Foley-Wismer & Becker, a Joint Venture *and* Dody Norman. Case 19-CA-12268

August 30, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On December 22, 1981, Administrative Law Judge Frederick C. Herzog issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a motion to strike Respondent's exceptions and, in the alternative, an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Foley-Wismer & Becker, a Joint Venture, Richland, Washington, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge: On or about April 2, 1980, the charge herein was filed by Dody Norman, an individual, alleging that Foley-Wismer & Becker (hereinafter referred to as the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act by harassing, discriminating against, and discharging employee Dody Norman. On May 30, 1980, the Acting Regional Director for Region 19 of the Board issued a complaint alleging, among other things, that the Respondent disciplined and discharged Dody Norman in March 1980 because of Norman's union activities. The Respondent's answer, timely filed, admitted certain factual allegations of the complaint but, generally speaking, denied all wrongdoings.

This case was heard by me at Richland, Washington, on November 6 and 7, 1980. All parties were afforded the right to participate, to examine and cross-examine witnesses, and to adduce evidence in support of their positions. In addition, the parties were afforded the right to file briefs and to make oral argument at the conclusion of the hearing.

Based on the record thus compiled, plus my consideration of the briefs filed by counsel for the General Counsel, the Charging Party, and the Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges and the answer admits that the Respondent is a joint venture engaged in the business of electrical contracting at Richland, Washington, that during the 12 months preceding the issuance of the complaint it sold goods and services valued in excess of $500,000, that during the same 12 months it had both direct and indirect interstate sales valued in excess of $50,000, that during those same 12 months it had direct and indirect purchases in interstate commerce in excess of $50,000, and that at all times material the Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Based on these admitted allegations, I find and conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting

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

We also find totally without merit Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge. Upon our full consideration of the record and the Administrative Law Judge's Decision, we perceive no evidence that the Administrative Law Judge prejudged the case, made prejudicial rulings, or demonstrated a bias against Respondent in his analysis or discussion of the evidence.

The General Counsel in its answering brief filed a motion to strike Respondent's brief which was submitted in support of exceptions to the Administrative Law Judge's Decision, because it did not meet the requirements set forth in Sec. 102.46(b) and (c) of the Board's Rules and Regulations. We hereby deny the General Counsel's motion to strike Respondent's brief.

[2] In joining his colleagues in finding a violation of Sec. 8(a)(1) here, Chairman Van de Water does so solely on the basis that Respondent discriminatorily applied a valid no-solicitation rule to employee Norman. He does not join in any presumption that promulgation of a rule restricting union solicitation and distribution during "working hours" or a "working situation" is unlawful just because it is promulgated during a union organizational campaign, particularly here, where employees were informed that the prohibition applied during working hours and did not apply before work, or during their lunch period, under circumstances without a rest period. The Chairman, therefore, would not rely on any ambiguity in finding the rule invalid but does agree that the record supports the finding that Respondent discriminatorily enforced the rule against Norman.

In adopting the Administrative Law Judge's Decision, Chairman Van de Water does not rely in any way on *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981). As noted in *Intermedics, Inc. and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc.*, 262 NLRB 1407 (1982), he approves the Board's Rules as expressed in *Essex International, Inc.*, 211 NLRB 749 (1974).

Industry, Local No. 598, AFL-CIO (hereinafter called the Union), is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

I find and conclude this allegation, which was admitted by the Respondent, to be true.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Near Richland, Washington, is the Hanford Works reservation operated by the United States Atomic Energy Commission. On this reservation an agency of the State of Washington has been engaged in the construction of three electrical generating plants. As is frequently the case in projects of this magnitude, a number of different contractors have been engaged. The Howard P. Foley Company and Wismer & Becker are discreet corporations, engaged in the building and construction industry. In connection with the construction of two of the three electrical generating plants they jointly succeeded in obtaining the overall construction contract, a project described during the hearing as entailing the expenditure of nearly a quarter of a billion dollars. Throughout this project they operated as a joint venture on the Hanford Works reservation.

Simply stated, the Respondent's obligations in carrying out the terms of its contract involve not only the construction of the two electrical generating plants but, also, keeping such a wealth of records, in highly organized fashion, as to enable complete review of the manner in which the project was carried out. In connection with these obligations the Respondent has both a quality assurance and a quality control program. Some of this work is done by inspectors, and other work is performed by document control clerks and other clerical employees.

Dody Norman, the Charging Party, worked for the Respondent from January 10, 1979, until she was discharged on March 19, 1980. Initially she worked at the Respondent's primary office on the construction site. However, in October 1979 she was transferred to the "field office," which served as the headquarters for the inspectors on the construction site.[1]

During her tenure Norman received pay raises in July 1979 and January 1980. While the Respondent argues that such raises were more the product of the length than the quality of her service to the Respondent, it is clear that her last such pay raise, from the rate of $5.35 per hour to the rate of $6 per hour, resulted from the view held and expressed by management officials in January 1980 that Norman "is a concerned and conscientious Document Control employee. I recommend that she be given a salary increase effective on her one year anniversary date." The document in which this view was exposed was signed by her department head, Joey Gorman (Ottersen), and was countersigned by William A. Liles, the Respondent's assistant project manager.[2]

During August 1979 union organizational activity began among the Respondent's document control and quality control employees, on behalf of the Union. A petition for a representation election was filed, resulting in an election on October 18, 1979, and the Board's certification of the Union as the exclusive bargaining representative of such employees on February 25, 1980. On March 14, 1980, the Union and the Respondent began collective-bargaining negotiations.

Dody Norman was an open and ardent advocate of the cause of unionism during the election campaign in the fall of 1979. When negotiations began she served as a member of the Union's negotiating committee, attending the first bargaining session. Thus, based on both the evidence and the positions of the parties, it is clear that Norman, from the time the organizational activities began to the time she was discharged on March 19, 1980, was regarded by both employees and management alike as the project's prime advocate of unionism.[3]

William Liles, the Respondent's assistant project manager, testified that it was he who made the decision to discharge Norman, based upon her "failing to adhere to a direct order" of March 12, 1980, to "discontinue the interruption of other employees in their daily work habits." Liles also testified that had Norman "not interrupted other employees in their daily work habits from March 12th [1980] to March 19th [1980]," she would not

[1] It was located only a quarter mile from the Respondent's primary office on the construction site. Employees went back and forth from the primary office to the field office by means of a shuttle bus which took only a few minutes to make the journey.

[2] During the hearing the Respondent introduced both testimony and documentary evidence tending to indicate that Norman was not viewed as a good worker by the Respondent's management. However, I reject such evidence as a predicate for the discharge of Norman, in light of the repeated and clear testimony of Assistant Project Manager Liles regarding the basis of his decision to discharge Norman. Nowhere within the statement of reason supplied by Liles was any mention made of the various and sundry types of misconduct attributed to Norman, especially during the fall of 1979, by both employees and supervisory witnesses for the Respondent. Additionally, the Respondent's documentation of certain warnings allegedly given to Norman cannot serve as a predicate for her discharge. For, as with the evidence mentioned above, no such warnings are among the reasons cited by Liles in explanation of his decision to discharge Norman.

While it is clear that the events directly relating to her discharge did not occur in a vacuum it is equally clear that the Respondent should not now be heard to inconsistently attack Norman's standing as a "concerned and conscientious Document Control employee" through testimony and documentary evidence which was not known to or relied upon by the person who made the decision about whether her work warranted her retention as an employee. Instead, such make-weight, *post hoc* attempts at justification have the effect of drawing the Respondent's stated reasons and justifications for Norman's discharge into even greater doubt. It is settled that an employer's distortion and magnification of an employee's deficiencies cast a deep shadow over a claim that mere business judgment was involved in the employee's termination. Cf. *United States Postal Service*, 256 NLRB 736 (1981).

[3] Throughout the hearing the Respondent, both in the testimony of Liles and others and through counsel, advanced the inference that Norman's activities interfered with the Respondent's production standards. Yet the Respondent's "evidence" in support of this contention consisted of nothing more than generalities, and self-serving conclusionary statements. Indeed, during Liles' testimony, I instructed the Charging Party's counsel to cease cross-examination on this point, based upon my observation that it was a futility to seek details or specifics from Liles.

Obviously, the assertion of a claim that Norman interfered with production, followed by a failure to provide a reasonable basis for the claim, raises the inference that the claim was specious, and that it was advanced in an attempt to magnify the alleged discriminatee's deficiencies as an employee. Under such circumstances it is not unreasonable to infer the presence of a discriminatory motivation on the part of the Respondent. See, for example, *The Singer Company*, 220 NLRB 1179 (1975); *Daylin, Inc., Discount Division d/b/a Miller's Discount Dept. Stores*, 198 NLRB 281 (1972); *The J. L. Hudson Company*, 198 NLRB 172 (1972); *Selwyn Shoe Manufacturing Corporation*, 172 NLRB 674 (1968).

have been terminated. He stated that there were two, and only two, incidents which caused him to determine that Norman was failing to adhere to his direct order, set forth above, of March 12, 1980.

One of the incidents was described by Liles as having occurred on March 17 on the project's shuttle bus as it made the quarter mile run between the two buildings at the Respondent's jobsite. According to Liles, this incident consisted of Norman threatening Mary Clark, an employee, with termination if she did not produce a $200 initiation fee and resume for the Union.

The other incident cited by Liles as having caused him to determine to fire Norman consisted of Norman's having detained three or four employees from their regular work on March 19, as she was talking to employees Lori Roberts and Kathy Coombs.

As a backdrop for his decision, Liles testified that the Respondent's job specifications required it to maintain and promulgate to all its employees a rule prohibiting, upon pain of possible discharge, unauthorized dues collections or sale of tickets. Additionally, so Liles claimed, Norman interfered with productivity, interrupted work, and badgered and harassed fellow employees throughout the election campaign, to the time she was discharged.

Liles testified that, during the election campaign, the Respondent found it necessary to call employees into meetings and explain to them that they could not talk about organizing the Union except during lunchbreak, coffeebreak, and after working hours.

However, Liles testified that throughout this period he received reports from supervisors and managers to the effect that Norman was interfering with the work of other employees, ultimately leading him to call her into a meeting on March 12, 1980.

According to Liles, he then warned Norman that the Respondent viewed her interference with other employees as a "critical matter," that it was to stop, but that "she could contact any employee she wanted any time outside the regular working hours." Liles testified that Norman voiced her understanding of, plus her agreement with, the restrictions thus placed upon her.

Thus, so the Respondent apparently contends, Norman entered her last week of employment with the Respondent as something of a probationary employee, and was shortly thereafter involved in the "two incidents" which, according to Liles, sealed her fate as an employee of the Respondent.

In light of Liles' claimed reliance upon the "two incidents" as demonstrative of Norman's failure to abide by the instructions given her during the meeting of March 12, it becomes important to examine their details.

A. *Norman's "Threat" to Clark*

On March 17 Norman used the shuttle bus to travel between the Respondent's two buildings. The driver was Ralph Webber. Mary Clark was also a passenger. While in transit Webber and Norman got into a conversation, part of which centered upon the Union's fee and/or dues. Webber asked Norman whether the Union's dues were different from those which he paid as a member of the Teamsters Union. She replied by telling him that the initiation fee was $200, and that it had to be paid by a certain time. Clark, who had not been part of the conversation, then injected that she was unable to pay such an amount at that time. Norman, with an admittedly mischievous wink at Webber, said to Clark, "Well, if I were you, I would beg, borrow, or steal it."[4]

Liles' testimony to the effect that Norman threatened Clark with termination of her employment during the ride on the shuttle bus is disputed by Norman. Instead, so Norman declared, it was several days prior to March 17 that, during a lunchbreak, she ran into Mary Clark and Laurie Louden as they waited for the shuttle bus. She asked Clark if she had given her a resume and Clark replied that she had not. At that Norman told her that there was a deadline for the receipt of the $200 initiation fee, and that, if the deadline was missed, Clark would not be permitted to vote on whether or not to accept the tentative collective-bargaining agreement. And, Norman's testimony continues, she went on to say that after a contract was signed the Union would send letters to the Respondent to cause the termination of those who had still not joined the Union. As previously noted, Clark did not testify. And Louden's testimony on this point was merely to the effect that Norman once told both her and Clark that their resumes were needed "for the negotiations" and if things were "to go smoothly." Indeed, when specifically asked by the Respondent's counsel whether Norman had threatened to have either Clark or her terminated, absent the payment of $200, Louden emphatically responded that the subject was not brought up at that time. Thus, notwithstanding my view that Louden's demeanor evidenced a clear dislike for, and bias against, Norman, Louden's testimony was not supportive of the Respondent's position.

It seems clear that the credible evidence in this case will not support the Respondent's proposition that Norman engaged in misconduct by threatening Clark during the course of a bus ride on March 17, 1980. While I am aware that the Respondent contends that it could and would have effectively countered Norman's testimony had Clark been present to testify, the fact remains, however, that it did not, and, further, its inability in this regard was not caused by any other party.[5]

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[4] The only evidence concerning this incident was Norman's testimony. Though Webber was called to testify, he was unable to remember any conversation at all between Norman and Clark, both of whom were known to him. He did recall, however, that no inquiry was ever made of him by the Respondent about any such conversation or incident. Clark was not called as a witness, while the Respondent, through counsel, asserted that she was unavailable to testify. I find that, for whatever reason, Norman's testimony on this point stands unrefuted.

[5] I do not accept the letter from Clark to Liles, dated March 19, as sufficient to detract from the credibility I have attached to Norman's testimony. The letter was, of course, unsworn and its contents were not the subject of cross-examination. Nor do I view it as directly contradictory of Norman in some important respects. Finally, I note that Liles, by his own testimony, was not in possession of Clark's letter until sometime during the termination interview with Norman. I further note that the Respondent's own minutes of that meeting make no mention of this incident. Finally, I note that the Respondent violated its own policy with respect to verifying the truth and accuracy of the report it received on the Clark incident for it stands unrefuted that, contrary to Liles' generalized testimony about the Respondent's policy, the Respondent never contacted the busdriver, Webber, to learn whether he recalled any such incident as described by Clark. And, though it received a statement from Laurie

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B. *Norman's "Detention" of Roberts and Coombs*

On March 19, 1980, employees Roberts and Coombs went from the "document control" area in the Respondent's primary office at the site to its field office. They asked Norman to get some records out for their review. When they received the records they laid them out on a table and all three employees began working on them. As they worked Coombs and Roberts asked questions of Norman. Still working, Norman responded to their questions. This scenario continued for 5 minutes before being interrupted angrily by Supervisor Lint, who told them they were not supposed to talk about the Union on the Company's time and "stormed out."

Coombs was not called as a witness. But Roberts testified, and she stated that it was not Norman who started their talk about the Union. She also acknowledged her own prior knowledge of the Respondent's rule against discussion of the Union during "working time." As she described the rule's enforcement it is clear that the only effect of the rule was to compel employees to become secretive. Thus, she recalled that Norman exclaimed, "Now I am in trouble," upon observing Lint's approach. Neither Roberts nor Coombs was disciplined in any fashion for having violated the rule at the same time and in the same manner as Norman.

Lint, who claimed to have observed the entire exchange between Norman, Coombs, and Roberts, testified that it lasted only 45 to 90 seconds. His testimony supplied no further details. Significantly, his testimony failed to support any claim that Norman's conversation with Roberts or Coombs resulted in any employee being "detained" from work or experiencing a decline in productivity. The critical nature of this fact is shown by Liles' testimony to the effect that, had Norman merely been engaged in a conversation with Coombs and Roberts, with no interruption of work, he would not have deemed Norman to have engaged in misconduct. For, as Liles' testimony made clear, such casual "workbench" conversation was freely tolerated by the Respondent.

But it is not necessary to dwell upon this minor incident, obviously magnified[6] by Supervisor Lint and Liles. For it could not possibly have been among the *real* reasons relied upon by Liles when he determined to discharge Norman. Liles testified that,

> Actually, the deciding factor was the Mary Clark incident. At reviewing my notes, it actually took place on March 17th . . . .

Surely, the Respondent cannot credibly claim that Norman's brief response to questions from Roberts and Coombs on March 19 was one of the two main incidents forming a basis for her discharge in the face of Liles' volunteered testimony that Norman's fate had already been sealed by an incident which occurred at least 2 days prior thereto.

C. *The Alleged Rule and its Violation*

The Respondent has attempted to demonstrate the existence of valid, nondiscriminatory rules against "discussion of the union" during working hours. It argues that such a rule was, in essence, mandated by the Respondent's job specifications, as well as by "disturbances" and "diminished productivity" caused by discussions among employees of the pros and cons of unionism, especially when such discussions were carried on by Norman. Moreover, based on this argument, it contends that the warning extended to Norman on March 12, 1980, was amply justified.

However, as previously noted, the "rule" in the Respondent's job specifications (sometimes referred to during the hearing as "site rules" or "project rules") obviously cannot serve as a valid basis for warning or discharging Norman because of conduct encompassed within either of the two incidents previously set forth. For this rule pertained only to unauthorized dues collection or sale of tickets. Norman's conduct, however, cannot reasonably be said to have constituted a violation of so narrow a rule. True enough, she did mention "dues" in the presence of Clark on March 17, and she did earlier advise Clark of the results to be anticipated should Clark fail to join the Union or pay dues to the Union by certain specified times. But nowhere has it been demonstrated that Norman did more than convey information to Clark. Moreover, the "collection" incident with Clark has already been demonstrated to have played, at most, a very questionable part in Norman's discharge.

But the Respondent's main reliance has been placed on Norman's alleged violation of a "rule" which has not been shown to have had any exact language. Instead, so the Respondent claims, the discussions and disruptions during both the preelection period and the period between the election and the beginning of negotiations led it to see the need for a new rule. Accordingly, it held meetings of employees to convey to them that they were "not to discuss, either way, pro or con, the union, in a work situation because it became very heated, emotional, disruptive to work and caused bad feelings." Employees were made to understand, so the Respondent claims, that they could not discuss union policies or anything about the Union during working hours. They could do so before work, during their lunch period, and after work, but not during the 4 hours in the morning and the 4 hours in the afternoon when work was supposed to be done. From all this the Respondent argues that the rule was conveyed to employees in such a way that they could not have understood it to restrict solicitation or distribution at times when employees were not actively at work.

Louden which spoke in general terms about Norman "pressuring" an employee Louden was training in the field, it is also clear that the incident described by Louden could not, if consistent with Liles' testimony about the reasons for Norman's discharge, have been one of the two incidents. For Louden's "statement" is dated March 6, 1980, almost a full week before the occurrence of the incidents described by Liles.

[6] Such overreaction by an employer to a violation of even a valid work rule by an employee, especially when the rule has not been shown to have been evenly enforced, or necessary to maintain production standards, supports the inference that such violation has been seized upon as a pretext, and is supported only by an invidious and discriminatory motive. *Neptune Water Meter Co.* v. *N.L.R.B.*, 551 F.2d 568, 570 (4th Cir. 1977); *Flowers Baking Company, Inc.*, 240 NLRB 870, 872 (1979); *Sea-Land Service, Inc.*, 240 NLRB 1146 (1979).

The evidence in this case, however, fails to support, even belies, such claims and arguments. For according even to the Respondent's evidence, this new rule was conveyed to employees by word of mouth and, from all that appears, never reduced to writing. Thus, it seems scarcely surprising that none of the witnesses recalled the wording, much less the essence, of the rule precisely like any other witness on this subject matter. And the Respondent's reliance upon the "clear intent" of the rule seems badly misplaced, even were it not for the fact that the holding in a case supporting such a rationale has, since the hearing herein, been overruled. See *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981), overruling *Essex International, Inc.*, 211 NLRB 749 (1974). Thus, whether considering this case from a pre- or a post- *T.R.W. Bearings* standpoint, the Respondent's "rule" must be considered as impermissibly intrusive upon employees' rights to freely communicate their thoughts concerning the merits or lack thereof of unionism. Additionally, the rule must be found to be invalid on the basis of its ambiguity,[7] as well as upon the basis of its disparate, discriminatory, and selective application.[8]

The right of employees to communicate with each other concerning the desirability of organizing is one which is protected by Section 7 of the Act. For the effectiveness of organization rights "depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." *Central Hardware Company* v. *N.L.R.B.*, 407 U.S. 539, 543 (1972). "Direct personal contact is the most truly effective means of communicating not only the option of collective bargaining, but the most compelling reasons for exercising that option." *Belcher Towing Company*, 256 NLRB 666, 667 (1981). Consequently, in seeking to discuss the desirability of selecting the Union as their bargaining representative, the Respondent's employees were exercising a right guaranteed to them by Section 7 of the Act.

"No 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." *N.L.R.B.* v. *Babcock & Wilcox Company*, 351 U.S. 105, 113 (1956). The facility where employees work has long been recognized as a "place uniquely appropriate" for exercise of that right of employees. *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793, 801, fn. 6 (1945).

Thus, absent a valid rule or special circumstances employees are protected in such discussions. *Hambre Hombre Enterprises, Inc., d/b/a/ Panchito's*, 228 NLRB 136 (1977).

I, therefore, find and conclude that the oral rule promulgated to employees by the Respondent and which, generally speaking, prohibited discussion of the Union "in a work situation," or "during working hours," is invalid, and is unlawful, as alleged in paragraphs 5 and 11 of the complaint. I shall, accordingly, require that the Respondent rescind such rule, as well as all warnings and discipline administered on the basis of its existence.[9]

D. *Conclusion*

The Respondent's actions in warning and discharging its employee, Norman, were predicated upon the validity of a rule which was clearly anything but valid. It follows that the "rule," whatever its wording, must be rescinded. Should the Respondent choose to replace it with another rule it has but to incorporate within the actual working of any rule it may promulgate sufficient clarifying language, as the Board has time and again pointed out. *T.R.W. Bearings Division, a Division of T.R.W., Inc., supra.*

Additionally, the Respondent shall be required to rescind the warning to Norman of March 12, 1980, and to reinstate her to the position from which she was terminated on March 19, 1980, with full seniority and other rights and privileges intact. Backpay shall be as provided hereinafter.

[7] Employee Roberts was led to testify that the rule merely prohibited discussion during "working time." Yet employee Louden testified that the rule's prohibition extended to a "work situation." Employee Hughes compounded this apparent conflict by stating that the rule prohibited discussion of union policies during "working hours." And, even with "clarification" for Norman by Supervisor Otterson, the rule remained impermissibly broad and/or vague, for Otterson simply told Norman that she wanted to hear no more union discussion from her from 7:30 until 11 a.m. (when Norman's lunch period began) or 11:30 a.m. until 4 p.m.

[8] The Respondent's rule was applied in an uneven fashion. The evidence showed that "workbench conversation" was freely tolerated by the Respondent. So were baby pools and pools of wagers on sporting events. Indeed, such activity was not only well known to the Respondent's supervisors, but also participated in by them.

Additionally, the Respondent seeks to draw a distinction between such activities as are set out above and discussions concerning the merits of unionism. It argues that the latter type discussions, and especially those in which Norman participated, had the potential, and sometimes actual, result of causing employees' tempers to flare, and their productivity to fall. But its argument was supported by only unpersuasive, conclusionary evidence, rather than any data or records, despite the clarity of its position that the maintenance of reams of records of production was a primary activity of the very unit under discussion.

And, finally, the Respondent's argument and evidence fail to adequately explain its justification for maintaining distinctions between the various types of conduct which were shown to have caused employees' tempers to flare. For while the Respondent sought to squelch discussion of unionism on this basis, it appears to have remained rather sanguine regarding the heated exchanges shown to have accompanied employee discussions of such subjects as politics, or whether or not the "file exempt" (in an attempt to avoid or evade payment of taxes).

In the face of this inconsistency I am compelled to conclude that the Respondent's rule, and the Respondent's attempts to enforce it, was an attempt on the part of the Respondent to illegally hinder and restrain employees in the exercise of rights protected by the Act.

[9] The General Counsel's *prima facie* case has been established in this case by the showing that Norman was warned and discharged pursuant to an invalid and discriminatorily applied rule. The Respondent's justifications for its actions (i.e., the two "incidents" set forth previously herein) have been thoroughly discredited by me, and, therefore, cannot serve as any predicate for a defense that the Respondent would have taken the action against Norman in any event, even absent any protected activity on her part. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. The Respondent, Foley-Wismer & Becker, a Joint Venture, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. The Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing a rule which, though ambiguous, clearly prohibited and threatened employees with discharge or other discipline if they engaged in union or protected concerted activity which it deemed violative of its rule against discussing the Union during working hours or during certain hours of the workday.

4. The Respondent has violated Section 8(a)(1) and (3) of the Act by discriminatorily warning and discharging employee Dody Norman in an attempt to enforce the unlawful rule against discussing the Union, referred to above, and/or in an attempt to cause her to cease her other protected concerted activities on behalf of the Union.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER[10]

The Respondent, Foley-Wismer & Becker, a Joint Venture, Richland, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminatorily promulgating, maintaining, or enforcing its rule against discussion of the Union during working hours.

(b) Discouraging union activity or membership in the Union, or in any other labor organization, by warning, disciplining, discharging, or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of employment.

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

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to Dody Norman immediate and full reinstatement to her former position of employment, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of her discriminatory discharge. Backpay and interest shall be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(b) Withdraw and rescind its unlawful rule, and notify its employees in writing that it has taken such action.

(c) Withdraw its warning to Dody Norman of March 12, 1980, and destroy, and hold for naught, any records thereof.

(d) Preserve and, upon request, make available to the Board and its agent, for examination and copying, all payroll records and reports and all other records required to ascertain the amount, if any, of any backpay which may be due under the terms of this Order.

(e) Post at its Hanford Works reservation, in the State of Washington, its offices and facilities, copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 19, after being signed by Respondent's authorized agent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that these notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a 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."

APPENDIX

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

After a hearing at which all sides had a chance to give evidence the National Labor Relations Board has found that we have violated the National Labor Relations Act and we have been ordered to post this notice.

The Act gives employees the following rights:

> To engage in self-organization, to form, join, or assist any union
>
> To bargain collectively through representatives of their own choosing
>
> To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
>
> To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT discriminatorily promulgate, maintain, and enforce a rule against discussing the Union during working hours or in a work situation. We hereby notify you that any rule pertaining to this subject matter has been withdrawn and abolished.

WE WILL NOT discourage membership or activities on behalf of United Association of Journeymen

and Apprentices of the Plumbing and Pipefitting Industry, Local No. 598, AFL-CIO, or any other labor organization, by warning or discharging employees or discriminating against them in their hire or tenure.

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

WE WILL rescind and expunge from our personnel or other records any reference to the warning issued to Dody Norman.

WE WILL offer to Dody Norman immediate and full reinstatement to her former position of employment or, if that job is no longer in existence, to a substantially equivalent position without prejudice to her seniority or other rights and privileges, and WE WILL also make her whole for any loss she may have suffered as a result of the discrimination against her, with interest thereon.

All our employees are free to join the above-named labor organization, or any other labor organization, or to refrain therefrom.

FOLEY-WISMER & BECKER, A JOINT VENTURE