

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

CONAGRA FOODS, INC.

Cases 9-CA-089532

And

9-CA-090873

9-CA-062889

UNITED FOOD AND
COMMERCIAL WORKERS
UNION, LOCAL 75

9-CA-062899

9-CA-068198

CONAGRA FOODS, INC.'S
POSITION STATEMENT REGARDING
ISSUE ON REMAND

Prepared and Submitted By:

Chad P. Richter
Ross M. Gardner
Jackson Lewis, P.C.
10050 Regency Circle, Suite 400
Omaha, Nebraska 68114
(402) 391-1991
richterc@jacksonlewis.com
garderr@jacksonlewis.com

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY	.3
II. PROCEDURAL HISTORY	.4
III. LAW AND ANALYSIS.	.8
A. The Regional Director Did Not Provide ConAgra with Fourteen Days' Notice of the Alleged Non-Compliance.	.8
B. The Motion for Default Judgment Does Not Include the Alleged Letter-Posting Violation.	.9
C. ConAgra Was Not Provided Due Process in Responding to the Alleged Letter-Posting Violation.	.10
D. The Posted Letter Was Not a Violation of the Terms of the Settlement Agreement.	.11
IV. CONCLUSION.	.12

SUMMARY

This matter was remanded to the National Labor Relations Board (“Board”) by the United States Court of Appeals for the Eighth Circuit solely to determine whether a letter posted by ConAgra Foods, Inc. (“ConAgra”) in 2013, constitutes a violation of the terms of a Board Approved Settlement Agreement entered into by the parties in 2011 such that the General Counsel is entitled to a default judgment against ConAgra. The General Counsel’s Motion for Default Judgment must be denied for four reasons. First, pursuant to the terms of the Settlement Agreement, before the General Counsel could file a Motion for Default Judgment, the Regional Director had to provide ConAgra with notice of alleged noncompliance with the terms of the Agreement and fourteen days to cure. The Regional Director did not do so in this case.

Second, on its face, the Motion for Default Judgment does not include the alleged letter-posting violation. This allegation was added to the Complaint in the above-captioned cases at the end of trial, over ConAgra’s objection. The Motion was never similarly amended. From a procedural standpoint, the Board cannot grant a default judgment based on an alleged violation that is not included in the Motion for Default Judgment.

Third, ConAgra was never provided with due process related to the alleged letter-posting violation. The Acting General Counsel amended the Complaint in these cases to add the letter-posting allegation at the end of trial, over ConAgra’s objection. ConAgra did not have the opportunity to respond to the allegations or to submit evidence. This is a violation of ConAgra’s due process rights under Section 10 of the National Labor Relations Act (“Act”), and as such, the alleged letter-posting violation cannot form the basis for a default judgment.

Finally, the letter posted by ConAgra does not violate the terms of the Settlement Agreement. The Company remains in compliance with the terms of the Settlement Agreement.

As a result, ConAgra respectfully requests the Board deny the General Counsel's Motion for Default Judgment.

I. PROCEDURAL HISTORY

The above-captioned cases involve several Unfair Labor Practice Charges filed by United Food and Commercial Workers Union Local 75 ("Union") against ConAgra. On November 30, 2011, ConAgra entered into a Board Approved Settlement Agreement, settling Cases 9-CA-062889, 9-CA-062899, and 9-CA-068198, which included the following:

Removing pro-Union literature from non-work areas; prohibiting employees from reading pro-Union literature, advising employees that it was against company policy for them to read such material, taking and attempting to take pro-Union literature from employees, prohibiting employees from signing authorization cards on non-work time and in non-work areas; and enforcing a solicitation/distribution policy in an overly broad manner thereby restricting employees in the exercise of their Section 7 rights; Issuing a verbal written warning and a written warning to employee Janette S. Haines in retaliation for her support for and activities on behalf of United Food & Commercial Workers Union, Local 75, a labor organization.

See attached Exhibit A.

The Settlement Agreement also provided that ConAgra would comply with all of the terms of the Notice to Employees attached to the Settlement Agreement, which included an agreement that ConAgra would not "advise our employees that they may not discuss and voice their opinions on union related issues in working areas and/or during work time", would not "discipline employees for engaging in solicitation/distribution in non-work areas and during non-work time", and would not "in any like or related manner, interfere with, restrain or coerce [employees] in the exercise of the above rights guaranteed [employees] by Section 7 of the Act." Exhibit A.

The Settlement Agreement also included the following provision:

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charging Party, the Regional Director will issue the complaint that will include the allegations spelled out above in the Scope of Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that all of the allegations of the aforementioned complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

Exhibit A.

ConAgra fully complied with the Settlement Agreement, which included posting six copies of the Notice to Employees. As a result, cases 9-CA-062889, 9-CA-062899, and 9-CA-068198 were closed on compliance. This left Cases 9-CA-089532 and 9-CA-090873 unresolved.

The underlying charge in Case 9-CA-089532 alleged that ConAgra "prohibited employees from engaging in union activity while on 'company time.'" *See attached* Exhibit B. The underlying charge in Case 9-CA-090873 alleged that ConAgra "unlawfully and discriminatorily disciplined Jan Haines, in retaliation for protected, concerted activity under the Act." *See attached* Exhibit C.

Cases 9-CA-089532 and 9-CA-090873 were heard before Administrative Law Judge Arthur Amchan ("ALJ") in 2 days of trial in Dayton, Ohio, on March 25, 2013, and March 26, 2013. At the end of the trial, after all evidence was submitted and both parties rested their cases,

the Acting General Counsel moved to amend the Complaint to allege that a letter ConAgra posted to employees, which was admitted as an exhibit in the trial, violated Section 8(a)(1) of the Act. *See attached* Exhibit D (Transcript 426:21-427:24). ConAgra objected to the amendment on the record, indicating the Company should be permitted to respond to the new allegations and that the matter should be subject to a hearing. The ALJ permitted the amendment over ConAgra's objection. Exhibit D (Transcript 427:21-428:4). No notice was provided to ConAgra prior to the amendment and ConAgra did not have an opportunity to respond to the amendment or to put on evidence at trial related to the amendment. The Acting General Counsel did not provide ConAgra with fourteen days to cure the alleged default, as required by the terms of the Settlement Agreement.

On May 9, 2013, the ALJ issued his decision in cases 9-CA-089532 and 9-CA-090873. (*See* Acting General Counsel Exhibit 6 to Memorandum in Support of Motion for Default Judgment). In pertinent part, the ALJ concluded that the ConAgra violated the Act by issuing Jan Haines a verbal warning for solicitation and by posting a letter regarding employees' solicitation rights. ConAgra appealed the AJL's decision to the Board.

On May 17, 2013, the Acting General Counsel filed with the Board a Motion for Default Judgment and Memorandum in Support of Motion for Default Judgment in Cases 9-CA-062889, 9-CA-062899, and 9-CA-068198, on the ground that ConAgra failed to comply with the terms of an informal settlement agreement by engaging in the conduct alleged in Cases 9-CA-089532 and 9-CA-090873, as amended at the end of trial.

The Board consolidated Respondent's appeal in Cases 9-CA-089532 and 9-CA-090873 with the Acting General Counsel's Motion for Default. On November 21, 2014, the Board issued a decision upholding the decision of the ALJ. *See* 361 NLRB No. 113 (2014). The Board also

granted the Acting General Counsel's Motion for Default Judgment, based solely on ConAgra's issuance of a verbal warning to Jan Haines. In granting the Motion for Default Judgment, the Board stated as follows,

Because the Respondent's discipline of Haines constitutes a sufficient basis upon which to grant the General Counsel's motion, we find it unnecessary to reach the respondent's argument that the unlawful April 30 letter concerning its solicitation policy is an improper basis for granting the motion.

Id. at p. 5, fn. 13.

ConAgra appealed the Board's decision to the United States Court of Appeals for the Eighth Circuit. On February 19, 2016, the Eighth Circuit issued a ruling reversing the Board's decision in part, and upholding the Board's decision in part. *See attached* Exhibit E. In particular, the Court found that ConAgra did not violate the Act in issuing a verbal warning to Haines. The Court found that ConAgra violated the Act by posting the letter, and further held that the letter was "an overbroad no-solicitation rule." Exhibit A, p. 19.

With regard to the Acting General Counsel's Motion for Default Judgment, the Eighth Circuit held that the Board's default judgment against ConAgra was based solely on the company's issuance of discipline to Haines. Exhibit A, p. 20-21. Because the Court found Haines' discipline to be lawful, it refrained from enforcing the Board's default judgment. However, the Court remanded the case to the Board "to determine whether ConAgra's posted-letter violation constitutes grounds for granting the General Counsel's motion." Exhibit A, p. 21.

On June 17, 2016, the Board provided the parties with notice that it is accepting these cases on remand from the United States Court of Appeals for the Eighth Circuit, and indicating the parties may file statements of position addressing the issue on remand. The issue on remand, as stated by the Eighth Circuit, is limited to "whether ConAgra's posted-letter violation constitutes grounds for granting the General Counsel's [Motion for Default Judgment]." Exhibit

A, p. 21. As indicated below, ConAgra's alleged posted-letter violation does not constitute grounds for granting the General Counsel's Motion for Default Judgment. ConAgra respectfully requests that the Board dismiss the General Counsel's Motion with prejudice.

II. LAW AND ANALYSIS

ConAgra's alleged posted-letter violation does not constitute grounds for default judgment for three reasons. First, pursuant to the terms of the Settlement Agreement, in order to hold ConAgra in default, the Regional Director had to provide ConAgra with notice of alleged non-compliance with the terms of the Settlement Agreement and provide the Company with fourteen days to cure. This did not occur, and as such, the Board cannot hold ConAgra in default. Second, the General Counsel is attempting to hold ConAgra in default solely based on the alleged posted-letter violation. ConAgra did not receive due process on this allegation, and as such, it cannot form the basis for a default judgment. Finally, the alleged posted-letter violation is not a violation of the terms of the Settlement Agreement. As such, ConAgra remains in compliance with the terms of the Agreement.

A. The Regional Director Did Not Provide ConAgra with Fourteen Days' Notice of the Alleged Non-Compliance

As explained above, at the close of trial for cases 9-CA-089532 and 9-CA-090873, the Acting General Counsel moved to amend the Complaint to allege that a letter posted to employees violates Section 8(a)(1) of the Act. The alleged letter-posting violation is now the sole basis for the General Counsel's Motion for Default Judgment. The Settlement Agreement states, in pertinent part, as follows

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance

without remedy by the Charging Party, the Regional Director will issue the complaint that will include the allegations spelled out above in the Scope of Agreement section.

Exhibit A. Thus, the express terms of the Settlement Agreement require at least the following two things to occur before ConAgra may be held in default: (1) the Regional Director provides ConAgra with notice of alleged non-compliance with the terms of the Agreement, and (2) fourteen days pass with ConAgra failing to remedy the alleged non-compliance. *Neither of these conditions occurred.* As such, ConAgra cannot be held in default.

B. The Motion for Default Judgment Does Not Include the Alleged Letter-Posting Violation

The terms of the Settlement Agreement further require the Regional Director to serve ConAgra with a Complaint that details specific allegations of non-compliance with the terms of the Settlement Agreement. The Board also holds that the Regional Director's Complaint must include specific allegations of non-compliance. *See Local 560, Int'l Bhd. of Teamsters*, 362 NLRB No. 183 (2015) (denying motion for default judgment because motion did not include explanation of non-compliant conduct and terms of settlement agreement violated).

In the instant case, the Acting General Counsel's Motion for Default Judgment was filed on March 6, 2013, and included only the initial allegations in Cases 9-CA-089532 and 9-CA-090873. These cases were tried before the ALJ on March 25, and 26, 2013. The Acting General Counsel amended the Complaint to include the alleged letter-posting violation at the end of the trial. The Motion for Default Judgment was not similarly amended. As such, the Motion for Default Judgment does not include the alleged letter-posting violation. The Board cannot hold ConAgra in default for allegations not included in the General Counsel's Motion for Default Judgment. The other basis for the Motion for Default Judgment was found to be lawful by the United States Court of Appeals for the Eighth Circuit, and thus, not a violation of the terms of

the Settlement Agreement. As such, the Motion must be dismissed because it sought to hold ConAgra in default only based on lawful activity, and did not include the issue remanded by the Eighth Circuit.

C. ConAgra Was Not Provided Due Process in Responding to the Alleged Letter-Posting Violation

The Acting General Counsel moved to amend the complaint to allege as a separate independent allegation of the complaint that Respondent's exhibit R4 violated Section 8(a) (1) of the Act. This action violates Section 10(b) of the Act, as ConAgra was not provided notice of such an amendment. 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). The Acting General Counsel's Amendment to the Complaint should have been denied as a violation of 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).

Indeed, immediately after granting the Acting General Counsel's request to amend his complaint over ConAgra's objection, the ALJ himself stated, "And, of course, you can argue that it violates due process for me to grant the amendment." Exhibit D (Transcript 428:8-20). The amendment not only deprived ConAgra of its due process right to respond as to whether the letter posting violated the Act, it also deprived ConAgra of the right to respond to the allegation that the letter posting violated the terms of the Settlement Agreement such that ConAgra could be held in default. The General Counsel's Motion for Default Judgment must be denied because ConAgra cannot be held in default without due process.

D. The Posted Letter Was Not a Violation of the Terms of the Settlement Agreement

The Settlement Agreement states, in pertinent part, that ConAgra will not "advise our employees that they may not discuss and voice their opinions on union related issues in working areas and/or during work time", will not "discipline employees for engaging in solicitation/distribution in non-work areas and during non-work time", and will not "in any like or related manner, interfere with, restrain or coerce [employees] in the exercise of the above rights guaranteed by Section 7 of the Act." Exhibit A. The Settlement Agreement also requires ConAgra to comply with the terms of the Notice to Employees attached to the Agreement. That Notice indicates ConAgra will not "enforce our solicitation/distribution policy in an overly broad manner by applying it to non-work areas and non-work time [. . .]" Exhibit A.

The letter posted by ConAgra which forms the sole basis for the Motion for Default Judgment read as follows,

We also wish to remind employees that discussions about unions are covered by our Company 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.

See Exhibit E, p. 5. This letter does not prohibit *discussion* of union related issues in working areas or during work time. The letter prohibits *solicitation* and *distribution* in work areas or during work time. ConAgra did not violate the express terms of the Settlement Agreement. As such, the Motion for Default Judgment should be dismissed.

IV. CONCLUSION

The General Counsel's Motion for Default is procedurally improper and, to that end, granting the General Counsel's Motion would deny ConAgra due process. The General Counsel also failed to provide ConAgra with notice and the opportunity to cure before filing the Motion for Default Judgment. This is fatal to the General Counsel's claims. Further, the letter posted by ConAgra did not violate the terms of the Settlement Agreement. For these reasons and those discussed above, ConAgra respectfully requests that the Board deny the General Counsel's Motion for Default Judgment with prejudice and without the opportunity to amend.

Dated this 30th day of June, 2016

CONAGRA FOODS, INC.

Respectfully submitted by:

/s/ Chad P. Richter

Chad P. Richter

Ross M. Gardner

Jackson Lewis, P.C.

10050 Regency Circle, Suite 400

Omaha, Nebraska 68114

(402) 391-1991

richterc@jacksonlewis.com

garderr@jacksonlewis.com

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of June, 2016, the above and foregoing **ConAgra Foods, Inc.'s Position Statement Regarding Issue on Remand** was sent via Federal Express overnight mail, to the following:

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Pamela M. Newport
United Food and Commercial Workers
International Union, Local 75
7250 Poe Avenue
Dayton, OH 45414-2698

Garey E. Lindsay, Esq.
National Labor Relations Board
John Weld Peck Federal Building
550 Main Street, Room 3003
Cincinnati, OH 45202-3271

Daniel A. Goode, Attorney
Counsel for the General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

/s/Chad P. Richter _____.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF

ConAgra Foods, Inc.

Cases 9-CA-062889, 9-CA-062899, 9-CA-068198

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE — Upon approval of this Agreement and receipt of the Notices from the Region, which may include Notices in more than one language as deemed appropriate by the Regional Director, the Charged Party will post immediately in conspicuous places in and about its plant/office, including all places where notices to employees/members are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notice (and versions in other languages as deemed appropriate by the Regional Director) made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting. Further, in the event that the charged union maintains such bulletin boards at the facility of the employer where the alleged unfair labor practices occurred, the union shall also post Notices on each such bulletin board during the posting period.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, or other electronic means, if the Charged Party customarily communicates with its employees or members by such means. The electronic posting shall remain posted for 60 consecutive days from the date it was originally posted. The Charged Party will e-mail the Region's Compliance Officer at jon.grove@nlrb.gov with a link to the electronic posting location on the same day as the posting. In the event that passwords or other log-on information is required to access the electronic posting, the Charged Party agrees to provide such access information to the Region's Compliance Officer. If the Notice is distributed via e-mail, the charged party will forward a copy of the e-mail distributed to the Regional Compliance Officer.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

NON-ADMISSION - By the execution of this Agreement, the Charged Party does not admit that it has, in fact, violated the Act.

SCOPE OF THE AGREEMENT — This Agreement settles only the following allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters; Removing pro-Union literature from non-work areas; prohibiting employees from reading pro-Union literature, advising employees that it was against company policy for them to read such material, taking and attempting to take pro-Union literature from employees, prohibiting employees from signing authorization cards on non-work time and in non-work areas; and enforcing a solicitation/distribution policy in an overly broad manner thereby restricting employees in the exercise of their Section 7 rights; Issuing a verbal written warning and a written warning to employee Janette S. Haines in retaliation for her support for and activities on behalf of United Food & Commercial Workers Union, Local 75, a labor organization.

It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence. By approving this Agreement, the Regional Director withdraws any Complaints and Notices of Hearing issued in the above case(s), and the Charged Party withdraws any answers filed in response.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY. Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes _____ No _____
Initials Initials

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional

EXHIBIT
A

Director will issue the complaint that will include the allegations spelled out above in the Scope of Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that all of the allegations of the aforementioned complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

NOTIFICATION OF COMPLIANCE — The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above captioned case(s).

Charged Party ConAgra Foods, Inc.		Charging Party United Food & Commercial Workers Union, Local 75	
By: Name and Title Roger J. Miller Attorney	Date	By: Name and Title <i>P. M. Newport</i> Pamela M. Newport Attorney	Date Nov. 30, 2011
Recommended By: Erdin Taylor Attorney	Date 11/30/11	Approved By: Gary W. Muffley Regional Director	Date <i>Gary W. Muffley</i> 11/30/11

And, in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

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 enforce our solicitation/distribution policy in an overly broad manner by applying it to non-work areas and non-work time, thereby inhibiting employees in the exercise of their rights to engage in activity on behalf of the United Food & Commercial Workers, Local 75, or any other labor organization.

In this regard, WE WILL NOT remove pro-union literature from non-work areas for a reasonable period of time except as necessary to maintain proper sanitation standards; WE WILL NOT prohibit employees from reading or taking pro-union literature; WE WILL NOT advise employees that it is against our policy for employees to read pro-union literature; WE WILL NOT take or attempt to take pro-union literature from employees; and WE WILL NOT prohibit employees from signing authorization cards on non-work time and in non-work areas.

WE WILL NOT advise our employees that they may not discuss and voice their opinions on union related issues in working areas and/or during work time. Discussing and voicing opinions on union related issues as described in this paragraph does not include solicitation/distribution which may be prohibited in work areas and on working time.

WE WILL NOT discipline employees for engaging in solicitation/distribution in non-work areas and during non-work time.

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

WE WILL notify our employees that they have the right to solicit union authorization cards, read and take pro-union literature, and to engage in distribution/solicitation of pro-union literature in non-work areas and during non-work time.

WE WILL notify our employees that they have the right under the Act to discuss and voice their opinions on union related issues in working areas and/or during work time.

WE HAVE rescinded the disciplinary verbal written warning and the written warning that we issued to our employee Janette S. Haines, in retaliation for her exercise of Section 7 rights in passing out Union authorization cards and distributing pro-Union literature to employees in non-work areas and during non-work time; and WE HAVE expunged these warnings from her personnel file and they will not be used against her in connection with any future disciplinary action.

WE WILL notify our employees that the warnings issued to Janette S. Haines in connection with solicitation/distribution have been rescinded and that employees will not be disciplined for engaging in solicitation/distribution in non-work areas and during non-work time.

Dated: _____ By: _____
(Responsible Official) (Title)

CONAGRA FOODS, INC.

Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building,
550 Main Street, Cincinnati, Ohio 45202-3271 TEL: (513) 684-3686

*PMN 11/30/11
UFCW 75*



INTERNET
FORM NLRB-SD1
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 24 U.S.C. 3512

DO NOT WRITE IN THIS SPACE	
Case 0-CA-089532	Date Filed September 18, 2012

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer ConAgra Foods	b. Tel. No. 937-336-2115
	c. Cell No.
	f. Fax No. 937-339-8024
d. Address (Street, city, state, and ZIP code) 801 Dye Mill Road Troy, OH 45373	e. Employer Representative Scott Adkins, Plant Manager
	g. e-Mail
	h. Number of workers employed Approx. 600
i. Type of Establishment (factory, mine, wholesaler, etc.) Food Processor	j. Identify principal product or service Food Products
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1st subsection) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Since sometime in July 2012, and continuing, the above-named Employer has prohibited employees from engaging in union activity while on "company time."	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) United Food and Commercial Workers Union, Local 76	
4a. Address (Street and number, city, state, and ZIP code) 7250 Poe Avenue, Suite 400 Dayton, Ohio 45414	4b. Tel. No. 937-665-0075
	4c. Cell No.
	4d. Fax No. 937-665-0600
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) United Food and Commercial Workers International Union	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By <u>Gary Holland (Signature)</u> (signature of representative or person making charge)	Tel. No. 937-665-0075
Gary Holland, Director of Organizing (Print type name and title or office, if any)	Office, if any. Cell No. 513-237-5416
	Fax No. 937-665-0600
	e-Mail gary.holland@ufcw75.org
Address 7250 Poe Avenue, Suite 400, Dayton, OH 45414	Sept. 18, 2012 (date)

**EXHIBIT
B**

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

J.A 00511

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is required to complete the information will cause the NLRB to decline to invoke its processes.

EX-111

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case
09-CA-090873

Date Filed
October 5, 2012

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer ConAgra Foods		b. Tel. No. 937-335-2115
		c. Cell No.
		f. Fax No. 937-339-8024
d. Address (Street, city, state, and ZIP code) 801 Dye Mill Road Troy, OH 45373	e. Employer Representative Scott Adkins Plant Manager	g. e-Mail
		h. Number of workers employed Approx. 600
i. Type of Establishment (factory, mine, wholesaler, etc.) Food Processor	j. Identify principal product or service Food Products	

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On or about September 24, 2012, The above-named Employer unlawfully and discriminatorily disciplined employee Jan Haines, in retaliation for her protected, concerted activity under the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

United Food and Commercial Workers Union, Local 75

EXHIBIT
C

4a. Address (Street and number, city, state, and ZIP code)

7250 Poe Ave.
Dayton, OH 45414

4b. Tel. No. 9376650075

4c. Cell No.

4d. Fax No. 9376650600

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

United Food and Commercial Workers International Union

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By 
(signature of representative or person making charge)

Gary Holland, Director of Organizing
(Print type name and title or office, if any)

Tel. No. 9376650075 ext. 3007

Office, if any, Cell No.
513-237-5416

Fax No. 9376650600

e-Mail
gary.holland@ufcw75.org

7250 Poe Ave., Dayton, OH 45414

Oct. 5, 2012
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

EX-100 C
J.A 00513

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

CASE NO 9-CA-089532 (VOLUME 1 of 2)
9-CA-090873

In the Matter of

CONAGRA FOODS,
Employer,

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75,
Petitioner

The above-entitled matter came on for hearing pursuant to notice before ARTHUR AMCHAN, Administrative Law Judge, at the Old Post Office Building, Historic Courtroom, 120 West Third Street, Dayton, Ohio, on Monday, March 25, 2013, at 3 16 p.m.



A P P E A R A N C E S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

On Behalf of the General Counsel
Jamie Ireland, Esq.
Zuzana Murarova, Esq.
NATIONAL LABOR RELATIONS BOARD
J W Peck Federal Building
550 Main Street
Suite 3003
Cincinnati, Ohio 45202

On Behalf of the Respondent:
Ruth Horvatic, Esq.
Jennifer Dehloff, Esq.
McGRATH NORTH MULLIN & KRATZ, P. C.
First National Tower
Suite 3700
1601 Dodge Street
Omaha, Nebraska 68102

Also Present:
Mr Gary Holland,
UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 75

1 Q. Do you oversee employees?

2 A. Yes, ma'am.

3 Q. Who do you report to?

4 A. Karen Jones

5 Q. And what is her job title?

6 A. Supervisor.

7 Q. Do you work closely with Ms , is it Miss Jones,
8 Ms Jones?

9 A. Yes And to answer your question, no, I just
10 run my own department, and I tell her if there's problems

11 MS IRELAND: No further questions

12 MS HORVATICH: Nothing further

13 JUDGE AMCHAN: You can step down

14 THE WITNESS Thank you.

15 JUDGE AMCHAN: You're excused, yes

16 THE WITNESS Thank you.

17 (WITNESS EXCUSED.)

18 MS HORVATICH: The Respondent rests

19 JUDGE AMCHAN: Do you have anything on
20 rebuttal?

21 MS MURAROVA: Well, yes At this point in
22 time, we'd like to amend the Complaint based on the
23 testimony and evidence we've heard in this case to allege
24 that the Employer, by written posting from April 30th,
25 2012 to the present told employees that discussing unions

1 is limited to non-working areas That's in Respondent's
2 Exhibit 4, is specifically what I'm referring to!

3 MS HORVATICH: That's not what this says

4 MS IRELAND: Well, one, two, Paragraph 4
5 says, "We also wish to remind employees that discussions
6 about unions are covered by our Company's solicitation
7 policy." And then it --

8 MS HORVATICH: And then it goes on to state
9 what that policy states

10 MS IRELAND: Yes

11 JUDGE AMCHAN Well, I mean, they can amend
12 the Complaint And you're saying that Exhibit R4 doesn't
13 violate the Act.

14 MS DELHOFF: I think if we were amending it
15 at the point -- at this point, then we're going to have to
16 have further hearing about it; right?

17 JUDGE AMCHAN: I'm sorry, what?

18 MS DEHLOFF: We are -- are we going to have
19 another hearing to talk about this new allegation in the
20 Complaint?

21 JUDGE AMCHAN No, they're saying that
22 they're amending the Complaint to conform to the evidence,
23 is what they're asking me to do I mean, it says what it
24 says.

25 I mean, I think the -- I'm inclined to grant the

1 amendment But then the question is does it -- does the
2 document, on its face, violate 8(a)(1) I mean, you've
3 already said it does They say it does; you say it
4 doesn't. It seems to me pretty simple

5 Anything else? You don't have any rebuttal
6 witnesses?

7 MS IRELAND: No, we don't, Judge.

8 JUDGE AMCHAN: We're done? And, of course,
9 you can argue that it violates due process for me to grant
10 the amendment. We're done?

11 Okay. I'll close the hearing, and I guess 35
12 days is standard, so briefs would be due, I think, around
13 April 30th, if my math is right.

14 All right. Thank you very much, and do give some
15 thought to settlement. And I think if your settlement
16 would be withdrawal of Complaint, Paragraph 5, in exchange
17 for rescission of the verbal warning to Ms Haines, but
18 that's up to you. Okay. Take care everybody.

19 (Off the record.)

20 JUDGE AMCHAN: Back on the record.

21 MS MURAROVA: I just wanted to clarify that
22 it's our allegation -- the allegation we would like to
23 amend in -- is that Respondent Exhibit R4 is a violation
24 of Section 8(a)(1) of the Act

25 JUDGE AMCHAN: Okay.

United States Court of Appeals
For the Eighth Circuit

No. 14-3771

ConAgra Foods, Inc.

Petitioner

v.

National Labor Relations Board

Respondent

United Food and Commercial Workers International Union, Local 75

Intervenor

No. 15-1049

ConAgra Foods, Inc.

Respondent

v.

National Labor Relations Board

Petitioner

United Food and Commercial Workers International Union, Local 75

Intervenor

**EXHIBIT
E**

National Labor Relations Board

Submitted: November 18, 2015
Filed: February 19, 2016

Before RILEY, Chief Judge, BEAM and KELLY, Circuit Judges.

BEAM, Circuit Judge.

Upon charges filed by the United Food and Commercial Workers International Union, Local 75 (the Union), the National Labor Relations Board (the Board) issued a complaint alleging, as amended, that ConAgra Foods, Inc., violated the National Labor Relations Act (the Act), 29 U.S.C. §§ 151-169, by censuring an employee for soliciting union membership and by posting a sign prohibiting discussion of unions during working time. Additionally, the General Counsel for the Board moved for default judgment against ConAgra under a settlement agreement to an earlier dispute. An Administrative Law Judge (ALJ) ruled in favor of the Union on both allegations, and a divided Board panel affirmed and granted the motion for default judgment. We grant ConAgra's petition for review, set aside the Board's order in part, enforce it in part, and remand for further proceedings.

I. BACKGROUND

A. Facts

At all times relevant to this dispute, ConAgra has maintained a policy that its employees may not solicit union support or distribute union-related materials during

working time or in work areas. "Working time" and "work areas" include times and areas where employees are expected to be working; they do not include, for example, employee-break times, break rooms, restrooms, parking lots, or hallways. The policy does not prohibit, at any time or place, discussions about unions that do not amount to solicitation. The legality of this policy is not disputed.

In August 2011, the Union began a drive to organize workers at ConAgra's Slim Jims manufacturing plant in Troy, Ohio. Around that time, ConAgra allegedly engaged in certain unfair labor practices, namely removing union literature from employee break rooms and prohibiting discussion of unions during working times and in work areas. ConAgra entered into a settlement agreement with the Union which provided that if ConAgra did not comply with the agreement's terms, the Union would bring charges based on the 2011 conduct and ConAgra would not challenge those allegations.

In April 2012, ConAgra posted a letter on a bulletin board in the plant that read, 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. Distribution of materials is not permitted during working time or in work areas at any time.

The following September, an incident occurred between Janette Haines, an employee and leading proponent of union organization at the plant, and two other plant employees, Megan Courtaway and Andrea Schipper. The exact course of events is disputed. Haines's version is this: She approached Courtaway and Schipper in the

restroom and asked them to re-sign union authorization cards,¹ and they said that they would. A few days later, again in the restroom, Haines asked Schipper if Schipper would like Haines to put the cards in Schipper's locker. Schipper said that she would, gave Haines her locker number, and explained that she and Courtaway shared a locker. Haines proceeded to put three cards in the locker, one for Schipper, one for Courtaway, and one for Courtaway's husband, who was also an employee at the plant. Afterward, Haines walked past Schipper and Courtaway on the production floor of the plant. As she walked by, she said to them, "[H]ey, I put those cards in your locker." Several days passed, and Haines had not yet received signed cards from Schipper or Courtaway. Haines saw them again in the restroom, and asked them if they were reconsidering their decision to sign the cards. Courtaway indicated her husband was having second thoughts, and Haines attempted to persuade them to sign the cards.² This was the end of their interaction.

¹A signed union authorization card provides evidence of an employee's intent that the union negotiate with management on the employee's behalf, and thus a sufficient number of signed authorization cards provides a basis to either petition the Board for union elections or for the Board to issue an order recognizing the union as the representative of all employees in the bargaining unit. See 29 U.S.C. § 159(a), (c)(1); NLRB v. Gissel Packaging Co., 395 U.S. 575, 597-99 (1969). Union authorization cards generally must have been signed within a period one year prior to the date the union seeks elections or recognition, Blade-Tribune Publ'g Co., 161 N.L.R.B. 1512, 1523 (1966), remanded in light of Gissel Packaging, 71 L.R.R.M. (BNA) 3104 (9th Cir. 1969), and so although presumably Schipper and Courtaway had previously signed authorization cards, Haines was attempting to obtain newly signed cards for the upcoming year.

²Haines testified about this final conversation in the restroom, but neither the ALJ nor the Board referenced it in their respective decisions. Accepting as we do the ALJ's credibility determination and the Board's implicit adoption of Haines's testimony, we infer that the ALJ credited and the Board adopted her entire account of the matter.

Courtaway and Schipper testified to a different version of events. Courtaway testified that she and Haines had only a single conversation, which occurred on the production floor as Haines walked by. Haines told Courtaway that she was going to place cards in Schipper's locker, and that she needed Courtaway and Courtaway's husband to re-sign them. Schipper testified that she was standing nearby during that conversation and overheard it and that Haines only spoke directly to Courtaway. The conversation Schipper testified to overhearing comports with Courtaway's account. Schipper testified that this was the first time she had heard anything from Haines about signing authorization cards and that there were no other conversations with Haines on the subject.

It is undisputed that the encounter on the production floor occurred during working time and in a work area. It is also undisputed that Courtaway was cleaning at that time, that she had to stop cleaning because of the conversation, that Schipper was standing by the production line waiting for it to begin running, and that the conversation was very brief. Afterward, Courtaway and Schipper reported the conversation to management. About a week later, management presented Haines with a verbal warning memorialized by a notice of corrective action, which she signed along with several members of plant management. The notice stated: "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."

B. Procedural History

In response to the warning, the Union filed a charge against ConAgra with the Board, alleging ConAgra violated § 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1), (3), by censuring Haines. The Acting Regional Director for Region 9 of the Board filed an order consolidating the charge with an earlier filed charge, along with a complaint and a notice of hearing before an ALJ. At the close of the hearing, the

General Counsel moved to amend the complaint to allege that the posted letter chilled union activity and so also violated § 8(a), and the ALJ granted the motion. The ALJ found that the warning and the posted letter violated the Act, and he dismissed the earlier filed charge. ConAgra filed exceptions to the ALJ's findings and conclusions as to the two violations of the Act. Additionally, the General Counsel moved for default judgment on charges based on the 2011 conduct because the violations of the Act violated the terms of the settlement agreement.

A divided, three-member Board panel affirmed the ALJ's findings, conclusions, and rulings, adopted and modified his recommended order, and granted the motion for default judgment.³ Although the ALJ credited Haines's, Courtaway's, and Schipper's conflicting testimony, his findings, adopted by the Board, comported with Haines's version. The Board concluded the warning violated the Act because Haines did not engage in solicitation. It found she did not request that Courtaway and Schipper sign an authorization card, noting that the encounter was very brief and that Haines did not present an authorization card for signature at that time. It also concluded the posted letter violated the Act because employees would reasonably interpret the letter as prohibiting protected conduct. Finally, the Board granted default judgment on the 2011 charges on the ground that the warning violated the terms of the settlement agreement. ConAgra petitions for review of the Board's

³The General Counsel did not file an exception to the dismissal of the earlier filed charge, and so it was not addressed by the Board. The ALJ did find, however, that Haines's warning was motivated by retaliation for the incident described in that charge. Only one member of the two-member majority adopted this finding, and in any event the Board stated that antiunion animus is only relevant where the reason for the discipline is in dispute. See Wright Line, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981). Because it was not a finding adopted by a majority of the panel and because neither the Board nor the Union disputes ConAgra's claimed reason for disciplining Haines, we do not address the issue of retaliatory discipline here.

decision and order, the Board cross-petitions for enforcement of its order, and the Union intervenes.

II. DISCUSSION

Section 7 of the Act, 29 U.S.C. § 157, recognizes the right of employees to form, join, or assist labor organizations, to bargain collectively with their employer, to engage in activities toward those ends, or to refrain from such activities. Section 8 makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" this right, 29 U.S.C. § 158(a)(1), or "by discrimination in regard to any term or condition of employment to encourage or discourage membership in any labor organization." Id. § 158(a)(3).

The issues for review are whether ConAgra violated the Act when it censured Haines and when it posted the letter explaining its no-solicitation policy, and if so whether these violations provided a basis for default judgment under the settlement agreement. We afford great deference to the Board where, as here, it has affirmed the ALJ's findings. Town & Country Elec., Inc. v. NLRB, 106 F.3d 816, 819 (8th Cir. 1997). "We will enforce the Board's order if the Board has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole, even if we might have reached a different decision had the matter been before us de novo." Id. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." NLRB v. La-Z-Boy Midwest, 390 F.3d 1054, 1058 (8th Cir. 2004) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

A. The Verbal Warning

1. The Conflicting Testimony

As an initial matter, we address whether we rely on Haines's or Courtaway and Schipper's version of events. "The rule in this Circuit is that 'the question of credibility of witnesses and the weight to be given their testimony' in labor cases is primarily one for determination by the trier of facts." NLRB v. Midwest Hanger Co., 550 F.2d 1101, 1104 (8th Cir. 1977) (quoting NLRB v. Morrison Cafeteria Co. of Little Rock, 311 F.2d 534, 538 (8th Cir. 1963)). Credibility determinations, like other findings of fact, are conclusive if "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(f).⁴ ConAgra argues that Haines's version is not supported by substantial evidence. It points both to Courtaway's and Schipper's conflicting accounts and to the notice of corrective action Haines signed. The Board and the Union argue that Courtaway's and Schipper's testimony is less credible than Haines's.

The ALJ credited the testimony of Haines, Courtaway, and Schipper without acknowledging that their accounts were markedly contradictory. Although the ALJ credited Courtaway's and Schipper's accounts, we believe the Board's implied adoption of Haines's version was supported by substantial evidence. In her testimony, Haines recalled Schipper's locker number, which comports with her account of Schipper having provided her that information. Furthermore, Haines testified that she

⁴We have reviewed credibility determinations in labor cases in particular under a shock-the-conscience test, Midwest Hanger, 550 F.3d at 1104; Morrison Cafeteria, 311 F.2d at 538, but we have stated that "[a]lthough we see no inherent conflict between the shock-the-conscience standard of review and the earlier and more traditional[, substantial-evidence] standard . . . , we prefer to apply the latter standard, based as it is on the teachings of Universal Camera[Corp. v. NLRB], 340 U.S. 474 (1951)]." Town & Country, 106 F.3d at 820.

passed Courtaway and Schipper on her way to perform cleaning chores that she completed at the beginning of her shift, before the production lines began running. Schipper testified she saw Haines carrying cleaning supplies, corroborating Haines's testimony. Finally, Schipper testified that she and Courtaway took the authorization cards from their locker to management twenty minutes after the encounter. This tends to support Haines's testimony that she had already placed the cards in the locker when she spoke to Courtaway and Schipper because Haines was on her way to begin her shift during the encounter. ConAgra rightly points to contrary evidence supporting Courtaway and Schipper's version. In ascertaining substantiality of the evidence, however, we may not "displace the Board's choice between two fairly conflicting views, even though [we] would justifiably have made a different choice had the matter been before [us] *de novo*." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Therefore, we adopt the Board's findings of fact that accord with Haines's testimony.

2. Whether Haines Engaged in Solicitation

The issue remains whether ConAgra violated the Act when it censured Haines. This turns on whether Haines engaged in activity protected under the Act. If Haines was soliciting union support during working time in violation of ConAgra's no-solicitation policy, then her actions were not protected and ConAgra was within its rights to censure them. The Board concluded:

Haines' statement on the production floor that she had placed authorization cards in her fellow employees' locker did not constitute "solicitation." There was no request, i.e., no solicitation of Schipper and Courtaway to sign cards during this brief interaction, and there were no cards presented for their signature. Instead, Haines simply informed Schipper and Courtaway that the authorization cards *they had already agreed to sign* (in a conversation in the restroom during a break) were in their locker. Unlike the conduct found to be solicitation in prior

cases, Haines' comment was not a request to take any action and posed no reasonable risk of interfering with production because it did not call for a response of any kind. Indeed, her information was conveyed in, at most, a few seconds. Accordingly, the Respondent violated Section 8(a)(3) when it issued Haines a verbal warning because she engaged in protected union activity.

ConAgra Foods, Inc., 361 N.L.R.B. No. 113, 2014 WL 6632914, at *3 (Nov. 21, 2014) (citation omitted).

The Board's reasoning bears mention in two respects. First, it contained the legal conclusion that for a statement to amount to solicitation of union support it must have been accompanied at that time by the presentation of an authorization card for signature.⁵ Second, the Board also considered the duration of the act in question in determining whether it amounted to solicitation. Because Haines did not present a card for signature and because her statement (and the corresponding hiatus in Courtaway's work) was very brief, the Board made a factual finding that Haines's statement was not a request that Schipper and Courtaway sign their cards. We address each of these aspects of the Board's decision in turn.

a. Whether Solicitation Requires the Presentation of a Card for Signature and the Presence of an Actual Disruption

We first examine whether the Board correctly applied the law. ConAgra asserts, incorrectly, that our review of the Board's legal conclusions is *de novo*. Although the word "solicitation" is not found in the Act, the Board's definition of that term forms, in part, the contours of rights guaranteed employees under the Act and so amounts to a construction of it. "The Board's construction of the Act is 'entitled

⁵The Union does not take this position, arguing merely that the absence of a card "merely buttresses the finding" that Haines did not make a request.

to considerable deference,' and must be upheld if it is reasonable and consistent with the policies of the Act." St. John's Mercy Health Sys. v. NLRB, 436 F.3d 843, 846 (8th Cir. 2006) (citation omitted) (quoting Ford Motor Co. v. NLRB, 441 U.S. 488, 495 (1979)).⁶ ConAgra argues that the Board defined solicitation in an unreasonable manner inconsistent with the Board's own precedent. It also asserts that the Board's definition would create practical problems for employers. The Board responds that it has always held that the presentation of an authorization card for signature at the time is a necessary component of solicitation.

In Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945), the Supreme Court made clear that the "purpose [of the Act] is the right of employes [sic] to organize for mutual aid without employer interference," but that the Board must adjust that right to "the equally undisputed right of employers to maintain discipline in their establishments." This accommodation between employees' right to organize and employers' property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956). To that end, the Court has endorsed the Board's balancing of those rights as they pertain to solicitation of union support:

The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.

⁶We note that we see no substantive difference between this articulation of our standard of deference and the one put forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984), i.e., "whether the agency's answer is based on a permissible construction of the statute."

Republic Aviation, 324 U.S. at 803 & n.10 (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943)).⁷ By contrast, no-solicitation rules applicable to nonworking times and areas are presumptively *invalid* absent a showing of special circumstances showing the rule is necessary to maintain discipline and production. Id. at 803 & n.10, 804. As the dissenting Board member pointed out, these presumptions form long-established and clear rules of the road that best strike the balance between and maintenance of the rights of employers and employees that Republic Aviation and Babcock & Wilcox declared to be policy objectives of the Act.

Another "underlying purpose of this statute is industrial peace." Brooks v. NLRB, 348 U.S. 96, 103 (1954). The distinction between working and nonworking times and areas furthers this objective by providing an easily ascertainable standard upon which employers can rely so as to avoid fact-specific conflicts each time they enforce their policies. The Peyton Packing presumption fosters such predictability, and thus industrial stability, through consistent application of the Act, providing clear boundaries to employers and employees.

The Board majority characterized solicitation of union membership as a request demanding immediate action and drew from this understanding the conclusion that such a request must be accompanied by the physical presence of an authorization card presented for signature. The Board reasoned that "drawing the 'solicitation' line at the presentation of a card for signature makes sense because it is that act which 'prompts

⁷We note this decision was written before the Board adopted its distinction between "working time," which excludes employee breaks, and "working hours," which does not. See Essex Int'l, Inc., 211 N.L.R.B. 749, 750 (1974). The presumption set out in Peyton Packing has remained applicable to no-solicitation policies that, like ConAgra's, are limited to working time. Midland Transp. Co. v. NLRB, 962 F.2d 1323, 1326 (8th Cir. 1992).

an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity." ConAgra, 2014 WL 6632914, at *2 (quoting Wal-Mart Stores, Inc., 340 N.L.R.B. 637, 639 (2003), enforcement denied in relevant part, 400 F.3d 1093 (8th Cir. 2005)). For several reasons, we disagree.

First, contrary to the Board's assertion, it has not "consistently held" that the presentation of an authorization card for signature at the time of solicitation is required. See, e.g., Home Depot, U.S.A., Inc., 317 N.L.R.B. 732, 732-33, 736 (1995) (wearing a union button, asking employees if they had complaints about their job, and passing out business cards constituted solicitation); Uniflite, Inc., 233 N.L.R.B. 1108, 1109, 1111 (1977) (affirming ALJ's finding of the same where solicitor discussed union, stated he could get an authorization card, and suggested more information could be obtained from member of union organization committee); The J.L. Hudson Co., 198 N.L.R.B. 172, 178 (1972) (affirming ALJ's finding that 3 to 5 minute conversation informing employees that the union had obtained membership cards, asking if they had signed one, and stating that they ought to "was solicitation to union membership pure and simple"). But see Wal-Mart, 340 N.L.R.B. at 638-39 ("[A]n integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at that time."); Farah Mfg. Co., 187 N.L.R.B. 601, 602 (1970) ("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.").

Second, a categorical rule such as this would be contrary to the Act's policy of balancing the rights of employers and employees. It would tilt that balance toward employees by providing a road map to organizers on how to garner support for union membership on working time and in work areas. Moreover, it would prevent employers from maintaining production and discipline. The likelihood of disruption

from solicitation does not arise solely from the possibility that an employee would be made to sign their name to a card. That likelihood exists because an entreaty from an organizer to support the union is inherently disruptive. The act of persuasion demands attention from the listener and draws attention away from production. See United States v. Kokinda, 497 U.S. 720, 734-35 (1990) (characterizing solicitation in First Amendment context as disruptive because "one must listen, comprehend, decide, and act in order to respond to a solicitation"). Limiting union-membership solicitation to situations where a card is presented for signature prevents the employer from prohibiting much de facto solicitation, and alters the balance of rights set out in Peyton Packing decidedly in favor of employees.

Finally, the requirement that an authorization card be presented for signature at the time of the solicitation is patently unreasonable. Under the Board's construction of the Act, an employee cannot be prohibited under a valid no-solicitation policy from requesting support for union organization from another employee in the most explicit terms, putting a pen in his fellow employee's hand, so long as he directs the solicited party to sign a card only at the end of the shift. To hold that an employer would violate the Act by censuring such clearly solicitous activity seems to us absurd, straying far afield of what employers, employees, and prior Board decisions have understood solicitation, in its ordinary sense, to entail.

The Board also indicated that the brief duration of the encounter—the extent to which Haines's statement was actually disruptive—precluded a finding that she solicited Courtaway and Schipper. It wrote: "[A] momentary interruption in work, or even a risk of interruption, [does not] subject employees to discipline for conveying such union-related information." ConAgra Foods, Inc., 2014 WL 6632914, at *3. The Board's analysis risks upending a long-understood distinction between those conversations that are merely union related and those that solicit union membership. The general rule is that "[n]o restriction may be placed on the

employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline," Babcock & Wilcox, 351 U.S. at 113, and this necessity is presumed as to solicitation in times and places in which it carries the risk of disruption. See Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 619-21 (1962).

Accordingly, an employer may censure *any* discussion—about unions, the weather, or anything else—that is sufficiently disruptive. But when that discussion solicits union support it may be subject to a blanket prohibition by an employer during working time. To define solicitation as only those statements that are, in fact, sufficiently disruptive because an authorization card is presented removes this distinction. Of course, once it is determined that a statement or conversation is merely a discussion of unions, rather than a solicitation of union membership, the question of whether that statement or conversation is disruptive becomes determinative of whether the employer may censure it. But the presence or absence of a disruption cannot itself be the test for whether a no-solicitation policy has been violated, except to the limited extent that it may shed light on the statement's nature or intent.

Under the Board's application of the Act in this instance, de facto solicitation that is sufficiently brief and nondisruptive is protected conduct that may not be censured under a valid no-solicitation policy. This understanding disturbs the balance of employees' right to organize and employers' right to exercise control over their business. Employees' right to organization would wax to include de facto solicitation that the employer could not show to be sufficiently disruptive, which would result in the waning of employers' property rights. This shift is, in our view, contrary to the Act's policy of balancing and maintaining those rights set out in Republic Aviation and Babcock & Wilcox. In addition, such a shift risks creating a dispute over each nondiscriminatory application of a valid rule, obligating the Board to engage in a

fact-specific inquiry to determine whether a particular act of solicitation does in fact disrupt production. This would be contrary to the Act's objective of work place stability.

Thus, we hold that in answering the factual question of whether a statement amounts to solicitation of union support, neither the presentation of a card for signature at the time nor the duration of the conversation are determinative. We conclude that the Board's novel construction of the Act in this case is unreasonable, contrary to the policies of the Act, and therefore an incorrect application of the law.

b. Whether Haines's Statement Constituted Solicitation of Union Membership

We next determine whether the Board's factual finding that Haines's statement did not amount to solicitation is supported by substantial evidence. ConAgra argues that Courtaway's and Schipper's testimony and the notice of corrective action signed by Haines objectively contradict Haines's account, and so the Board's finding that Haines did not request a signature is unsupported by substantial evidence. The Board and the Union counter that Haines's account shows that she merely provided information and did not request a signature. As we have stated, we accept at the outset Haines's version of events—that she stated, "[H]ey, I put those cards in your locker."

The Board's definition of solicitation was laid out thoroughly in W.W. Grainger, Inc., 229 N.L.R.B. 161 (1977), enforced, 582 F.2d 1118 (7th Cir. 1978):

It should be clear that "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. "Solicitation" for a union usually means asking someone to join the union by signing his name to an authorization card in the

same way that solicitation for a charity would mean asking an employee to contribute to a charitable organization or having the employee sign a chance book for such a cause or in the commercial context asking an employee to buy a product or exhibiting the product for him from a book or showing the product.

229 N.L.R.B. at 166. Nothing in this definition requires that an employee utter an express question or command to solicit union membership. A concrete effort to obtain a signature on an authorization card directed from one person to another, without more, is sufficient. This understanding comports both with prior Board precedent such as Home Depot, Uniflite, and J.L. Hudson, and with the ordinary understanding of that term as to "ask for or try to obtain (something) from someone." *Solicit*, New Oxford American Dictionary (3d ed. 2010).

Our prior decision in Wal-Mart Stores, Inc. v. NLRB, 400 F.3d 1093 (8th Cir. 2005), is instructive, as it examined solicitation in a range of circumstances. In Wal-Mart, an employee, Shieldnight, was censured by his employers for (1) wearing a t-shirt that read, "Sign a card . . . Ask me how," (2) inviting other employees to a union meeting being held that evening, and (3) stating that he would like another employee (Starr) to consider signing a union authorization card. *Id.* at 1096-97. We concluded that the Board's finding that the statement on the t-shirt was not solicitation was supported by substantial evidence because "[a]nyone, including any Wal-Mart employee . . . , was free to ignore both Shieldnight and the message on the t-shirt." *Id.* at 1098. We also affirmed the Board's finding that inviting another employee to a union meeting was not solicitation. "Instead of a solicitation that required a response, the record shows that Shieldnight's statements were more akin to a statement of fact that put his co-workers on notice that there was to be a union meeting that night and that they were welcome to attend." *Id.* at 1099.

We concluded, however, that "[i]n light of the totality of the circumstances," Shieldnight's statement that he would like for Starr to sign an authorization card did constitute solicitation. Id. We noted that Starr "understood the exchange as a request to sign the card, an understanding likely to be reached by the average person in a similar situation." Id. We also noted that "[t]here is little doubt as to Shieldnight's intent in the words he spoke to Starr," and "[t]he fact that [Shieldnight] did not place a card directly in front of Starr at the time of his statement makes little difference in regard to the nature of his conversation." Id. at 1099-1100. Accordingly, the nature of the statement, the intent of the putative solicitor, the understanding of the listener relative to that of an average person, and the surrounding circumstances guide our analysis.

Haines's efforts to obtain signatures from Courtaway, Schipper, and Courtaway's husband both before and after the encounter on the production floor made her intent clear. Her statement was intended to urge Courtaway and Schipper to sign the cards that she had placed in their locker. Courtaway's and Schipper's testimony shows they understood Haines's statement as a request for a signature, and under the circumstances an average person would do the same. That Haines's statement was not phrased in the imperative does not change its nature; the implicated request was clearly intended and understood by all parties. The substance of Haines's actions in the context of her extended effort to obtain signatures from Courtaway, Schipper, and Courtaway's husband points to the conclusion that the encounter on the production floor should be seen as a component part of those efforts, and therefore an act of solicitation which occurred, indisputably, on working time and in a working area.

Looking to the record as a whole, we conclude that there is not substantial evidence supporting the finding that Haines did not engage in solicitation. The Board cites no evidence that Haines was merely providing information divorced from an

effort to obtain signed authorization cards. To the contrary, all indications in the record point to Haines's statement as part of a prolonged effort of soliciting union support from Courtaway, Schipper, and Courtaway's husband. We acknowledge that these facts present a close case. Our holding should not be read to indicate that merely mentioning union authorization cards or providing information, without more, constitutes solicitation. But where an employee makes a statement that is intended and understood as an effort to obtain a signed card, and that effort is part of a concerted series of interactions calculated to acquire support for union organization, that employee has engaged in solicitation subject to censure under an employer's validly enacted and applied no-solicitation policy. We therefore reverse the Board's conclusion that ConAgra violated the Act when it censured Haines for violating its no-solicitation policy.

B. The Posted Letter

Next, we look to the Board's conclusion that ConAgra violated the Act by posting an overbroad no-solicitation rule. A workplace rule is overbroad and thereby violates § 8(a)(1) of the Act if it "would reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 N.L.R.B. 824, 829 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999). The Board found the letter would be construed by employees as prohibiting any discussion of unions during working time, including discussions protected under the Act.

ConAgra argues that the Board looked only at the phrase "discussions about unions are covered by our Company's Solicitation policy" and failed to consider that phrase in the context of the entire letter. It argues the following sentence clarified that the no-solicitation policy did not apply to discussions about unions, and it argues the Board improperly interpreted "covered" to mean "prohibited." ConAgra contends that this is in contravention of Board precedent and that the General Counsel failed

to produce any employees who testified to understanding the letter the way the Board concluded they would. The Board counters that it did not read any part of the letter in isolation, and it argues evidence of employees' interpretation or actual enforcement is not necessary for a finding that a policy is overbroad.

We conclude the Board's finding is supported by substantial evidence. The structure of the letter creates the potential for confusion, inviting the reader to equate "discussions about unions" with solicitation. Employees not familiar with the fine legal distinctions between these terms would reasonably tend to read the letter as a prohibition of any discussion about unions during working time. It is apparent the Board reached this conclusion by examining the letter in its entirety. To the extent ConAgra presents a reasonable alternative reading, "any ambiguity in the rule must be construed against the Respondent as the promulgator of the rule." Lafayette Park Hotel, 326 N.L.R.B. at 828. Furthermore, "merely maintaining an overly broad rule violates the Act," Beverly Health & Rehab. Servs., Inc., 332 N.L.R.B. 347, 349 (2000), enforced, 297 F.3d 468 (6th Cir. 2002), and "[e]vidence of enforcement of the rule is not required to find a violation of the Act." Id. We affirm the Board's conclusion that ConAgra violated the Act by maintaining an overly broad rule.

C. Default Judgment on the 2011 Claims

The Board asks us to summarily enforce their order entering default judgment on the claims arising from ConAgra's 2011 conduct.⁸ In its decision, the Board stated

⁸The Board argues that ConAgra has waived any challenge to the General Counsel's motion for default judgment because it did not address that subject in its opening brief. Although we have indeed summarily enforced uncontested portions of the Board's order, e.g., NLRB v. Bolivar-Tees, Inc., 551 F.3d 722, 727 (8th Cir. 2008), ConAgra contests the only bases upon which the Board could have granted the motion. This is, in substance, a challenge to the default judgment and we exercise our

it was granting the General Counsel's motion only on the ground that Haines's warning violated the Act and thereby the settlement agreement. The Board declined to address ConAgra's argument that the posted-letter violation would not support the granting of default judgment. Because we decline to enforce the Board's order as to the warning, we likewise refrain from enforcing the default judgment and remand the case to the Board to determine whether the posted-letter violation constitutes grounds for granting the General Counsel's motion.

III. CONCLUSION

Accordingly, for the reasons stated herein: we reverse the Board's conclusion that ConAgra violated § 8(a)(1) and (3) of the Act when it issued Janette Haines a verbal warning on October 2, 2012, and consequently reverse the Board's grant of the General Counsel's motion for default judgment; thus setting aside parts (1)(b)-(e) and (2)(b) of the order; we affirm the Board's conclusion that ConAgra violated § 8(a)(1) of the Act by maintaining overbroad work rules regarding its solicitation policy and enforce parts 1(a), (f), 2(a) as it pertains to the April 30, 2012, violation, and 2(d) of the order, and part 2(c) with the understanding that the Board will modify the attached notice consistent with this opinion; and we remand this case to the Board to determine whether ConAgra's violation of § 8(a)(1) constitutes a basis upon which to grant the General Counsel's motion for default judgment.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent as to Part II.A.2.b. of the court's decision. I would conclude, after looking to the record as a whole and accepting the facts as stated in

discretion under 29 U.S.C. § 160(e) to deny enforcement should there be no grounds to grant the motion.

Part I.A. of the court's opinion, that substantial evidence does support the Board's conclusion that Haines did not engage in solicitation. I concur in the rest of the opinion, but not in the judgment reversing the Board's conclusion that ConAgra violated the Act when it censured Haines for violating its no-solicitation policy.

According to Haines's version of events, which the court adopts, Schipper and Courtaway were in the restroom when they agreed to re-sign union authorization cards and when Schipper agreed that Haines could place the cards in her locker. Later, on the production floor, Haines said, "I put those cards in your locker." I agree that the production-floor statement is not divorced from Haines's initial effort to obtain their signatures, but that does not necessarily mean the statement qualified as solicitation. To the contrary, by the time she made the production-floor statement, Haines's initial restroom-based effort to convince Courtaway and Schipper to sign the union authorization cards had concluded: Courtaway and Schipper had agreed to re-sign cards. "Instead of a solicitation that required a response, the record shows that [Haines's] statement [was] more akin to a statement of fact." See Wal-Mart Stores, Inc. v. N.L.R.B., 400 F.3d 1093, 1099 (8th Cir. 2005).

I agree with the court that this case presents a close call. And I agree that providing information or mentioning union authorization cards, without more, is not solicitation. But I disagree that the conversation in the restroom and Haines's statement on the production floor amounted to a *single* concerted effort to obtain signatures. Based on the record presented, I would conclude there is substantial evidence to support the Board's finding that Haines did not engage in solicitation. See Town & Country Elec., Inc. v. N.L.R.B., 106 F.3d 816, 819 (8th Cir. 1997) (noting the great deference we afford the Board's affirmation of an ALJ's findings).

RECEIVED

2016 JUL -5 AM 11:06

NLRB
ORDER SECTION

Page 1 of 2

ORIGIN ID: OMAA (402) 391-1991
CHAD P. RICHTER
JACKSON LEWIS P.C.
10050 REGENCY CIRCLE
SUITE 400
OMAHA, NE 68114
UNITED STATES US

SHIP DATE: 30JUN16
ACTWGT: 1.00 LB
CAD: 107354799/WSX12750

BILL SENDER

TO

NATIONAL LABOR RELATIONS BOARD
1015 HALF ST SE

WASHINGTON DC 20003

(202) 273-1000

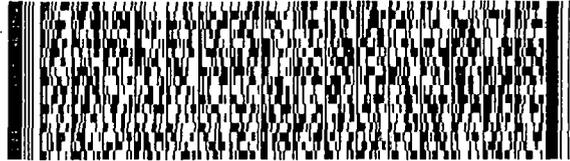
REF: 353340

INV:

PO:

DEPT:

540.116CB0727F



FedEx
Express



J181010208501uv

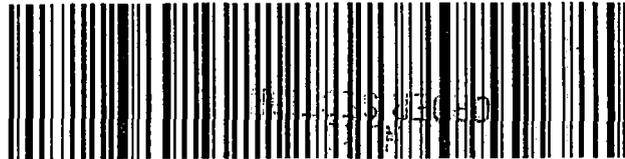
REL#
3785346

FRI - 01 JUL 10:30A
PRIORITY OVERNIGHT

TRK# 7834 8820 4771

XC XSMA

20003
DC-US IAD



2016 JUL -5 AM 11:02

RECEIVED

PS|Ship - FedEx Label