George C. Foss Company *and* National Association of Independent Unions. Case 20-CA-16875

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 18 April 1983 Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees William E. Merrow, Dan Brown, Doyle Graham, Richard Harris, Roger Stevens, John Francis Moore, Jurgen Ulbrich, Dale Young, John Doolittle, and Matthew Burnley. In so concluding, the judge found that the Respondent unlawfully applied the union-security clause of its collective-bargaining agreement so as to require these employees to join International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO (Local 340) without affording them the full statutory grace period guaranteed them by Section 8(a)(3) and Section 8(f)(2) of the Act. We adopt the judge's conclusion, but we modify his rationale as set forth below.

The pertinent facts are as follows. The Respondent executed a collective-bargaining agreement with Local 340 on 12 February 1982, which covered all the Respondent's electrical employees including the above-named individuals. Since the Respondent was engaged primarily in the building and construction industry, Section 8(f)(2) of the Act permitted the Respondent to enter into an agreement with a labor organization requiring, as a condition of employment, membership in the labor organization "after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later." The Respondent's agreement with Local 340 so provided.[1] The Respondent discharged the 10 discriminatees about 2:30 p.m. on 19 February 1982. At the hearing, the Respondent contended that the discharges were lawful because the 10 discriminatees had refused to comply with the union-security clause in the Respondent's collective-bargaining agreement with Local 340.

As noted above, the language of Section 8(f)(2) expressly provides that union membership can be required of employees "after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later." In construing the statutory grace period under Section 8(f)(2), the Board has held that employees are entitled to a *full* 7-day grace period *following* employment to become union members pursuant to a union-security provision and that requiring employees to become union members on the seventh day following employment is unlawful. *J. W. Bateson Co.*, 134 NLRB 1654, 1655 (1961). Similarly, the Board has held that a union hiring hall fee is not collectible until the eighth day following employment, *Carpenters Local 2375 (AGC of California)*, 192 NLRB 314, 317 (1971), and that a collective-bargaining agreement clause requiring membership "on the seventh day" following employment or the effective date of the agreement clearly fails to provide the full 7-day grace period required by the Act, *Tri-W Construction Co.*, 139 NLRB 1286, 1292 (1962).

In the present case, the collective-bargaining agreement was executed 12 February 1982 and the employees were discharged about 2:30 p.m. on 19 February 1982, i.e., on the seventh day following the execution of the agreement. Therefore, applying the above principles, it is clear the Respondent, prior to discharging these employees, had not afforded them the full 7-day statutory grace period to which they were entitled following the effective date of the Respondent's collective-bargaining agreement with the Union. Accordingly, we conclude that the Respondent's discharge of these 10 employees violated Section 8(a)(3) and (1) of the Act.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, George C. Foss Company, Sacramento, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Thus, the Respondent's collective-bargaining agreement with Local 340 contained the following union-security clause:

> All employees covered by the terms of this agreement shall be required to become and remain members of the union as a condition of employment from and after the eighth day following the date of their employment or the effective date of this agreement, whichever is later.

[2] In view of our finding that the discriminatees were not afforded the full 7-day statutory grace period, we find it unnecessary to pass on the judge's conclusion that the union-security clause in the Respondent's collective-bargaining agreement extended the statutory grace period.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Sacramento, California, on December 7 and 13, 1982. National Association of Independent Unions (the NAIU) filed an unfair labor practice charge and an amended charge on January 29 and February 22, 1982, respectively, against George C. Foss Company (Respondent). On April 30, 1982, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent. The complaint was amended on November 29 and again at the trial on December 7, 1982. The complaint, as amended, alleges in substance that Respondent engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., herein called the Act.

All parties[1] were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the NAIU,[2] and Respondent. Based on the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

At all times material herein, Respondent, a California corporation with an office and place of business in Sacramento, California, has been engaged as an electrical contractor in the building and construction industry. During its last fiscal year, Respondent purchased and received at its Sacramento facility goods and materials valued in excess of $50,000 from firms which directly purchased those goods and materials from outside the State of California. Accordingly, it admits, and I find, Respondent to be an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The NAIU is now, and has been at all times material herein, a labor organization with the meaning of Section 2(5) of the Act.

International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, herein called Local 340 or the IBEW, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

As mentioned earlier, Respondent is an electrical contractor in the building and construction industry. Respondent has a history of bargaining with Local 340 as part of the NECA multiemployer bargaining unit. Respondent was party to the 1978-1981 NECA-Local 340 bargaining agreement, which expired May 31, 1981. On June 10, Local 340 commenced a strike against NECA and its employer-members, including Respondent. Respondent continued to operate during Local 340's strike by employing replacement employees. On September 15, Local 340 sent a letter disclaiming interest in the NECA multiemployer bargaining unit. Thereafter, on September 25, Local 340 filed 17 representation petitions with the Board seeking to represent employees of 17 employers formerly in the NECA bargaining unit in 17 separate single employer units. Respondent was one of the 17 employers for whose employees Local 340 petitioned to represent. On or about September 28, Local 340 agreed to permit its striking employees to return to work for Respondent. However, the Local 340 employees did not work on the same jobsites as the employees whom Respondent had hired during the strike.

On October 1, NECA signed a collective-bargaining agreement with the NAIU, which agreement purported to cover the employees of the employers involved in the NECA-Local 340 negotiations, including Respondent. For some time thereafter, Respondent applied the NECA-NAIU collective-bargaining agreement to its replacement employees. Respondent's IBEW employees worked pursuant to the terms of the previously expired IBEW bargaining agreement. On February 12, 1982, Respondent and Local 340 executed a collective-bargaining agreement covering all of Respondent's electrical employees.

Within this factual background, the General Counsel contends that Respondent discharged 10 of its employees on February 19, 1982, because the employees were members of the NAIU.[3] Respondent denies the commission of any unfair labor practices. In addition, Respondent contends that the employees were discharged pursuant to a lawful union-security clause in its collective-bargaining agreement with Local 340. Finally, Respondent contends that William E. Merrow, alleged by the General Counsel to be an employee, was a supervisor within the meaning of Section 2(11) of the Act and, therefore, that the discharge of Merrow cannot be violative of the Act.[4]

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[1] Prior to the hearing, National Electrical Contractors Association, Sacramento Valley Chapter (NECA) made a motion to intervene, which motion was denied by the Regional Director. At the hearing, NECA renewed its motion to intervene. NECA sought intervention on the ground that the legality of its collective-bargaining agreement with NAIU, to which it claimed Respondent was bound, would be litigated in this proceeding. I ruled that I would allow intervention only if the legality of NECA's contract or whether Respondent was bound by said contract became issues in the case. However, neither the General Counsel nor Respondent litigated the case on any theory which placed the NECA-NAIU contract at issue. Thus, I did not permit NECA to inject additional issues into the case. NECA was invited to file an amicus curiae brief, but no brief was filed on its behalf.

[2] The NAIU's brief was filed 1 day late but was considered as if timely filed.

[3] The 10 employees are William E. Merrow, Dan Brown, Doyle Graham, Richard Harris, Roger Stevens, John Francis Moore, Jurgen Ulbrich, Dale Young, John Doolittle, and Matthew Burnley.

[4] In the original complaint the General Counsel alleged that Merrow was a supervisor and that Merrow's discharge violated Sec. 8(a)(1) as an

Continued

B. *Supervisory Status of William E. Merrow*

1. The facts

Merrow was hired by Glen Sutton, Respondent's estimator, in late August or early September 1981 as the senior working foreman at Respondent's State Capitol project. On the State Capitol project, Merrow corrdinated work with the representative of the general contractor, Chappick Construction. Merrow's responsibility was to read the blueprints, lay out the work, distribute the work, give assignments to the men, and order parts. Merrow did not have authority to hire or fire employees. In October, after Respondent added men to Merrow's crew, he received a 15-percent pay increase. John Francis Moore, also designated foreman, received a similar pay differential.[5] Sutton and Merrow approved overtime. Merrow did not discipline employees, although he did tell employees that they were taking too much time on their scheduled breaks.

In assigning work to his crew, Merrow would first meet with Chappick's superintendent on the job. Then Merrow would meet with his working foremen and decide the job assignments for that day. While Merrow could assign workers to various locations on the jobsites according to Chappick's needs, he could not transfer employees to other jobsites. On one occasion, Merrow asked that certain of the workmen not be sent to another jobsite to help Local 340 members familiarize themselves with a particular job in progress. The workmen were sent to the jobsite notwithstanding Merrow's request to the contary. Merrow did make a recommendation to promote an employee from apprentice to journeyman. The record does not reflect whether the recommendation was followed. Moore and John Doolittle were promoted from journeymen to foremen after a recommendation by Merrow. However, the record indicates that Sutton and Merrow fully discussed the subject. The record does not indicate whether the promotion was based on Merrow's recommendation or on an independent judgment of Sutton. Employees were laid off on a last-in, first-out basis. The determination to lay off was made by Sutton after consulting with Merrow. Merrow on occasion allowed employees to leave work early. However, he called Respondent's office for permission to do so. On one occasion, an official of Chappick complained about one of Respondent's electricians. Merrow called Sutton and reported Chappick's complaint. Merrow recommended that the electrician be given another chance and Sutton agreed. About a week later, Chappick again complained about the employee and Merrow reported the complaint to Sutton. Sutton told Merrow to lay off the employee and Merrow followed those instructions.

The above account of Merrow's job responsibilities is based on Merrow's testimony. Sutton, Elwyn Simard, Respondent's president, and Carl (Bud) Beerman, field superintendent, all testified in this proceeding but none was questioned concerning Merrow's job responsibilities or duties.

2. Analysis

Section 2(11) of the Act states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

The possession of any one of the authorities specified in Section 2(11) is sufficient to plaqe an employee in the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Fair Lady, Inc.*, 211 NLRB 189 (1974). On the other hand, the legislative history of Section 2(11) indicates that Congress intentionally distinguished between "straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire, or fire, discipline, or make effective recommendations with respect to such actions." Thus, a "leadman" or "straw boss" may give "minor orders to directives or supervise the work of others, but he is *not necessarily* a part of management and a 'supervisor' within the Act." *Black Kettle, Ltd.*, 263 NLRB 380 (1982); *NLRB v. Doctor's Hospital*, 489 F.2d 772, 776 (9th Cir. 1973).

In the instant case, it appears that Merrow was Respondent's choice as a skilled electrician to run the State Capitol job. However, the running of the job appears routine in nature and not requiring independent judgment in view of the supervision and instructions received by Merrow from Sutton, the general contractor, and the job blueprints. *Iron Workers Local 28 (Virginia Contractors)*, 219 NLRB 957 (1975); *Electrical Workers IBEW Local 915 (Borrell Bigby)*, 225 NLRB 317 (1976). While Merrow made work assignments, it appears that he was acting as a conduit of orders from Sutton and Chappick's superintendent and not that he exercised substantial independent judgment. *General Thermo, Inc.*, 250 NLRB 1260 (1980). Merrow's recommendations to Sutton regarding personnel were in the nature of relaying information to Sutton from which the latter could make a determination rather than effective recommendations. *Cablevision Systems Co.*, 251 NLRB 1319, 1323 (1980). The ultimate effects of Merrow's recommendations are not clear from the record. Sutton, the witness best able to testify as to Merrow's authority in general, and the effectiveness of his recommendations in particular, did not testify regarding Merrow's alleged supervisory author-

integral part of a pattern of conduct directed towards employees because of their membership in the NAIU. On November 29, 1982, the complaint was amended to delete these allegations. At the opening of the trial, the General Counsel again amended the complaint to allege that Merrow was an employee and to include Merrow with the nine other alleged discriminatees.

[5] There is no contention that Moore was a supervisor within the meaning of the Act.

ity.[6] From the failure of Respondent to offer Sutton's testimony regarding Merrow's authority, I draw the inference that Sutton's testimony would have been adverse or unfavorable to Respondent's case. See *Martin Luther King Nursing Center*, 231 NLRB 15 fn. 1 (1977), and authorities cited therein. Thus, for all of the above reasons, I find that Merrow acted as a leadman or strawboss on Respondent's State Capitol jobsite but was not a supervisor within the meaning of Section 2(11).

C. *The Alleged Unfair Labor Practices*

As mentioned earlier, beginning approximately September 28, 1981, Respondent's striking Local 340 members returned to work. On or about October 1, NECA and the NAIU signed a collective-bargaining agreement and, shortly thereafter, Respondent began applying the NECA agreement to its non-IBEW employees, including the employees at issue herein. The Local 340 employees were working under the terms and conditions of the NECA-Local 340 agreement, which had expired on May 31. Although Respondent had crews of IBEW and NAIU employees, none of its jobsites had a mixed crew. In the first week of October, Beerman visited Respondent's non-IBEW jobsites and informed those employees of the NAIU agreement. The NECA-NAIU agreement contained a union-security clause, which clause Beerman read to the employees. The 10 employees at issue in this case joined the NAIU during October 1981 sometime after Beerman notified them of the union-security clause.

On February 12, 1982, Respondent signed a collective-bargaining agreement with Local 430. At the time of the signing of this contract, Respondent had two NAIU jobs, the State Capitol project (with eight employees) and the Gasafire Building (with two employees). Respondent employed one other NAIU member, John Reichert, a material handler, who worked at Respondent's shop and delivered materials to jobsites. On the date that it signed the agreement with Local 340, Respondent employed 23 IBEW member electricians. Respondent's collective-bargaining agreement with Local 340 contained a union-security clause which provided in pertinent part:

> All employees covered by the terms of this agreement shall be required to become and remain members of the union as a condition of employment from and after the eighth day following the date of their employment or the effective date of this agreement, whichever is later.
>
> All workmen who may be accepted into membership shall thereby paying [sic] regular monthly union fees uniformly paid by other members of the same classification in the union in order to defray the cost of the collective-bargaining agreement in accordance with its rules. In the event that a workman fails to tender the full and uniform admission fees or to maintain his membership in accordance with the provisions of this section, the union shall notify the employer to discharge this individual workman within 48 hours (Saturdays, Sundays, and holidays excluded) for failure to maintain continuous good standing in the union in accordance with its rules above referred to in this paragraph.

Carl "Bud" Beerman, Respondent's field superintendent, testified that on the afternoon of February 16 he told Matthew Burnley and John Doolittle, Respondent's only employees on the Gasafire project, that a contract had been signed with Local 340 and that the two employees had until Friday, February 19, "to go over to IBEW." Burnley said that he could not "go over to IBEW" because he did not get along with Lee Frith, Local 340's business manager. Doolittle said that he "*might* go over to IBEW" but that he had had problems in the past with an IBEW local union in Los Angeles. Doolittle said he did not think the IBEW would accept him. Beerman said, "Well, the only one way to do it is to try." Doolittle answered that "[he] thought [he] had best stay where [he] was."

Later on the afternoon of February 16, after the conclusion of work, Beerman spoke to the eight employees on the State Capitol project. According to Beerman, he told the employees that a contract had been signed with Local 340 and "according to the law and the way the contract was written legally . . . [the employees] would have to join IBEW by the 19th." One of the employees said, "You mean if we don't join, Friday will be our last day?" and Beerman answered, "Yes." Merrow asked if he had to quit the NAIU and Beerman answered that it was up to Merrow. Merrow said that the employees could not belong to two unions. Beerman answered that at one time Respondent had an employee who belonged to two unions. Employee Dan Brown asked what would happen to the employees if they joined the IBEW when the State Capitol project ended. Beerman answered that if Respondent had work the employees would be kept on, otherwise the employees could return to Local 340's hiring hall. Brown said that if the employees went to Local 340's hiring hall they would never get referred to any jobs. Beerman answered that was a matter between the employees and the IBEW and that he had no control over that. Beerman told the employees that they had done a good job. There were several questions concerning Local 340 to which Beerman answered that he did not know. According to Beerman, the conversation ended with Merrow saying that the employees would talk it over and let Beerman know.

Beerman returned to Respondent's office and called Frith. Beerman told Frith that there was a possibility that Frith would be hearing from Respondent employees from the State Capitol and Gasafire projects. Beerman next told John Reichert, material handler, that Respondent had signed a contract with Local 340 and that Reichart had until Friday "to go out to IBEW if he wanted to stay." Reichert, no longer employed by Respondent, testified that on February 16 Beerman asked if Reichert "would like to run down and get on the books over at IBEW." Reichert replied that he would. The following

[6] As mentioned earlier, the General Counsel amended the complaint at the outset of the hearing to put Merrow's status in issue. At that time, I overruled Respondent's objection to the amendment but instructed Respondent that I would permit it sufficient time to prepare to defend that issue. The General Counsel put on his case on that date and Respondent put on its defense 6 days later. No motion for further time to prepare a defense was made.

day, Reichert went over to Local 340's offices and joined Local 340 as a material handler. Reichert waited a few hours and then was given a dispatch to Respondent as a material handler. Reichert did not work alongside the alleged discriminatees but rather worked in the shop. There were no other employes present when Reichert was asked by Beerman to join Local 340.

All of the nine discrminatees who testified in this proceeding denied receiving such information from Beerman.[7] John Francis Moore, a foreman under Merrow on the State Capitol jobsite, testified that on February 16 Beerman told him that "it looked as if Foss was going to sign with Local 340, IBEW." Beerman said "he wasn't sure whether or not or when they would, but . . . that's the way it looked like it was coming down." Beerman asked Moore to keep it quite. On the morning of February 18, Beerman told Moore that Respondent had been advised by its attorneys to sign with Local 340 and that the employees on the job would be terminated. Beerman told Moore that Merrow had been offered a management position so that Merrow could remain on the job and supervise the new crew. Beerman offered Moore the position if Merrow decided not to stay with the job.

Merrow testified that the first conversation he had with Beerman regarding this subject was on the morning of February 18. According to Merrow, Beerman told him that Respondent's attorneys had advised the Company "to go back with the IBEW" and as a consequence the employees were going to be terminated. Beerman asked Merrow not to tell the other employees yet. Beerman told Merrow that Merrow could remain on the job as a supervisor over the IBEW crew. Merrow answered that he (Merrow) had a job prospect in Alaska and would give Beerman an answer that evening. Approximately 6 o'clock that evening, Beerman called Merrow to ask about Merrow's decision. Merrow said that he did not think that being an NAIU member and supervising a crew of Local 340's members would work out particularly since he was earning less than the Local 340 members. Beerman said that Merrow should not worry about that because Merrow could get general foreman's pay and be part of management. Merrow said that he "would pass on the offer." The next morning Beerman made another offer to Merrow to stay on as a supervisor with Moore as estimator. Merrow turned down this offer as well.

On the afternoon of Thursday, February 18, when Beerman returned to the State Capitol jobsite, the employees had been forewarned by Moore that Beerman had something to say about their job status. According to the employees, Beerman told the eight employees on that job that Respondent's attorneys had advised the Company to sign with Local 340 and that Respondent was going to do so. Beerman said he was sorry to have to let the employees go because they had done a good job but that the matter was not in his hands. All seven employees that testified concerning this conversation denied that there was any mention of their joining Local 340.

On Friday, February 19, Beerman returned to the State Capitol job in the morning and made another offer to have Merrow remain on the job as a supervisor and Moore remain as estimator. Merrow and Moore each rejected the offer. That afternoon, Beerman returned to the job and gave the eight employees their final paychecks. Beerman told the employees that he was sorry and hoped that there were no hard feelings. He told the employees that Respondent's lawyers had advised the Company to "go back to IBEW."

Beerman visited the Gasafire project on February 18 and spoke with the two employees on that job, Matthew Burnley and John Doolittle.[8] According to Burnley and Doolittle, Beerman told the two employees that he was sorry to have to let them go and that they had done fine work, but that Respondent's attorneys had advised the Company "that it [would] be better to go with IBEW" and therefore the employees had to be terminated. Doolittle asked if the employees would continue working on the job if they joined Local 340. When Beerman did not answer, Burnley answered that "it wouldn't do any good because Lee Frith [Local 340's business manager] didn't care for [Burnley] and would not accept [Burnley]." Doolittle also volunteered that Local 340 gave them the option of joining Local 340. The next day, Beerman returned to the jobsite and gave Burnley and Doolitle their final checks.

D. *Respondent's Defense*

As mentioned earlier, Respondent contends that it lawfully discharged the instant 10 employees due to their refusal to comply with the union-security clause in Respondent's collective-bargaining agreement with Local 340.[9]

In January 1982, Respondent engaged Dennis R. Murphy to represent it for purposes of collective bargaining with Local 340. On or about January 25, 1982, Murphy and Local 340's negotiating committee reached tentative agreement on a collective-bargaining agreement. However, the membership of Local 340 turned down the proposed agreement during the ratification process. Further negotiations resulted in an accepted agreement which was signed by Elwyn Simard, Respondent's president, on Friday, February 12.

Murphy testified that on February 12 he had a discussion with Frith concerning Respondent's NAIU employees and that the employees had through Friday, February 19, to join Local 340. Murphy told Frith to expect the NAIU employees to come over and join Local 340 and that Respondent did not want any disruption on its

[7] Alleged discriminatee Dale Young had moved from the State and did not testify in this proceeding. The parties stipulated that Young was an employee of Respondent on February 19 and was terminated along with the other employees and for the same reasons.

[8] Although both Burnley and Doolittle were receiving foremen's pay, there is no contention that either was a supervisor within the meaning of the Act.

[9] The General Counsel's complaint does not attack the legality of the collective-bargaining agreement or the union-security clause. Rather, the General Counsel simply contends that the employees were discharged without being given an opportunity to comply with the union-security clause.

jobs or Murphy would not submit Respondent's signed agreement. Frith said that he understood.[10]

On Tuesday, February 16, Murphy spoke with Toni Potter, Respondent's office manager, and told Potter that he had spoken to Frith and that all Respondent had to do was to tell the NAIU employees to sign up with Local 340 and that Local 340 was expecting the employees. Murphy testified that in later discussions that week with Potter he was told that most of the employees did not want to join Local 340. Murphy, in answer to a question from Potter, advised Potter that certain employees could be retained as management if they did not work with the tools of the trade and did not do any of the work covered by the agreement. Thus, Murphy advised Potter that members of management were not required to join Local 340 and that certain employees could, in that manner, be retained without joining Local 340. Murphy advised Potter that the employees had through the end of the working day on Friday, February 19, to join Local 340 and that if the employees did not join they had to be terminated and paid all the moneys then due them.[11]

During the late afternoon of February 12, Simard, who was recuperating at home from surgery, called Respondent's offices and spoke by conference phone to Potter, Sutton, Beerman, and Jack Sheldon, an estimator. Simard advised these managers that Respondent had signed an agreement with Local 340.[12] Simard told the managers that Respondent "had to make an offer to the present employees, that they go out to the local union and sign up and continue to be our employees."

As mentioned earlier, Beerman testified that on Tuesday, February 16,[13] he spoke to the employees at both the State Capitol and Gasafire jobsites. According to Beerman, he told the employees that Respondent had signed a contract with Local 340 and that the employees would have to join Local 340 by February 19. As mentioned earlier, all nine employees denied having such a meeting with Beerman.

According to Beerman, he had a conversation on Wednesday with the owner of Chappick, the general contractor on the State Capitol job, who told Beerman that he wanted to keep at least the foremen, Merrow and Moore, on the job even if it meant offering them more money. Beerman then made an offer of a management position to both Moore and Merrow but both men declined his offers. On Friday, February 19, Beerman made two visits to the jobsite. First, Beerman learned that the employees had decided not to join Local 340. Secondly, Beerman returned to the jobsite and paid the employees their final paychecks. Beerman made two similar trips to the Gasafire Building.

E. *Later Events Bearing on Credibility*

On June 22, Beerman met with Moore and Roger Stevens concerning Respondent's offer of reinstatement. According to Beerman and Sheldon, during this conversation, Beerman commented to Stevens and Moore that it was too bad that the two employees had not accepted Respondent's "offer to stay on with the IBEW" at the time of the discharges. Both Stevens and Moore agreed that they should have accepted Beerman's offer, but at the time they were concerned about being kept on for a week or so and then let go. This account of the conversation is based on the credited testimony of Beerman and Sheldon, which Stevens and Moore did not effectively deny.

On June 30, Merrow visited Respondent's office and spoke with Beerman. According to Potter and Beerman, Beerman said, "If you remember, at the time you were laid off [February 19, 1982] I tried to get you guys to stay and told you we would work on trying to get you into 340. We offered to keep you on." Merrow replied, "yeah, I remember, but we thought the new union [NAIU] was a better deal." The above account of this conversation is based on the credited testimony of Potter and Beerman, which testimony Merrow did not effectively deny.

In June, Doolittle called Beerman in response to Respondent's offer of reinstatement. Beerman credibly testified that in the conversation Doolittle offered to testify favorably for Respondent if the Company secured membership for him in the IBEW in the Los Angeles area. Beerman did not accept Doolittle's offer. Doolittle admitted asking Beerman to help him get into the IBEW but could not adequately explain how the subject was raised. I credit Beerman's testimony regarding this conversation.

F. *Credibility Resolutions*

Initially I must determine whether Beerman told the employees of the union-security clause in Respondent's agreement with Local 340 and of their obligation to join Local 340. Beerman's testimony is contradicted by nine employees. However, credibility is not determined by the number of witnesses but rather by their trustworthiness.[14] Former employee Reichert testified in harmony with Beerman to the extent that he was given an opportunity to join Local 340 and took advantage of that opportunity. Further, Beerman's testimony is in harmony with the instructions given Respondent's management by its attorney Murphy and its president Simard. Most importantly, employees Stevens, Moore, and Merrow admitted in June 1982 that they had previously been given an opportunty to join Local 340 and to keep their jobs. While I am cognizant of the fact that Beerman was pos-

[10] On or about January 25, Murphy spoke to Frith regarding Simard's desire to continue the NAIU employees on the two jobs then in progress. Murphy told Frith that Respondent did not want any problems on its jobs and that the NAIU employees had a right to join Frith's union.

[11] The NAIU objected to testimony by counsel for Respondent on the ground that such testimony by an attorney constitutes a breach of the Canons of Ethics. The Board has held that it is not its function or responsibility to pass on the ethical propriety of a decision by counsel to testify in one of its proceedings. When, as here, the testimony is otherwise proper and competent, it should be accepted in evidence. *Operating Engineers Local 9 (Frontier Sand)*, 210 NLRB 129 fn. 1 (1974). Even considering Murphy's dual role in this proceeding, I credit his testimony.

[12] The regular workday was over by the time Simard notified the managers of the signing of the agreement with Local 340.

[13] Monday, February 15, was a holiday and Respondent's offices were closed on that date. However, Respondent's employees on the State Capitol project worked on the holiday.

[14] Testes ponderantur non numerantur.

turing for the upcoming trial when he reminded the employees of the opportunity he had given them to join Local 340, I find the employees' responses most telling. The employees did not simply accede to Beerman's statements but rather gave convincing and logical reasons for their having chosen not to join Local 340 in February. Employee John Doolittle was effectively impeached by his attempt in June to trade favorable testimony for Respondent's assistance in obtaining membership for Doolittle in a Los Angeles local of the IBEW. Finally, on one other point where the employees' testimony was in conflict with Sutton's testimony regarding their employment interviews, Alvin Richards, no longer employed by Respondent, testified contrary to the employees and consistent with Sutton's testimony. Accordingly, based on their demeanor on the stand, the logical probabilities, and the corroboration by disinterested witnesses, I credit the testimony of Beerman and Sutton where their testimony conflicts with that of the alleged discriminatees.

G. *Analysis and Conclusions*

Section 8(a)(3) of the Act provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
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> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employees on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Working in conjunction with Section 8(b)(2), Section 8(a)(3) outlaws a closed shop while allowing a union shop with a 30-day grace period.[15] Section 8(b)(2) provides that it shall be an unfair labor practice for a labor organization:

> (2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

In the building and construction industry, Section 8(f)[16] reduces from 30 days to 7 the minimum grace period before which an employee may be required to join the union.

Thus, under the statutory scheme it is discriminatory for an employer to discharge an employee for nonmembership in a labor organization, but the discrimination is excused if the conditions of the proviso to Section 8(a)(3) are satisfied. The burden placed on an employer to excuse such discrimination is less than that on a labor organization.[17] *Conductron Corp.*, 183 NLRB 419, 427 (1970). However, there can be no doubt that an employer must give an employee the statutory grace period prior to discharging an employee for nonmembership in a union. *Versatile Services*, above.

The Board has construed the language of the grace period in Section 8(a)(3) to mean 30 calendar days not counting the first day of employment or 31 days including the first day. *Granite City Steel Co.*, 169 NLRB 1009, 1011 (1968); *States Packing Co.*, 137 NLRB 1420, 1422 (1962). The Board has found unlawful an agreement or practice that required an employee to state his intent to join before 30 days was worked. *Argo Steel Co.*, 122

[15] A closed shop is one where an employee must be a union member as a condition of hire. A union shop is one where an employee must become a union member in order to retain employment. However, under Sec. 8(a)(3) an employee may satisfy the union membership requirement simply by paying initiation fees and dues; full membership is not required. "Membership" as a condition of employment is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

[16] Sec. 8(f) provides:

> (f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because . . . (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later . . . *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act.

[17] The law is well settled that before a union may seek an employee's discharge for failure to comply with union-security provisions it must afford the employee a reasonable opportunity to comply with such provisions and also inform the delinquent employee of the amount owed, the method used to compute such amount, and the manner in which the obligation may be satisfied. *Versatile Services*, 258 NLRB 810, 815 (1981); *Teamsters Local 150 (Delta Lines)*, 242 NLRB 454 (1979).

NLRB 1077, 1092 (1959); *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962). The Board's reasoning is that the Act gives employees 30 days of employment before they can be compelled to make a choice. Further, the Board has held unlawful a retroactive agreement which shortens the statutory grace period even where the economic benefits of the contract are retroactive. *Associated Machines*, 114 NLRB 390 (1955), enfd. 329 F.2d 858 (6th Cir. 1956); *Teamsters Local 25 (Tech Weld)*, 220 NLRB 76 (1975); *Typographical Union 53 (Plain Dealer)*, 225 NLRB 1281 (1976); *Newspaper Guild Local 86 (Peoria Journal)*, 248 NLRB 88 (1980). Although union-security clauses need not necessarily be reduced to writing, if no written document exists to be judged on its face the parties must satisfy a stringent burden of proof in establishing the existence and precise terms of the agreement. Further, the parties must establish that the affected employees had been fully and unequivocally notified of the requirement. *Pacific Iron & Metal Co.*, 175 NLRB 604 (1969).

Applying the above principles of law to the instant case, it appears that the employees were not given the statutory grace period prior to having to join Local 340. Local 340 gave the employees no notice of their obligation to tender dues and fees. Respondent notified the employees on the afternoon of February 16 that they had until February 19 to join Local 340 in order to retain their jobs. The employees were clearly not given the statutory minimum grace period of 7 days in which to decide whether to join Local 340 and retain their jobs.

Apparently, Respondent calculated the 7-day grace period from the date of the execution of the contract on February 12, 1982. However, even if the effective date of the contract rather than the first day of notice applied, Respondent would still be in violation of the Act. Under the terms of the collective-bargaining agreement's union-security clause, the employees would have had until Saturday, February 20, to join Local 340. If the contractual grace period is greater than the statutory minimum, the employees are entitled to the greater period of time before they can be required to join the Union. Cf. *Alcoa Construction Systems*, 212 NLRB 452 (1974). Respondent's apparent determination that permitting the employees more time would have been futile is speculation not permitted by the Act.

In sum, I find that Respondent unlawfully applied the union-security provision so as to limit the less than 7 days, the grace period before which the employees could be required to join Local 340. Accordingly, I find that Respondent's discharge of the 10 employees for nonmembership in Local 340 was discrimination in violation of Section 8(a)(3) and not excused by the proviso to Section 8(a)(3) or Section 8(f).[18]

[18] As mentioned earlier, the complaint alleged that the employees were discharged because of their membership in NAIU. However, inconsequential or technical variances between the phraseology or characterization of the violation charged and the violation found are not a valid defense where it is clear the respondent "understood the issue and was afforded full opportunity to justify [its] actions." *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981).

Conclusions of Law

1. Respondent George C. Foss Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. National Association of Independent Unions and International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO are now, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging William E. Merrow, Dan Brown, Doyle Graham, Richard Harris, Roger Stevens, John Francis Moore, Jurgen Ulbrich, Dale Young, John Doolittle, and Matthew Burnley prior to the grace period before which said employees could be required to join Local 340, Respondent has engaged in and is engaging in unfair labor practices within the meaing of Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent violated Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Respondent shall be ordered to offer immediate and full reinstatement, to the extent that it has not already done so, to William E. Merrow, Dan Brown, Doyle Graham, Richard Harris, Roger Stevens, John Francis Moore, Jurgen Ulbrich, Dale Young, John Doolittle, and Matthew Burnley to their former jobs or, if their jobs no longer exists, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges previously enjoyed. Additionally, Respondent shall be required to make Merrow, Brown, Graham, Harris, Stevens, Moore, Ulbrich, Young, Doolittle, and Burnley whole for any loss of earnings they may have suffered by reason of their unlawful discharges on February 19, 1982, with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid on the amounts owing, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Olympic Medical Corp.*, 250 NLRB 146 (1980). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, George C. Foss Company, Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Encouraging membership in International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, or any other labor organization, by discharging employees under union-security provisions without affording them the statutory period provided by Sections 8(a)(3) and 8(f)(2) of the Act before such provisions are invoked.

(b) In any like or related manner interfering with, restraining, or coercing its 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) To the extent it has not already done so, offer William E. Merrow, Dan Brown, Doyle Graham, Richard Harris, Roger Stevens, John Francis Moore, Jurgen Ulbrich, Dale Young, John Doolittle, and Matthew Burnley immediate and full reinstatement to their former positions of employment or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make whole Merrow, Brown, Graham, Harris, Stevens, Moore, Ulbrich, Young, Doolittle, and Burnley for any loss of earnings they may have suffered by reason of Respondent's discrimination against them in the manner set forth in the section of this decision entitled "The Remedy."

(c) Expunge from its files any reference to the discharges of Merrow, Brown, Graham, Harris, Stevens, Moore, Ulbrich, Young, Doolittle, and Burnley and notify them in writing that this has been done and that evidence of their discharges shall not be used as a basis for future personnel action against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in Sacramento, California, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

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

[20] If 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 an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, 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 encourage membership in International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, or any other labor organization, by discharging employees under union-security provisions without affording our employees the statutory period provided by Section 8(a)(3) and Section 8(f)(2) of the Act before such provisions are invoked.

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

WE WILL, to the extent we have not already done so, offer William E. Merrow, Dan Brown, Doyle Graham, Richard Harris, Roger Stevens, John Francis Moore, Jurgen Ulbrich, Dale Young, John Doolittle, and Matthew Burnley immediate and full reinstatement to their former positions of employment or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Merrow, Brown, Graham, Harris, Stevens, Moore, Ulbrich, Young, Doolittle, and Burnley for any loss of earnings they may have suffered by reason of our discrimination against them, plus interest.

WE WILL expunge from our files any reference to the discharge of Merrow, Brown, Graham, Harris, Stevens, Moore, Ulbrich, Young, Doolittle, and Burnley and notify them in writing that this has been done and that evidence of their discharges shall not be used as a basis for future personnel action against them.

GEORGE C. FOSS COMPANY