JD(SF)-37-05
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

WASTE MANAGEMENT OF ARIZONA, INC.

and **Case 28-CA-19526**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 104, GENERAL TEAMSTERS (EXCLUDING MAILERS), STATE OF ARIZONA, AFL-CIO

David Kelly, Esq., Phoenix, AZ, for the General Counsel.
Laurent R.G. Badoux, Esq., Phoenix, AZ, for the Respondent.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on January 31 and March 1, 2005. International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL-CIO (the Charging Party or the Union), filed an original, a first amended, and a second amended unfair labor practice charge in this case on June 28, July 30, and September 24, 2004, respectively. Based on that charge as amended, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on December 9, 2004. The complaint alleges that Waste Management of Arizona, Inc., (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[1] I now make the following findings of fact and conclusions of law.

[1] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits,[2] and I find that the Respondent is a Delaware corporation, with an office and principal place of business in Houston Texas, and with a number of facilities located in the State of Arizona, including a facility located at 1580 East Elwood, Phoenix, Arizona (herein called the Respondent's Elwood facility), from which facilities it has been engaged in the business of providing comprehensive waste management services to municipal, commercial, industrial, and residential customers throughout the United States, Canada, and Puerto Rico. Further, I find that during the 12-month period ending June 28, 2004, the Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 in States of the United States other than the State of Arizona; and that during the dame period, the Respondent in conducting its business operations, purchased and received at its Arizona facilities goods valued in excess of $50,000 directly from points located outside the State of Arizona.

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

II. Labor Organization

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

III. Alleged Unfair Labor Practices

A. The Dispute

It is the contention of the General Counsel that on about May 3, 2004,[3] the Respondent's district manager of the Elwood facility, Bill Minnis, issued a document entitled "Clarification of No-Solicitation/No-loitering," which document on its face constituted a violation of Section 8(a)(1) of the Act. According to the General Counsel, by the issuance of this document the Respondent promulgated an overly broad and discriminatory rule that had the effect of prohibiting its employees from discussing the Union or distributing union literature during working hours, of prohibiting its employees from being present at the Elwood facility for reasonable periods of time before and after their working hours, and of isolating off-duty employees to a specified area at the facility. Further, the employees were expressly advised in that document that violations of the rules set forth therein could result in disciplinary action. It is the position of counsel for the General Counsel that the Respondent issued this memorandum in an effort to stifle union and protected concerted activity, including an attempt to prevent employees from discussing matters that had been revealed during a recent unfair labor practice trial.

On the other hand, the Respondent denies that the document in question contains anything unlawful. According to counsel for the Respondent, the Minnis' memo was issued because of very legitimate employment concerns existing at the Elwood facility. Specifically, it

[2] All pleadings reflect the complaint and answer as those documents were finally amended.
[3] All dates are in 2004 unless otherwise indicated.

is alleged that following a recent unfair labor practice trial, employees attempting to perform their jobs in a productive manner were prevented from doing so by other employees who "pestered" them with non-work related matters. Further, it is alleged that male employees congregating in certain areas of the facility caused female employees going to the rest room to feel uncomfortable. Counsel contends that in an effort to prevent employees from being "bothered" while working and to prevent "loitering," the Respondent's district manager issued the memo of May 3. Thus, it is claimed there was a legitimate business justification for Minnis' action.

As will become apparent, the majority of the testimony at the hearing consisted of the Respondent's counsel offering evidence in an effort to establish the genuineness of its business concerns, which allegedly resulted in the issuance of the memo in question. Counsel for the General Counsel attempts through the testimony of his witness to show that the Respondent's alleged justification for the memo was a pretext, and that there were no legitimate business concerns. It is the General Counsel's contention that, lacking legitimate business concerns, the issuance of the Respondent's memo, which allegedly violates the Act on its face, cannot be justified.

B. Background Facts

The Respondent is engaged in the business of waste management services, for which it employs truck drivers who pick up waste from various types of containers throughout the Phoenix metropolitan area. In addition to drivers, the Respondent employs mechanics, dispatchers, and various office, sales, and clerical personnel. The Respondent has five facilities in the Phoenix area. However, the only property involved in this proceeding is referred to as the Elwood facility. The Respondent also operates a transfer station near the Phoenix Sky Harbor Airport where drivers dump their waste, for subsequent transfer to land fills. The district manager of the Elwood facility during the time of the events in question and presently is Bill Minnis. He testified that during the April to May 2004 time period, the Respondent employed approximately 125 to 130 employees at the Elwood facility, of which about 85 to 90 were drivers and 14 were mechanics.

The Union has conducted an organizing campaign among certain of the Respondent's Phoenix area employees since approximately early 2003.[4] That campaign has generated the filing of unfair labor practice charges with the Board. I take administrative notice that certain of those charges were heard at trial by an administrative law judge of the Board on January 26 to 29, February 17 to 19, and April 6, 2004. Further, I take administrative notice that the judge issued his decision on August 16, 2004, finding that the Respondent had engaged in certain unfair labor practices. That decision is reported at JD(SF)-62-04 (Judge Albert A. Metz). Exceptions have been filed to the decision, and the matter is presently pending on appeal before the Board.[5]

---

[4] There was apparently an organizational effort by the Union as early as 2001, but it was unrelated to the facts in this case.

[5] While it is axiomatic that the decisions of administrative law judges do not serve as binding precedent, I can obviously take administrative notice of the issuance of Judge Metz' decision, and of certain undisputed facts set forth in that decision, such as the dates the case was heard at trial. It was on that basis that I took administrative notice of the earlier decision, over the objection of counsel for the Respondent.

On about May 3, 2004, Bill Minnis issued the memorandum entitled "Clarification of No-Solicitation/No loitering" to the employees at the Elwood facility. (G.C. Exh. 5.) There is some dispute as to exactly how the memo was disseminated. According to Minnis, the memo was read word for word to the drivers in attendance at a safety meeting, and copies were then posted on various bulletin boards around the facility. He testified that he was not present at the safety meeting where the memo was read. Other witnesses testified that Minnis read the memo to them at the safety meeting. Some witnesses testified that they received their own copy of the memo, while others indicated they read the memo when it was posted on the bulletin board. In any event, these variances are insignificant as the collective testimony of the witnesses indicates that the memo was widely disseminated on or about the date it bears. It appears that Minnis' intention was to have the memo widely distributed at the Elwood facility, and the Respondent does not contend otherwise. However, it was only at the Elwood facility that the memo was distributed.

As noted earlier, the General Counsel contends that certain statements in the memo constitute a *per se* violation of the Act. Therefore, I will set forth the memo in its entirety, with original emphasis, as follows:

05/03/2004

To: All Elwood Employees
From: Bill Minnis
Re: Clarification of No-Solicitation/No-loitering

As a result of various complaints received, the following reminders are made. In accordance with the Company's No-Solicitation Rule, employees may use the employee bulletin boards in the break rooms. This privilege has been available and will continue to be available as long as it is not misused or abused. It is for the purpose of allowing our personnel to post communications of personal matters.

1. Management has received a complaint that communications that have been posted have been removed.

This memo is to remind our personnel not to remove or deface any postings that do no belong to you. Violations may lead to disciplinary action.

2. Management has also received complaints of solicitations of employees who are working by other employees who are still working or who are "off the clock." Remember, the No-solicitation Rule is to protect employees from being pestered while working. The rule prohibits solicitations, which includes distribution of materials, in working areas during work hours.

This memo is also to remind our personnel not to violate the No-Solicitation Rule. Violations may lead to disciplinary action.

3. Management has also received complaints about off-duty employees bothering other personnel and/or loitering in work areas or in the buildings. Personnel who have clocked out should promptly leave the premises. Insurance and safety, among other concerns, require non-working personnel to leave the facility. Unless (1) an appointment is made or (2) management has asked the employee to remain, or (3) permission is granted, off-duty personnel ("clocked out") are to leave. Promptly leaving means within 5 minutes after clocking out. If waiting for a ride, etc., please wait in the break area outside the east reception door.

This memo is also to remind our personnel of the no-loitering requirement. Violations may lead to disciplinary action.

Before further considering the parties arguments, it is necessary to describe the physical layout of the Respondent's Elwood facility. The property is surrounded by fencing, chain link and rock wall. There are three access areas to the facility, but Minnis testified that only one gate is left unlocked, referred to as the main gate and utilized by most employees. At the hearing, Minnis used a diagram of the physical plant to locate various buildings and designated areas. (G.C. Exh. 2.) He placed the main gate at the southeast corner of the property. There are two parking areas designated for use by employees for their personal vehicles. One employee parking area is near the main gate in the southeast area of the property, while the second employee parking lot is located on the northeast side of the property. Minnis' office, as well as certain others, is located in a trailer, near the employee parking area in the southeast corner of the facility. To the west of the trailer is a two-story building, referred to as the main building. It is in this main building that most of the office space is located, including personal offices, dispatch, driver rooms, conference rooms, reception area, lobby, rest rooms, and lockers. (G.C. Exh. 3 & 4.)

In the center of the property there is a fuel island. Various witnesses testified that it is at the fuel island where the drivers are required to fill their trucks with fuel and clean windows at the end of their shifts. The fuel island has the capacity to fill four trucks at the same time, and it is not unusual for there to be a line of trucks waiting to gas up at the end of a shift. To the west of the fuel island there is a building comprising a tire shop, wash bay, and service bays. A weight room, containing weights, a treadmill, and steppers, occupies part of the tire shop. Any employee can have access to the weight room, as long as the employee signs a liability waiver. Other structures occupy space on the property, and there are large areas devoted to parking space for the Respondent's garbage trucks. There are approximately 75 to 80 company vehicles housed at the Elwood facility.

While the main building contains two floors, it is on the first floor where most of the employees' conduct at issue in this case occurred. (G.C. Exh. 4.) From the testimony of numerous witnesses, it is clear that employees frequently congregate at various places on the first floor. The most congested portion of the first floor is the northeast area, comprised of the dispatch office, lobby, and drivers' room. It is in the lobby, immediately adjacent to the dispatch office, where the time clock is located. Employees are required to clock in and out for payroll purposes, and during certain times of the day the time clock area becomes heavily trafficked with employees doing just that. This may include drivers, mechanics, and office personnel. Further, truck drivers are required to complete certain "paper work," both before and after they drive their scheduled routes. While drivers may perform this paper work function in their trucks, it appears from the testimony of various witnesses that most of this work is performed in the lobby or drivers' room. This further congests the area.

Numerous office personnel also have their offices on the first floor. Further, the men's and women's lockers and bath rooms are located on the first floor, just to the west of the lobby and drivers' room. Office personnel who wished to use those bath room facilities sometimes found themselves having to walk through a group of employees waiting to use the time clock or drivers doing paper work. Certain female employees in particular testified that they found the congestion in this area disconcerting, as they made their way from their office cubicles to the bathroom facilities. Some of them described the presence of male employees in this area as making them feel uncomfortable, and even described the scene as similar to "running a gauntlet" in order to use the bathroom. More will be said of their feelings latter in his decision.

Just to the east of the main building is an area referred to as the east reception area. (G.C. Exh. 4.) It is in this general area that employees who car-pool or are driven to work wait for their rides to pick them up after their work shift is over. Also, just outside of the northeast

corner of the building are located vending machines and a "Gatorade" container. When taking breaks outside, employees often utilize both the east reception area and the area in the immediate vicinity of the vending machines and Gatorade container. Although smoking may not technically be permitted in these areas, it appears from the testimony of various witnesses that employees frequently do smoke there. There is an outside entrance to the lobby from the vending machine/Gatorade area, and another outside entrance close to the lobby from the east reception area. (G.C. Exh. 4.) This even further congests the northeast section of the first floor.

It should be noted, that apparently there are two bulletin boards in the main building, which are available to employees who wish to post personal material. Timothy Peek, a frontload driver, who is a member of the union organizing committee, testified that following the earlier unfair labor practice trial for this Employer, he was first informed of the existence of these two bulletin boards. According to Peek, Bill Minnis personally showed him the location of one posting board, located on the first floor of the main building in a small room just to the southwest of the drivers' room. While this room is referred to on the Respondent's floor plan as a "break" room and contains a refrigerator and microwave, Peek testified that he had never seen drivers use this room to take their breaks, preferring to utilize the "drivers' room." (G.C. 4.) The other employee bulletin board is on the second floor in the safety room. Peek testified that as soon as he learned of the existence of these bulletin boards, he began to use the first floor board to post union literature.

Finally, when considering the Respondent's Elwood facility, it should be noted that Minnis testified that much of the physical plant is considered to be within the "yellow line." He indicated that within that zone employees are expected to wear safety vests to increase their visibility, because of the excessive amount of truck traffic. While Minnis' testimony was somewhat confusing, it appears that the yellow line zone runs from the maintenance shop north past the fuel island, and includes the garbage truck parking areas, as well as the service bays, wash bays, and tire shop. (G.C. Exh. 4.) In other words, it would include those areas of the facility where company trucks were likely to be in transit.

C. Analysis and Conclusions

1. The No-Solicitation Rule

It is the position of the General Counsel that the no-solicitation rule set forth in the memo of May 3 is facially invalid, because it specifically prohibits employees from soliciting and distributing materials during "work hours." (G.C. Exh. 5.) I agree.

The Board has long held that rules prohibiting solicitation and distribution of materials during "work hours" are presumptively invalid. The Board has consistently reasoned that the term "work hours" is inherently ambiguous, because it encompasses all the hours of the workday, including employees' break and lunch periods. The principle that an employer may not prohibit solicitation on an employee's own time was established by the Supreme Court in *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). Upon that principle, the Board has consistently found "work hours" prohibitions of solicitation and distribution to be presumptively invalid on their face. *St. George Warehouse, Inc.,* 331 NLRB 454, 462 (2000), enfd. 261 F.3d 493 (3rd Cir. 2001); *Southwest Gas Corp.,* 283 NLRB 543, 546 (1987); *MTD Products, Inc.,* 310 NLRB 733 (1993); *Brigadier Industries Corp.,* 271 NLRB 656, 657 (1984); *Our Way, Inc.,* 268 NLRB 394, 395 (1983).

Counsel for the General Counsel correctly points out in his post-hearing brief that when a rule of the kind described above is found presumptively unlawful on its face, it becomes the employer's burden to show that it communicated or enforced the rule in a way that clearly conveyed to employees the intent to permit solicitation during those periods, such as lunch and breaks, when employees are not actively engaged in their work duties. *MTD Products*, *supra*; *Ichikoh Mfg.,* 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1004); *Our Way, supra* at 395 fn. 6. The burden remains on the employer, which created the ambiguous or facially invalid rule, to establish that it has clarified the rule by effectively communicating to its employees their right to engage in solicitation when not actively involved in work duties. Only in this way can the impact of the facially invalid rule be vitiated. *Laidlaw Transit, Inc*., 315 NLRB 79, 83 (1994). As the Board has held, "[a]ny remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule." *Tele Tech Holdings,* 333 NLRB 402, 403 (2001), citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

In the matter at hand, the Respondent has failed to establish that it clarified the rule by informing its employees of their right to solicit during breaks and lunch periods. In fact, there is absolutely no evidence in the record to indicate that Bill Minnis, or any other management official, ever attempted to clarify the rule in any fashion. The rule was presented to the employees verbatim, in the form of the memo of May 3. Whether employees had the memo read to them, or read it for themselves on a bulletin board or when it was distributed to them, there was no effort made by the Respondent to further explain its meaning. Thus, there was no affirmative effort made by the Respondent to negate the facially invalid language of the memo.

Counsel for the Respondent argues in his post-hearing brief that union supporters continued to solicit support for the Union during work hours, and so must have been aware that the rule was not being strictly enforced. As no employees were disciplined for violation of the rule, this was allegedly a demonstration by the Employer that the prohibition was not inflexible. However, I do not subscribe to the theory that the Respondent can escape liability for its invalid, overly broad rule, merely because the Respondent chose not to enforce the rule. The Board has held that evidence of this sort is irrelevant. According to the Board, "[t]he mere existence of an overly broad rule of this kind tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced." *Tele Tech Holdings,* 333 NLRB 402, 403 (2001). Accord *Grand-View Health Care Center,* 332 NLRB 347, 348 (2000); *Brunswick Corp.,* 282 NLRB 794, 795 (1987).

During the course of the trial, a number of employees testified that Minnis was a highly "approachable" manager. In his brief, counsel for the Respondent argues that because Minnis was so approachable, employees who were confused about the Employer's solicitation policy would have contacted him in order to resolve their confusion. Since no employees came to Minnis with any questions about the policy, counsel contends that they were not confused by its language, and understood that they could solicit for or against the Union when not actively engaged in their work duties. I do not concur. Minnis may be a very approachable manager, never the less, the fact that no employees quested him about the policy is more likely than not because the policy was clear on its face in prohibiting solicitation and distribution during "work hours." As the Board has traditionally held, such language is plainly understood by employees to mean all hours of the workday, including employees' break and lunch periods. The Respondent certainly does not meet its burden of overcoming the presumption of invalidity of at best an ambiguous rule by establishing an absence of questions to Minnis about the rule.

In any event, the Respondent does not concede that its no-solicitation policy as expressed in the memo was invalid on its face. To the contrary, relying on the Board's recent decision in *Washington Fruit and Produce Company*, 343 NLRB No. 125 (2004), counsel for the

Respondent argues that the Employer had a lawful right to restrict solicitation while employees were engaged in work duties. However, I believe that *Washington Fruit* is distinguishable on its facts and law from the matter before me. In *Washington Fruit*, the Board held that the rule in question was valid on its face because it prohibited solicitation during employees' "working time or during the working time of the employee or employees at whom such activity is directed." (Underscoring added by the undersigned.) There is nothing in *Washington Fruit* that alters the Board's longstanding policy that employees have the right to solicit other employees during the time the employees are not actively engaged in performing work duties. In the matter at hand, the memo "prohibits solicitation, which includes distribution of materials, in working areas during work hours."[6] It is the use of the term "work hours" that causes the memo to be presumptively invalid on its face. As noted above, the Board has long held that such a term is inherently ambiguous because it connotes all hours of the work day, including break and lunch times. Alternatively, the term "working time," used by the employer in *Washington Fruit*, is generally construed to mean that period when work duties are being actively performed. See *Southwest Gas Corp., supra; Our Way, Inc., supra.*[7] In short, an employer may lawfully prohibit solicitation during "work time," but not during "work hours."

Upon reflection, I am of the view that *Washington Fruit* does not overrule or alter the Board's long-standing doctrine that a no-solicitation rule that prohibits employees from soliciting or distributing materials during working hours is facially unlawful. As I have noted, not only is the Respondent's rule unlawful on its face, but the Respondent has failed to meet its burden to establish that it effectively communicated to its employees their right to solicit during break and lunch periods, so as to eliminate the impact of the unlawful rule.

In addition to concluding that the Respondent's no-solicitation rule was facially unlawful, I find the timing of the issuance of the memo to be highly suspect, and intended to interfere with employees' Section 7 rights. While the union campaign had been in progress since early 2003, employee interest increased with the holding of the unfair labor practice trial in the earlier case on dates in January, February, and April 2004. The trial ended on April 6, and Minnis and other witnesses testified that employees were frequently talking about the details of the trial, including what witnesses did or did not say. Further, driver and union supporter Timothy Peek testified that following the conclusion of the trial, he learned of the existence of employee bulletin boards, upon which he and other union supporters began to post pro-union material. Approximately one month later, on May 3, Minnis issued the memo in question.

According to Minnis' testimony and the wording on the memo, he issued the document in order to "protect employees from being pestered while working." However, I do not believe him. There certainly may have been isolated incidents of employees being bothered about the Union while they were working, such as at the fuel island or transfer station, and a number of employees who opposed the Union testified that they registered complaints with Minnis. Certainly such isolated incidents could have been handled on a case-by-case basis with Minnis speaking to the offending employees. I did not find Minnis' contention that the complaints were

---

[6] The Board does normally distinguish between solicitation and distribution, as an employer may lawfully prohibit distribution of literature by employees in work areas at any time. See *United Parcel Service,* 327 NLRB 317 (1998); *RCN Corp*., 333 NLRB 295 (2001). However, in the memo of May 3, the Respondent specifically links distribution with solicitation, prohibiting both "during work hours." By linking these terms, the Respondent has created confusion and such ambiguity must be resolved against the Respondent.

[7] In *Our Way*, the Board, citing to its earlier decision in *Peyton Packing Co.,* 49 NLRB 828, 843 (1943), stated that "working time is for work" is a long-accepted maxim of labor relations.

numerous to be credible. He had no notes or documents to support such a claim, and I am of the view that he exaggerated and embellished the complaints that he did receive in an effort to support his contention that the memo was justified as a business necessity.

The Board has held that the implementation of an otherwise lawful no-solicitation rule timed to coincide with union organizational activity can be unlawful where there exists "an illegal coercive effect." *F.P. Adams Co.,* 166 NLRB 967, 968 (1976). In the matter before me, Minnis issued the memo at a time when it is acknowledged that there was much conversation about the recently concluded trial, and union supporters were for the first time utilizing the company bulletin boards to post union literature. It was in this context that Minnis chose to issue the no-solicitation memo, which clearly would have a chilling effect on the employees' willingness to organize. As Minnis' explanation for the issuance of the memo was, in my view, inadequate to establish a genuine business justification, I am left to conclude that the memo was intentionally timed in response to the renewed interest by some employees in the organizational efforts of the Union. As such, the rule would be unlawful. See *Dillon Companies, Inc. d/b/a/ City Market,* 340 NLRB No. 151 (2003).

Based on the above, I conclude that by the issuance of the memo of May 3, the Respondent promulgated an overly broad and discriminatory rule that prohibited its employees from engaging in solicitation and distribution during their lunch and break periods. As such, the Respondent has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in paragraphs 5(a) and 6 of the complaint. Concomitantly, as the memo threatened employees with discipline if they failed to abide by the no-solicitation/no-distribution rule, I further find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 5(b) and 6 of the complaint.

2. The No-Loitering Rule

The General Counsel takes the position that the "no-loitering requirement" as set forth in the memo of May 3 is overly broad and facially invalid. Again, I agree. The Board's policy on "no-access"[8] rules is now well established. In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that a no-loitering rule is valid only if the following three conditions are met: (1) the rule limits access solely with respect to the interior of the plant and other working areas; (2) it is clearly disseminated to all employees; and (3) it applies to off-duty employees seeking access to the plant for any purpose. In my view, the problem with the memo in question is that it does not simply limit access to the interior of the Employer's facility and other working areas.

As can be seen from the memo, employees "who have clocked out" are directed to "promptly leave the premises." They are further directed "to leave the facility," with "promptly" later defined as meaning "within 5 minutes after clocking out." Finally, employees who may be "waiting for a ride, etc." are specifically directed to "wait in the break area outside the east reception door." (G.C. Exh. 5.) Under this directive, five minutes after clocking-out, employees would not be permitted to remain in the employee parking lots, at the exit gate, in the weight room, and in the break area where the vending machines and Gatorade containers are located. (G.C. Exh. 2 & 4.) The Board has specifically held that such " a rule denying off-duty employees access to parking lots, gates and other outside non-working areas is invalid unless sufficiently

[8] The term "no-loitering," as used by the Employer in the memo of May 3 to restrict the physical presence of employees on its property, is synonymous with the term "no-access."

justified by business reasons." *Tele Tech Holdings*, 333 NLRB 402, 404 (2001). Access to non-working areas is necessary if employees are to be able to engage in Section 7 activity on their employer's property. The Respondent's memo unlawfully precludes this activity.

Under a plain and simply reading of the memo, it is perfectly clear that after clocking-out employees are expected to leave the Respondent's property, with the excepting of a limited and rather isolated area on the east side of the main building, the east side reception area, where they may wait for car pool rides. I believe that this is the meaning of the language any reasonable employee would receive after reading the memo. In my view, there is no ambiguity regarding this portion of the memo. However, even assuming such ambiguity, the Board has held that ambiguity in a no-loitering rule "must be construed against the [employer] as the promulgator of the rules." *Ark Las Vegas Restaurant,* 343 NLRB No. 126 (2004). Further, the Board has clearly rejected any defense based on alleged ambiguity, holding that to the extent a no-access rule "may convey to employees a prohibition that is more extensive than permissible, [the employer] must assume the burden of the ambiguity." *Continental Bus System, Inc*., 229 NLRB 1262,1262 (1977).

From the testimony of Bill Minnis, it is quite clear that when he uses the terms "premises" and "facility" in the memo, he is referring to the entire area of the Respondent's property that is anywhere inside the fence at the Elwood facility. This would include those areas where work is not normally performed, such as the employee parking lots, the main gate, the weight room, and outside the main building in the area of the vending machines and Gatorade containers where breaks are taken. In his post-hearing brief, counsel for the Respondent does not really try and argue the propriety of the no-loitering language. Instead, he argues that the rule could not have had a chilling effect on employees' Section 7 activity, because no one was disciplined for violating the rule and there was a legitimate work related necessity for its implementation.

As I noted earlier, in connection with the no-solicitation rule, the fact that no employee was disciplined for violation of such a rule is irrelevant. The Board has repeatedly held that "[t]he mere existence of an overly broad rule of this kind tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced." *Tele Tech Holdings*, 333 NLRB 402, 403 (2001). Accord, *Grand-View Health Care Center*, 332 NLRB 347, 348 (2000); *Brunswick Corp*., 282 NLRB 794, 795 (1987). Accordingly, I do not consider counsel's argument that no employees were disciplined for breach of the no-loitering rule to be worthy of sustained discussion.

However, a more significant argument involves counsel for the Respondent's contention that the no-loitering policy was instituted in order "to curtail a potentially hostile work environment for female employees." A number of female employees testified that on their way to the only women's bathroom on the ground floor of the main office building at the facility, they sometimes had to walk through crowds of male drivers and mechanics. These female employees testified that the situation made them feel uncomfortable, with at least one employee making a comparison to "running a gauntlet," and several employees referencing "a hostile work environment."

I certainly do not question the genuineness of the female employees' complaints about feeling uncomfortable on their way to the rest room as they passed through a large group of male employees. However, that does not mean that the Employer's response was reasonable, or that the problem necessitated a response that infringed on employees' Section 7 rights. To begin with, the female employees who testified were, for the most part, unaware as to whether

the congregated male employees were on or off-duty. Minnis also did not seem clear on this matter. Of course, for those employees who were on-duty, the no-loitering memo would have had no affect.

In fact, the problem was limited to those areas on the first floor of the main building near the dispatch, lobby, reception, and drivers' room, which were congested because employees entering the facility to begin work needed to clock-in, and drivers clocking-out needed to complete their paper work. (G.C. Exh. 4.) Those were the only areas where the congregation of male employees caused discomfort for female employees on their way to the rest room.[9] The solution to the problem could have been limited to instructing the drivers and mechanics to simply not congregate in those specific areas. Instead, the Employer issued the memo of May 3, which effectively precluded employees from engaging in legitimate union activity when off-duty, except in the isolated east reception area. I do not believe the memo can be legitimately justified on the basis of business necessity. The Respondent's alleged concern about preventing a hostile work environment for female employees is in my opinion disingenuous. The issuance of the memo with its no-loitering provision was a little like "trying to kill a fly with shot gun."

As I noted earlier, I find the timing of the issuance of the memo highly suspect. It was issued at a period of renewed interest in the Union and its organizing activities. Minnis' issuance of the memo, which was dramatically more encompassing than was necessary to solve the problem, was I believe intended to make it more difficult for the employees to engage in legitimate union activity in those areas of the facility where employees had the right to congregate. There was no credible allegation that off-duty male employees were congregating in the parking lots, in the weight room, at the gates, and in the break areas by the vending machine and Gatorade dispensers, and in so doing "harassing" female employees. Yet, these areas were included in the general prohibition in the memo against "loitering" by remaining on the property five minutes after clocking-out.[10]

There is an exception in the memo for remaining on the property for longer than five minutes, when permission is first secured from management. (G.C. Exh. 5.) However, such an "exception" does nothing to remedy the Respondent's overly broad restrictions on access to the property. It is axiomatic that any rule that requires employees to secure permission from their employer as a precondition to engage in protected concerted activity on the employees' free time and in non-work areas is unlawful. *Enterprise Products Co*., 265 NLRB 544, 554 (1982). Further, the memo's restrictions on access are not made less onerous by the Respondent's exception to the loitering policy for those employees who are waiting for rides and may, therefore, "wait in the break area outside the east reception door." Not only is this area rather isolated, but according to the memo, permission is given to be in this area after clocking-out only for those employees "waiting for a ride." Presumably, employees waiting for other reason, such as to engage in legitimate union activity, would not be permitted in the area.

---

[9] It should be noted that in addition to the first floor rest room, the main building also contained a women's rest room on the second floor. (G.C. Exh. 3 & 4.) While the first floor rest room was more convenient for the female office personnel who complained about the congestion, they were free to use either rest room.

[10] Although the memo also makes reference to "insurance and safety," in his post-hearing brief counsel does not attempt to justify the issuance of the memo on this basis. In any event, there is no credible evidence that this was a factor.

Counsel for the Respondent defends the policies at issue in the memo largely on the basis of an employer's right to promulgate rules designed to maintain order in the work place. See *Lafayette Park*, 326 NLRB 824 (1998). However, as I have indicated, the flaw in this argument is that the Respondent could have adequately addressed both the perceived problems of employees being "pestered" by union supporters while working, and off-duty employees "loitering" in work areas, without enacting policies severely limiting its employees ability to engage in union activity. I believe that the Respondent's no-loitering policy, as with its no-solicitation/no-distribution policy, was specifically designed to restrict its employees Section 7 activity. In any event, whether the restriction was intentional, or whether the result was a natural consequence of that policy, the effect was clearly to chill the Section 7 rights of the employees.

Based on the above, I conclude that by the issuance of the memo of May 3, the Respondent promulgated an overly broad and discriminatory rule that prohibited employees from being present at the Elwood facility for reasonable periods of time after their working hours.[11] Further, I find that by the same memo the Respondent has isolated off-duty employees by restricting them to a specific area of the Elwood facility. As such, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights. Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 5(c), (d), and 6. Concomitantly, as the memo threatened employees with discipline if they violated these provisions, I find that the Respondent has further violated Section 8(a)(1) of the Act.[12]

Conclusions of Law

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

2. The Union, International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct, the Respondent has violated Section 8(a)(1) of the Act:

(a) Promulgating an overly broad and discriminatory rule that effectively prohibited its employees from soliciting on behalf of the Union, or distributing union literature, during their breaks and lunch periods, and at other times when not engaged in work duties;

[11] While the complaint alleges unlawful restrictions on the presence of employees at the facility both "before" and after working hours, the memo is actually silent regarding periods "before" work.

[12] The complaint does not specifically allege the threat to discipline employees for failing to comply with the no-loitering rule as a violation of the Act. However, the May 3 memo containing the threat is in evidence, the issue is before the parties, it is closely related to the complaint allegations, and was fully litigated at the hearing. Under such circumstances, it is appropriate to resolve the issue. See *Garage Management Corp.* 334 NLRB 940 (2001); *Hi-Tech Cable Corp.,* 318 NLRB 280 (1995). As noted, I have concluded the threat constitutes a violation of the Act.

(b) Promulgating an overly broad and discriminatory rule that prohibited its employees from being present at the Elwood facility in non-work areas for reasonable periods of time after their working hours were concluded;

(c) Promulgating an overly broad and discriminatory rule that isolated off-duty employees to a specified area at the Respondent's Elwood facility, effectively prohibiting such employees from being present in other non-work areas of the facility after their working hours were concluded; and

(d) Threatening its employees with discipline if they failed to abide by the above-described rules.

4. The above 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.

The Respondent must amend its memo addressed to all Elwood employees dated May 3, 2004, and any similar documents, to make it clear to its employees that it is not prohibiting solicitation or distribution of literature during their breaks and lunch periods, and at other times when they are not engaged in work duties. Additionally, the Respondent must make it clear that employees are not prohibited from being present in non-work areas for reasonable periods of time after the conclusion of their work hours.

Further, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Waste Management of Arizona, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Promulgating an overly broad and discriminatory rule that effectively prohibits its employees from soliciting on behalf of the Union, or distributing union literature, during their breaks or lunch periods, and at other times when not engaged in work duties;

[13] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Promulgating an overly broad and discriminatory rule that prohibits its employees from being present at the Elwood facility in non-work areas for reasonable periods of time after their working hours are concluded;

(c) Promulgating an overly broad and discriminatory rule that isolates off-duty employees to a specified area at the Respondent's Elwood facility, effectively prohibiting such employees from being present in other non-work areas of the facility after their work hours are concluded;

(d) Threatening its employees with discipline if they fail to abide by the above-described rules;

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

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

(a) Within 14 days of this Order, amend its memo addressed to all Elwood employees dated May 3, 2004, and any similar documents, to make it clear to its employees that it is not prohibiting solicitation or distribution of literature during their breaks and lunch periods, and at other times when they are not engaged in work duties. Additionally, the Respondent must make it clear that employees are not prohibited from being present in non-work areas for reasonable periods of time after the conclusion of their work hours.

(b) Within 14 days after service by the Region, post at its Elwood facility in Phoenix, Arizona, copies of the attached Notice marked "Appendix"[14] in both English and Spanish. 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 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 the Elwood facility at any time since May 3, 2004; and

(c) 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.

Dated at San Francisco, California, on April 25, 2005.

Gregory Z. Meyerson
Administrative Law Judge

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

JD(SF)-37-05
Phoenix, AZ

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 do anything that interferes with these rights. Specifically:

WE WILL NOT prohibit you from discussing the International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL-CIO (the Union), or prohibit you from distributing union information or materials, during your breaks and lunch periods, and at other times when you are not engaged in work duties.

WE WILL NOT prohibit you from being present at the Elwood facility in non-work areas for reasonable periods of time after you clock-out from work.

WE WILL NOT threaten you with discipline for discussing the union, or for distributing union information or materials, during your breaks and lunch periods, and at other times when you are not engaged in work duties; or for being in non-work areas for reasonable periods of time after you clock-out from work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind and remove from the memo issued to all Elwood employees on May 3, 2004, any rule that prohibits you from soliciting or distributing materials during your breaks and lunch periods, and at other times when you are not engaged in work duties, and any threat to discipline you for doing so.

WE WILL rescind and remove from the memo issued to all Elwood employees on May 3, 2004, any rule that prohibits you from being present in non-work areas for reasonable periods of time after you clock-out, and any threat to discipline you for doing so.

WASTE MANAGEMENT OF ARIZONA, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.