

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

In the Matter of

CONAGRA FOODS, INC.

and

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 75

Cases 9-CA-089532
9-CA-090873

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION:

This matter is before the Board on Respondent's exceptions to Administrative Law Judge Arthur J. Amchan's decision in which he correctly found that Respondent issued Janette Haines a verbal warning on October 2, 2012, for solicitation in violation of Section 8(a)(1) and (3), and posted and maintained a letter at its Troy, Ohio facility since April 30, 2012, in violation of Section 8(a)(1) of the Act.

As will be discussed below, Respondent's exceptions to the Judge's credibility resolutions, material findings of fact and conclusions of law concerning its violations of Section 8(a)(1) and (3) of the Act are without merit because they dismiss the Judge's well-reasoned credibility determinations, ignore or trivialize important facts that support the Judge's factual and legal findings, and disregard applicable Board precedent. ^{1/}

^{1/} References to the Administrative Law Judge's decision will be cited herein as (ALJD p. ____, l. ____); references to the transcript in this proceeding will be cited herein as (Tr. ____); references to the General Counsel's exhibits will be cited herein as (G.C. Ex. ____); and references to Respondent's exhibits will be cited herein as (R. Ex. ____).

II. THE JUDGE PROPERLY CONCLUDED THAT HAINES HAD CONVERSATIONS WITH EMPLOYEES COURTAWAY AND SCHIPPER (EXCEPTIONS 1- 5):

These exceptions lack merit. Because the Judge had the opportunity of observing the witnesses while testifying, the Board should not overrule his credibility resolutions unless the clear preponderance of all relevant evidence convinces the Board that such resolution was incorrect. See, *Standard Dry Wall Prod.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d. Cir. 1951). The Judge properly concluded, based upon the credible and factual testimony of the witnesses, that: (i) Haines spoke to employees Megan Courtaway and Andrea Schipper in the ladies' room and asked them if they would sign a new authorization card, (ii) that Courtaway and Schipper indicated they would sign a new card, (iii) that Haines again spoke to Schipper a few days later in the ladies' room, (iv) at which point Haines asked Schipper if she could put authorization cards in Schipper's locker for Schipper, Courtaway, and Courtaway's husband, and (v) Schipper agreed and gave Haines her locker number. (ALJD p. 6, ll. 30-38) As demonstrated hereafter, the record facts support the Judge's findings regarding Exceptions 1 through 5, and the Judge properly credited Haines, the Board should deny Respondent's exceptions. Thus, contrary to Respondent's exceptions, in about September 2012, Haines spoke to employees Courtaway and Schipper about re-signing authorization cards. (Tr. 271) This happened one evening in the restroom when Haines asked Schipper and Courtaway if they were going to re-sign cards and both said, "yeah." (Tr. 271, 272) In response thereto, Haines said, ok, I'll see that you get your cards. (Tr. 271) A few days later, Haines spoke to Schipper again in the restroom. (Tr. 272) When Haines asked Schipper again about re-signing and if she would like Haines to put cards in her (Schipper's) locker, Schipper consented and gave Haines her locker number. (Tr. 272, 273) Haines asked for Courtaway's locker number and Schipper replied that since she and Courtaway share a locker, she could put Courtaway's card in her

(Schipper's) locker. (ALJD p. 6, ll. 35-38; Tr. 273) Thereafter, Haines put three cards in Schipper's unlocked locker (one card each for Schipper, Courtaway, and Courtaway's husband, Steven). (Tr. 272, 273) Prior to this conversation with Schipper, Haines did not know Schipper's locker number or that Schipper and Courtaway shared a locker. (Tr. 273-274)

III. THE JUDGE PROPERLY CREDITED HAINES', SCHIPPER'S, AND COURTAWAY'S TESTIMONY REGARDING THEIR CONVERSATION ON THE PRODUCTION FLOOR (EXCEPTIONS 6 -10):

With respect to Respondent's Exceptions 6 and 7, the Judge properly credited Haines' testimony relating to the incident for which she was disciplined and Schipper's testimony to the extent it conflicts with Courtaway's testimony. (ALJD p. 6, ll. 40-42) Respondent's Exception 8, that the Judge improperly found that Courtaway was at her work station waiting for the production line to start working, is immaterial because their conversation only lasted a few seconds. (ALJD p. 6, ll. 42-43) Respondent's Exceptions 9 and 10 are also unfounded because Haines did not ask Courtaway and Schipper to sign authorization cards in a work area and their conversation did not interfere with production. (ALJD p. 6, ll. 45-46) The Judge properly found that Haines passed by Courtaway and Schipper at their work station and told Courtaway she had put authorization cards in their locker. (Tr. 274, 285, 352, 358, 362) Courtaway said okay. (Tr. 274, 288) Schipper was not working but waiting for the production line to start running. (Tr. 350, 359) It is irrelevant that Courtaway stopped working because the conversation lasted only a few seconds, at most, did not interfere with production, nor did Haines hand them a card or ask them to sign one. (Tr. 274, 275, 285, 352, 358, 362, 364) Further, Haines' statement did not require an immediate response from Courtaway or Schipper. (Tr. 350, 351, 359) She then continued on to work. (Tr. 274, 275, 358, 364) Contrary to Respondent's assertions, Haines did not ask Courtaway or Schipper to sign an authorization card on the production floor; rather, she

had put cards in their locker and asked them to sign the cards at a later time. Therefore, based upon the record and the Judge's credibility determinations, these exceptions should be denied.

See *id.*

IV. RESPONDENT UNLAWFULLY DISCIPLINED HAINES IN VIOLATION OF SECTION 8(a)(1) AND (3) OF THE ACT:

A. Courtaway and Schipper did not tell Respondent that Haines asked them to sign authorization cards on the production floor but told Respondent she put cards in their locker to sign (Exceptions 11, 12, 22-26)

Respondent's Exceptions 11 and 12 lack merit and misconstrue the record facts. The Judge properly concluded that Courtaway told Respondent's line lead Amanda^{2/} that Haines put authorization cards in their locker, and neither Courtaway nor Schipper told anyone that Haines asked them to sign a card on the production floor. (ALJD p. 7, ll. 4-5, 11-12; Tr. 354, 360, 361, 362) Specifically, Courtaway told line lead Amanda that Haines said she was going to put cards in their locker to sign. (Tr. 361-362) At no point did Haines ask Courtaway or Schipper to sign a card on the floor, nor did either employee tell Respondent that Haines asked them to do so. (Tr. 361-362)

Exceptions 22 and 23 are also unfounded. The Judge properly concluded that there was no explanation in the record as to why Courtaway felt compelled to report to her line lead that Haines left authorization cards in Schipper's locker and there is no explanation as to why the line lead immediately sent the two employees to their supervisor to write out a statement. (ALJD p. 8, ll. 7-10) Although this information is irrelevant to Haines' discipline, Respondent's attempt to argue that Courtaway reported Haines' conduct because of ConAgra's solicitation/distribution policy is further unsubstantiated by the record. Contrary to Respondent, there is no evidence in the record to indicate Courtaway's or its line-lead's internal state of mind, nor is such relevant in

^{2/} Amanda is a first name; her last name was not included in the record.

any event. Rather, the record only indicates that Courtaway reported her conversation with Haines to her line lead and then to her supervisor. (Tr. 354, 359-360) Further, because Respondent failed to call the line lead as a witness in the proceeding, there is no explanation as to why she sent the two employees to their supervisor.

Respondent's Exception 24, that it issued Haines the warning based on inaccurate information (which it apparently didn't possess); Exception 25, that Respondent had inaccurate information that Haines asked employees to sign authorization cards on the production floor; and Exception 26, that Respondent did not possess information that Haines asked employees to sign cards on the production floor are also groundless. (ALJD p. 8, ll. 10-13) As noted above, neither Courtaway nor Schipper told Respondent that Haines asked them to sign cards on the production floor. (ALJD p. 7, ll. 4-5, l. 11-12; Tr. 354, 360, 361, 362) Therefore, the Judge properly found that Haines concluded that Respondent had inaccurate information, did not possess information that she asked employees to sign cards on the production floor, and that her warning was based on inaccurate information. (ALJD p. 8, ll. 10-12)

B. Respondent's investigation into Haines' discipline

i. Exceptions 13 through 16

Contrary to Respondent's Exceptions 13 through 16, the Judge: (i) properly found that Manager of Human Resources Thomas Thompsen's involvement with Haines' discipline was unclear, (ii) correctly discredited Thompsen's testimony, (iii) correctly held that neither Schipper nor Courtaway testified to being interviewed by anyone other than their immediate supervisor, and (iv) properly found that because Human Resources Generalist Brad Holmes did not interview either employee, it was highly unlikely that Thompsen, Holmes' supervisor, conducted interviews. (ALJD p. 7, ll. 29-31, 32-34, 36-39) Respondent's assertions again are without

merit. First, the Judge properly concluded that the record is unclear what, if any, involvement Thompsen had with Haines' discipline. (ALJD p. 7, ll. 29-34) Thompsen testified that "we" took a look at statements written by Schipper and Courtaway (relating to their conversation with Haines) and consulted legal counsel to determine whether to discipline Haines. (Tr. 321) Although Thompsen did not attend the October 2, 2012 disciplinary meeting, he later testified that he also spoke to Courtaway and Schipper about their conversation with Haines. (Tr. 321, 326) Thompsen did not provide any more details about his alleged involvement in Haines' discipline.

Second, the Judge correctly discredited Thompsen's testimony. (ALJD p. 7, ll. 34) Relying on Courtaway's and Schipper's testimony, neither of whom testified that they spoke to anyone other than their line lead and immediate supervisor about their conversation with Haines, and Senior Human Resources Generalist Brad Holmes' testimony, who reports to Thompsen, who denied interviewing Courtaway or Schipper, the Judge concluded it was highly unlikely that Thompson, Holmes' supervisor, interviewed either employee. (ALJD p. 7, ll. 37-39; Tr. 338, 353-354, 359-360) Therefore, the Board should uphold the Judge's determination to discredit Thompsen's testimony. See, *Standard Dry Wall Prod.*, 91 NLRB 544 (1950).

Third, the record indicates that Schipper and Courtaway only spoke to line-lead Amanda and immediate supervisor Birkler about their conversation with Haines; they did not speak to Holmes or Thompsen about Haines. (Tr. 353-354, 359-360) Rather, in response to a question of whether she spoke to Thompsen or Holmes about the conversation, Courtaway said that she spoke to her line-lead, Amanda, and to her supervisor. (Tr. 353-354) Therefore, in the course of discrediting Thompsen's testimony, the Judge correctly concluded that Schipper and Courtaway

did not speak to Thompsen about Haines and Thompsen did not interview either employee. (ALJD p. 7, ll. 37-39); see, 91 NLRB 544.

ii. *Exceptions 17 and 18*

These exceptions are also without merit. The Judge properly found that there was a strong indication that Respondent decided to discipline Haines before it heard her side of the story, and not telling Haines which employees accused her of solicitation made it virtually impossible for her to effectively respond to these accusations. (ALJD p. 7, l. 27, n. 5) There is ample evidence in the record to support the Judge's findings. The record demonstrates that on the morning of October 2, 2012, Haines' supervisor, Bo Smith, told her that Brad Holmes wanted to speak with her. (Tr. 276) When Haines met with Smith and Holmes, Holmes told her that two girls had complained that she had solicited them on the gable top. (Tr. 277, 336) Haines said that absolutely did not happen and Holmes said he was giving her a verbal warning and had to do it because of Respondent's policy. (Tr. 277, 337) Haines even asked who complained about her and Holmes refused to tell her. (Tr. 337) Haines then said she's been doing this for over a year and a half and absolutely did not solicit anyone on the line because she knows the rules to soliciting and the difference between soliciting and talking about the Union. (Tr. 275, 278, 337) This was the only opportunity in the record where Holmes gave Haines the opportunity to explain what happened. Haines was then presented with the warning. (Tr. 278, 279; G.C. Ex. 5) Based on the evidence, the Judge was correct in finding that Respondent had already decided to discipline Haines at the time of the meeting; the warning was drafted and ready to be signed at the time of the meeting and Holmes did not give Haines an opportunity to explain what happened, let alone tell her who complained about her conduct. Therefore, for the reasons stated Respondent's Exceptions 17 and 18 should be denied.

iii. Exceptions 19 to 21, 27, and 28

In these exceptions, Respondent again misconstrues the record evidence. Contrary to Exceptions 19 to 21, the Judge correctly found that Respondent's investigation into Haines' conduct was inadequate, inaccurate, biased, and indicated discriminatory motivation. Moreover, he correctly found that Haines' verbal warning was discriminatorily motivated and that Respondent bore substantial animus towards Haines because of her conduct at the August 22 meeting. (ALJD p. 7, l. 27, n. 5, p. 8, ll. 2-3, 5-7) Contrary to Exceptions 27 and 28, the Judge properly concluded that Respondent was looking for an excuse to retaliate against Haines for her union activity and it would not have issued Haines the October 2 verbal warning but for the animus towards her August 22, 2012 protected conduct. (ALJD p. 8, ll. 12-15)

First, as indicated above, neither Thompsen nor Holmes interviewed Courtaway or Shipper about their conversation. Second, Haines' warning was likely drafted prior to the meeting because it was given to her to sign at the meeting, and Holmes neglected to tell Haines which employees accused her of allegedly soliciting. (Tr. 278, 279, 321, 326, 337, 338, 353-354, 359-360) Third, the Judge properly concluded that Respondent knew that Haines was a vocal and active supporter of the Union, given her involvement with the Union since August 2011, as reflected by her distribution of union literature to employees and acquisition of signed authorization cards. (ALJD p. 4, ll. 36-37, p. 5, ll. 3-5, p. 8, l. 5; Tr. 261-262) Immediately prior to her discipline, Haines attended an August 22, 2013 meeting ran by labor consultant Phil Craft during which she communicated her support for the Union at this meeting and asked Craft questions. (Tr. 263, 266, 267, 268-269, 270, 271)

Further, the evidence presented by Respondent that it has disciplined other employees, including a supervisor, for violating its solicitation and distribution policy is of absolutely no

relevance here. This is not a case involving a mixed motive or a *Wright Line* defense. There is no dispute that Haines was disciplined for her union activities. The only dispute – and it is rather lopsided – is whether Respondent could lawfully discipline Haines because those union activities violated a lawful no-solicitation policy. The fact is, they did not, because her activities did not amount to solicitation. See, *Wal-Mart Stores, Inc.*, 340 NLRB 637 (2003). Therefore, given Haines’ open support of the Union of which Respondent was aware, it’s conclusory and inadequate investigation of Haines’ conversation with Courtaway and Schipper, and the fact that Haines’ conduct did not constitute solicitation, as discussed below, the foregoing exceptions should be denied. (See, ALJD p. 10, ll. 23-24; Tr. 261, 262, 263, 266, 267, 268-69, 270, 271, 275, 277, 278, 279, 321, 326, 336, 337, 338, 353-354, 359-360, 361)

V. THE BOARD’S DECISION IN *WAL-MART STORES*, 340 NLRB 637 (2003), IS CONTROLLING (EXCEPTIONS 29 -34):

Contrary to Respondent’s Exceptions 29 through 34, the Judge properly concluded: (i) if an employee tells another on the production line that he or she should get an authorization card from the first employee after working hours in a non-work area, the employee is not engaged in unprotected solicitation; (ii) this case is distinguishable from *Wal-Mart Stores*; (iii) Haines’ statements to Courtaway and Schipper did not have a significant potential to disrupt the workplace; (iv) it is meaningless to say that employees can express their support or opposition to the Union on work time but cannot tell others how they may demonstrate that support or opposition; (v) if it is protected activity to discuss the Union or speak for or against the Union, an employee may tell other employees about meetings or rallies either in favor or against the Union; and (vi) employees have a protected right to tell employees where they may obtain pro or anti-union buttons, or an authorization card, or sign an anti-union petition on non-working time, if

located in a non-work area. (ALJD p. 8, ll. 28-30, p. 9, l. 8, 12-14, 16-18, 18-20, 20-23); see, 340 NLRB 637.

The Judge properly concluded, consistent with *Wal-Mart Stores, Inc.*, that if an employee tells another on the production line that he or she should get an authorization card from the first employee after working hours in a non-work area, the employee is not engaged in unprotected solicitation. (ALJD p. 8, ll. 28-30) “An integral part of the solicitation process is the *actual presentation of an authorization card* to an employee for signature *at that time.*” See, 340 NLRB 637, 638-639 (emphasis added); see also, *Lamar Ind. Plastics.*, 281 NLRB 511, 513 (1986)(noting that an employee did not engage in conduct lawfully proscribed by a no-solicitation rule when she asked a co-worker if she had a union authorization card). The Board emphasized that while the employee did tell a co-worker he would like her to sign an authorization card, he did not attempt to have her sign the card at that time, nor was there evidence that he even had the card on his person at the time of the conversation. See *id.* at 639. Here, Haines did not have nor did she present Schipper or Courtaway with an authorization card at the time she spoke to them on the production floor; rather, she told them she had put the cards in their locker. (Tr. 274, 275, 285, 352, 358, 362-363)

The facts of the present case are also distinguishable from that of *Wal-Mart Stores, Inc.*, as the Judge properly noted, because in the present case Haines testified that she did not have any authorization cards on her person and therefore, could not have distributed the cards. (ALJD p. 9, ll. 3-4); see *id.* at 639 (noting no evidence that the employee had cards with him at the time of the conversation). The Judge correctly noted that “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 are supposed to be

working.” (ALJD p. 8, ll. 35-37); *id.* at 639 (emphasis added). Indeed, both Courtaway and Schipper testified that Haines’ conduct did not prompt them to take an immediate response or action. (Tr. 350, 351, 359) Because Haines’ conduct did not require an immediate response, Haines did not have cards with her but had put them in the locker, a non-work area, and their conversation lasted only a few seconds, the conversation did not have a significant potential to disrupt the workplace. (ALJD p. 9, ll. 10-14; Tr. 274, 275, 285, 352, 356, 362-364)

In the present case, it is undisputed that employees are allowed to talk while working and talk about various non-work related topics. (Tr. 20, 39, 44) To prohibit employees from discussing the union, but allow them to discuss other non-work related subjects clearly violates Section 8(a)(1) of the Act. See, *In re Teledyne Advanced Materials*, 332 NLRB 539 (2000)(citations omitted); *Jensen Enter., Inc.*, 339 NLRB 877, 878 (2003) (citing *Willamette Ind.*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986)). Therefore, the Judge’s conclusions that to allow employees to express their support or opposition to the union on work time, but to prohibit them from telling others how they may also demonstrate their support or lack thereof violates the Act. (ALJD p. 9, ll. 16-18) Similarly, if Respondent allows discussions about unions, either for or against, it cannot prevent an employee from merely telling others about meetings or rallies for or against the union. (ALJD p. 9, ll. 18-20) Likewise, employees may tell others where to obtain pro or anti-union buttons, or an authorization card or sign an anti-union petition on non-working time, if located in a non-work area. (ALJD p. 9, ll. 20-23) Therefore, the Judge properly distinguished between: (i) merely talking about the Union, even talking about signing an authorization card *at a later time*, and (ii) signing an authorization card on the spot. As such, Respondent’s exceptions to these basic premises of the Act are completely unfounded.

Respondent relies on cases prior to the Board's decision in *Wal-Mart Stores, Inc.* in support of its argument that nothing more than the act of asking is required to find solicitation. See, 340 NLRB 637. Although *President Riverboat Casinos of Mo., Inc.*, a 1999 decision, notes that solicitation includes inviting another to a union meeting, such is not the issue in the present case and the Board held the opposite in *Wal-Mart Stores, Inc.* See, 329 NLRB 77, 82 (1999); 340 NLRB 637 at 639 (stating solicitation for a union is not the same thing as *talking about a union or a union meeting* or whether a union is good or bad). ^{3/} Further, *Int'l Signal & Control Corp.* noted that solicitation ordinarily means that someone is asking an employee to join a union by signing a union authorization card. See, 226 NLRB 661, 665 (1976). Haines did not ask Courtaway and Schipper to sign cards on the production floor, but had put cards in their locker to sign.

Respondent also misconstrues Board law in its argument that requiring the actual presentation of an authorization card rids an employer's right to have a no-solicitation policy. In *Stoddard-Quirk Mfg. Co.*, the Board's focus was on the employer's property rights with respect to solicitation and literature distribution. See, 138 NLRB 615 (1962). It did not address whether an authorization card is required as the Board did in *Wal-Mart Stores, Inc.* In *Soaring Eagle Casino & Resort*, the Board does not indicate what, exactly, it believes to be solicitation. See, 359 NLRB No. 92 (April 16, 2013)(finding an employee unlawfully disciplined for "soliciting" by talking to other employees about the union and handing out union wristbands). Further, contrary to Respondent's assertion, *Farah Mfg. Co.* states "[t]he 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."

^{3/} Contrary to Respondent's position, *Opryland Hotel* did not conclude that an employee was soliciting where the employee invited another employee to a union meeting. See, 323 NLRB 723 (1997).

187 NLRB 601, 602 (1970). Therefore, the Board seems to indicate that offering the card to an employee and/or obtaining his or her signature is required.

Respondent argues that the Board has also distinguished between orally asking an employee to sign a union authorization card and the actual presentation of the card to the employee, and again relies on *Farah Mfg. Co.*, 187 NLRB 601. Respondent misconstrues the language in this case. In *Farah*, the Board stated “*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.*” See *id.* at 602 (emphasis added). Respondent is correct in noting that the Board ultimately held that the act of presenting an employee with a union authorization card for signature is more akin to oral solicitation than distribution. See *id.* at 602. However, contrary to the *Farah Mfg. Co.*, Haines did not present either Courtaway or Schipper with an authorization card and thus, was not engaged in “oral solicitation.” Further, unlike the present case, in *McDonnell Douglas Corp.* cited by Respondent, the employee sought to distribute cards in connection with literature rather than in connection with oral solicitation; the Board inferred that if employees only sought to *distribute* cards by themselves that would be oral solicitation. See, 240 NLRB 794, 806 n. 20 (1979) (emphasis added). Haines did not distribute cards “in connection with oral solicitation” nor did she have them on her person. Further, Respondent admits that the act of presenting an authorization card to an employee requires the solicitor to also ask the employee to sign the card for it to constitute oral solicitation. (Respondent’s Brief in Support of Exceptions, p. 17) Thus, contrary to Respondent, the presentation of an authorization card is a requirement for such conduct to be solicitation. Therefore, Respondent’s Exceptions 29 through 34 should be denied.

**VI. ACTING GENERAL COUNSEL'S MOTION TO AMEND THE COMPLAINT
(EXCEPTIONS 35-36, 38-39):**

These exceptions should also be denied. The Judge properly: (i) construed Counsel for the Acting General Counsel's motion to amend the complaint as a motion to conform the pleadings to the evidence, (ii) found the amendment not prejudicial and does not deny Respondent due process, (iii) found the amendment has a sufficient nexus to the charge to satisfy Section 10(b), and (iv) found no additional evidence could have a bearing on the merits of the additional allegation in the amendment. (ALJD p. 9, ll. 32-33, 34, n. 7, 39, 42, p. 10, l. 2) First, contrary to Respondent, Counsel for the Acting General Counsel had not rested its case when it motioned to amend the complaint; it had rested subject to rebuttal. (Tr. 288) During Respondent's case in chief, Respondent introduced its Exhibit 4 and on cross-examination, Counsel for the Acting General Counsel asked Respondent about this Exhibit. (Tr. 291, 303) Then, on rebuttal, Counsel for the Acting General Counsel moved to amend the complaint to include Respondent's Exhibit 4 as an independent violation of Section 8(a)(1). (Tr. 426-27)

Second, the Judge properly noted that Respondent did not timely raise a Section 10(b) defense. (ALJD p. 9, l. 34, n. 7) Rather, Respondent did not raise this defense until filing exceptions to the Judge's decision. The Judge properly held that even if Respondent had raised a timely Section 10(b) defense, the amendment has a sufficient nexus to the charge filed on September 18, 2012. (ALJD p. 9, l. 34, n. 7) The amendment clearly relates to the allegation at issue in the amended complaint in that it states that, "discussions about unions are covered by our Company's solicitation policy;" the remaining 8(a)(3) allegation involves whether Haines was disciplined for talking to employees about the Union or for soliciting.^{4/} Therefore, the

^{4/} The posted letter also was sufficiently connected to the Section 8(a)(1) allegation that the Judge dismissed, which alleged that Respondent prohibited employees from talking about the Union on work time or on the production floor. Counsel for the Acting General Counsel has not excepted to this finding.

Judge properly granted the amendment, which does not violate due process. Finally, the Judge properly found that because Section 8(a)(1) violations are adjudicated pursuant to an objective test – whether an employee could reasonably interpret the letter as prohibiting protected conduct, no additional evidence could have affected the merits and thus the legality of the letter was fully litigated. (ALJD p. 9, ll. 41-42, p. 10, ll. 1-2); see, *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

VII. RESPONDENT’S LETTER TO EMPLOYEES VIOLATES SECTION 8(a)(1) OF THE ACT (EXCEPTIONS 37, 40-44):

These exceptions are unfounded. Respondent’s letter posted on April 30, 2012 speaks for itself. (R. Ex. 4) It provides, in part,

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*.

(R. Ex. 4) (emphasis added) As noted above, pursuant to *Lutheran Heritage Village-Livonia*, Section 8(a)(1) violations are adjudicated pursuant to an objective test – whether employees could reasonably interpret the letter as prohibiting protected conduct. See, 343 NLRB 646. Respondent asserts that the Judge determined that one sentence out of the letter violates the Act, and ignores the subsequent sentences. Respondent is incorrect. Contrary to the language of the letter, Respondent argues that the first sentence, “. . . discussions about unions are covered by our Company’s solicitation policy,” specifically refers employees to ConAgra’s solicitation policy. In other words, employees are directed to look up the policy. This argument is baseless because the letter then states, “That policy says that solicitation for or against unions . . . must be limited to non-working times.” There is absolutely no reason to believe that employees are directed to read Respondent’s solicitation policy because the next sentence of the letter explains what the policy is.

The Judge properly held that “in equating ‘discussions about unions’ with solicitation, the letter is overly broad” and violates Section 8(a)(1). (ALJD p. 10, ll. 15-16) He correctly noted that the letter does not distinguish between “solicitation” and “discussions about unions,” but equates them. (ALJD p. 10, ll. 16-17) The posted letter clarifies that Respondent’s solicitation policy restricts employees from soliciting for or against unions to non-working times; in other words, employees could reasonably believe that discussions about unions are also subject to these restrictions. See *id.* Therefore, the Judge properly held that that an employee could reasonably interpret the April 30, 2012 letter as restricting protected conduct within the meaning of Section 8(a)(1) of the Act. (ALJD p. 10, ll. 17-18)

VIII. THE JUDGE’S CONCLUSIONS OF LAW, PROPOSED REMEDY, AND RECOMMENDED ORDER ARE PROPER PURSUANT TO BOARD PRECEDENT WHICH ESTABLISHES THAT RESPONDENT VIOLATED SECTION 8(a)(1) and (3) OF THE ACT (EXCEPTIONS 45-48):

Counsel for the Acting General Counsel asserts, based upon the Judge’s proper credibility determinations, logical factual and legal findings, and applicable Board precedent, that the Judge’s conclusions of law, proposed remedy, and recommended order were correctly determined. Therefore, Respondent’s catch-all Exceptions 45 through 48 do not warrant a response.

IX. CONCLUSION:

Respondent’s exceptions to the Judge’s recommendation that it violated Section 8(a)(1) and (3) of the Act are without merit because they disregard the Judge’s rational credibility determinations, diminish significant and important facts which support his legal and factual findings, and disregard applicable Board precedent. Therefore, the Judge correctly found that Respondent: (i) violated Section 8(a)(1) and (3) by issuing Janette Haines a verbal warning on October 2, 2012 for solicitation, and (ii) violated Section 8(a)(1) by posting and maintaining its

letter since April 30, 2012 at the Troy, Ohio facility. Accordingly, based on the foregoing and the record as a whole, the Board should affirm the Administrative Law Judge's decision and adopt his recommended order remedying Respondent's unfair labor practices.

Dated at Cincinnati, Ohio this 20th day of June 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

June 20, 2013

The undersigned hereby certifies that Counsel for the Acting General Counsel's Answering Brief to Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge was served on all parties by electronic mail to the following addresses listed below:

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