

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9**

**CONAGRA FOODS, INC.**

**Cases 9-CA-089532  
9-CA-090873**

**and**

**UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 75**

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**CONAGRA FOODS, INC.'S  
BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION  
OF THE ADMINISTRATIVE LAW JUDGE**

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Respondent, ConAgra Foods, Inc. (hereinafter “ConAgra” or the “Company”), for its Brief in Support of Exceptions to the Decision of the Administrative Law Judge in the above-captioned matter states as follows:

## **I. INTRODUCTION**

This case came for hearing before the Honorable Arthur J. Amchan, Administrative Law Judge (hereinafter “ALJ”) on March 25 and 26, 2013. On May 9, 2013, the ALJ issued his Decision JD-34-13. The ALJ found that the Acting General Counsel failed to establish that ConAgra, through certain employee meetings, violated the National Labor Relations Act (the “Act”) by telling employees they cannot “talk” about the Union while on company time or on the production floor, and dismissed that portion of the Amended Complaint. ConAgra takes no exception to that decision.

The ALJ did, however, determine that ConAgra violated the Act by issuing Jan Haines a verbal warning for solicitation and by posting a letter regarding employees’ solicitation rights. As explained below, these decisions were in error. First, the ALJ erred in mischaracterizing Haines’s discipline and in failing to find that Haines asked two employees to sign authorization cards on the production floor during production time despite an abundance of evidence in the record. Second, the ALJ erred in determining that asking an employee to sign an authorization card, without more, does not constitute solicitation. Third, the ALJ erred in granting the Acting General Counsel’s untimely amendment to the Amended Complaint, although ConAgra received no such notice of such amendment, and in thereafter finding that a posting, which was the subject of the amendment, violated the Act on its face. As a result, ConAgra respectfully requests the National Labor Relations Board (the “Board”) to reject the ALJ’s Order and dismiss the remaining allegations contained in the Amended Complaint.

## II. STATEMENT OF THE CASE

### A. The Alleged Unfair Labor Practices and the ALJ's Decision.

The Acting General Counsel alleged that ConAgra, by Phillip Craft, on or about August 22, 2012, told employees that they cannot “talk” about the Union while on company time or on the production floor during the following meeting times: 5:00 a.m., 6:30 or 7:00 a.m., 2:00 p.m., and 10:00 p.m., in violation of Section 8(a)(1) of the National Labor Relations Act (hereinafter the “Act”). (GC Exh. 1(e), ¶¶ 5(a)-(d), 7). The Acting General Counsel further alleged that on or about October 2, 2012, ConAgra issued a verbal warning to its employee Janette S. Haines because Haines formed, joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, in violation of Sections 8(a)(1) and (3) of the Act. (GC Exh. 1(e), ¶¶ 6(a)-(b), 8). ConAgra timely filed its Answer denying these allegations. (GC Exh. 1(i)). Subsequently, but prior to trial, the Acting General Counsel amended her Complaint, requesting a notice reading remedy. (GC Exh. 1(j)). ConAgra timely filed its Answer to Amended Complaint, submitting that the extraordinary remedy of a notice reading is not necessary and goes beyond what is necessary to erase the effect of any alleged misconduct. (GC Exh. 1(l)). At the close of the hearing regarding this matter, after both parties had rested their cases, the Acting General Counsel moved to amend the complaint again to allege as a separate independent allegation that Respondent’s exhibit R4 violated Section 8(a)(1) of the Act (Tr. 428).

This matter was heard before the ALJ in 2 days of trial in Dayton, Ohio, on March 25 and 26, 2013. On May 9, 2013, the ALJ issued his decision. The ALJ concluded that the Acting General Counsel failed to establish that ConAgra, through certain employee meetings, violated the Act by telling employees they cannot “talk” about the Union while on company time or on

the production floor, and dismissed that portion of the Amended Complaint.<sup>1</sup> The ALJ did, however, determine that ConAgra violated the Act by issuing Jan Haines a verbal warning for solicitation and by posting a letter regarding employees' solicitation rights.

**B. General Background.**

The ConAgra plant located in Troy, Ohio, produces Slim Jim® and bakery products, which include pizza and breadsticks for school lunches (Tr. 290). The Troy plant currently has approximately 750 employees, 50 of which are salaried (*Id.*). Scott Adkins is the Plant Manager for the Troy plant (Tr. 289). He has been the Plant Manager for eight (8) years (Tr. 290). Thomas Thompsen is the Manager of Human Resources for the Troy plant, and has had that position for over three (3) years (Tr. 310).

ConAgra utilizes a handbook at its Troy plant, which contains policies for ConAgra (Tr. 315). Among those policies is a solicitation/distribution policy, which provides the following:

In the interest of all Associates and the Company, no solicitation or distribution of non-business related material is allowed during work time or in work areas.

Solicitation may include solicitation for funds or contributions for organizations from customers, Associates, family members of Associates, or persons from other firms doing business with the Company, including but not limited to baseball pools, raffles, the sale of cosmetics, etc.

In addition, trespassing, soliciting or distributing literature by any non-Associate on Company property is prohibited.

(R Exh. 2).<sup>2</sup> ConAgra also provides training regarding its policies. During a town hall meeting in 2011, ConAgra explained its solicitation/distribution policy to its employees (Tr. 316). This

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<sup>1/</sup> As noted in the Introduction section of this brief, ConAgra takes no exception to that decision and as such it is not addressed in this brief.

<sup>2/</sup> The validity of ConAgra's solicitation/distribution rule is not at issue.

training included a slideshow with a slide that explained ConAgra's solicitation/distribution policy as follows:

#### General Information on Solicitation/Distribution

- No distribution rule
  - Prohibit in work areas at all times
  - Prohibit in all areas during working time
  - Prohibit all non-employees from distributing
- No solicitation rule
  - Prohibit all solicitation during working time
  - Prohibit solicitation in a work area on employee's own time
  - Prohibit all non-employees from soliciting

(R Exh. 6).<sup>3</sup> ConAgra additionally had this policy posted in both of its buildings in Troy in conspicuous locations in the main hallways, alongside the Employee Rights Notice Posting,<sup>4</sup> which provides employee rights under the Act (Tr. 291-93). That letter provides the following relating to ConAgra's solicitation/distribution policy:

We also wish to remind employees that discussions about unions are covered by our Company's Solicitation policy. That policy says that solicitation for or against unions or other organizations by employees must be limited to non-working times. Distribution of materials is not permitted during working time or in work areas at any time.

(R Exh. 4).<sup>5</sup>

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<sup>3</sup>/ As noted above, the validity of ConAgra's solicitation/distribution rule is not at issue.

<sup>4</sup>/ The Employee Rights Notice Posting was not posted in relation to a settlement agreement (Tr. 292-93). This posting is more akin to an OSHA information poster (Tr. 292). ConAgra voluntarily posted this informational poster despite the D.C. Circuit Court of Appeals ruling temporarily enjoining the NLRB's rule requiring the posting of this poster (Tr. 292). *See Nat'l Ass'n of Manufacturers v. NLRB*, No. 12-5068 (D.C. Cir. Apr. 17, 2012).

<sup>5</sup>/ As discussed further in the Argument below, Counsel for the Acting General Counsel moved to amend the Amended Complaint to allege that this policy violates Section 8(a)(1) of the Act. Granting this motion would violate due process. Regardless, this policy does not violate the Act for it merely directs employees to ConAgra's admittedly lawful solicitation policy.

Consistent with the above policies, at ConAgra, employees are allowed to solicit for the Union anytime that is not in a working area during work time. A working area does not include parking lots, break rooms, restrooms, or hallways. (Tr. 294.) Additionally, ConAgra allows employees to generally talk or discuss about the Union at any time. There is no policy that prohibits employees from talking about the Union. (Tr. 294.) In fact, besides Haines's verbal warning which is at issue in this matter, there is no evidence that any employees have been disciplined for talking or discussing about the union during working time (Tr. 29-31, 61-62, 98-99, 140-41, 156-57, 180-81, 199, 238, 301, 324, 371-72).<sup>6</sup> Further, several employees testified that they talk or have heard other employees talk about the Union during working time (*Id.*).

**C. Background of Alleged Unlawful Discipline of Jan Haines for Solicitation.**

The Acting General Counsel alleged that on or about October 2, 2012, ConAgra issued a verbal warning to its employee Jan Haines because Haines formed, joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, in violation of Sections 8(a)(1) and (3) of the Act.<sup>7</sup> Haines received a verbal warning for violating ConAgra's solicitation policy after two employees reported that Haines had asked them to sign union authorization cards during working time in a working area (Tr. 321, 350, 358, 362). (GC Exh. 5). After reading statements and interviewing the employees, Megan Courtaway and Andrea Schipper, Thomas Thompsen made the decision to give Haines the discipline (Tr. 321, 326).

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<sup>6</sup>/ Crystal Lindamood testified that an employee known as "Union Joe" told her that he was suspended for 3 days for talking about the Union. She testified that she doesn't really know the reason why he was suspended, that's just what he told her. (Tr. 85.) There was no evidence presented to support this allegation and as such the testimony should be discredited.

<sup>7</sup>/ It is undisputed that ConAgra was aware of Haines's Union support and activities (Tr. 261).

Megan Courtaway testified that Haines approached her while she was on the production floor working. At that time Courtaway was cleaning. (Tr. 350.) When Haines spoke to Courtaway, Courtaway had to stop working (*Id.*). She testified that: “[Haines] called me over and asked me, or actually told me that she needs me and my husband to re-sign our union cards” (*Id.*). She testified that Haines told her that she was going to put the cards in Andrea Schipper’s locker for her and her husband to sign (Tr. 352). Courtaway stated that this was the first time she had heard anything from Haines regarding signing union authorization cards and that this was the only conversation she had with Haines about signing authorization cards (Tr. 350). She also stated that the conversation did not last long, but she did have to stop working (Tr. 352).

Andrea Schipper testified that she was standing by Courtaway when Haines asked her to sign a union authorization card (Tr. 357-58). She testified that “Jan Haines came up to Megan Courtaway and told us that we needed to sign union cards, and that she’ll put them in my locker. And Megan just walked away. And she said that Megan’s husband needed to sign the (sic), too” (Tr. 358, 362). Schipper testified that when Haines asked Courtaway and her to sign union authorization cards, she was on the production floor waiting to cut on the line. She also testified that Haines was holding a sanitizer bottle, because she was on the floor cleaning. (Tr. 358). She also stated that this was the first and only time she had heard Haines asking her or Courtaway to sign a card (*Id.*). She stated that after this conversation, she went with Courtaway to report to their supervisor to tell him that Haines had asked them to sign union authorization cards (Tr. 360-61). After this, she went to her locker to see if the union authorization cards were in her locker. They were (*Id.*).

Although both Courtaway and Schipper testified that the only time Haines asked them about union authorization cards was while they were working on the production floor [Tr. 350,

358], Haines testified that she had first asked both Courtaway and Schipper if they were going to re-sign union authorization cards in the restroom [Tr. 271-72]. Haines also testified that she again asked Schipper about signing a union authorization card in the restroom and told her at that time that she would put three cards in her locker because Courtaway and her husband were also going to sign cards (Tr. 272-73). Haines testified that on another occasion, she passed Courtaway and Schipper between two machines and said, “hey, I put those cards in your locker” (Tr. 274, 285). During this third conversation, Haines testified that the conversation took place on the production floor between machines called “Optics” and that she was working, Courtaway was working, and Schipper was working (Tr. 285-86). Haines also admitted she put the cards in Schipper’s locker because she wanted Courtaway and Schipper to sign them (Tr. 287).

### **III. QUESTIONS INVOLVED AND TO BE ARGUED**

The Questions Involved and to Be Argued are the following, along with those contained in ConAgra’s Exceptions to the Decision of the Administrative Law Judge, and those addressed in the Law and Analysis, below:

1. Whether the ALJ’s recitation of facts and credibility determinations regarding the verbal warning to Janette Haines were based on substantial evidence as a whole?

Primary Exceptions on this issue are Respondent’s Exceptions: 1-31

2. Whether ConAgra violated Section 8(a)(3) and (1) by issuing Janette Haines a verbal warning for solicitation?

Primary Exceptions on this issue are Respondent’s Exceptions: 12-34; 45

3. Whether the ALJ incorrectly concluded that asking an employee to sign an authorization card is not solicitation?

Primary Exceptions on this issue are Respondent’s Exceptions: 29-34

4. Whether the ALJ incorrectly concluded that Haines’s actions did not constitute solicitation?

Primary Exceptions on this issue are Respondent’s Exceptions: 12-34

5. Whether the ALJ incorrectly construed the Acting General Counsel's motion to amend as a motion to conform the pleadings to the evidence?

Primary Exceptions on this issue are Respondent's Exceptions: 35-36; 38

6. Whether the ALJ incorrectly granted the Acting General Counsel's motion to amend?

Primary Exceptions on this issue are Respondent's Exceptions: 35-36; 38

7. Whether the ALJ incorrectly found that no additional evidence could have a bearing on the additional allegation in the amendment?

Primary Exceptions on this issue is Respondent's Exception: 35-36; 38-39

8. Whether the ALJ incorrectly found that the letter posting was overly broad and violates Section 8(a)(1)?

Primary Exceptions on this issue are Respondent's Exceptions: 40-44; 46

9. Whether the ALJ incorrectly found that the letter posting violates Section 8(a)(1)?

Primary Exceptions on this issue are Respondent's Exceptions: 40-44; 46

10. Whether the ALJ's Conclusions of Law, Remedies, and Recommended Order were based in fact and law?

Primary Exceptions on this issue are Respondent's Exceptions: 45-48

#### **IV. LAW AND ANALYSIS**

##### **A. The ALJ Erred in Mischaracterizing Haines's Discipline.**

At the outset, it is important to clarify the reason that Jan Haines's received a verbal warning. In his decision, the ALJ confuses the reasoning behind her discipline, finding that there was no evidence that Haines was attempting to have employees actually sign authorization cards on the production floor. (ALJ Decision p. 8). The record shows that this was not the reasoning behind her discipline. Rather, Haines was disciplined for *asking* employees to sign union authorization cards on the floor. Her written discipline specifically states the following:

On 9/24/12, we received two complaints from your coworkers that you solicited them in a working area, while you and your coworkers were working, and *you asked them to sign union cards*.

(GC Exh. 5). As explained below, Tom Thompsen, the Manager of Human Resources, made the final decision regarding Haines's discipline (Tr. 321, 326). He made the decision after interviewing and reviewing statements of Megan Courtaway and Andrea Schipper, who testified at trial that Haines's had approached them on the production floor and asked them to sign union cards (Tr. 321, 326, 350, 352, 355, 358, 360, 361, 362, 364). ConAgra does not claim there is any evidence that Haines was disciplined for actually handing out union authorization cards on the production floor. Rather, ConAgra disciplined Haines for asking employees to sign union authorization cards on the production floor and claims that the act of asking employees to sign union authorization cards constitutes solicitation and was unprotected because Haines asked employees to sign cards on the production floor during working time. (GC Exh. 5; Tr. 321, 326, 350, 352, 355, 358, 360, 361, 362, 364).

The ALJ incorrectly emphasized a small portion of testimony from Holmes, who worked in human resources under the direction of Thompsen, in assessing Haines's discipline. Holmes testified that he told Haines that employees had reported that she was offering cards for them to sign on the floor (Tr. 336). From this testimony, the ALJ concluded that the investigation of Haines's conduct was inadequate, inaccurate, and biased and indicated discriminatory motive. However, there is no allegation in the Amended Complaint relating to the investigation of Haines's conduct; rather the allegation is limited to her actual discipline.

Additionally, the record shows that Holmes did not make the decision to discipline Haines, he only informed her of this decision. Tom Thompsen clearly testified that he made the final decision to discipline Haines's for solicitation after reviewing statements written by Schipper and Courtaway and interviewing both of them (Tr. 321, 326). He also testified that he does not always attend disciplinary meetings although he makes the discipline decision (Tr. 321).

There is not a shred of evidence that Holmes was part of the actual decision to discipline Haines. Indeed, he testified that he did not personally speak with either Courtaway or Schipper about their statements (Tr. 338). Thompsen, the decision-maker, on the other hand, testified that he reviewed the statements and talked with both Courtaway and Schipper in coming to his decision to discipline Haines (Tr. 321, 326). Although the ALJ may not agree with the way ConAgra came to its decision to discipline Haines, he should not substitute his business judgment for that of an employer. *Lamar Advertising of Hartsford*, 343 NLRB 261 (2004).

The ALJ states that “[t]here is no explanation in this record as to why Megan Courtaway felt compelled to report to her line lead that Haines had left authorization cards in *Andrea Schipper’s locker*.” He goes on to also state that “[t]here is no explanation as to why the line lead immediately sent the two employees to their supervisor to write out a statement.” (ALJ Decision p. 8) (emphasis added). First, this information is irrelevant as to the discipline of Haines. Neither Courtaway nor her line lead is a supervisory employee and neither made the decision to discipline Haines. Second, there is explanation in the record as to why Courtaway would report such conduct and the line lead would send her to her supervisor. Not only did Courtaway report that Haines had left authorization cards in her locker, but there is more than sufficient evidence, and none to the contrary, that Courtaway also reported that Haines actually asked her to sign the authorization cards (Tr. 350, 352, 355, 358, 360, 361, 362, 364). As explained above, ConAgra’s solicitation/distribution policy prohibits solicitation of non-business related material during work time or in work areas. This provides a clear explanation in the record as to why Courtaway and her line lead would report Haines’s conduct—they believed that Haines’s actions violated ConAgra’s solicitation/distribution policy. Indeed, Tom Thompsen,

the decision-maker, agreed that her conduct did in fact violate ConAgra's solicitation/distribution policy.

**B. The ALJ Erred in Failing to Find that Haines Asked Schipper and Courtaway to Sign Union Authorization Cards on the Production Floor During Working Time.**

In his decision, the ALJ stated that he credited the testimony of Schipper and Courtaway, but failed to find that Haines asked them to sign cards despite the abundance of testimony provided at trial. Rather, the ALJ found that Haines merely told Courtaway that she had put authorization cards in their locker. This conclusion is absurd. From the testimony at trial, it is exceptionally clear that Haines, on the production floor during working time, also asked Courtaway and Schipper to sign the cards she was going to and did in fact put in the locker:

Megan Courtaway Testimony

- “[Haines] called me over and asked me, or actually told me that she needs me and my husband to re-sign our union cards” (Tr. 350).
- **Judge Amchan:** And she told you that, she said –  
**The Witness:** Yes.  
**Judge Amchan:** -- there – I'm putting some authorization cards in Andrea's locker. I'd like you and your husband to sign them.  
**The Witness:** Yes.  
(Tr. 352).
- “[Haines] came to me and she told me that she needed Steven, which is my husband, Andrea, and I to re-sign – well, actually, no, she didn't say Andrea, I'm sorry – me and Steven to re-sign our union cards” (Tr. 355).

Andrea Schipper Testimony

- “Jan Haines came up to Megan Courtaway and told us that we needed to sign union cards, and that she'll put them in my locker. And Megan just walked away. And she said that Megan's husband needed to sign the (sic), too” (Tr. 358).
- “Well, Jan Haines told us that she would put union cards in my locker . . . to sign, and she did. So I went to my locker to see if they were there, and they were” (Tr. 360).
- **The Witness:** . . . Megan told Amanda, our line lead, that she asked us to.  
**Judge Amchan:** Well, she – that she asked you to do what?  
**The Witness:** Sign union cards.

**Judge Amchan:** That were – but, the Union cards that were in your locker.

**The Witness:** Yes.

(Tr. 361).

- “[Haines] told Megan that she was going to put three union cards in my locker for us to sign, and Megan’s husband to sign” (Tr. 362).
- “Jan told Megan she needed us to sign union cards, and her husband, also. And that she would put them in my locker” (Tr. 364).

Clearly, Courtaway and Schipper testified and reported that Haines had asked them to sign union authorization cards on the production floor during working time.

The ALJ also erred by finding that Courtaway was waiting for her production line to start at the time of her conversation with Haines. This is inaccurate. Courtaway specifically testified that she was working, specifically cleaning, when Haines approached her (Tr. 350). She also testified that she had to stop working when Haines approached her (Tr. 350, 352).

The ALJ additionally appears to credit Haines’s testimony that she had asked Courtaway and Schipper in the restroom to sign new union authorization cards prior to asking them on the production floor. (ALJ Decision p. 6). He does so despite the fact that Courtaway and Schipper both testified that the *first and only* time Haines asked to them to sign new cards was on the production floor during working time and was the incidence that resulted in Haines’s discipline (Tr. 350, 358).

**C. The ALJ Erred in Determining that Asking An Employee to Sign a Union Authorization Card is Not Solicitation.**

Specifically at issue in this matter, as recognized by the parties and the ALJ, is a legal question as to whether Haines’s action of asking employees to sign union authorization cards constitutes solicitation. In his decision, the ALJ concluded that conduct similar to that of Haines does not constitute solicitation. He determined that asking an employee to sign a union authorization card is not solicitation. As explained below, however, the ALJ was incorrect

because asking an employee to sign a union authorization card, without more, constitutes oral solicitation.

In *Wal-Mart Stores, Inc.*, the Board determined that the employer unlawfully disciplined an employee in violation of Sections 8(a)(3) and (1) because it found that the employee did not engage in conduct that was lawfully subject to the employer's no-solicitation rule. 340 NLRB 637 (2003), *enforcement denied* 400 F.3d 1093 (8th Cir. 2005). In that case, an employee received discipline after he wore a self-made T-shirt that read "Union Teamsters" on the front and "Sign a card . . . Ask me how" on the back off-duty at the employer's store and while on duty, invited a manager and employees to a union meeting that night, and in addition stated that he would like one of the employees to consider the Union and to sign a union authorization card.

*Id.* at 637-38. Relevant to this matter the Board stated the following:

In the context of a union campaign, "[s]olicitation' for a union usually means asking someone to join the union by signing his name to an authorization card." *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enfd.* 582 F.2d 1118 (7th Cir. 1978). However, an integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at that time. As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working.

*Id.* The Board found that the employee's T-shirt did not "speak' directly to any specific individual or group of individuals and it did not call for an immediate response, as would an oral person-to-person invitation to accept or sign an authorization card." *Id.* at 639. The Board further recognized that there was no claim that while wearing the T-shirt the employee encouraged any associates with whom he spoke to sign an authorization card. *Id.* Additionally, the Board determined that the employee did not engage in solicitation when he told an employee

that he would like her to sign an authorization card, because “there is no evidence that Shieldnight made any attempt to have Starr actually sign an authorization card at the time, or even that he had a card with him at the time of the conversation.” *Id.*

Chairman Battista dissented in this case, and would have found that the employee had engaged in solicitation because he asked an employee to sign a union card. *Wal-Mart*, 340 NLRB at 641 (Battista, dissenting). He defined the term “solicitation” as “the act of asking someone to do something.” *Id.* He further stated the following:

The fact that a solicitation does not prompt a “physical response” does not mean that there is no solicitation. For example, an employee who asks another to sign a union card at some future time is nonetheless engaged in solicitation. For the same reason, the absence of a tendered card at the time of solicitation does not mean that there is no solicitation. Phrased differently, a solicitation is a solicitation even if the requested action will not occur immediately.

*Id.*

Importantly, the Eighth Circuit agreed with Chairman Battista’s dissent and denied enforcement of the Board’s Order related to the employee’s discipline for asking another employee to sign a union authorization card during working time. *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093 (8th Cir. 2005). The Eighth Circuit determined that the employee said he would “like for [the employee] to have a [union authorization] card to sign,” and that such a statement constituted solicitation “even though he did not actually offer [the employee] a card at the time he asked her to sign.” *Wal-Mart*, 400 F.3d at 1099. The Court further stated that the “fact that he did not place a card directly in front of [the employee] at the time of his statement makes little difference in regard to the nature of his conversation.” *Id.* at 1100. The Court additionally noted that “[a]sking someone to sign a union card offers that individual person the choice to be represented by a union.” *Id.*

In his decision, the ALJ specifically discussed the Eighth Circuit's decision outlined above. In relation to that decision the ALJ specifically stated the following:

I am bound by Board precedent even if the Wal-Mart case is indistinguishable from the instant matter. Judges must apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied, *Waco, Inc.*, 273 NLRB 746, 749 n. 14 (1984).

(ALJ Decision p. 9) (emphasis added). It is submitted that the Board should adopt the Eighth Circuit's position in this matter.

The Board decision in *Wal-Mart* is in stark contrast to decades of binding precedent, which define solicitation as asking someone to sign a union card, without more. Prior to the *Wal-Mart* case, the Board was clear that “[s]olicitation involves asking another to do something.” *President Riverboat Casinos of Mo., Inc.*, 329 NLRB 77, 82 (1999). Indeed, since at least 1976, the Board has consistently held that solicitation in the union context generally involves asking someone to sign a union authorization card. *See W.W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enfd.*, 582 F.2d 1118 (7th Cir. 1978) (solicitation “usually means asking someone to join the union by signing his name to an authorization card”); *Int’l Signal & Control Corp.*, 226 NLRB 661, 665 (1976) (“Solicitation ordinarily means that someone is asking an employee to join a union by signing a union authorization card.”).

Furthermore, requiring the actual presentation of union authorization cards at the time of the question eviscerates an employer's right to have a no solicitation policy. The Board has long held that oral solicitation may only be prohibited during working time and in working areas. *See Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Soaring Eagle Casino & Resort*, 359 NLRB No. 92 (Apr. 16, 2013) (“Oral solicitations by employees may be prohibited only during working time.”). The Board has specifically distinguished between *orally* asking an employee to sign a

union authorization card and the actual presentation to an employee of a card. In *Farah Manufacturing Co.*, 187 NLRB 601 (1970), the Board considered whether passing out union authorization cards is considered distribution. In its analysis, the Board consistently separated the act of asking an employee to sign a card from the act of presenting the employee with the card. *Id.* at 601-02. Indeed, the Board categorized the issue as “whether the presentation to an employee of a union authorization card for signature, in the course of oral solicitation, is an act of ‘literature distribution,’ rather than an act of ‘solicitation’ within the meanings of the Board’s relevant standards.” *Id.* at 601 (emphasis added). In ultimately concluding that the act of presenting an employee with a union authorization card for signature is more akin to oral solicitation than distribution, the Board stated the following:

Union literature is aimed at informing employees about union matters and/or propagandizing about the virtues of unionization, and its distribution contemplates that the material will very probably be discarded by the recipient once the message is read. The purpose of the authorization card, however, is to provide tangible evidence of effective solicitation, and a request that an employee affix his signature to an authorization card really completes the act of solicitation. The presentation of an authorization card to an employee for signature in the course of oral solicitation is therefore necessarily an integral and important part of the solicitation process. And the card’s delivery to an employee by the solicitor—prompted, as it usually is, by the solicited employee’s oral declaration of interest—normally contemplates signature upon receipt and the card’s return to the solicitor.

In light of the foregoing, it follows that Respondent’s view of its employees “signing up” of others as an act of literature distribution has no legal merit and that its maintenance of a rule banning such activity, as well as oral solicitation, in working areas during nonwork time is in violation of Section 8(a)(1) of the Act.

*Id.* at 601-02 (emphasis added).

By the same token, in a subsequent case, the Board found that the act of presenting an employee with a union authorization card was considered distribution where “Respondent’s operations may present special security problems in connection with card distribution, because the employees sought to distribute cards in connection with literature rather than in connection with oral solicitation . . .” *McDonnell Douglas Corp.*, 240 NLRB 794, 806 n.2 (1979). Thus, although the act of presenting a union authorization card to an employee requires the solicitor to also ask the employee to sign the card for it to constitute oral solicitation, the act of asking an employee to sign a union authorization card does not require the act of presenting a union authorization card to constitute oral solicitation.

The Board has consistently required nothing more than the act of asking to find solicitation. In *President Riverboat*, for example, the Board found that an employee who merely invited another to a union meeting “was, in fact, soliciting.” 329 NLRB at 81-82 n.12, 14. There was no evidence the meeting was imminent and the Board required nothing “in furtherance” of this invitation. *See also Opryland Hotel*, 323 NLRB 723, 728, 731, 732 (1997) (finding solicitation where employee invited another to a union meeting). Indeed, as contemplated in *Farah Manufacturing, Co.*, discussed above, the Board only contemplated the presentation of a union authorization card after the employee gave an oral declaration of interest in response to oral solicitation. 187 NLRB at 602. As a result, it is clear that asking an employee to sign a union authorization card, in and of itself constitutes oral solicitation and the presentation of a card is not necessary for this action to be considered oral solicitation. In this case, it was Haines who approached the two employees. It was Haines who admittedly sought to have them sign union authorization cards. Her intent was crystal clear. She was soliciting co-workers to support a union. That is the essence of solicitation, and that is precisely what occurred here.

**D. Haines Clearly Asked Courtaway and Schipper to Sign Union Authorization Cards During Working Time in a Work Area and Thus Violated ConAgra's Solicitation Policy.**

The question of whether the Company unlawfully disciplined Haines is evaluated under the *Wright Line* test. *See Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under the *Wright Line* analysis, Counsel for the Acting General Counsel has the initial burden to establish a prima facie case to support the inference that protected activity was a motivating factor in the employer's decision to discipline the employee. A prima facie case is established by proof of the following:

- (1) That the employee was engaged in protected activity;
- (2) That the employer was aware of the activity; and
- (3) That the activity was a substantial or motivating reason for the employer's action.

*See Manor Care of Easton, PA LLC d/b/a ManorCare Health Services-Easton*, 356 NLRB No. 39 (2010); *Continental Auto Parts*, 357 NLRB No. 78 (2011). Once a prima facie case has been established, the burden shifts to the Company to demonstrate that the same adverse employment action "would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. *See also Manor Care*, 35 NLRB No. 39 (2010). "Absent a showing of anti-union motivation, an employer may [discipline] an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws." *Foothill Sierra Pest Control, Inc.*, 350 NLRB No. 3 (2007).

As described above, asking an employee to sign a union authorization card is a form of oral solicitation under Board law. The record is clear that Haines specifically asked employees Courtaway and Schipper to sign authorization cards during working time. Both Courtaway and Schipper testified that Haines told them that she needed them to sign union cards and that she

would put them in Schipper's locker (Tr. 350, 357-58, 362). All three of the employees, Courtaway, Schipper, and Haines, were on working time in a work area when this conversation took place (Tr. 285-86, 350, 358). The intent of Haines's statement to Courtaway and Schipper was clear. Haines had received authorization cards from the Union for the purpose of getting employees to sign the cards (Tr. 286-87). The purpose of her statement to Courtaway and Schipper was to have them sign the cards (*Id.*). Because she asked the employees to sign the cards on the production floor during working time, Haines was clearly in violation of ConAgra's solicitation policy. As a result, ConAgra lawfully disciplined Haines under its solicitation/distribution policy.

**E. ConAgra Showed That Haines Would Have Been Disciplined Regardless of Any Protected Activity.**

Additionally, ConAgra has shown that the same adverse employment action would have taken place even in the absence of the protected conduct. "To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the protected activity." *Cellco P'ship d/b/a Verizon Wireless & Communications Workers of Am.*, 349 NLRB No. 62 (2007). There is no evidence that ConAgra selectively enforced its valid no-solicitation policy. In fact, ConAgra has disciplined a supervisor for violating its no-solicitation policy after he wrongfully stopped an employee from soliciting information and talking about a UFCW flyer during non-work time. (R Exh. 5). ConAgra has also previously disciplined an employee on more than one occasion under that policy for soliciting and distributing DVDs at the facility, including during working time. (R. Exhs. 7, 8, & 9).

**F. The Acting General Counsel's Amendment to the Complaint Violates Due Process and the Posting Itself Does Not Violate the Act on its Face.**

Despite the fact that Respondent's exhibit was received into evidence prior to the end of the hearing and ten witnesses testified after the exhibit was received into evidence, the Acting General Counsel did not move to amend his complaint until after all parties had rested their cases just prior to the close of the hearing. The ALJ classified the form of the Acting General Counsel's motion as a motion to amend the complaint to conform to the evidence (Tr. 427), and so found in his decision. This was error.

The Acting General Counsel moved to amend the Amended Complaint to allege as a separate independent allegation of the complaint that Respondent's exhibit R4 violated Section 8(a)(1) of the Act (Tr. 428). This action violates Section 10(b) as ConAgra was not provided notice of such an amendment. The amendment does not have sufficient nexus to the charge, especially considering that the ALJ dismissed the charge relating to unlawfully telling employees they could not talk about the Union while on company time or on the production floor. ConAgra was not apprised that it would have to defend against this allegation, and the issue was not fully litigated. *Weather Tamer, Inc.*, 253 NLRB 293, 304 (1980); *Kern's Bakeries, Inc.*, 227 NLRB 1329, n.1 (1977). As a result, the Acting General Counsel's Amendment to the Complaint should be denied as it violates due process. *See Taurus Water Disposal, Inc.*, 263 NLRB 309 (1982) (finding complaint could not be amended because the General Counsel moved to amend the complaint as a separate independent allegation and the new allegation was unrelated to the allegations contained in the original complaint).

Even if the Acting General Counsel is allowed to amend the Amended Complaint, Respondent's exhibit R4 does not violate Section 8(a)(1) of the Act on its face. The ALJ determined that one sentence out of the posting violates the Act, without looking to the sentences

that follow, explaining the policy. Individual or particular phrases of a disputed rule or policy may not be read in isolation, but rather must be considered with the policy as a whole in determining its validity. *Supply Technologies, LLC*, 359 NLRB No. 38 (Dec. 14, 2012) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)). The particular sentence in dispute provides the following: “We also wish to remind employees that discussions about unions are covered by our Company’s Solicitation policy.” (R. Exh. 4). Employees are specifically referred to ConAgra’s admittedly lawful policy. Furthermore, the ALJ completely ignores the following sentences, which explain ConAgra’s lawful solicitation/distribution policy. The paragraph as a whole reads as follows:

We also wish to remind employees that discussions about unions are covered by our Company’s Solicitation policy. That policy says that solicitation for or against unions or other organizations by employees must be limited to non-working times. Distribution of materials is not permitted during working time or in work areas at any time.

(R Exh. 4).

To determine whether mere maintenance of certain work rules violates Section 8(a)(1) of the Act, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). As noted above, “[i]n determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (citing *Lafayette Park Hotel*, *supra*). “If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably

construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.*

The rule read as a whole does not explicitly restrict Section 7 rights and there is no evidence that the rule was promulgated in response to union activity or that it has been applied to restrict the exercise of Section 7 rights. Clearly, employees would not read this posting as violating their rights under the Act. The posting is nothing more than a reminder of and indeed specifically refers to ConAgra’s lawful policy, which explicitly explains the Company’s solicitation policy and states that solicitation, not general discussions, is limited to non-working times. Nowhere in the posting or the policy does it state that discussions are considered solicitation. The posting and ConAgra’s solicitation policy itself specifically limit *solicitation*—not discussions—during working time and in work areas. Additionally, as explained above, the validity of ConAgra’s solicitation policy itself, which is provided in ConAgra’s handbook, is not at issue in this matter.

Furthermore, Scott Adkins, Plant Manager, testified that this policy is posted right next to the Employee Rights Notice Posting (Tr. 291-93). That posting provides employee rights under the Act and specifically provides the following:

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

*See* National Labor Relations Board Website, Employee Rights Notice Posting, available at <https://www.nlr.gov/poster>.

The Acting General Counsel did not call a single witness to testify that they were confused by the Company’s posting. There is no evidence that a single employee read or would

interpret this posting as violating their rights under the Act. Indeed, the evidence presented at trial clearly showed that employees are allowed to and did in fact talk about the Union during working time (Tr. 29-31, 61-62, 98-99, 140-41, 156-57, 180-81, 199, 238, 301, 324, 371-72). The evidence also clearly showed that no employees have been disciplined for talking about the Union during working time (*Id.*). As a result, even if the Acting General Counsel was allowed to employ this “hide in the weeds” strategy and be allowed to again amend his complaint, Respondent’s exhibit R4 does not violate Section 8(a)(1) of the Act on its face.

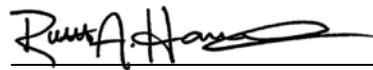
## V. CONCLUSION

For the reasons discussed above, ConAgra submits that the unfair labor practice charges alleged by the Acting General Counsel are without merit and the ALJ erred in finding ConAgra violated the Act relating to Haines’s verbal warning and the letter posted to employees. Accordingly, ConAgra respectfully requests the Board to reverse the findings of the ALJ relating to Haines’s verbal warning and the letter posted to employees and dismiss the remaining allegations contained in the Amended Complaint.

Dated this 6th day of June 2013.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 6th day of June 2013, the above and foregoing **ConAgra Foods, Inc.'s Brief in Support of Exceptions to the Decision of the Administrative Law Judge** was emailed to the following:

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