

Titanium Metals Corporation and David W. Smallwood. Case 28-CA-15910

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
LIEBMAN AND WALSH

On March 30, 2001, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and limited cross-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 briefs and has decided to affirm the judge's rulings, findings, and conclusions except as set forth below and adopts the recommended Order as modified as set forth in full below.¹

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by taking the following actions: (1) on about May 25, 1999,² issuing a written warning to the Charging Party, David W. Smallwood, allegedly for poor work performance and failing to cooperate in the related investigation, distributing a newsletter, and encouraging employees to call him during working hours; (2) on about May 26, suspending, and later discharging Smallwood for distributing the newsletter; (3) on about May 26, denying Smallwood's request for union representation during an interview regarding the May 25 warning; and (4) since about May 25, maintaining and enforcing an overly broad no-solicitation/no-distribution rule. We adopt the judge's findings and conclusions regarding these matters for the reasons set forth in his decision.

2. The judge also found it inappropriate to defer to an agreement between the Respondent and the Union purporting to settle Smallwood's grievance over his discharge. We agree that deferral to the agreement is not appropriate, but only for the reasons explained below.

Facts

The Respondent and the United Steelworkers of America, Local 4856, AFL-CIO (the Union) were parties to a collective-bargaining agreement, in effect from 1996 through 2000, that covered production and maintenance employees. Smallwood was employed by the Respon-

dent as a furnace operator, a classification included in the bargaining unit.

On May 26, the Respondent notified Smallwood that he was suspended, pending termination for publishing and distributing a newsletter. Smallwood published this newsletter on his own time, using his own resources and equipment, often with input from employees, but independent of the Union. As described by the judge, the newsletter addressed wages, hours, and working conditions, and was critical of the Respondent.³ Smallwood distributed the newsletters by placing them in the union mailbox, which was not located on the Respondent's premises, and to employees at their home addresses.

On June 8, the Respondent converted Smallwood's suspension to a discharge, effective May 26. Smallwood immediately filed a grievance alleging that his discharge was unjust and in violation of several articles of the collective-bargaining agreement. On June 23, Smallwood attended a third-step grievance meeting, which did not resolve the grievance. Smallwood was never notified of any further meetings regarding his grievance.

Unbeknownst to Smallwood, the Union entered into a written agreement with the Respondent regarding his grievance on February 15, 2000. Smallwood received nothing by way of relief under the agreement. The following is the full text of the agreement, which is entitled a "Letter of Understanding:"

This will document our understanding with respect to grievance 99-48. Mr. Smallwood was *not* discharged for engaging in protected activities under the NLRA. The Company recognizes the Union's rights to communicate with represented employees, to post notices and other related Union materials on bulletin boards as outlined in the collective bargaining agreement, and to engage in all other legally protected rights and activities, including, but not necessarily limited to, the NLRA. Again, the company did not terminate Mr. Smallwood for engaging in activities protected under the NLRA or OSHA. The Company's reasons for discharging included issues such as insubordination, inappropriate conduct toward the company, ongoing and costly workmanship related infractions, providing misleading and inaccurate information related to melting investigations, etc.

By letter dated March 8, 2000, the Union notified Smallwood that it would take no further action on his

¹ We modify the judge's recommended Order and notice consistent with our decisions in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), and *Ferguson Electric Co.*, 335 NLRB 142 (2001), to conform more closely to the Board's usual remedial provisions.

² All dates hereafter are 1999 unless otherwise indicated.

³ Having examined copies of several editions of the newsletter that are in evidence, including the one distributed around May 26, we agree with the judge that the newsletter was not so misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech, to cause Smallwood to lose the Act's protection.

grievance and would not proceed to arbitration. The letter did not mention the “Letter of Understanding.” In fact, Smallwood did not learn about the existence of the agreement until a copy was made available to him by the General Counsel during hearing preparation in January 2001.

Analysis

The Board will defer to an arbitrator’s award where the proceedings (1) appear to have been fair and regular; (2) all parties have agreed to be bound; and (3) the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). In *Alpha Beta Co.*, 273 NLRB 1546 (1985), enfd. sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987), the Board extended the deferral principles of *Spielberg* to settlements negotiated by parties to a grievance-arbitration process.

Applying these principles, the judge found deferral to the “Letter of Understanding” inappropriate, because he found that it was clearly repugnant to the purposes and policies of the Act. Thus, he found that the agreement failed to satisfy the third *Spielberg* factor. We agree that deferral is inappropriate, but we do so only for the following reasons.

The Board has held that a union may legitimately settle a grievance over the objection of the grievant. The Board will defer to such a settlement, provided that the *Spielberg* deferral standards are satisfied. *Postal Service*, 300 NLRB 196 (1990). We assume, without deciding, that the “Letter of Understanding” was a settlement agreement subject to analysis under the *Spielberg* standard, because it purported to resolve Smallwood’s grievance. We find, however, under all the circumstances, that the process that resulted in the “Letter of Understanding” was not fair and regular and, accordingly, failed to satisfy the standard for deferral.

Not only was the agreement reached without Smallwood’s participation or his agreement to be bound by it, the existence of the agreement was never disclosed to him by the Union or the Respondent. Smallwood only became aware of it when, during preparation for the hearing in this case, the General Counsel made a copy available to him. Moreover, although the “Letter of Understanding” recites several reasons for Smallwood’s discharge—including “insubordination, inappropriate conduct toward the company . . . [and] providing misleading and inaccurate information”—these reasons were not the explanation given to Smallwood when he was discharged. In the absence of any explanation from the Respondent or the Union for this deviation, the “Letter of Understanding” appears to be an attempt to disguise the real reason for the discharge: Smallwood’s protected,

concerted activity of distributing a newsletter that addressed employment conditions and employment-related matters.

Because, under these circumstances, the “Letter of Understanding” does not satisfy the *Spielberg* standard of fairness and regularity, we decline to defer to it.

ORDER

The Respondent, Titanium Metals Corporation, Henderson, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing an overly broad no-solicitation/no-distribution work rule.

(b) Failing to honor employees’ requests for union representation.

(c) Warning, interrogating, suspending, or discharging employees for engaging in activity protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David Smallwood reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Smallwood whole for any loss of earnings and other benefits he may have suffered by reason of the Respondent’s unlawful discharge, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, formally rescind in writing its overly broad no-solicitation/no-distribution rule and post notice that this has been done.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning, suspension, or discharge of David Smallwood and notify him in writing within 3 days thereafter that this has been done and that the unlawful employment actions will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Henderson, Nevada facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 1999.

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

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in activities protected by Section 7 of the Act.

WE WILL NOT coercively question you about your activities protected by Section 7 of the Act.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT maintain or enforce an overly broad no-solicitation/no-distribution rule.

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

WE WILL, within 14 days of the Board's order, offer David Smallwood full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Smallwood whole for any loss of earnings and other benefits resulting from his discharge, plus interest.

WE WILL within 14 days from the date of this Order, formally rescind in writing its overly broad no-solicitation/no-distribution rule and post notice that this has been done.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful warning, suspension, and discharge of David Smallwood, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning, suspension, and discharge will not be used against him in any way.

TITANIUM METALS CORPORATION

Nathan W. Albright, Esq. and *Brian P. Kalmaer, Esq.*, for the General Counsel.
James Winkler, Esq. (Hicks and Walt), of Las Vegas, Nevada, for Respondent.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on January 16-19, 2001. The original charge was filed by David Smallwood (Smallwood) on July 2, 1999. Smallwood filed an amended charge on August 9, 2000.¹ The Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on August 24, 2000. The complaint was amended at the hearing. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act² (the Act) by warning, suspending, and discharging Smallwood because he published a newsletter dealing with wages, hours, and working conditions of Respondent's employees. The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by denying Smallwood's request to be represented by the Union, by promulgating and enforcing an overly broad no-solicitation/no-distribution rule and by interrogating Smallwood concerning his protected concerted activity. Respondent filed timely answers to the complaint and denied all wrongdoing. Respondent asserts as affirmative defenses that the Board

¹ All dates herein shall be 1998 unless otherwise stated.

² 29 U.S.C. § 151 et seq.

should have deferred to the grievance arbitration procedure and that Smallwood's discharge was justified due to the defamatory, disparaging, and disloyal nature of his publication.

The parties have been afforded a full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation, with an office and place of business located in Henderson, Nevada, that is engaged in the manufacture of metals and where in the 12 months preceding the filing of the original charge, it annually purchased and received goods valued in excess of \$50,000 directly from points outside the State of Nevada. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In addition Respondent admits and I find that the United Steelworkers of America Local 4856, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ISSUES

1. Did Respondent violate Section 8(a)(1) and (3) by discharging Smallwood?
2. Did Respondent violate Section 8(a)(1) and (3) by warning and suspending Smallwood?
3. Were Smallwood's publications disloyal and disparaging?
4. Did Respondent violate Section 8(a)(1) by promulgating and enforcing an overly broad no-solicitation/no-distribution rule?
5. Did Respondent violate Section 8(a)(1) by interrogating Smallwood concerning his protected concerted activity?
6. Did Respondent violate Section 8(a)(1) by refusing Smallwood's request for union representation?
7. Should the Board defer to the grievance arbitration procedure?

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the fabrication of titanium metal ingots at its Henderson, Nevada facility. Alan Gines (Gines) was Respondent's employee relations supervisor, Vinoo Kamdar (Kamdar) was Respondent's melt division supervisor, Jim Stanley (Stanley) was Respondent's melt shop foreman, and Sarp Sezar (Sezar) was a foreman in the melt department. Additionally, Loren Taylor (Taylor) was the human resources manager for Respondent. Billy Hand (Hand) was the union president and Robert Hunt (Hunt) was the Union's grievance representative for the Respondent's melt division.

Smallwood began working for Respondent during a strike at the Henderson plant on July 11, 1994, and was terminated on May 26, 1999, for publication and distribution of a newsletter. Smallwood was employed in the melt department as a furnace operator from October 1996 until he was terminated. There was a collective-bargaining agreement in effect between Re-

spondent and the Union that covered production and maintenance employees. In addition to the collective-bargaining agreement, Respondent maintained an employee handbook that contained plant rules and regulations which remained in effect throughout Smallwood's employment. Respondent's plant rules and regulations contain, among other things, rules regarding possession of unauthorized materials and unauthorized activities.

B. The Newsletters

From May through November 1997 and again in late March and May 1999, independent of the Union, Smallwood published a newsletter called the "Titanium Times Newsletter," the "Titanium Times," and the "Tungsten Times" (newsletter). It was distributed to about 20 of Respondent's melt department employees at their home addresses and to the Union at the Union's office. While there is no evidence that Smallwood ever distributed the newsletter at work, it is clear that the newsletter was widely read and circulated in the melt department. The newsletter was usually about six pages long and contained articles of general interest as well as those dealing with wages, hours, and working conditions at the Henderson facility, many of which were critical of supervisors and Respondent's labor-management policies. Many of Smallwood's coworkers in the melt department contributed information for the articles in each edition of the newsletter and many employees discussed the issues with each other and with Smallwood before and after they appeared in articles in the newsletter. The contents of the newsletters are summarized below.

The May 1997 newsletter contained stories about safety issues, the poor quality of coveralls, an innocuous article about a gay rodeo, and an alleged error by Respondent in shipping defective ingots to a customer in France and the potential for this error to adversely affect the employees' profit-sharing plan provided by Respondent.

The June 1997 newsletter included articles about a conflict between Supervisor Stanley and an employee that resulted in charges the employee filed against Stanley through the collective-bargaining agreement; the lack of adequate coveralls supplied by Respondent; safety; a labor management committee and its effect on employees' workload; and an article critical of Supervisor Kamdar's relations with employees.

The July 1997 issue of the newsletter offered, among others, the following items: a story concerning the discipline of an employee in which Smallwood characterizes the discipline as a witch hunt and suggests Respondent's leadership is "crap"; an article alleging Respondent was charged with price fixing and states there is evidence of fraud by supervisors and foremen;³ articles dealing with safety, tools, paperwork, and coveralls; and a story about a dispute between a foreman and an employee dealing with working conditions in which Smallwood refers to Respondent's "piss poor leadership," supervisors who have a "clear and present bias" towards certain employees and a final conclusion that management's credibility is "in the toilet."

³ Respondent offered no evidence denying the truth of this allegation.

The August 1997 newsletter had an article dealing with fraud in production records, a story referring to Supervisor Vinoo Kamdar as "Voodoo Commissar" and an item that described Supervisor Pat Dressler, known by his nickname, the Catfish, as "just a bad foreman." In that story an employee is quoted as stating, "I'm about to give ole Catfish flying lessons off the back porch if he keeps this up." Specifically, the column states that Foreman Pat Dressler is not allowing employees to take their breaks every 2 hours as specified in the collective-bargaining agreement. The story also makes reference to the clause in the collective-bargaining agreement that addresses times in which breaks are taken. There were also items about safety, production, working conditions, and coveralls.

In the September 1997 edition, the newsletter had an article about a new African-American supervisor, a piece concerning Respondent's alleged attempt to suppress the newsletter that Smallwood compared to Soviet and Fascist attempts to suppress the truth. Employee Phillips contributed to a column about safety, entitled "Close Call on the Ingot Blaster." Therein, Smallwood discussed an incident where a cable snapped on a piece of equipment at Respondent's facility. The article states that a maintenance employee indicated that the cable had not been replaced in 3 years and questions whether Respondent had even inspected the cable. There were also stories about overtime and tools.

The October 1997 newsletter contained a tongue in cheek attempt at humor concerning a forklift accident. Smallwood said that callers attributed the accident to "Voodoo Kamdar who got into some bad ginseng tea Seeing double, Voodoo mounted the forklift instead of the golf cart and gave it the gas. Dazed and disoriented, Voodoo crawled to his office only to wake up with a severe hangover." There was a story about Pauline Vincent, a member of Respondent's management, and her dealings with the grievance procedure. In this article Smallwood states, "People close to the situation in the lab say that Pauline must be suffering from a form of schizophrenia." Union President Hand contributed to the article appearing on the first page of the October 1997 newsletter. The story discussed the potential decrease of tariffs imposed on foreign producers of titanium sponge. According to the top of the third column on the second page of this newsletter, Hand, a unit employee, told Smallwood that Respondent's employees should write letters to their senators indicating that reduced tariffs could jeopardize their jobs. Hand also contributed to the article on the third page of the October 1997 newsletter. This column discusses, among other things, safety when operating forklifts. The story on page four of this newsletter is about the Union and Respondent. The article discussed the discipline of unit employee Kevin Kersey. Kersey was disciplined for allegedly being out of his work area, when he was actually working on union business.

In the November 1997 edition, Smallwood wrote an article that accused Respondent of wasting money and adversely affecting the employees' profit-sharing plan. Another story discussed safety issues. There was a column that contained a discussion on the lack of proper heating in the press area. Article 13.20 of the collective-bargaining agreement, mentioned in that article, provides that "proper heating, ventilating and lighting

systems shall be installed and maintained in the Plant where needed." An article entitled "Public Enemy Number One?" dealt with the poor relations between employees and supervisor Stanley. In this story, Smallwood asks rhetorically if Stanley is "Public enemy number one" due to the manner in which he deals with employees.

In late March 1999, Smallwood resumed publishing the newsletter after a 16-month hiatus. The April edition made reference to the earlier "Public Enemy Number One?" article and further discussed Smallwood's December 1997 discipline. This newsletter also contained items dealing with safety issues and motivation of employees through a reward program for unit employees, instituted by Respondent with the Union's cooperation. There was an item about quality control in which Smallwood, in an attempt at humor, stated, "Vinoo and a couple of his secret police might kick down your door."

In the final newsletter issued on May 25 or 26, Smallwood wrote an article entitled "Melt Division's Dynamic Duo," that discussed Stanley's involvement in Respondent's disciplinary process. This article discussed discipline issued by Kamdar and the working conditions of employees in the melt division. Supervisors Stanley and Kamdar are referred to as Howdy Doody and Buffalo Bob because "both were likeable and loveable." There was an article in which Smallwood stated supervisor, "Vinoo (Kamdar) is trying to sink his canoe and ours too" and "Vinoo hasn't a clue." This article dealt with Kamdar's discipline of workers. There were safety stories and an article alleging that management had a problem with cronysim, nepotism, and fraternization that adversely impacted on labor management relations.

C. The Warnings

1. December 22, 1997

On December 22, 1997, Respondent issued a written warning to Smallwood for violating the Respondent's harassment free workplace policy by his defamatory, demeaning, and belittling written and verbal comments in the newsletter. In the disciplinary notice, Respondent warned Smallwood that he was being disciplined for the content of his newsletters. Specifically the notice stated:

Your defamatory, demeaning and belittling written and verbal comments have been disruptive to the work force and undermined the supervisor's authority and ability to manage the Melt Shop and its workforce. As an example, you have characterized and referred to them with contemptuous nicknames and in derogatory terms such as, "public enemy number one" and "Infamous."

The derogatory terms were references to the article, "Public Enemy Number One?" in the November 1997 edition of the newsletter. The verbal comments mentioned in the written warning concern a voice message Smallwood left for Stanley at work on November 16, 1997. In the message Smallwood said someone told him, "maintenance isn't going to work for a criminal no more. I—I hope this isn't the case. I'll talk to maintenance about it but, uh, hope you're doing OK . . ." It is clear from the context of the message that Smallwood was not accusing Stanley of being a criminal but merely reported what

he had heard. It is also clear that Smallwood was expressing concern for Stanley and solicited his comments. At the hearing Gines testified that other examples of demeaning and defamatory newsletter material that led to the warning included a statement that Kamdar was drinking bad ginseng tea in the October 1997 issue at page three under the headline "Assault on VDP, Driver Missing," a reference to Supervisor Pauline Vincent suffering from schizophrenia in the October 1997 edition at page four under the heading "Pauline Vincent, x-USWA President suspected of conducting a sting Operation," and a photograph of a police suspect who was African-American at page seven of the July 1997 issue of the newsletter.⁴

2. April 6, 1999

On April 6, after Smallwood resumed the newsletter, Respondent issued him a written warning for leaving work on March 10, without permission. It is not disputed that at least two other employees, David Washington and Bill Hickman, also left work on March 10 but were not disciplined. Hunt, the grievance representative who handled the grievances for all three employees, testified that his investigation found that while Washington and Hickman had advised Supervisor Sezar that they were leaving work, Smallwood did not. Hunt also testified about two prior grievances where employees were not disciplined for leaving work without permission. Hunt admitted that he knew nothing personally about those grievances, and he conceded he did not know how those grievances were resolved.

3. May 24

After the April edition of the newsletter was distributed at a meeting on May 24, Gines warned Smallwood he would be terminated if he caused any further problems, including further distribution of the newsletter at the plant.

4. May 25

On May 25, Respondent issued Smallwood a written warning,⁵ confirming the May 24 oral warning. The written warning indicated Smallwood was being disciplined for poor work performance, including a May 18, 1999 incident in which he allegedly damaged a titanium ingot, for his questionable and misleading response to the investigation of that incident, for distribution of the newsletter, and for encouraging employees to call him during working hours. The written warning of May 25 provides in pertinent part:

In addition, the unacceptable nature and negative consequences of the distribution of your newsletter within the plant was reiterated. . . . Your actions with respect to the latest melting incident and newsletter are in violation of numerous work rules including Insubordination Rule 3 failure to cooperate with supervision, 5 neglect of duty, and 7 hindering or limiting work. Disorderly conduct Rule 1 inciting/advocating trouble, Unauthorized Activities Rules 1 and 2 distributing

unauthorized materials and soliciting, and company policies such as harassment.

D. The Discharge of Smallwood and His Request for Union Representation

Smallwood published the final edition of the newsletter virtually concurrent with his May 25 warning. The uncontradicted evidence reflects that Respondent discharged Smallwood on May 26 due to the publication and distribution of the May newsletter. The testimony reflects that Gines and Supervisor Max Frederick met Smallwood when he got to work on May 26 and escorted him to Kamdar's office. There, Gines informed Smallwood he was suspended pending termination.

Smallwood then asked for union representation. Gines picked up the telephone and asked someone to find Union Representative Bob Hunt. According to Smallwood, Gines hung up the telephone and asked Smallwood if he had any newsletters with him. Smallwood said no but as Gines continued to look at Smallwood, he handed Gines the plastic bag he was carrying. Gines opened the bag and searched it but did not find a newsletter therein. Shortly thereafter, Hunt arrived.⁶ After Gines advised Hunt that Smallwood was being terminated for writing the newsletter, Frederick escorted Smallwood from the plant. By letter dated June 8, 1999, Respondent converted Smallwood's suspension to a discharge effective May 26, 1999.

E. The No-Solicitation/No-Distribution Rule

At all relevant times herein since 1985, Respondent maintained an employee's handbook. This handbook contained rules relating to possession, distribution, and circulation of written material. The rules provide at page 15 of the handbook:

Unauthorized Activities

1. Posting or distributing unauthorized materials on Company premises without approval of the Industrial Relations Manager.
2. Soliciting, selling, collecting or circulating petitions for any purpose on Company time or premises unless authorized by the Industrial Relations Manager.

As noted above, Respondent cited these rules infractions in issuing the written warning to Smallwood on May 25.

F. The Grievance-Arbitration Procedure

Pursuant to the grievance-arbitration provision in the parties collective-bargaining agreement, Smallwood's discharge was the subject of a grievance that went to step three on July 22, 1999. Before the grievance reached arbitration, it was resolved by Respondent and the Union in a "Letter of Understanding" dated February 15, 2000. In the letter the parties agreed:

Mr. Smallwood was not discharged for engaging in protected concerted activities under the NLRA. . . . The

⁴ This warning has not been alleged as a violation of Sec. 8(a)(1) or (3) of the Act as it is outside the 10(b) period but is relevant in determining whether Respondent harbored animus toward Smallwood.

⁵ There is no evidence that Respondent suspended Smallwood at this time as alleged in the complaint. I will dismiss the portion of the complaint alleging a May 25 suspension of Respondent.

⁶ Gines testified that he did not question or search Smallwood's bag until after Hunt arrived. I credit the testimony of Smallwood concerning the sequence of events regarding the timing of the questioning and search. Smallwood's testimony was more precise in the detail concerning these events and Gines appears to rely on his notes of the May 26 meeting to support his recollection, yet those notes shed no light on the order in which the events happened.

Company's reasons for discharging Mr. Smallwood included issues such as insubordination, inappropriate conduct toward the Company and supervisory employees, ongoing and costly workmanship related infractions, providing misleading and inaccurate information related to melting incident investigations, etc.

Smallwood was notified of the Union's decision by letter dated March 8, 2000. However, Smallwood did not learn about the Letter of Understanding until January 2001. Smallwood was never consulted concerning the agreement by the parties to settle the grievance and he never gave his consent to it.

IV. THE LAW AND ANALYSIS

A. Protected Concerted Activities

1. The law

In *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); and *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*); the Board defined when an individual engages in concerted activity for other mutual aid or protection. The Board in *Meyers I* stated:

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.⁷

In *Meyers II*, the Board emphasized that its definition of concerted activity included individual activity where, "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB at 887.

It is clear that an individual who seeks enforcement of a contract obligation is engaged in concerted activity. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966); *Felix Industries*, 331 NLRB 144, 145 (2000). However, concerted activity protected by Section 7 of the Act by the mutual aid or protection clause is not limited to union activity. In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court agreed with the court of appeals that protected acts encompassed the distribution of a newsletter dealing with efforts to enlist legislators to vote against right to work amendments to the State constitution and to override the veto of a minimum wage law. The Supreme Court found protected "whatever is reasonably related to the employees' jobs or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here, distributed on the plant premises in such a manner as not to interfere with the work." *Eastex, Inc. v. NLRB*, 437 U.S. at 562.

While it may be found that an individual's action is concerted and protected under section 7 of the Act, that protection may be lost under certain circumstances.

The Supreme Court in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), held that employee conduct involving a disparagement of an employer's product, rather than publicizing a labor dispute, is not protected. The leaflet found unprotected in *Jefferson Standard*, supra, was an employee handbill that contained an attack on the quality of the employer's television broadcasts and management policies without reference to a labor dispute or to wages, hours, or working conditions. Likewise, in *Sahara Datsun*, 278 NLRB 1044 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987), the Board found that an employee's statements that the employer falsified customer credit applications, which were made to the bank that granted financing to the employer's customers, were unprotected. The Board found that the statements, although related to terms and conditions of employment, were, nevertheless, unsubstantiated assertions that could have ruined a long-standing business relationship based on trust and fair dealing. On the other hand, the Board in *Veeder-Root Co.*, 237 NLRB 1175 (1978), found that employee literature did not lose the protection of the Act because it was false, misleading, or inaccurate, provided that the statements were not deliberately or maliciously false or made with reckless disregard for the truth. See *National Steel Corp.*, 236 NLRB 822, 824 (1982). The Board has also found that employee action is protected whether or not employees were reasonable or correct in a good-faith belief. *Fredericksburg Glass & Mirror*, 323 NLRB 165, 179 (1997). The Board's decision in *New York University Medical Center*, 261 NLRB 822, 824 (1982), reflects how the Board applied this standard. In that case, the Board found that the statement, "[T]he NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them," was not deliberately or maliciously false because it was based on employee reports that the employer's guards were searching black and Hispanic employees. See also *Alaska Pulp*, 296 NLRB 1260 (1989) (references offensive to Japanese culture); *Felix Industries*, 331 NLRB 144 (2000); and *CKS Tool & Engineering, Inc.*, 332 NLRB 1578 (2000) (use of foul language directed at a supervisor); *New River Industries*, 299 NLRB 773 (1990) (use of humor or sarcasm).

2. The analysis

a. The May 25 warning and May 26 termination of Smallwood

There is no dispute that Smallwood's publication of the newsletter in 1997 and 1999 meets the *Meyers I* and *Meyers II* definition of protected concerted activity. Smallwood collaborated with fellow employees in the publication of each edition of the newsletter. Fellow employees either discussed common complaints with Smallwood or provided him with information concerning common complaints that Smallwood translated into articles. Smallwood testified without contradiction that many employees gave him authority to publish their comments and thus he was speaking with their authority and on their behalf. From the context of numerous articles in each edition, Respondent was made aware that these complaints emanated from the

⁷ *Meyers Industries*, 268 NLRB at 497.

employees. Thus, the articles in the newsletter often refer to the fact that employees are complaining about supervisors, safety or other issues encompassed under the collective bargaining agreement and that employees are the source of the information in the articles. It is clear further that the publication of the newsletter was protected as many of the stories deal with wages, hours, and working conditions.

It is not clear however that Smallwood was engaged in union activity in his publication of the newsletter, particularly in 1999. There is no evidence that the Union played a role in supporting, distributing, or contributing to the newsletter. While union officers may have provided some information for articles, it is not clear that they did so in their official capacity rather than as unit employees. In 1997 there were articles that dealt with the collective-bargaining agreement but this was done in a peripheral manner that was too attenuated to be considered union activity on the part of Smallwood. These articles referenced the collective-bargaining agreement but did not seek their enforcement. In the two editions of the newsletter in 1999, for which Smallwood was fired, there is no direct appeal for contract enforcement and no other evidence of union involvement in the newsletter. Therefore, I find that Smallwood's publication of the newsletter did not constitute union activities and I will dismiss those portions of the complaint alleging that Respondent's warnings and discharge of Smallwood violated Section 8(a)(3) of the Act.

From the beginning of his publication of the newsletter, Respondent demonstrated animus toward Smallwood's activity. In the December 22, 1997 disciplinary notice, Respondent warned Smallwood that he was being disciplined for the content of his newsletters. Smallwood was warned that further conduct of this nature would result in further disciplinary action up to and including termination. This warning led to the hiatus in publication of the newsletter.

At the end of March 1999 Smallwood resumed publishing the newsletter and by May 24, 1999, the final edition was released. From the context of the May 24 meeting Respondent conducted with Smallwood, it is clear that he was told that if another newsletter appeared he would be fired. In addition, the May 25 warning reiterated that further distribution of the newsletter would result in suspension and termination. When Respondent learned that another newsletter issued on May 25, after the previous warnings of May 24 and 25, Smallwood was terminated for publication and distribution of the newsletter. It is clear from the entire record that the primary reason for Smallwood's warnings on May 24 and 25 and his termination on May 26 was the publication of the last edition of the newsletter. On May 26 Gines told Hunt this was the reason for firing Smallwood. Later at the June 23, 1999 grievance meeting Taylor stated that the sole reason for terminating Smallwood was his publication of the newsletter.

Respondent contends that it lawfully terminated Smallwood because some of the articles in his newsletters fell outside the protection of the Act. In this regard Respondent refers to items that appeared in the 1997 newsletters. However, Respondent did not fire Smallwood for publication of the newsletter in 1997. After his December 1997 warning, Smallwood continued to work for Respondent for 17 months. It was not until the

publication of the final newsletter in May that Smallwood was terminated for its continued publication and distribution. Since Respondent did not fire Smallwood for his activities in 1997, it is the publication and distribution of the newsletter in 1999 that must be scrutinized to determine if Respondent had justification for Smallwood's termination.

The substance of the April and May-June 1999 newsletters dealt with issues directly affecting Respondent's workers who had assisted Smallwood by discussing the substance of the articles with him and by providing him with the information contained in the stories. Respondent contends that Smallwood's article "Here we go again" in the April 1999 issue is a character assassination of Stanley and is not protected by the Act. However, a close examination of the story reflects that there is nothing offensive concerning Stanley. Respondent argues Smallwood published an article in the May-June 1999 newsletter that is unprotected because it does not deal with working conditions or other mutual aid or protection but is a vitriolic attack on management. The article is entitled, "Cronyism, Nepotism and Fraternalization." In the article Smallwood defines each term and states:

While nepotism and fraternization may present a problem from time to time, it's the cronyism that's really doing a number on Timet. Relationships forged over many years begin to cloud a supervisor's ability to manage fairly. The proof may be found in the fact that some workers have been fired for the same thing others have done, and, in some cases, continue to do. Cronyism is the cause. It's sometimes referred to as the "good ole boy" network. Many workers at Timet feel as though certain people are being "protected". They can destroy equipment and cause the loss of product and nothing ever happens. . . . Timet even imports cronies from other companies. Arriving from FMC were the following people. . .

John Sanderson, Plant Manager
Loren Taylor, Human Resources Mgr.

Bob Blankenship, Facilities Mgr.

Craig Wilkinson, Safety Supervisor

Jerry Madden VDP Mgr.

....

If one of these people screws up do you think the others will band together to cover his butt? I think there is a good chance. Is there a potential for cover-ups? . . . It's all part of the disease of cronyism and its dangerous.

While Respondent takes the position that this article has nothing to do with working conditions or other mutual aid or protection, the substance of the article deals with more favorable treatment some employees may receive from supervisors based on who they know. Clearly this is related to working conditions and is protected. The article also alludes to managers hired because they may have been friends and suggests that this may result in the potential for coverups. There was no evidence adduced at the hearing that the statements in Smallwood's article were false, misleading, or inaccurate nor is it apparent that the statements were deliberately or maliciously false or made with reckless disregard for the truth. There is no

evidence that the newsletter was given circulation beyond the employees in the melt department. The April and May-June editions were not yet available on a website,⁸ nor were they distributed to any advertisers as no advertisers appear in these editions.

Respondent argues further that Smallwood was disciplined on May 25 for providing his work phone number in the newsletter and inviting employees to call him at work as well as for a melt incident that occurred on May 18. It is clear that the primary motivation for Smallwood's May 25 warning as well as his termination was the publication of the newsletter. Moreover, it was common practice for employees to receive phone calls at work. There is no evidence that Smallwood ever received excessive phone calls at work or that they adversely effected his performance. The primary focus of the May 24 meeting, the written discipline of May 25, and the termination of May 26, was publication of the newsletter. Thus, the argument that Smallwood was disciplined for either the publication of his phone number at work or for the melt accident is pretextual.

Respondent violated Section 8(a)(1) when it warned Smallwood on May 25 and terminated him on May 26 because he engaged in protected concerted activity in publishing the newsletter in April and May 1999. The newsletter did not lose the protection of the Act as the subject matter of the articles did not constitute disparagement of Respondent, advocate violence, nor were they maliciously false or made with reckless disregard for the truth. *Veeder-Root Co.*, 237 NLRB 1175 (1978), *Fredericksburg Glass & Mirror*, 323 NLRB 165 (1997).

b. The April 6, 1999 warning

General Counsel argues that Respondent's April 6 warning to Smallwood was due to his protected concerted activity and his union activity in publishing the newsletter. However, while the April edition of the newsletter had issued by the time of the warning on April 6, there was no evidence of animus yet directed at Smallwood regarding the newsletter. The two employees who had also left work on April 6 did so with permission of the supervisor they had notified and there is no probative evidence of disparate treatment. Hunt's testimony concerning other employees not disciplined for leaving work without permission is not reliable since he had no personal knowledge of the facts in those cases. I find that General Counsel has failed to establish that Respondent's motive in issuing the April 6 warning was Smallwood's protected-concerted or union activity and I will dismiss that portion of the complaint.

B. The Request for Union Representation

1. The law

Employees have a Section 7 right to union representation at interviews where there is a reasonable belief that the employee will be disciplined. *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). However this right does not apply where the adverse action has been decided and the employee is only being informed. *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992); *Baton*

⁸ See May-June edition at p. 1 under the column entitled "Special points of interest."

Rouge Water Works Co., 246 NLRB 995 (1979). But the Board has held that where an employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision, the employee's right to representation applies. *Becker Group, Inc.*, 329 NLRB 103, 107 (1999).

2. The analysis

General Counsel alleges that on May 26, 1999, at the termination/suspension meeting, Respondent denied Smallwood's request for union representation. The evidence establishes that Smallwood requested representation by Union Steward Robert Hunt. Although he could not be located initially, Hunt arrived a short time later and represented Smallwood. While it is clear that the purpose of this meeting was simply to inform Smallwood of disciplinary action that had already been decided, it appears that Gines went beyond that purpose and interrogated Smallwood about distribution of the newsletter before Hunt arrived. In these circumstances, Smallwood's right to union representation did not attach until Gines questioned and searched him to determine if he had a newsletter in his possession. This interrogation and search was to support Respondent's decision to terminate Smallwood for publishing and distributing the newsletter. It was Gines who had made the decision to terminate Smallwood for violation of Respondent's unauthorized activities rules 1 and 2 (distributing unauthorized materials and soliciting) but he had no evidence that Smallwood had personally distributed the newsletter at the plant. The interrogation took place in a supervisor's office. Based on *Becker Group*, supra, I find Respondent violated Section 8(a)(1) when Gines went beyond informing Smallwood of the disciplinary action and questioned him about possession of the newsletter in the absence of a union representative.

C. The No-Solicitation/No-Distribution Rule

1. The law

With regard to rules hindering or forbidding solicitation, the Board has stated that, "[a] no-solicitation rule is lawful so long as its prohibition is confined to periods when employees are performing actual job duties, periods which do not include that employee's own time such as lunch and break periods." *Clinton Electronics Corp.*, 332 NLRB 479, 497 (2000) [citing *Our Way, Inc.*, 268 NLRB 394, 395 (1983)]. *Our Way, Inc.* also applies to cases involving rules prohibiting or placing limitations on distribution. *Caval Tool Division*, 331 NLRB 858 fn. 2 (2000).

2. The analysis

Respondent's unauthorized activities rules 1 and 2, on their face, do not permit an employee to solicit or distribute during lunch and break periods. "Indeed, the mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline." *Grandview Health Care Center*, 332 NLRB 347, 348 (2000) (citing *Ingram Book Co.*, 315 NLRB 515, 516 (1994); *J.C. Penney Co.*, 266 NLRB 1223, 1224 (1983)). In order to defeat this presumption of illegality of its overly broad rules, Respondent must show a compelling and legitimate business reason neces-

sitating the rule. *Midland Transportation Co.*, 304 NLRB 4, 5 (1991). No evidence has been adduced to establish a compelling and legitimate business reason necessitating the rules. "Interference with employee circulation of protected material in non-working areas during off-duty periods is presumptively a violation of the Act unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interest." *Champion International Corp.*, 303 NLRB 102, 105 (1991) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)). I find that the maintenance and enforcement of Respondent's no-distribution/no-solicitation rule violates Section 8(a)(1) of the Act.

D. Deferral to the Grievance Arbitration Procedure

1. The law

In *Alpha Beta Co.*, 273 NLRB 1546 (1985), the Board extended the principles of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), to settlements negotiated by parties to a grievance/arbitration process. The Board stated they would defer to a settlement agreement where the grievance proceedings were fair and regular, all parties had agreed to be bound, including the employees, and that the results of the settlement agreement are not clearly repugnant to the principles and policies of the Act, i.e., not palpably wrong. In *Postal Service*, 300 NLRB 196 (1990), the Board extended its decision in *Alpha Beta* to settlements between the employer and authorized bargaining representative over the objection of the affected employee.

2. The analysis

Although there is serious doubt that the letter of understanding constitutes a settlement since there was arguably no quid pro quo received by the Union in exchange for their withdrawal of the grievance, applying the *Alpha Beta* standards to this agreement it is apparent that deferral is not appropriate. While there is no evidence that the proceedings were unfair or irregular through the third step of the grievance procedure, and all parties were bound to the settlement, the settlement is repugnant to the principles and policies of the Act. The conclusions reached in the letter of understanding that Respondent did not violate the Act, that Smallwood did not engage in protected concerted activity and that Respondent terminated Smallwood for legitimate reasons is palpably wrong based on the discussion above. Under the principles in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), *Alpha Beta Co.*, 273 NLRB 1546 (1985), and *Postal Service*, 300 NLRB 196 (1990), it is not appropriate to defer to the parties settlement agreement.

E. Collateral Defenses

Respondent raises two collateral defenses. Respondent argues that Smallwood's activities were defamatory and created a hostile work environment. Respondent contends it has an obligation to ensure a workplace free from harassment and defamation. Having found that Smallwood's publication of the newsletter was protected-concerted activity, neither so opprobrious nor flagrant as to lose its protected status, under the Board's

test in *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and its progeny, no further consideration of these collateral defenses under State law or other Federal statutes need be considered.

Based on the foregoing findings of fact, legal analysis, and the record as a whole, I make the following

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in conduct in violation of Section 8(a)(1) of the Act.

(a) Issuing warnings, interrogating, suspending, and discharging David Smallwood because he engaged in concerted activities with other employees for mutual aid and protection by publishing the newsletter.

(b) By denying David Smallwood's request for union representation at the May 26, 1999 interview.

(c) By promulgating and maintaining, since April 2, 1999, an overly broad no-solicitation/no-distribution rule.

(d) On May 25, 1999, by warning David Smallwood that his distribution of the newsletter violated Respondent's no-solicitation/no-distribution rule.

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

REMEDY

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

Having discriminatorily suspended and then discharged David Smallwood, Respondent must offer him reinstatement to his former position and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his suspension and discharge to date of a proper offer of reinstatement, as prescribed in *F. W. Woolworth*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent must further expunge from any of its records any reference to Smallwood's May 25 warning and his May 26 suspension and discharge, and notify him in writing that such action has been taken and that any evidence related to this warning, suspension, and discharge will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Formally rescind in writing its overly broad no-solicitation/no-distribution rule and post notice that this has been done.

[Recommended Order omitted from publication.]