

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

DURA-FIBRE LLC¹

and

Case 30-CA-18988

CAROL HEALY, An Individual

Andrew S. Gollin, Esq.,
for the Government.²

Tony J. Renning, Esq.,
for the Company.³

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. This is a discipline and discharge case which I heard in trial in Menasha, Wisconsin, on November 7, 2011. This case originates from a charge filed on May 20, and amended on July 19, 2011, by Carol Healy, an individual, (Healy or Charging Party Healy). The prosecution of the case was formalized on August 25, 2011, when the Acting Regional Director for Region 30 of the National Labor Relations Board (the Board), acting in the name of the Board's Acting General Counsel, issued a complaint and notice of hearing (the complaint) against Dura-Fibre LLC (the Company).

The Company, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint.

It is specifically alleged the Company, since on or about March 1, 2011, has maintained an overly-broad rule in its plant discipline rules prohibiting employees from "Posting, distributing or circulating unauthorized notices, posters or handbills on Company premises or causing same to be done." It is also alleged that on or about March 29, 2011, Healy prepared

¹ The name of the Respondent appears as, by motion, corrected at trial.

² I shall refer to counsel for the Acting General Counsel as counsel for the Government and I shall refer to counsel for the Government as the Government.

³ I shall refer to counsel for the Respondent as counsel for the Company and shall refer to the Respondent as the Company.

and circulated a survey, with and on behalf of other employees, soliciting their opinion regarding a change made to the laminating machine startup schedule and its effect on employees' wages, hours, and other terms and conditions of employment. It is further alleged that on or about March 31, 2011, the Company disciplined and then discharged Healy because she prepared and circulated the petition and it did so in order to discourage employees from engaging in these and/or other concerted activities. It is also alleged Healy was, by the same survey, soliciting opinions from her coworkers regarding a negotiated change to the collective-bargaining agreement concerning the laminating machine startup schedule and the effects thereof on the employees' wages, hours and other terms and conditions of employment in order to discourage employees from engaging in union activities. The discipline given to and discharge of Healy is alleged to violate Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The maintenance of the solicitation and distribution rule is alleged to violate Section 8(a)(1) of the Act.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the whole record, the post trial briefs, and the authorities cited therein. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act as alleged in the complaint.

Findings of Fact

I. Jurisdiction, Labor Organization Status, Bargaining Unit, and Collective- Bargaining Agreement

The Company is a corporation with an office and place of business in Menasha, Wisconsin, where it has been, and continues to be, engaged in the manufacturing of laminated paperboard products. During the past calendar year, a representative period, the Company sold and shipped goods and materials valued in excess of \$50,000 directly to customers located outside the State of Wisconsin. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit, and I find, that at all material times herein, the United Steelworkers Local 2-432 (the Union) has been and continues to be a labor organization within the meaning of Section 2(5) of the Act.

It is admitted that all production and maintenance employees of the Company (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and based on Section 9(a) of the Act the Union has been, and continues to be, the exclusive collective-bargaining representative of the unit. The Company's recognition of the Union as the bargaining representative of the unit has been embodied in a series of collective-bargaining agreements, the most recent of which is effective from October 19, 2009, to June 22, 2013.

II. The Facts

5 The Company specializes in laminating, die-cutting, and printing fiberboard products.
 10 For example, the Company’s products are on inexpensive furniture such as the backs of
 bookshelves. The back portion of the shelves are made of fiberboard paper. The backs are
 produced by laminating sheets of fiberboard paper together until the desired product is
 manufactured. The Company employs approximately 60 employees, 43 of which are in the
 bargaining unit and, as earlier noted, the collective-bargaining agreement covering the unit
 15 employees is effective until June 22, 2013. The Company is essentially divided into two sides
 or departments. One side (laminating) houses the laminating machine, which operates
 continuously with six employees on each of three shifts. The other side (converting) has three
 die-cutter machines, along with baler and forklift equipment and machine operators. The
 shipping and maintenance department employees are on the converting side as well. At the time
 of the trial herein, the Company was operating with three shifts per day 5 days per week. The
 third shift, which is the focus herein, is 10 p.m. to 6 a.m.

20 The Company, for an extended period, operated three shifts per day, 7 days per week.
 However, on or about September 18, 2010, the Company commenced operating with three shifts
 per day 5 days per week. Although the laminating machine operates continuously, going to a 5-
 day workweek necessitated having to restart the machine at the beginning of each new
 workweek.

25 The startup of the laminating machine had been each Monday morning at 6 a.m.
 However, in the fall of 2010, the Company and the Union, following a vote (29 in favor of the
 change with 10 opposed) among the bargaining unit employees, agreed to change the startup of
 the laminating machine from Monday morning at 6 a.m. to Sunday night at 10 p.m. Normally,
 Sunday work for unit employees was paid at double time while Saturday work was paid at time
 and a half. The agreement changing the startup time to Sunday night for the third shift (10 p.m.
 30 to 6 a.m.) called for them to be paid at straight time, including the hours worked on Sunday.

35 Union President Dan Nett testified not everyone was happy with the change, to the
 startup time. Nett said unit employees talked to him individually, as well as at the Union’s
 monthly meetings, about their discontent. Nett explained, “There were some issues about just
 the vagueness of it. When it was going to start, the pay period, the how it was going to be paid
 out, as far as being that its’ Sunday and, you know, I’d be paid straight time. . . .” He further
 explained there continued to be issues about it, every day, as well as at the union meetings. Nett
 said it was first brought up at the regular monthly union membership meeting in November 2010
 and raised each month thereafter. Nett notified the Company in early 2011 that employees were
 40 coming to him upset about the startup change.

45 Company Human Resource Manager Jamie Gonnering learned some of the unit
 employees had questions regarding, or were confused about, the change in startup time from
 Monday morning to Sunday evening.

Laminating department third-shift employee (roll tender) Dennis Newbert was directly
 affected by the change in the startup time and spoke with fellow unit employees, specifically

Carol Healy and Tom Jacob, about his concerns. Newbert explained he was, “disappointed how it took place. . . .how it wasn’t explained properly” and the number of days an employee could be called upon to work in any particular week.

5 Charging Party Healy was unhappy from the beginning with the change. She worked in
the laminating department as a wet-end operator for the last 3–4 years of her employment and
was responsible for the glues, coatings, ink, and printing of the laminated products. Healy
generally reported to Lead Person Tim Jacobs, or on occasion, to fill-in Lead Person Tom
10 Jacobs, who is Tim Jacobs brother. Healy explained the change in startup time changed family
dynamics and created economic issues for she and other unit employees. Healy testified, “[I]f
you come in on Sunday night, a lot of people plan things on Sundays with their families, and
you would have to either go to bed earlier and get a nap in or you would not be able to attend
those [family] functions.” Healy also objected that they were not paid double time for Sunday
and they had to come in on holiday evenings if the holiday fell during the week. Healy said it
15 also changed coworker Tom Jacobs’ family dynamics because he was the care giver for his
mother. Healy talked weekly with Tom Jacobs about the change. She also spoke about the
change with coworkers from October 2010 until her termination on March 31, 2011. As a result
of her conversations with coworkers, Healy found “some that were in favor of it and some that
really didn’t like it.”

20 Healy explained the changed startup time was discussed at the union membership
meetings held on the third Monday of each month. Healy attended as many monthly meetings
as possible and specifically attended the March 21, 2011 meeting at a local restaurant.
According to Healy, 7 to 8 other unit employees attended while Union President Nett placed the
25 number at 10. Laminating employee Newbert specifically named certain employees that were
present namely Carol Healy, Tom Jacobs, Joe Hostetter, and Lisa Vandeloop. Union President
Nett, Vice Present Steve Wilz, Treasurer Tim Voelker, and Recording Secretary Tim Jacobs
were present. It is undisputed several members talked about the change in startup time and did
so at length. Healy stated employees “were frustrated and confused because we weren’t sure
30 exactly how it was suppose to work.” She explained the frustration centered, in part, around:
“‘How the Sunday night start-ups worked with overtime,’” and “‘if you missed a day during the
week, your Friday night would be straight time.’” Union President Nett said the discussions
centered around whether pay would be straight, time and a half, or double time for weekend
work. Nett added the discussions were “heated” and some employees’ were adamant about
35 going back to a Monday startup time.

Laminating department employee Newbert said the “heated” discussions were not
getting anywhere but “just kept going and going and going.” According to Newbert, Union
President Nett then stated: “Well, we’ll do a survey.” Newbert asked who would do the survey
40 and Nett responded, “We’ll have amongst one of you guys go out and do it.” Newbert protested
asking how he would have time to do a survey. According to Newbert, Nett responded,
“Somebody here has to do it,” adding: “[W]hen you get this survey done with results, bring it to
me, and then I’ll take it to a union vote.” Newbert said Nett further added, “One of you will
distribute and bring the results to me.” Thereafter the meeting ended. Newbert said when he left
45 the meeting he had no idea who would take the lead with respect to the survey. Newbert thought
about doing it but was glad he didn’t after seeing what happened.

Charging Party Healy testified Union President Nett looked straight at she and Tom Jacobs and said, "Put together a survey. Get people's opinions and see if they—what they like about it, what they don't." According to Healy, Union Recording Secretary Tim Jacobs, Vice President Wilz, and Treasurer Voelker all nodded their heads in approval when Union President
5 Nett told them to create a survey and get the employees opinions. Healy said no timeframe was given for completion of the survey.

Union President Nett acknowledged the issue of a "survey" came up at the March 21 meeting adding, "I do believe it was my idea." Nett said the startup time issue had been brought
10 up for a few months and "it was something we just needed to put to bed, I guess, or let it go." Recalling specifically, Nett testified, "I just do believe that all I said was just that maybe we should do a survey." Nett said he did not direct anyone to conduct a survey, nor did he talk specifically with anyone about doing a survey. Nett, for example, denied having a direct conversation with laminating employee Newbert about the survey. Nett added no one took him
15 up on doing the survey and, as far as he knew, no one wanted to conduct one. Nett also said he wanted to talk with his International union representative to see if an additional vote on the startup time could be taken. Nett stated he would have gone to the Company prior to conducting any survey to obtain the Company's input and approval. Nett specifically denied authorizing or directing anyone to conduct a survey and added none of the other union officers did so. Nett
20 testified that when he left the union meeting on March 21, 2011, he did not believe anyone was going to create and/or conduct a survey.

Charging Party Healy created, with assistance from Acting Lead Person, Tom Jacobs, a handwritten draft of the survey at her workstation during working time the night of March 29,
25 2011. Healy said they chose March 29 to create the survey because Tom Jacobs received a phone call from Union Recording Secretary Tim Jacobs asking if the survey had gotten put together. Healy said she and Acting Lead Person Tom Jacobs created the survey because, "there was frustration and confusion on the floor about the Sunday night start-ups, and we wanted to get members' opinions to see if we could find some common ground, see what people . . .
30 thought, you know." Healy and Tom Jacobs showed the handwritten draft to Union Steward Jeff Nitz (a roll grab driver on third shift). Nitz suggested allowing employees to write out what they liked or disliked about the startup time change. Healy and Tom Jacobs incorporated the suggested change. Tom Jacobs typed the draft and printed the necessary copies of the survey to distribute.
35

The survey distributed by Healy and Tom Jacobs follows:

SUNDAY NIGHT START UP SURVEY

40 Are you aware?
There is a "Side Letter" stating that if you
don't have 40 hrs in, weekend work will be straight time.

45 yes
no

survey could have taken place. Nett added, "I guess they asked me if I had authorized it, and I said, 'No. I wasn't aware it was going to happen or be circulated.'"

5 Human Resources Manager Gonnering said that after she learned from Hollin and Nett a survey had been taken she and Hollin immediately began an investigation with assistance from Nett and Union Treasurer Voelker. Gonnering quickly ascertained Charging Party Healy and Acting Lead Person Tom Jacobs had drafted and distributed the survey. Union Vice President Wilz provided Healy's original handwritten draft to the Company. Gonnering said Healy and Tom Jacobs acknowledged drafting and distributing the survey. Gonnering said Healy told her 10 she had been told by Union President Nett to do the survey. Gonnering then confronted Nett who told her the Union had not authorized the survey. Gonnering said she believed Nett because "our relationship has been so good, I have no reason to believe that Dan Nett would ever be dishonest to me . . . regarding the union-management relationship." Gonnering also stated Union Treasurer Voelker, Vice President Wilz, and Recording Secretary Tim Jacobs all 15 indicated no one had been directed to draft or distribute a survey.

Human Resources Manager Gonnering testified she had concerns regarding the accuracy of the survey. She said for example, the reference to a "side letter" was not accurate because there was no "side letter," and added that if one existed she would have created it and she did not 20 do so. Gonnering questioned that part of the survey regarding no double time pay ever for the third shift. Gonnering considered that inaccurate because if an employee came to work early at 9:30 p.m. for the third shift on Sunday the employee would be paid double time the first 30 minutes. Gonnering acknowledged employees working the regularly scheduled 10 p.m. to 6 a.m. third shift on Sunday night would be paid straight rather than double time.

25 Gonnering acknowledged she, "didn't realize how big of a situation it [shift start change] had become and it wasn't until . . . March, when this whole survey got drafted, that I even realized how big of a deal it was. . . ."

30 Human Resources Manager Gonnering issued disciplinary points to Healy and Tom Jacobs March 31, 2011, for their role in drafting, creating, and distributing the survey, however, she met with Union President Nett and Treasurer Voelker beforehand to inform them. Gonnering gave Healy and Tom Jacobs the same number of disciplinary points noting it could be determined later which points would stand after she spoke with Healy and Tom Jacobs. 35 Gonnering decided, after meeting separately with Healy and Tom Jacobs, on March 31, 2011, that all the points for both would remain. Gonnering issued each of them a prepared disciplinary letter at the end of her meeting with them. The letters were essentially identical, with respect to points given and justification for the points. The letter for Healy is set forth in full:

40 Carol Healy
721 Cedar Street
Neenah, WI 54956

45 March 31, 2011

Dear Carol,

5 It has been brought to Rick Hollin (VP—Operations) and Jamie Gonnering (Human Resource Manager) attention that you participated in creating and distributing a non-authorized survey to union employees about Sunday night start ups and double time concerns. This survey was distributed to union employees beginning on March 29th. Several employees brought this survey to our attention and asked us to look into the situation further.

Upon reviewing the survey, we have found the following:

- 10
- 1) The survey was falsely worded.
 - 2) It was not authorized by your union leadership team, nor did they tell you to distribute it.
 - 3) It was not authorized by the management team, nor did they tell you to distribute it
 - 15 4) The survey was completed during work time on Dura-Fibre’s computer, paper, and printers without supervisory permission.

20 You will be issued disciplinary points for this situation, resulting in a total of **20 points** (Labor Agreement, October 19, 2009 to June 22, 2013, Exhibit B, Plant Discipline Rules, General Rules) due to the following violations:

- **Group 1(4 points)**
 5. Posting, distributing, or circulating unauthorized notices, posters or handbills on Company premises or causing same to be done.
- 25 • **Group 1(4 points)**
 6. Wasting Company time and/or material.
- **Group 1(4 points)**
 8. Performing personal work with Company equipment without supervisory permission.
- 30 • **Group 2(8 points)**
 6. Purposely providing false information to the Company for personal gain.

35 Your current disciplinary folder indicates your points balance is at 24 points. With the newly assessed points (20 points), you will be at a total point balance of 44 points. The union contract states (Labor Agreement, October 19, 2009 to June 22, 2013, Exhibit B, Plant Discipline Rules, Plant Discipline rules):

- 40
1. Any employee who accumulates twenty-four (24) points for violation of Plant Rules is just cause for discharge.

Therefore, this incident has resulted in the termination of your employment effective March 31, 2011 due to a violation of disciplinary points.

45 Your final check will be mailed to you at your home address and your insurance will end March 31, 2011 at 12pm. COBRA paperwork will be mailed to you at

your home address through EBC. If you should have any additional questions, we expect that you would call either Rick Hollin (969-3624) or myself (969-3622).

Sincerely,
/s/ Jamie Gonnering

Jamie Gonnering
Human Resource Manager

Cc: Can Nett, Rick Hollin, Jason Gscheidmeier

The plant discipline rules, general rules, set forth in the above-disciplinary letter are accurately quoted in full and taken from the parties collective-bargaining agreement. Gonnering explained that while there is no mention of the employee handbook in the disciplinary letters issued to Healy and Tom Jacobs, employees can always reference the handbook for clarification of what the parties collective-bargaining agreement means regarding plant disciplinary rules, general rules. Gonnering testified the provisions of the parties collective-bargaining agreement always take precedence over the employee handbook with the exception of matters being specifically covered by Federal or State statute.

One portion of the employee handbook Human Resources Manager Gonnering said needed to be read in conjunction with of the disciplinary letters issued to Healy and Tom Jacobs follows:

Solicitation and Distribution of Literature

No employee may solicit, or distribute literature in any form (including e-mails), in working areas during working time. "Working time" means the time in which the employee is required to be performing work, but does not include break periods or meal periods or periods in which the employee is properly excused from performing work. An employee who is not on working time shall not solicit employees or distribute literature to employees who are on working time. The rule applies to solicitation and distribution of literature of all types for causes or organizations.

On April 3, 2011, grievances were filed on behalf of Healy and Tom Jacobs. It stated in Healy's grievance, "The survey that was drafted for the union committee was for the union body for discussion of Sunday night start-up, pros & cons. The purposes was to help resolve conflicts of Sun pm start-up which was to benefit the Union & the Company." The relief sought was "all points to be dropped."

Healy and Tom Jacobs' grievances were addressed by the Union and the Company at a meeting on April 6, 2011. Gonnering and Hollin were present for the Company along with Nett, Voelker, Wilz, and Tim Jacobs for the Union. Union President Nett recalled that either Human Resources Manager Gonnering or Operations Manager Hollin told the union committee something to the effect, "If this matter goes to arbitration and the Company finds out that the

union group misrepresented themselves, i.e. union executive committee, about authorizing this survey, they will be issued points for posting, distributing, and circulating.”

5 Gonnering testified the Company agreed to reduce the disciplinary points given Healy to
12. The Company agreed to dismiss the 4 points for plant discipline rule group 1 number 6,
“Wasting Company time and/or material” because Healy and Tom Jacobs’ actions did not cause
the laminating machine to be shut down. The Company also agreed to dismiss these 4 points
10 given Healy for plant discipline rule group 1 number 8; “Performing personal work with
Company equipment without supervisory permission.” The Company dismissed these points
because her acting lead person, Tom Jacobs, told her to do it. The Company did not dismiss, but
rather left in place, the plant disciplining rule group 1 number 5, “Posting, distributing, or
circulating unauthorized notices, posters or handbills on Company premises or causing same to
15 be done” points (4) given Healy, as well as the plant disciplinary rule group 2 number 6,
“Purposely providing false information to the Company for personal gain” points given Healy.
The Company upheld Healy’s March 31, 2011 termination because she was subject to a “last
chance agreement,” whereby, if she received any additional discipline she would be terminated.
The parties agree Healy would not have been discharged on March 31, 2011, but for her part in
creating and distributing the survey in question.

20 Human Resources Manager Gonnering testified she was not aware of any other written
surveys at the facility prior to the March 29, 2011 survey at issue herein. Gonnering further
indicated she was not aware of any office pools for basketball or football, or for the selling of
Girl Scout cookies, Pampered Chef Cookware, Lisa Sophia Jewelry, or “those types of things
happening in the workplace during working time” prior to the trial herein.

25 Charging Party Healy, however, testified she had seen employees soliciting for various
causes while working at the Company. She explained: “I have seen school fundraisers such as
pizza sales, flower bulbs, wrapping paper, cookie dough, Girl Scout cookies; football boards and
pools . . . raffles for several outdoor clubs, entertainment books; Lisa Sophia parties; candlelight
30 parties . . . Pampered Chef parties . . . [and] PartyLite candlelight parties.” She observed such
activities in the break room, as well as on the work floor, in the laminating and connecting
departments during working time throughout the year. Healy said supervisors were present
while the soliciting was taking place and some even participated in the football pools. Healy
specifically identified Maintenance Manager Terry Thompson, Production Manager Dennis
35 Koeppel, and Operations Manager Hollis as being fully aware of these type activities.

 Laminating department employee Newbert testified he had observed employees
distributing materials for entertainment books, football pools, business cards, and fundraisers for
schools on the work floor during worktime at the Company. Newbert explained he had been
40 asked to join football pools or to help fundraisers.

 Union President Nett testified he was aware of raffles, Pampered Chef parties, Girl Scout
cookie sales, pizza sales, and those types of notices being distributed at the Company but only in
the nonwork area lunchroom. Nett first testified he was not aware of these type items being
45 carried onto the work area. However, Nett later acknowledged he was aware of charts or
football raffles on the work floor.

III. Analysis, Discussion, and Conclusions

Before an analysis of the facts is made and controlling precedent applied, it is necessary to make certain credibility resolutions. I note the facts, for the most part, are undisputed, but, nonetheless, some resolutions regarding what was said and whether certain actions were authorized is necessary and helpful. In arriving at my credibility resolutions, I have taken into account my impressions of the witnesses as they testified. I have also considered each witnesses' testimony in relation to other witnesses' testimony and in light of the exhibits presented herein. If there is any evidence that might seem to contradict the credited facts, I have not ignored such evidence, but rather have discredited or rejected it as not reliable or trustworthy. I considered the entire record in arriving at the facts herein. My observations persuade me Healy and Newbert testified truthfully. Healy's testimony was clearly in line with undisputed facts and events. She described in detail what she had heard, observed, and did without equivocation. Newbert's somewhat limited testimony was supportive of Healy's more lengthy testimony but just as unequivocal. I am unwilling to rely on Union President Nett's testimony where it conflicts with the testimony of other witnesses. Nett impressed me as attempting to avoid fully committing himself to what he was saying. As examples he testified, "I'm almost positive I told her." "I do believe I told her." "I guess they asked me if I authorized it." and, "I just do believe that all I said was just that maybe we should do a survey." In considering Nett's testimony about whether he authorized a survey regarding the startup time for the laminating machine, I have considered the fact he was told by either Human Resource Manager Gonnering or Operations Manager Hollin that if he (Nett), or the Union's executive committee, authorized the taking of a survey he and the Union's executive committee would be assessed disciplinary points also. Hereinafter, I will refer to Healy's credited testimony, and in doing so, I am specifically not relying on any testimony of Nett that would conflict with either Healy's or Newbert's testimony.

The starting point for analysis of the issues herein begins with the Company going from a three shift per day, 7-day workweek to three shifts per day, 5-day workweek. The laminating machine is in continuous operation but with a 5-day workweek it is shut down at the end of the workweek and restarted at the beginning of the new workweek. For a while, after the 5-day workweek commenced in September 2010, the laminating machine was restarted on Monday morning at 6 a.m. However, the Company and the Union, after a vote by the unit employees, agreed upon a change in the startup time from 6 a.m. Monday morning to a 10 p.m. startup on Sunday night.

A number of unit employees were unhappy with the change. They expressed concerns about how the weekend days would be paid, and, they complained the change had not been explained properly; it disrupted their weekend activities; and, created economic issues for them. Unit employees began individually talking to Union President Nett about their concerns and, starting in November 2010, raised their concerns at the regular monthly union membership meetings. The employees' concerns about the startup change were discussed thereafter daily and at each monthly union membership meeting. Union President Nett notified the Company in early 2011 that the unit employees were coming to him upset about the change. Human Resource Manager Gonnering also learned, at about the same time, of the unit employees questions and confusion regarding the change in the startup time.

Charging Party Healy started talking to fellow coworkers about the change in October 2010 and did so until her termination in March 2011. She spoke to, among others, her Lead Person Tom Jacobs and employee Newbert, both of whom shared her concerns. Some of Healy’s main concerns related to how the change in the startup time impacted weekend family dynamics and the economic impact it created.

It is against the above backdrop that Healy and several (probably 8 to 10) other unit employees attended the March 21, 2011 monthly union membership meeting and raised their concerns about the changed startup time. The meeting was “heated” with some employees’ adamant they wanted to have the startup time changed back to Monday mornings. Unit employees expressed, among other frustrations, how the new startup time was supposed to work and how overtime, time and a half, and straight time would be allocated for weekend work. The meeting just kept on going until Union President Nett announced they would do a survey and asked who among the unit employees would do it. Nett stated someone present had to do the survey and when they had done so to bring the results to him and he would take the matter to a union vote. Employee Newbert believed Union President Nett was speaking directly to him about conducting the survey. Charging Party Healy believed Nett was looking at her and Tom Jacobs when he asked for some employee or employees to put together a survey regarding the employees’ opinions, likes, and dislikes about the startup time. Union Recording Secretary Tim Jacobs, Vice President Wilz, and Treasurer Voelker all signaled their approval of President Nett’s directions to create a survey and bring the results to him. I note Union President Nett acknowledged bringing up the idea of a survey because the issue of the changed startup time had been ongoing for a while and, “we just needed to put [it] to bed . . . or let it go.” I, however, do not credit Nett’s denial he never authorized or directed anyone to create or conduct a survey, his statements and actions indicate otherwise. Nett specifically asked the unit employees at the meeting to conduct a survey and bring the results to him.

It is clear Union President Nett requested a survey be conducted and I so find. That union officials wanted a survey taken is further demonstrated by Union Recording Secretary Tim Jacobs telephoning Acting Lead Person Tom Jacobs, on March 29, 2011, asking if a survey had actually been taken. Healy and Tom Jacobs created and distributed the survey when they did because of the inquiry of Tim Jacobs to Tom Jacobs. The Union continued demonstrating its interest in the survey when Union Steward Jeff Nitz suggested changes to the language of the survey so as to specifically ask that the unit employees write out what they liked or disliked about the changed startup time. After Charging Party Healy told Union President Nett about the survey and where he could find the filled out copies, he responded it was “good” she had gotten the survey together. Nett’s interest in a survey and its results never diminished. The survey Healy and Tom Jacobs distributed addressed concerns related to straight time and premium pay for weekend work, the likes and dislikes of the Sunday night startup time and whether the employees desired to return to a Monday morning startup.

Does Healy’s (and Tom Jacob’s) creating and distributing the survey among unit employees, as well as providing the results thereof to the Union, constitute concerted activity protected by the Act? I find it does.

First, its helpful to briefly review certain guidance of the Board and courts regarding concerted activity including under what circumstances it will or will not be protected under the

Act. Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act makes it an unfair labor practice, “for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” For an employee’s activity to be “concerted” the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee him/herself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 775 F.2d 941 (D.C. Cir. 1985), sub nom. *Meyers Industries v. Prill*, cert denied 474 U.S. 948 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB* 835 F.2d 1481 (D.C. Cir 1987), cert. denied 487 U.S. 1205 (1988). The Board pointed out in *Meyers I* that although the legislative history of Section 7, the Act, does not specifically define concerted activity, it does reveal that Congress considered the concept in terms of “individuals united in terms of a common goal.” The statute requires that activities under consideration be “concerted” before they can be “protected.” As the Board observed in *Meyers I*, Section 7, of the Act does not use the term protected concerted activities only concerted activities. It goes without saying the Act does not protect all concerted activity. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. See, e.g., *Ewing v NLRB*, 861 F.2d 353 (2d Cir. 1988). It is clear the Act protects discussions and/or actions between two or more employees concerning terms and conditions of employment. Wages (straight, time and a half, and double time) are vital terms and conditions of employment and seeking clarification about or having discussions among employees about wages are at the core of Section 7 rights because wages are probably the most critical element in employment. *Parexel International, LLC* 356 NLRB No. 82, slip op. at 3 (2011). The scheduling of shift times are likewise core elements of terms and conditions of employment. In summary, on this point, it is clear Healy and Tom Jacobs engaged in concerted activity protected by the Act when they prepared and distributed a survey soliciting their coworkers views on the changed startup time for the laminating machine and how that change impacted their wages. When Healy and Tom Jacobs, at the direction of Union President Nett, prepared and distributed the survey they were also engaging in union activity protected by the Act. In this regard, I note the survey was requested by the Union in order to see if the unit employees wished to have the Union negotiate another change for the startup time with the Company.

Company Human Resource Manager Gonnering acknowledged that had Healy not participated in the preparation and circulation of the survey among her coworkers regarding the startup time for the laminating machine and pay for weekend work she would not have been disciplined or discharged on March 31, 2011. Based on the fact the Company took disciplinary action against Healy because she engaged in concerted and union activity protected by that Act, it is not necessary to engage in a *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), analysis because motivation is not an issue. *Winston-Salem Journal*, 341 NLRB 124, 133 (2004).

The Company in its posttrial brief acknowledges employers are prohibited from disciplining employees for engaging in protected concerted activity. The Company also correctly observes that not all concerted activity is protected by the Act. The Company, citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); and *Trompler, Inc. v. NLRB*, 338 F.3d 747, 748 (7th Cir. 2003), argues Healey was lawfully terminated for a breach of contract and that her actions were otherwise indefensible. In deciding the issues in *Washington*

Aluminum, the Supreme Court noted, but found not applicable in the case before it, that certain concerted activities may fall within normal categories of unprotected concerted activities such as those that are unlawful, violent, in breach of contract, or otherwise indefensible. I note the Board in *Atlantic Steel Co.*, 245 NLRB 814 (1979), observed that an employee engaged in protected concerted activity can by opprobrious conduct also lose the protection of the Act.

In analyzing the Company’s contention that Healy’s creating, distributing, and collecting the survey on the startup time and related pay issues was a breach of contract I examine the contract rule relied upon by the Company in its defense. The rule at issue states employees are prohibited from, “Posting, distributing, or circulating unauthorized notices, posters or handbills on Company premises or causing same to be done.” This rule is overly broad and invalid and may not serve as a defense for the Company. It is clear an employer may, without violating the Act, make and enforce reasonable rules covering the conduct of employees on employer time. Stated differently, and more applicable herein, an employer may impose certain restrictions on its employees’ right to engage in protected concerted and/or union solicitation and distribution without violating the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). However, any restrictions placed on employee rights must be clearly limited in scope and not interfere with or reasonably tend to chill employees in the exercise of their Section 7 rights. The appropriate inquiry for determining whether certain work rules (or contract provisions) violate Section 8(a)(1) of the Act is whether the rules or provisions would reasonably tend to chill employees in the exercise of their Section 7 rights. See, e.g., *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd. mem.* 203 F.3d 52 (D.C. Cir. 1999). If a rule or provision “explicitly” restricts Section 7 activities, as is the case herein, it is unlawful. *Lutheran Heritage Village – Livonia* 343 NLRB 646 (2004). The rule the Company contends Healy violated clearly and explicitly bans and/or prohibits distributing or circulating, for example, surveys related to working conditions and/or wages on company premises. The rule herein places no limitations on its application or scope. For example, it is not limited to actual working time or in work areas and includes employees’ break or lunchtimes.

I reject the Company’s contention the rule set forth above, and for which Healy was disciplined, must be read in conjunction with a section regarding solicitation and distribution in the employee handbook. The limitations therein do not include, for example, break or meal times. First, if the Company intended to discipline Healy pursuant to the employee handbook, it seems odd Human Resource Manager Gonnering did not so state in the disciplinary and discharge letter she issued Healy on March 31, 2011. Second, Healy was never told her discipline was based, in part, on provisions in the employee handbook. Third, although all employees were provided a copy of the employee handbook there is no showing they were specifically told the provision on solicitation and distribution somehow supplemented the collective-bargaining agreement provision. Human Resource Manager Gonnering’s suggestion that employees could use the employee handbook to clear up any uncertainty in provisions of the collective-bargaining agreement, such as the rule on solicitation, is not a valid defense for the Company. The Company may not place on employees the burden of having to look at other, even perhaps a related document, to clarify its enforced overly broad solicitation rule. Finally, the collective-bargaining agreement, by its terms, reflects that the provisions of the agreement prevail in the event the employee handbook conflicts with the collective-bargaining agreement. To the extent the Company contends the rule is valid because it is a product of collective bargaining is also without merit and fails. The Supreme Court in *NLRB v. Magnavox of*

Tennessee, 415 U.S. 322 (1974), found a ban on distribution in an agreement to be invalid because it stifled the organizational rights of employees, which rights are at the core of the representation and bargaining provisions of the Act. The Supreme Court made it clear banning the distribution of literature was a right that could not even be bargained away by the employee's representative. Stated differently, the defense of waiver is not available to the Company herein because the parties can not waive or bargain away core Section 7 rights guaranteed to employees.

The Company's contention Healy's actions, related to the survey were not protected because the actions were not authorized by the Company or the Union is without merit. Healy, in the circumstances herein, did not need the Company's or the Union's authorization or approval to engage in the concerted activity she participated in. See *Naples Community Hospital*, 355 NLRB No. 171, slip Op. 50–51 (2010). Her activities were protected by the Act. Even if Healy somehow needed authorization from the Union and/or the Company, which I find she did not, she had approval from both. The evidence establishes Healy and Tom Jacobs acted at the request of Union President Nett and other union officials to create, distribute, collective, and return a survey to the Union. The Union followed up on Nett's request with a telephone call to Tom Jacobs on March 29, 2011, from Union Recording Secretary Tim Jacobs asking whether a survey had been put together. Union President Nett, after being told the survey had been conducted, declared to Healy her actions related to the survey were "good." Simply stated, Healy and Tom Jacobs had the authorization, approval, and encouragement of the Union to conduct the survey. I am persuaded Healy had tacit authorization from the Company to conduct the survey. Tom Jacobs, her acting lead person, helped create the survey. Lead Person Tom Jacobs also typed and prepared the necessary copies of survey giving half to Healy to distribute in the laminating department. Healy had implied approval of management through the actions of her acting lead person. It is clear Human Resource Manager Gonnering considered Acting Lead Person Tom Jacobs to have certain authority on behalf of the Company. She agreed to drop the disciplinary charge against Healy that she "perform[ed] personal work with Company equipment without supervisor permission." Gonnering said the Company agreed to drop that charge because Acting Lead Person Tom Jacobs had told Healy to prepare a draft survey.

Other asserted reasons, raised by the Company, that Healy's actions were unprotected and she could be lawfully disciplined are likewise without merit. The Company contends Healy, by helping to prepare and distribute the survey was attempting to bargain collectively with the Company as a minority group or was trying to interject her personal self-interest into the startup time issue. It is clear Healy's efforts with respect to the survey were for, and not to bypass, the Union or inject only her specific views into the situation. Healy was working with and for the Union and not in any way attempting to bargain with the Company as a minority union. The results of the survey were provided by Healy to the Union for whatever use the Union desired. I note that after the survey was conducted, the Union and the Company agreed to return the startup time to Monday mornings.

Even if I concluded, which I do not, that the parties collective-bargaining agreement provision at issue herein had, in this case, to be read in conjunction with the employee handbook provision, I would still find Healy's discharge unlawful. Even if the two rules combined form a valid rule, the rule was discriminatorily enforced against Healy. The evidence establishes the Company permits solicitations for and distribution of, for example, football pools in working areas during working time with no resulting disciplinary action. Some supervisors have even

participated in such football pools. Maintenance Manager Terry Thompson, Production Manager Dennis Koeppel, and Operations Manager Hollis were aware of these various activities. Still other types of solicitations have occurred during working time and in working areas involving, for example, Pampered Chef, Party Lite Candlelight, and Lisa Sophia jewelry parties. The Company may not lawfully single out Healy while it allows other solicitations to take place with no disciplinary action.

The Company contends Healy’s creating, circulating, and collecting the survey herein was conduct outside the protection of the Act because Healy violated the Company’s rule against “purposely providing false information to the Company for personal gain.” The Company’s contention is factually without merit. Healy never provided, nor intended the survey be provided, to the Company. Human Resource Manager Gonnering only received the original hand draft of the survey because Union Vice President Wilz provided it to her during the investigation by the Company of the survey incident. Gonnering admitted Healy never gave the survey to anyone in management. Because I have concluded Healy never provided the survey information to the Company, I find it unnecessary to decide if any information in the survey was false, or, if so, was it maliciously or recklessly false. The Company advanced no valid defense or lawful justification for disciplining and discharging Healy.

CONCLUSION OF LAW

By on or about March 31, 2011, disciplining and then discharging its employee Carol Healy because she engaged in protected concerted and union activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act. Additionally, the Company violated Section 8(a)(1) of the Act by promulgating and maintaining a rule in its collective-bargaining agreement that unlawfully restricts employees’ ability to post, distribute, and/or circulate handbills.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the unlawful conduct toward Healy, the Company must, within 14 days of the Board’s Order, offer her reinstatement to her former job or, if her former job no longer exists, to a substantially equivalent job without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any lost wages and benefits as a result of her March 31, 2011 discipline and discharge, with interest. Backpay will be computed as outlined in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) (backpay computed on quarterly basis). Determining the applicable rate of interest will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (adopting Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employee shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). I also recommend the Company, within 14 days of the Board’s Order, be ordered to remove from its files any reference to its March 31, 2011 discipline and discharge of Healy and, within 3 days thereafter notify Healy in writing it has done so that her discipline and discharge will not be used against her in any manner. Further, the Company is to forthwith

rescind that portion of the parties' collective-bargaining agreement set forth at general rules, group 1 rule 5 page 20 that states, "Posting, distributing or circulating unauthorized notice, posters or handbills on Company premises or causing same to be done." The Company shall notify the employees in writing that this has been done. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Company, Dura-Fibre LLC, Menasha, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, discharging, or otherwise discriminating against its employees for engaging in concerted and/or union activity protected by the Act.

(b) Promulgating and maintaining a rule in its collective-bargaining agreement that unlawfully restricts its employee's ability to post, distribute, and/or circulate handbills.

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

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

(a) Within 14 days from the date of the Board's Order, offer Carol Healy full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Carol Healy whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline and discharge of Carol Healy, and within 3 days thereafter notify her in writing that this has been done and that her discipline and discharge will not be used against her in any way.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Rescind that portion of the parties collective-bargaining agreement set forth at general rules, group 1 rule 5 page 20 that unlawfully restricts employees ability to post, distribute, and/or circulate handbills.

5 (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 the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

10 (f) Within 14 days after service by the Region, post at its Menasha, Wisconsin facility, copies of the notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company 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 Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since March 31, 2011.

25 Dated, Washington, D.C., January 19, 2012.

30

William N. Cates
Administrative Law Judge

⁵ If this Order is enforced by a judgment of the 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 and Order of the National Labor Relations Board."

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 discipline, discharge, or otherwise discriminate against any of you for engaging in concerted and/or union activity protected by the Act.

WE WILL NOT promulgate and maintain a rule in our collective-bargaining agreement that unlawfully restricts employees' ability to post, distribute, and/or circulate handbills.

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

WE WILL, within 14 days from the date of this Order, offer Carol Healy full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Carol Healy whole for any loss of earnings and other benefits resulting from her discipline and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline and discharge of Carol Healy, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discipline and discharge will not be used against her in any way.

WE WILL rescind those portions of the collective-bargaining agreement set forth at general rules, group 1 rule 5 page 20 that unlawfully restricts employees' ability to post, distribute, and/or circulate handbills.

DURA-FIBRE LLC
(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.

310 West Wisconsin Avenue, Federal Plaza, Suite 700W, Milwaukee, WI 53203-2211
(414) 297-3861, Hours: 8:00 a.m. to 4:30 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, (414) 297-3819.