Consolidated Diesel Co. *and* CDC Workers Unity Committee a/w United Electrical, Radio and Machine Workers of America. Cases 11–CA–16183, 11–CA–16350, and 11–CA–16792

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On June 30, 1997, Administrative Law Judge Robert C. Batson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

We adopt the judge's findings that the Respondent violated Section 8(a)(1) by confiscating union literature and prohibiting employees from distributing union materials on nonworktime in nonwork areas. We also adopt the judge's finding that the Respondent violated Section 8(a)(1) by subjecting employees Fernando Losada and Jim Wrenn to its Performance Management Process Committee procedure for which permanent records are maintained. In doing so, we note the following.

The Respondent maintains a harassment policy which defines harassment as any unwelcome action, intended or not, which is considered offensive to a receiver or third party. This policy is implemented through the Respondent's Performance Management Process Committee, which is comprised of both employees and management representatives. Harassment charges are first investigated by an employee relations representative, who reports the results of his investigation to Employee Relations Manager Larry Williams. Williams decides whether the charge should be heard by the Performance Management Process Committee, which has the power to discipline individuals it finds to have violated the policy, including termination.

Charges were filed against both Losada and Wrenn in connection with separate incidents occurring on November 17, 1994, involving their distribution of a union newsletter. In both instances, the complaining employees explained the underlying circumstances to Employee Relations Representative Diane Whaley prior to the Respondent's requiring Losada and Wrenn to submit to further investigatory and potentially disciplinary proceedings.

A Performance Management Process Committee meeting was held on November 30, 1994, to consider the harassment charge filed against Losada, and both Losada and his accuser described their versions of what had occurred. During that meeting, the human resources manager reminded each employee that employees had the right to distribute literature during nonworktime in nonwork areas and further explained that Losada had the right to distribute the newsletter in a manner that did not violate the Respondent's harassment policy. As a result of the meeting, the charge against Losada was dropped. The Committee documented that a charge had been filed and withdrawn, and this documentation was maintained in a separate file, which would be referenced and considered if any future charges were filed against Losada.

Three meetings were held by the Performance Management Process Committee to investigate the charge filed against Wrenn. At the first two meetings, the group was unable to reach consensus. After the last meeting on January 9, 1995, the final decision of the group was to document that an allegation of harassment had been made but otherwise to take no action. The documentation was maintained in a separate file under, inter alia, Wrenn's name.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding at sec. III,B,2, par. 12, of his decision that the conduct of employees Losada and Wrenn did not constitute harassment, we rely only on his reference to the "reasonable person" standard and find it unnecessary to pass on his citation to *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). We also find it unnecessary to rely on the judge's speculation at sec. III,A, par. 6, that the seizure of union literature by the Respondent's guards from nonwork areas, absent other violations of the Act, could be found to be "de minimis." We further disavow the judge's conjecture at sec. III,B,1, par. 9, that employee Duke perhaps attempted to attack employees Losada and Avent after they tried to distribute union literature during Duke's lunchbreak.

[2] In his recommended Order and notice, the judge refers to the Respondent's promulgation and maintenance of an overly broad solicitation and distribution rule. The judge found, however, that the rule in effect at the relevant time was facially valid, but that the Respondent violated Sec. 8 (a)(1) by prohibiting employees from distributing union materials on nonworktime in nonwork areas of the facility. See *Stoddard-Quirk Mfg.*, 138 NLRB 615, 621 (1962). We will modify his conclusions of law, recommended Order, and notice to more closely reflect this violation.

Losada and Wrenn's distribution of the union newsletter is conduct clearly protected by Section 7.[3] Under established Board law, protected conduct must be egregious or offensive to lose its protection under the Act.[4] In this regard, the Board has held that the manner in which an employee exercises a statutory right must be extreme to be beyond the Act's protection.[5] There is no contention here that the manner in which Losada and Wrenn exercised their statutory right to distribute literature was so egregious, offensive, or extreme as to lose its protection. To the contrary, in finding that the conduct of Losada and Wrenn did not constitute misconduct in violation of the Respondent's harassment policy, which finding we adopt, the judge effectively found it was not. Thus, in light of the above, we agree with the judge that subjecting these employees to the Performance Management Process Committee procedure for which permanent records are maintained and may be utilized in the future for discipline, including termination, because they engaged in protected activity violates Section 8(a)(1).

We acknowledge that the Respondent's investigation and disposition of harassment charges through operation of its Performance Management Process Committee procedure is entirely consistent with its harassment policy, and that it is not contended otherwise. However, where, as here, the harassment charges directly relate to and implicate the employees' exercise of their Section 7 right to distribute union materials, the Respondent cannot apply its policy without reference to Board law. The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity.[6] Clearly, the Respondent's requiring employees who engage in protected concerted activity to submit to a process with the potential for interrogation about protected activity, discipline, discharge, and permanent documentation, simply because some person at one time claimed they felt harassed by that activity, has a reasonable tendency to restrain the exercise of Section 7 rights. Accordingly, since the conduct complained of to the Respondent's employee relations representative was not of a nature that would remove it from the protection of Section 7 and the complaints manifested a purely subjective notion of harassment, we find that the Respondent violated Section 8(a)(1) of the Act by requiring Losada and Wrenn to submit to the Performance Management Process Committee procedure and by retaining a record of the charges against them in its employment files.

Our dissenting colleague, noting that the issue here is whether the Respondent engaged in coercion by investigating and documenting harassment charges, states that an employer has a legitimate right to investigate charges of alleged employee misconduct. We do not dispute management's legitimate right to investigate facially valid harassment charges. Here, however, the Respondent's policy gives responsibility for an initial investigation to the Respondent's human resources department, which, through its employee relations manager, determines whether the process should continue through referral to its Performance Management Process Committee. The Respondent did conduct such investigations concerning the two incidents. Our finding of a violation here is based on the Respondent's continuation of its investigation into Losada's and Wrenn's conduct by subjecting the two employees to the Committee, with its power to document, discipline, or discharge, after the Respondent's initial investigation by its Human Resources Department disclosed that the employees had engaged in an exercise of their right to distribute union literature in a manner which clearly did not lose the Act's protection.[7]

[3] See *Stoddard-Quirk Mfg*., supra.

[4] See *United Parcel Service, Inc*., 311 NLRB 974 (1993), and cases cited therein.

[5] Id.

[6] See *Bank of St. Louis*, 191 NLRB 669, 673 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972); *Arcata Graphics*, 304 NLRB 541 (1991); *Nashville Plastic Products*, 313 NLRB 462 (1993); *Handicabs, Inc.,* 318 NLRB 890, 896 (1995), enfd. 95 F.3d 681, 684–685 (8th Cir. 1996), cert. denied 521 U.S. 1118 (1997); *Greenfield Die & Mfg. Corp*., 327 NLRB 237 (1998).

[7] The dissent attempts to mimimize the effect of the documentation, emphasizing that the documentation is kept in a separate file rather than the employees' personnel files, that the employees were not informed that documentation could lead to subsequent discipline, and further that evidence shows that, in fact, documentation could not lead to subsequent discipline. It is true that the employees were not told that discipline could result from documentation. However, neither were they told that it could not and, therefore, the employees were left in doubt regarding the effect of the documentation on their futures, even after employee Losada questioned what was meant by the term.

Further, although record testimony is unclear regarding how this documentation could be used in the future, the record reflects, the judge finds, and the Respondent in its brief concedes, that it would be considered if "relevant." In this regard, we note the testimony of a human resources representative at hearing that documentation is part of an employee's "history" and would be looked at subsequently in the event an employee was involved in a future incident of the same kind or if an employee was in contention for a promotion. She further testified that, if there was another disciplinary process, the convened Performance Management Process Committee could decide whether or not prior documentation was significant and could possibly find it was. Cf. *Hudson Oxygen Therapy Sales Co*., 264 NLRB 61, 67–68 (1982), in which the Board adopted the judge's finding in that case, over the employer's contrary assertion, that documenting an oral counseling in an employee's permanent record was disciplinary; in doing so, the judge noted that the permanent placement of the documentation in the record

AMENDED CONCLUSION OF LAW

Substitute the following for paragraph 1:

"1. By prohibiting employees from distributing union materials on nonworktime in nonwork areas of its facility."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Consolidated Diesel Co., Whitakers, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from distributing union materials on nonworktime in nonwork areas of the facility.

(b) Removing from nonwork areas of the facility union materials which have been lawfully left there for distribution.

(c) Subjecting employees to its Performance Management Process Committee procedure for which permanent records are maintained and may be utilized in the future for discipline, including termination, because they engaged in union or protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, remove from its files any documentation maintained as a result of action by the Performance Management Process Committee with respect to Fernando Losada and Jim Wrenn and within 3 days thereafter notify them in writing that this has been done and that the documentation will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility at Whitakers, North Carolina, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at is own expense, a copy of the notice to all current employees and former employees employed at any time since November 17, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

I do not agree with my colleagues that the Respondent violated the Act by enforcement of its facially valid antiharassment policy against employees Fernando Losada and Jim Wrenn.

The Respondent has long maintained, in its employee handbook, a policy entitled, "Respect for Others," which regulates workplace behavior that conflicts with the respectful treatment of fellow employees. Under this policy, charges of harassment, defined as "[a]ny unwelcome action, intended or not, which is considered offensive to the receiver or a third party," are subject to an investigation. The investigation consists of (a) referral of the charge to an employee relations representative, who reports that individual's findings to an employee relations manager, Larry Williams; and (b) possible subsequent referral of the charge by Williams to the Performance Management Process (PMP) Committee, which reviews the charge. Thereafter, the Committee takes whatever action is appropriate, if any, against the alleged offender. The policy also calls for documentation of the results of the investigation, specifying what action, if any, was taken, including, when appropriate, a record of the fact that no action has been taken. This record is maintained in a special file for harassment charges. Mere documentation is not a basis for future discipline; only a form of discipline entitled an "educational forewarning" can serve as the basis for future discipline.

Harassment charges were filed against employees Losada and Wrenn with respect to their conduct while distributing union literature. The charge against Losada was withdrawn after having been referred to the PMP Committee. Consistent with the policy, the fact that the charge was withdrawn was documented. The charge against Wrenn was also referred to the PMP Committee. The final action of the Committee, in Wrenn's case, was

reflected an intent to use it in the future for some purpose. Thus, in light of the above and contrary to the dissent, we do not find dispositive that during the initial meeting on the charge against Wrenn it was said at one point that documentation, as opposed to "educational forewarning," did not lead to immediate discipline and at another point that it did not lead to discipline. Further, contrary to the dissent, we find it irrelevant that the documentation is retained in a separate file.

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

documentation that an allegation of harassment had been made and that no action was taken.

My colleagues conclude that the investigation and the subsequent documentation of the disposition of the charges against Losada and Wrenn violate Section 8(a)(1). I disagree. It is undisputed that the Respondent's harassment policy is lawful on its face, and there is no contention that this investigation deviated from that policy. Indeed, my colleagues "acknowledge that the Respondent's investigation and disposition of harassment charges through operation of its Performance Management Process Committee Procedure is entirely consistent with its harassment policy." Therefore, solely at issue in this case is whether the Respondent engaged in 8(a)(1) coercion by investigating and documenting the Losada and Wrenn charges. I conclude that it has not.

With respect to the Respondent's investigation of the harassment charges, it is an employer's legitimate right to investigate charges of alleged employee misconduct. Cf. *Manville Forest Products Corp.*, 269 NLRB 390 (1984). The investigation here, consisting of the two-step procedure in the Respondent's policy for the processing harassment charges, is therefore privileged.

My colleagues say that they "do not dispute management's legitimate right to investigate facially valid harassment charges." However, according to my colleagues, if the first phase of an investigation does not substantiate the harassment charges, management is prohibited from looking further. I disagree. The evidence, after initial inquiry, may not be dispositive one way or the other, and thus there will be a need to inquire further. Here, Respondent inquired further, and ultimately took no action on the harassment charges. I would not condemn Respondent for following this prudent and reasonable course.

As to the documentation, since it is lawful for an employer to investigate alleged misconduct, it is likewise lawful to preserve a record of that investigation. In this regard, my colleagues erroneously raise the specter of 8(a)(1) coercion. However, there is no evidence of coercion. It is undisputed that neither Losada nor Wrenn was informed that a record of the events could be considered if future charges were filed against them. Rather, each of the employees was told that the outcome of the process would be a "documentation." In response to his question concerning what was meant by that term, Losada was told that the documentation would say that a meeting had occurred and that the charge was dropped. The only message to Wrenn about the documentation was that the history of what had occurred would be part of "the file."[1] Thus, neither employee was threatened, either orally or in writing, that documentation could lead to subsequent discipline.

Even more fundamentally, the undisputed evidence is that the documentation *could not* lead to subsequent discipline. Not only are there no references to the charges or investigations in the employees' personnel files, but, according to undisputed evidence, only a disciplinary measure entitled the "educational forewarning" can form the basis for subsequent discipline. Losada was not subject to an "educational forewarning" because his charge was withdrawn. In a PMP Committee meeting in the Wrenn investigation, the Respondent's facilitator Larry Williams distinguished between documentation and the "educational forewarning" on the basis that only an educational warning could serve as the basis for future discipline. The disposition of Wrenn's charge, however, was not an "educational forewarning."

Nor can it be said that the records associated with these investigations are an inherent form of discipline in their own right. As explained above, the Respondent's policy establishes the contrary. If it is the majority's belief that the Respondent will use its record of these harassment charges to bolster future charges of harassment and to bolster future discipline, that belief is an assumption and is not supported by the record of this case.

My colleagues assert that the documentation would be considered in the future if it is "relevant," and they note that the documentation is a part of an employee's "history." The terms "relevant" and "history" are unexplained. Indeed, my colleagues concede that the "record testimony is unclear regarding how this documentation would be used in the future." As against this lack of clarity, one thing is perfectly clear: only an "educational forewarning" can form the basis for subsequent discipline. The two incidents involved herein did not result in an "educational forewarning."

In sum, this case shows: (1) employees were not told anything coercive; and (2) that is because there *is* nothing coercive. Accordingly, I find that the Respondent lawfully invoked its "Respect for Others" policy to exercise its legitimate right to investigate allegations of employee harassment. I further find that the record of that investigation is likewise privileged. Furthermore, I find that, in any event, the Respondent neither by its words to employees, nor by the manner in which it maintained the

[1] As previously noted, the documentation does not go into the employees' individual personnel files, but is maintained in a separate file recording the Respondent's experience in implementing the anti-harassment policy.

records, engaged in conduct proscribed by Section 8(a)(1).[2]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit you from distributing union materials on nonworktime in nonwork areas of the facility.

WE WILL NOT remove from nonworking areas of the facility union materials which have been lawfully left there for distribution.

WE WILL NOT subject you to the Performance Management Process Committee procedure for which permanent records are maintained and may be utilized in the future for discipline, including termination, because you engaged in union or protected concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any documentation maintained as a result of action by the Performance Management Process Committee with respect to Fernando Losada and Jim Wrenn, and WE WILL, notify them in writing that this has been done and that the documentation will not be used against them in any way.

CONSOLIDATED DIESEL CO.

Jasper Brown, Esq., for the General Counsel.

[2] *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61, 67–68 (1982), cited by the majority, is inapposite. In that case, a memorandum recording an oral counseling of an employee was placed in the employee's personnel file. The memorandum threatened future discipline and indicated on its face that the employee had been so warned. Here, there is no record of the harassment charges in the employees' personnel files, and the employees were not threatened with future discipline.

Bruce A. Petesch and *Rodolfo R. Agraz, Esqs. (Haynsworth, Baldwin, Johnson, & and Greaves, P.A.),* of Raleigh, North Carolina, for the Respondent.

M. Travis Payne, Esq. (Edelstein & Payne), of Raleigh, North Carolina, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

I. BACKGROUND

ROBERT C. BATSON, Administrative Law Judge. These cases, consolidated for hearing, arose with the filing of the charge in Case 11–CA–16183 by the CDC Unity Committee a/w United Electrical, Radio and Machine workers of America (the Union), on August 25, 1994, alleging that Consolidated Diesel Co. (the Respondent or Employer) had violated Section 8(a)(1) of the Act, hereinafter cited, by threatening its employees with disciplinary action for distributing union literature or soliciting for the Union on nonworking time and in nonworking areas of the plant. On October 5, 1994, amended the charge alleging Respondent maintained an invalid solicitation and distribution rule in its employee handbook (GC Exhs. 1a, c).1

On approximately October 12, 1994, the Respondent and the Union entered into a Settlement Agreement which was approved by the Regional Director for Region 11 on October 24, 1994. The agreement required the posting of a notice to employees in which Respondent stated it would not maintain a solicitation/distribution policy prohibiting its employees from soliciting during nonworking time or prohibit distribution of union literature during nonworking time in nonwork areas. The notice further stated that Respondent would promulgate a rule clearly defining employees rights in that regard. The notice also stated that it would not inform employees they would be disciplined for engaging in such solicitation and distribution. The Respondent posted the notice for the required 60-day period.

On December 20, 1994, the Union filed a charge in Case 11–CA–16350 alleging in substance that the Respondent subjected its employees to a disciplinary process that included the possibility of termination for solicitation and distribution for the Union which was protected by the Act. (GC Exh. 1e.)

By letter dated February 10, 1995, the Acting Regional Director for Region 11, revoked the approval of the Settlement Agreement. (GC Exh. 5. Second consolidated complaint, par. 11.) On February 15, 1995, the Regional Director for Region 11, issued an order consolidating cases complaint and notice of hearing in Cases 11–CA–16183 and 11–CA–16350. On November 30, 1995, the Union filed a charge in Case 11–CA–16792 alleging Respondent interfered with employees in solicitation and distribution for the Union in violation of the Act and the Settlement Agreement. On February 6, 1996, the Union filed an amended charge in Case 11–CA–16792 alleging that Respondent confiscated union literature in nonwork areas. On February 16, 1996, the Regional Director issued a second order consolidating cases consolidating complaint and notice of hearing alleging that Respondent had engaged in unfair labor practices affecting commerce as defined in the National Labor Relations Act (the Act), the operative complaint herein.

FINDING OF FACT

II. JURISDICTION

The complaint alleges, the answer admits, and the evidence establishes that Respondent is a corporation with a facility located at Whitakers, North Carolina, where it is engaged in the manufacture of diesel engines and purchased and received goods valued in excess of $50,000 from points outside the State of North Carolina and during the same 12-month period sold and shipped goods valued in excess of $50,000 to points directly outside the State of North Carolina. Accordingly, Respondent is now and has been at all times material engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, the answer admits, and the evidence established that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The General Counsel's Exhibits are referred to as GC Exh.; Respondents as R. Exh.; and transcript references as Tr. Union exhibits are referenced as U. Exh.

III. ALLEGED UNFAIR LABOR PRACTICES

Prior to addressing the individual complaint allegations it would be helpful to briefly describe two items or policies on which Respondent relies in its defense. Respondent emphasizes its "Respect for Others" policy. It contends that prior to commencing operations it gave all initial hires a 7-month course on this policy and its policy on harassment. In that respect its employee handbook provides (R. Exh. 25, Tr. 444):

HARASSMENT

> Consolidated Diesel Company *will not tolerate harassment in any form*. We are committed to providing an environment for you that is free of harassment including, but not limited to, the following classifications: sexual, racial, religious, national origin, age, color, material status, physical or mental disabilities.
>
> Any unwelcome action, intended or not, *which is considered offensive to the receiver or a third party* may be labeled harassment. If you have been the recipient or the observer of a situation which appears to be harassment, you have the responsibility to report the situation immediately to your manager or to Human Resources. Human Resources should be notified immediately by either you or your manager.
>
> Incidents of harassment will be thoroughly investigated. Incidents of harassment or false accusations of harassment will be managed through CDC's Progressive Disciplinary Process, up to and including termination.

The second item to briefly describe is the Performance Management Process Committee (originally alleged as "peer review" process). This committee consists of some employee members; the human resources manager, and employee relations manager or facilitator. The perpetrator of alleged harassment and the victim of such appear, with witnesses if any, and after hearing the allegations the committee decides the disciplinary action to be taken, if any, up to and including termination.

In its defense of most of the complaint allegations the Respondent relies heavily on this procedure to effectively exonerate itself from responsibility.

The CDC workers unity committee consists of a significant group of employees who have been attempting to organize a union at Respondent for what appears to be several years, at least since 1992. In pursuit of this effort it periodically publishes a leaflet called the Unity News which addresses reasons why a union is needed. So for it appears to have published about 84 such leaflets (R Exh. 1–1eeee). It distributes these in several ways among which is to leave them in team rooms where employees take break and lunch periods.[2]

A. Confiscating the Unity News

Ethel Jones who worked on team 6 in October or November 1995, testified that about 2:45 p.m. one afternoon she observed a security guard ride up to team room 6 on his bicycle where he dismounted and entered the team room and went to a table and picked up a white piece of paper which she identified as a copy of the Unity News. He then went to the end of the table and picked up something else. He came back out folded them and put them in his back pocket. Jones then went the 15 or 20 feet to the team room where there were two employees. They verified to Jones that the guard had picked up all copies of the Unity News except one that one of the employees was reading.

Another instance of a guard confiscating the Unity News from a team room came from testimony of a former employee Callen Parker. Parker testified that after lunch one evening in October 1995, he observed a guard enter a team room and collect union literature. However, Parker could not see the guard in the team room and testified that the guard was in the team room but that no one took union literature from an employee who was reading it. In Parker's pretrial affidavit he stated that he did not believe the papers taken by the guard were the Unity News. At the hearing he testified that he was confused by the color. The Unity News is published in several different colors. I am persuaded that Parker's trial testimony was the more reliable and is accordingly credited.

The General Counsel's final witnesses on this issue was Zachary Means who testified that in September or October 1995, a security guard interrupted a team meeting in a team room. Previously the guard had talked in the hall with the team coordinator and told the team members he would have to pick up all the News letters on the table. No one was reading one at the time. Means testified that an employee, Garner, pulled one out of his pocket and asked "this one too?" The guard replied "yes." Garner denies that the guard took one from him or that he offered him one. Gardner verified that the guard did collect all newsletters on the table. Gardner further testified that the acting team manager came back and told them the guard had apologized and said he was not supposed to have picked up the literature.

The Respondent, while conceding that its solicitation/distri-bution rule published in the employee handbook was facially invalid in that it prohibited such activities during "working hours and on plant property" prior to the Settlement Agreement referenced above, contends that its current solicitation/distribu-tion rule in affect at this time was facially valid in that it made clear to the employees where they could lawfully solicit or distribute union literature, and thus no violation should be found. In the event a violation is found it is de minimis and no remedy is warranted.

In his closing argument3 the General Counsel argued that this case is similar to that in *Intermedics, Inc*., 262 NLRB 1407 (1982), where the Board found a violation of 8(a)(1) and was enforced by the Fifth Circuit Court of Appeals 715 F.2d 1022 (1983). The major difference between these cases is that in *Intermedics* there was a current overly broad no-solicitation rule in the employee handbook. In *Intermedics* the judge found that the "confiscation" of union literature was consistent with the employer's unlawful no-solicitation rule.

In my view the seizure of union literature as here, whether consistent with a no-solicitation rule or in violation of a valid published rule has the same impact on employees' exercising their rights under Section 7 of the Act. Were this the only violation of the Act here it could well be found to be de minimis and no remedy warranted. However, where as here, there are additional violation of the Act, the Respondent shall be ordered to cease and desist from violating the valid solicitation/distri-bution rule set forth in its employee handbook, and the notice it posted pursuant to the settlement agreement referenced above.

B. Harassment Allegations

1. Fernando Losada

On November 17, 1994, the CDC Unity Committee printed a new Unity News. One method of distribution was to have members take copies to the 30 plus team rooms where employees frequently took their breaks and lunch periods. The "NEWS" would be offered to employees there and copies of it would be left on the table to be available to employees who might desire to take one. It was this practice that brought about charges of harassment against Fernando Losada by uplift team member David Duke.

On that date, upfit team member David Duke was in the upfit team's team room having lunch with other team members. At approximately noon, the door to the team room of the upfit team was opened as Fernando Losada and Watt Avent burst into the room. Losada and Avent moved quickly around the room, one on each side of the center table, putting down copies of the Unity News in front of the seated team members in the room. Losada was attempting to give copies to the team members and put a paper in front of Duke's face. Duke said he felt threatened because of the suddenness of Losada's and Avent's entry into the room from behind, and instinctively stood up to defend himself. A verbal exchange ensued between Duke and Losada. Duke told Losada "[Y]ou're screwing with my lunch," and to leave, and then followed Losada and Avent to the door and directed some profanity at him.

Duke immediately contacted his supervisor, Team Manager Alice Burt, and told her that he wanted to discuss the situation with human resources. Burt called Employee Relations Representative Diane Whaley, and Duke met with Whaley. Duke told Whaley what had happened

[2] Respondents' employees, of which there are about 1300, are divided into teams by their job classification which Respondent calls business units, of which there are 30 plus. Each team has a team room.

[3] The General Counsel did not file a posttrial brief.

and told her that he wanted to file a charge of harassment. Duke told Whaley that he felt harassed because he had been startled by the suddenness of the door being opened and having literature he did not want forced on him during his limited time for lunch. Whaley took Duke's statement, and Duke returned to his job. (R. Exh. 7; Tr. 365–368.) Whaley subsequently interviewed team member witnesses to the incident Vernice Kelly, Barbara Pittman, and Joe Ward. (R. Exh. 8.)

A Performance Management Policy meeting was held on November 30, 1994, in which the incident was considered. Present were Duke, Losada, team member Tony Durant as a representative of Losada, witness Watt Avent, Losada's team manager, Gloria Terry, team member Joe Ward as Duke's representative, team member witness Vernice Kelly, Duke's team manager, Alice Burt, Employee Relations Representative Elaine Hunter, Employee Relations Representative Diane Whaley, and Human Resources Manager Larry Williams. (R. Exhs. 9, 10, 11; Tr. 271.) Hunter was present at Losada's request. (Tr. 75.) Duke and Losada presented their version of what occurred during the incident in question. General Counsel's witness Hunter testified that Duke and Kelly said they did not appreciate having their lunch interrupted, and that Kelly said that when Losada and Avent entered the team room it was like an ambush and she (Kelly) felt harassed. (Tr. 72, 105–106, 112, 114.) Hunter further testified that Whaley read out the information she had gathered from the people she had interviewed. (Tr. 103.)

During the meeting, Losada acknowledged that he could have handled the situation differently, and Duke admitted that he had probably overreacted to the incident. Williams reviewed with them the revised solicitation/distribution policy and stated that team members had a right to distribute literature in nonwork areas during nonworktime. (Tr. 162–163, 439–440.) He further explained that Losada and Avent had a right to enter the team room for solicitation and/or distribution, but in a manner which did not violate the Company's respect for others policy. (Tr. 112.) Duke dropped the harassment charges and documentation of the meeting was to be placed on file. Hunter advised Losada and Avent that they had a right to file a harassment charge against Duke. (Tr. 107, 109.) Losada acknowledged that both Hunter and Williams indicated that he could file a harassment complaint against Duke. (Tr. 146, 165.) Hiawatha Avent testified that Hunter advised him that he could file a complaint against Duke. (Tr. 180, 200.) When Williams asked Losada if documentation was acceptable, he specifically explained to Losada that the harassment charge was dropped, and the only thing documented was the meeting. (R. Exhs. 9, 10, 11; Tr. 368–370.)

Losada has subsequently distributed union literature in Duke's team room while Duke was present, without incident (Tr. 371–372), and indeed has received a promotion since that time.

On Duke's dropping his charges against Losada the only action taken by the group was to document that charges had been filed and withdrawn. A record of these events would be maintained, Respondent said in a separate file, but would be referenced and considered if any future charges were filed against Losada. Losada received a promotion after this incident.

The General Counsel argues in essence that Respondent continues to maintain an unlawful no-solicitation/distribution rule although the rule as revised in the employee handbook pursuant to the Settlement Agreement referenced above is facially valid.[4] His contention apparently is that not withstanding the facially valid published rule, the confiscation of union literature in nonworking areas of the plant and subjecting Losada and Wrenn, discussed hereafter, to its disciplinary process for lawful distribution of union literature and expressing their pro-union views makes the rule invalid. Apparently the theory is that Respondent initialized its "Respect for Others" policy and its policy on harassment to interfere with, restrain, and coerce its employees in their exercise of engaging in guaranteed Section 7 rights.

While it is true that employees engaged in solicitation and distribution for the union may do so in a manner that would remove them from the protection of the Act for engaging in such activities, such as attempting to physically force employees to sign a union card or threatening employees physically or otherwise to support the Union, that is not the case here. It appears from the record that neither Losada nor Avent made any statement, but merely presented a copy of the Unity News to employees having lunch and if they did not take it, they left a copy of the letter in front of them to take or leave. It appears that no words were ever spoken until Duke stood up and objected to them interfering with his lunch in an angry manner and followed Losada and Avent from the room using some profanity, perhaps attempting to attack them physically.

While an employer has a duty to investigate charges of an employee by another employee, where the allegation on the surface is not valid and involves protected Section 7 rights, the Employer violates Section 8(a)(1) of the Act when it places the charged employee into its disciplinary process. The Respondent admits that a record of the charge and disposition of its would be maintained in a file and would be referred to in the event of another charge against Losada.

2. Jim Wrenn

On the same day as the Losada-Duke event considered above, November 17, Losada and Avent also distributed the "Unity News" in the paint team room which may have precipitated the charges considered here against Jim Wrenn. There was no incident with respect to Losada and Avent here.

Prompted by the presence of the newsletters, team members Tim Engleking, Kathy Mills, and Greg Taylor began discussing among themselves union contract negotiations in other plants. At approximately noontime, Jim Wrenn entered the paint team room, asking one team member about the whereabouts of another team member. Wrenn then asked the team members present if they needed any copies of the Unity News, which he held up. David Pittman, a paint team member, said, "[N]o, but you can have this one," and held up a copy. Wrenn then made a comment, "why are ya'll so blind," and started to argue his point of view. Paint team member Kathy Mills told Wrenn that they did not want to hear what he had to say. Wrenn made reference to the team-based management system and claimed credit for getting the Martin Luther King Holiday introduced in the plant. Engleking felt that Wrenn, by gesturing to Engleking when he said "they" did not want to give the King holiday, was signaling him out as one of two white males on a team in which all of the other members were black. (R. Exh. 13; Tr. 381–392, 425–428.)

Engleking and Mills went to Employee Relations Representative Diane Whaley. Engleking and Mills explained the incident, and Engleking told her that he felt the situation needed the attention of Human Resources. Whaley asked Engleking if he just wanted to document the occurrence or file a formal complaint. Engleking stated that he wanted to file a formal complaint. Mills also said that she wanted to file harassment charges. (Tr. 392–394, 428–429.)

After returning from a normally scheduled 6-day break and the Thanksgiving holiday, Wrenn was told by his supervisor that two employees in the assembly side of the plant had filed a charge of harassment against him, and that he needed to be present at a meeting the following day. (Tr. 244–245.) Wrenn asked Elaine Hunter to be present in the meeting. (Tr. 75.) Wrenn was not advised of the nature of the charges nor was he told who had brought the charges. A series of three meetings of a Performance Management Process Committee were held to investigate and review the harassment charge filed by Engleking and Mills. Wrenn was present at each of these meetings, as were Hiawatha Avent as Wrenn's representative, Larry Williams, as facilitator, Mills, Engleking, Diane Whaley, Gloria Terry, and Alice Burt. During the first meeting, Wrenn was advised who was bringing the charges and what they said occurred. (Tr. 301.) Engleking, Mills, and Wrenn were afforded an opportunity to give their version of the events. During this meeting, Williams distinguished documentation from an educational forewarning, explaining that only educational forewarning could serve as a basis for future discipline. (R. Exhs. 14, 15.)

General Counsel's witness Elaine Hunter and General Counsel witness Hiawatha Avent acknowledged that Engleking said that he felt that Wrenn had tried to divide the team racially by making reference to the Martin Luther King holiday, and that he felt that Wrenn's comment regarding them as being blind was derogatory to him. (Tr. 122–123, 202–203.) Hunter and Avent also acknowledged that Kathy Mills was concerned that she did not want to hear Wrenn's comments during her lunch hour, that she "wanted to eat and be left alone," and that it was Mills' feeling that once she said she did not want to hear it, Wrenn should have left them alone. (Tr. 123–124, 202.) No consensus was reached after that first meeting, and it was decided that Whaley should interview additional witnesses. (R. Exh. 17; Tr. 126.)

Whaley interviewed all of the individuals identified by Wrenn, Engleking, and Mills. (R. Exh. 17; Tr. 299.) A second meeting was held on December 12, 1994. The result of the

[4] As noted above that Settlement Agreement was set aside by the region upon issuance of the instant complaint the Respondent continues to publish a facially valid rule in the employee handbook.

additional interviews were shared with the group. Consensus was still not reached, and Williams advised the group that Human Resources would review past practice and reconvene the group for a decision. (R. Exhs. 18, 19, 20; Tr. 452.) Williams thereafter met with Human Resources Director Barbara McGuffey. Elaine Hunter was also present. McGuffey emphasized that the matter should be returned to the peer group and that *they* should reach a decision. (Tr. 129, 452.)

At the third meeting, held on January 9, 1995, Williams communicated with the group that, in prior situations in which two employees had different views on whether harassment had taken place, no action was taken and the meeting was documented. (Tr. 453.) The final decision of the group was to document that an allegation of harassment had been made and that no action was taken. The document would be noted under the names of Engleking, Mills and Wrenn and maintained in a separate file for that purpose. (R. Exhs. 21, 22, 23; Tr. 453–454.)

The Respondent argues that neither Losada nor Wrenn was subject to any disciplinary action. However, Respondent admits that discipline up to and including discharge is a possible result of utilizing this process. Respondent further concedes that in the event other charges are filed against Losada or Wrenn the documentation maintained from the instant charges would be considered in evaluating those charges. In the case of Losada the documentation reflects that the charge was withdrawn. However, in the case of Wrenn the documentation reflect that after three meetings no decision was reached by the process and apparently remains an open charge subject to any interpretation Respondent might wish to view.

The Respondent further argues with respect to both Losada and Wrenn that once the charge had been made the burden shifted to the General Counsel to show that they did not engage in the complained of misconduct. In this case the complaint of misconduct was simply conduct by which the employees were engaging in protected Section 7 rights, thus, no such burden shifted to the General Counsel.

The Respondent's reliance on the Board's decision in *BJ's Wholesale Club*, 318 NLRB 684 (1995), is misplaced. There employee Teresa LaTorre complained to management that employee Caualiere repeatedly interrupted her during worktime to sign a union card and that this conduct was interfering with her work. Caualiere had previously been counseled about similar conduct. Also the Employer's discipline here merely consisted of telling the offending employee that there had been a harassment complaint filed against him. Thus, it appears that no progressive disciplinary action was activated that could lead to termination. While the Respondent here had a no-harassment rule, there appears to be no dispute Caualiere did repeatedly interfere with the complaining employees' work during worktime. In the instant case there was no interference with any employees' work. Here, also, there were no repeated activity by either Wrenn or Losada but merely the single incidents neither of which appears to have lasted more than 5 minutes.

The Respondent's emphasis that the controlling language in its harassment policy is "[any unwelcome action, intended or not, *which is considered offensive to the receiver or a third party* may be labeled harassment." It is axiomatic that conduct or actions considered harassment by one person may not be considered such by others. Thus, it is necessary to analysis whether the conduct complained of would be conduct, under the circumstances here, which would be reasonably offensive to a reasonable person.

The Respondent states that it had been unable to discover any Board precedent on the standard to be used in deciding whether harassment has occurred, but cites the Equal Employment Opportunity Commission's interpretation of the Supreme Court's pronouncement in *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993), regarding the standard to be used in evaluating harassment, is instructive. The Supreme Court indicated that an objectively hostile or abusive work environment is created when, (1) "a reasonable person would find [it] hostile or abusive," and (2) the victim subjectively perceives it as such. *Harris*, 510 U.S. 114. The EEOC has emphasized that "[t]he reasonable persons standard should *consider the victim's perspective and not stereotyped notions of acceptable behavior*." E.E.O.C. Notice 915.002.

Respondent further argues that the General Counsel failed to establish that there was no misconduct. In my view, the conduct Losada and Wrenn as well set forth in the record does not constitute misconduct in violation of Respondent's harassment policy.

With respect to Dukes' claim that he was startled by the sudden entry of Losada and Avent to the team room, it is evident that he could not have been startled more than a few seconds as to who it was and why they were there. Such momentary startlement could not reasonably be constructed as harassment.

Wrenn's conduct set forth above is also not in violation of Respondent's harassment or respect for others policies. On November 17, 1994, he entered the paint team room at about noon to distribute the Unity News whereupon some members began discussing union negotiation at other plants. When no employees present indicated they wanted a copy Wrenn said, "[W]hy are ya'll so blind," and started giving his point of view about the Union. Mills told him they did not want to hear what he had to say. Wrenn then made reference to the fact that the old CDC committee had been instrumental in getting the Company to observe the Martin Luther King Holiday. In making this statement he gestured to Engleking, one of two white males on the team and said the Company had not wanted to give it. It appears the entire episode lasted less than 5 minutes.

The complaints with respect to Wrenn's conduct here came from Kathy Mills and Engleking. Mill's complaint was that Wrenn should have shut up and not pushed his prounion views when she told him they didn't want to hear them and that it interfered with her lunch. Engleking complained that he was offended by Wrenn's question, "why are ya'll so blind," and that by gesturing toward him when he said the CDC Committee was instrumental in getting the Martin Luther King Holiday. He felt that Wrenn was trying to racially divide the plant.

During a union campaign, particularly one as long as this one, employees tend to become solidified as either prounion or antiunion and sometime seize upon any opportunity to advance their views. As noted above this episode in the paint team room appears to have been very brief and while differing views were expressed, I find nothing said by Wrenn that could be construed by a reasonable person as a violation of Respondent's "Respect For Others" or "Harassment" policy.

Since the process to which both Wrenn and Losada were exposed and permanent records maintained which could be utilized in the future for disciplinary action up to and including discharge, I find the Respondent violated Section 8(a)(1) of the Act by exposing them to that process.

CONCLUSIONS OF LAW

1. The Respondent, Consolidated Diesel Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

By the following acts and conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) Section 2(6) and (7) of the Act.

Respondent violated Section 8(a)(1) of the Act:

(1) By violating the Settlement Agreement it entered into on October 11 and 12, 1994, in Case 11–CA–16183 and approved by the Regional Director for Region 11 on October 24, 1994, correcting its invalid published solicitation/distribution rule.

(2) By having its security personnel confiscate the Unionpublished "Unity News" from nonworking areas which had been placed there during nonworking time.

(3) By subjecting its employees Fernando Losada and Jim Wrenn to its Performance Management Process Committee procedure for which permanent records are maintained and may be utilized in the future for discipline up to and including termination.

(4) Respondent has not otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

The Respondent argues and I agree that the remedy here should be narrowly constructed to the facts at hand. The Respondent shall be ordered to within 14 days of this order to amend its employee handbook and or notify its employees that its solicitation/distribution rule is that contained in the Settlement Agreement which was revoked by the Acting Regional Director on February 10, 1995, is effective.

It shall be ordered to expunge from all records and documents any reference with respect to Losada and Wrenn's appearance before the Performance Management Process Committee alluded to here.

Respondent shall not in any like or related manner interfere with, restrain or coerce its employees in the exercise of their Section 7 rights.

[Recommended Order omitted from publication.]