agent.

(3) Interrogating employees about their own or their fellow employees union sympathies, activities, or leaning and/or threatening that employees who attempted to persuade other employees to join them in supporting the Union would be discharged or otherwise disciplined.

(4) 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.

(1) Offer, if not already accomplished, Raul Bernard immediate and full reinstatement to his former job or, if that

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.

job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(2) Remove from its files any reference to the unlawful suspension or warnings or counselings, and notify Raul Bernard in writing that this has been done and that none of these records will ever be used against him in any way.

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

(4) Post at its plant in Sanger, California, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 32, 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.

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

⁸If 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."