

Labor Ready, Inc. and Donald Robinson. Case 20–
CA–28946–1

August 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On October 27, 1999, Administrative Law Judge Michael D. Stevenson issued the attached bench decision and certification. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Labor Ready, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(f).

“(f) Within 14 days after service by the Region, post at all its facilities in San Francisco, California and elsewhere in the United States copies of the attached notice marked “Appendix.”⁴ 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 customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the no-

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

² We agree with the judge, for the reasons set forth in the judge's opinion, that the Respondent's “no walk-off” rule is overbroad in violation of the Act. Respondent asserts that the order proposed by the judge would prevent Respondent from terminating an employee who decides to walk off the job “to go to a tavern for a beer.” We note, however, that the Respondent could promulgate an appropriately narrow rule that would allow it to terminate an employee under these and similar circumstances.

³ The judge made a minor inadvertent error in the *Excel Container, Inc.*, 325 NLRB 17 (1997) date in his Order. We hereby correct it.

⁴ 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.”

times are not altered, defaced, or covered by any other material. In the event, that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 1998.”

Mary Vail, Esq., of San Francisco, California, for the General Counsel.

J. Markham Marshall, Esq., Preston, Gates & Ellis, of Seattle, Washington, for the Respondent.

BENCH DECISION AND CERTIFICATION

MICHAEL D. STEVENSON: I heard this matter on October 6 and October 7 (closing arguments by telephone), and delivered a bench decision as provided in Section 102.35(a)(1) of the Board's Rules and Regulations on October 13, 1999, by way of a telephone conference call with all parties. Thereafter the hearing was closed. In that decision, I concluded that Respondent violated Section 8(a)(1) of the Act by terminating two discriminatees, by making a coercive threat, and by promulgating, maintaining, and enforcing an overbroad company rule.

My bench decision containing my findings of fact and conclusion of law is set forth in the transcript of this proceeding at page 263 through page 288. A copy of those transcript pages is attached immediately below. Thereafter, I have attached hereto a Bench Decision Supplement containing, a section entitled “Remedy,” my recommended Order in this case, and the Notice to Employees that must be posted by Respondent under the terms of my recommended Order. In accord with Section 102.45 of the Board's Rules and Regulations, I hereby certify the accuracy of the portion of the transcript appearing below, and I further certify that the transcript, together with the Bench Decision Supplement constitutes my entire decision in this case.

CONCLUSIONS OF LAW

1. Respondent, Labor Ready, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint by, on or about January 17, 1999, terminating Carlton Poward and Timothy Valley by, on the same date, acting through its supervisor and agent, Russel Cheek, threatening employees that they would be discharged if they walked off the job; and by promulgating, maintaining, and enforcing a company rule stating that employees who walk off a job will be discharged.

3. The violations described in Paragraph 2, above, affect commerce, and unless enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix.¹ Respondent must also

¹ In *Olive Garden*, 327 NLRB 5 fn. 2 (1998), the Board listed a number of precedents supporting the posting of the Notice on a com-

be ordered to offer immediate and full reinstatement to Carlton Poward and Timothy Valley, and to make them whole, with interest, for all losses they suffered because of the Respondent's unlawful discrimination against them. Backpay shall be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1978). Finally, Respondent must be ordered to rescind the rule in question.

BENCH DECISION
(VIA CONFERENCE CALL)

[Errors in the transcript have been noted and corrected.]

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JUDGE STEVENSON: Good afternoon. This is my bench decision in the case Labor Ready, Inc., 20-CA-28946.

This case was tried at San Francisco, California on October 6, 1999. Closing arguments were given by telephone on October 7, 1999. And the decision, which is what I'm in the process of giving at this moment, was also given by telephone on October 13th.

The charge was filed by Donald Robinson on February 11, 1999, and a first amended charge was also filed by Robinson on May 28, 1999. Respondent is a Washington State Corporation with principal offices located in Tacoma, Washington. Respondent maintains local offices at places of business in various cities throughout the United States, including several offices in the City of San Francisco, California. It engages in the business of providing temporary workers to employers engaged in the construction, landscaping and light industrial industries throughout the United States. For the calendar year ending December 31, 1998, Respondent, in the course and conduct of its business operations, performed services valued in excess of \$50,000.00 in states other than the State of California. Respondent admits that it is an employer engaged in commerce within the meaning of Sections 2(2)(6)(7) of the Act.

The issues in this case are whether the Respondent

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violated Section 8(a)(1) of the Act by, one, promulgating, maintaining and enforcing an allegedly over-broad rule stating that employees who walk off a job will be discharged. Two, through office manager Russell Cheek, threatening employees that they would be discharged if they walked off the job. And three, by discharging two employees, Carleton Poward and Timothy Valley for walking off the job.

For all times material to this case, I find the following facts:

Respondent maintains one of its offices located on the 4800 Block of Mission Street in San Francisco, California. That office is managed by Russell Cheek, a statutory supervisor and agent of Respondent. Also employed, as an assistant to Mr. Cheek, was Tiffaney Dressen, who worked for the Respondent between October of 1986 and March of 1999, when she voluntarily left for another job. Cheek testified as an adverse witness for General Counsel and for the Respondent, and Dressen testified as a Respondent witness.

pany-wide basis. The Board distinguished the precedents in *Olive Garden* but I find they are directly applicable to my Order requiring Respondent to post the notice at all of its various facilities. The rule in question, found unlawful herein is part of an established company policy and therefore company-wide posting is appropriate.

Respondent maintains its daily labor business for persons frequently down on their luck, and in this includes addicts, people of little education or experience with regular employment, and, on occasion, ex-convicts. I also find that the employees of Respondent include people with difficulty in relating to other people with authority.

Respondent obtains its source of labor from word of mouth,

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as was true in this case, responses to newspaper ads, and walk-ins off the street. As office manager, Cheek has a dual job title to recruit and check out his temporary workers, keep them sober and performing their work and, he has another job to recruit and keep satisfied the customer/clients of Labor Ready, that is people who will order and use the temporary labor recruited by Cheek and other managers.

During all times material, Respondent has posted and maintained at its San Francisco facility, and other facilities, a rule stating that employees who walk off the job will be discharged. (General Counsel Exhibit 4.)

As posted in the office, the rule in question admits of no exceptions. However, in the standard applications for employment, which are filled out by persons seeking employment, the rule is qualified to a degree, looking now to General Counsel Exhibits 2, which is the application of Timothy Valley, and General Counsel Exhibit 3, which is the application of Carleton Poward, page six of both exhibits, I note the rule referred to above is qualified by a statement, "Family emergencies, illness and injuries are the only excusable circumstances for leaving Labor Ready job sites before the end of a scheduled shift". The listed exceptions also require notice to the employing office of applicable circumstances/emergencies.

According to Cheek, the rule is further qualified by him and other managers who don't necessarily apply the rule

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literally, but rather liberally, taking into account any mitigating circumstances which may exist. Since Cheek is the only manager who testified at the hearing, and he did not refer in his testimony to any objective guidelines to guide his interpretation of the rule, I conclude that one manager might not see the same mitigating circumstances as Cheek does. That is like beauty, application and interpretation of the rule is in the eye of the beholder. Most importantly, employees cannot know how a given manager might view a given set of circumstances, and this includes Cheek himself. I conclude, therefore, that the rule rises or falls as it is printed on the wall of the various offices on which it is posted.

To the extent the employment applications qualifies the -- prohibition, this would create an ambiguity or inconsistency in the mind of an employee, even those amongst the most sophisticated. And this ambiguity or inconsistency must be resolved against Respondent for creating it, citing *J.C. Penney Company @ 266 NLRB*, p. 1224, (1983) case, and *Acme Tile and Terrazo, Inc.* reported at 318 NLRB, 425, p. 428 at footnote 8, (1995) case.

In mid January 1999, Respondent received an order to furnish several employees to a job at the Glenview Apartments in San Francisco, consisting of work to be performed as laboring services for a landscaping contractor. Cheek told several of the employees assigned to this job that the job was

expected to last for several weeks. Cheek assigned Robert Cartwright to the job as the point man, who is like a lead person. He was the senior member on the job, having about nine months experience for working for Respondent at various jobs, and is currently an employee of Respondent, and was a Respondent witness.

In addition to Cartwright, Donald Robinson, the Charging Party herein, was assigned to this job. Robinson did not testify at the hearing, and the General Counsel presents no legal issue with respect to Robinson.

Cartwright's primary duty was to get the work ticket signed by the customer and to act as liaison between the work crew on site, and Cheek back at the office. In this respect, Cartwright reported daily by phone to Cheek, and for this and all of his activities, he was paid fifty cents per hour more than the others assigned to the job.

Robinson recruited his half brother, Carleton Poward, and his friend of several years, Timothy Valley, to work for Respondent on the Glenview work site. Valley apparently did not begin to work until day three of the assignment. Two other employees, a woman named Anastasia, and a male employee were also assigned to the job, but they did not testify and did not play a role in this case.

Robinson drove Cartwright and others to the jobs site beginning on day one of the assignment. On day two, according

to Cartwright, there developed a conflict between him and Robinson. This developed when Robinson allegedly made disparaging remarks about Cheek, whom Robinson blamed for his low pay. When Cartwright objected to Robinson's remarks, Robinson supposedly told Cartwright to take the bus to the work site the next day. Cartwright also testified that Robinson and Poward took an extended lunch break on day two. However, Cartwright did not report this to Cheek.

On day three, additional conflict developed between Robinson and Cartwright. Both Poward and Valley gave their versions of this conflict, as witnesses for the General Counsel. According to Poward, at lunch Cartwright asked Robinson to buy him a pie and a six pack of beer, but Robinson refused as this would violate a rule of the company against liquor on the job site. With that, Cartwright stripped off his shirt and threatened to kick Robinson's M.F. ass. Valley, recalls it slightly differently. According to Valley, Cartwright asked Robinson to give him a ride to get some beer. When Robinson refused, a verbal confrontation developed. All agreed that Cartwright left the area for a while, but later Cartwright returned to where the other men were eating lunch, and told Robinson he was fired and referred him to Cheek.

In his testimony, Cartwright denied he ever attempted to get Robinson to obtain beer for him, although he allowed that he made a joking reference at lunch that a beer would taste nice

at lunch time after working hard on day three. Cartwright also testified that he gave Robinson ten dollars to get him something at the store, which Poward never got. When Cartwright demanded his money back, Poward returned a one dollar bill instead of the ten, and Cartwright never discovered this deception until Poward had left the work site. Cartwright also claimed Poward exhibited a knife on day three, in an attempt to intimi-

date him in connection with the dispute with Robinson. I might add, I do not believe any of this testimony of Cartwright, including the claim that Robinson and the others took an extended lunch break on day two.

It is undisputed that Cheek was called twice by Cartwright, who complained first that Robinson was acting crazy and Cheek should come to the job site. The second call reiterated this and also complained to Cheek that Robinson was throwing Cartwright's articles out of his, Robinson's, car to the ground. Robinson also called the office, but it isn't clear to me whether he spoke to Cheek or Cheek's assistant, Tiffany Dressen, to complain about Cartwright's asking for beer. This credibility question is not free from doubt, but so far as I can tell, Robinson threw Cartwright's clothes out of the car after Cartwright said he was fired. In any event, all agree that Cheek did ultimately go to the job site and observed some of Cartwright's articles and possessions on the ground, thrown there by Robinson before Cheek had arrived.

Robinson was described by Cheek as incoherent and out of control. Cheek told him to calm down and go back to the office. At this point, Poward and Valley sided with Robinson and protested to Cheek that Robinson was being punished for refusing to bring beer on the job site for Cartwright, who was not present as Cheek talked to Robinson and the two others. Cheek directed Poward and Valley to cease their protest and return to work, on threat of never being able to work for Respondent again. The two men continued their protest saying if he, Robinson, goes, we go too. Cheek then told all three to return to the office.

On his cellular phone, Cheek called Dressen to alert her to prepare final checks for Robinson, Poward and Valley, and to prepare her for a potentially angry demonstration by the three. The three arrived about five minutes before Cheek, and continued their noisy protest of Robinson's treatment, which they had begun on the job site. This protest consisted of loud voices, particularly by Valley, who threatened to report Respondent to the Labor Board. He pounded his fist on the counter, one or more times for emphasis, and there may have been profanity, for example, Respondent is a B.S. company, F this and F that, and I note that only Dressen was in the office for the first few minutes with the three men.

Once Cheek arrived back at the office and observed the angry protest continuing, he directed Dressen to prepare a

document barring Valley and Poward from ever working for any of Respondent's offices again. This procedure, called a "lockout," is to prevent unsatisfactory employees from merely applying to a different Respondent office where they are unknown. Accordingly, Dressen prepared an e-mail to Respondent's headquarters at Tacoma, Washington. For Valley, the reason for the lockout reads, "caused disturbance at our job site, then walked off unauthorized". For Poward the reason states, "walked off job site unauthorized". Taken from General Counsel Exhibit 7. In that exhibit, there is no reference to any disturbance being made at the office itself.

I turn now to the analysis of the facts and circumstances of this case. Credibility findings of what happened on site is not essential to this case, but I credit Poward and Valley over Cartwright, finding that Cartwright did ask Robinson either to get beer or to take Cartwright to get the beer. I base this on the

consistent positions that Poward and Valley took from the beginning of the incident to the end, and on my reading of the demeanor of the witnesses. When Robinson refused Cartwright's request, a confrontation developed after which Cartwright called Cheek to complain falsely that the men refused to work or were causing a disturbance. Cartwright then returned to tell Robinson he was fired, and the latter, Robinson, then threw Cartwright's possessions out of the car, and in this respect he may have been assisted by Valley.

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Although the General Counsel did not take this position, I find that the evidence amply supports a finding that Cartwright was an agent of Respondent, which held out Cartwright as speaking for Cheek and management on the job site. In addition, Cartwright acted as a conduit between Cheek and the employees on the job site.

When Cheek arrived at the job site, he appeared to me to ignore house rule number seven, which reads, "No alcohol/drugs on job", taken from General Counsel Exhibit 5. In his desire to diffuse the situation, Cheek simply didn't perform a proper investigation to find out what had happened.

Before focusing directly on the issues, I find, without legal significance, that all allegations regarding Robinson were found by the Region to be without merit. No existing issue in the case depends on Robinson for validity. Similarly, the fact that no beer was ever brought to the site is irrelevant and doesn't affect any issues in the case.

Events back at Respondent's office are similarly irrelevant. First, Cheek made it clear at the job site that Robinson, Poward and Valley were terminated. In this respect, the board has held, with the court approval, no set words are necessary to constitute a discharge, *NLRB v. Cement Makers Masons Local No. 555*, reported at 225 Fed. 2d. 168, @ p. 172, Ninth Circuit 1955 case, but rather the test of whether an employee has been discharged depends on the reasonable

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inferences that the employees could draw from the statements or conduct of the employer, *Penny-power Shopping News, Inc. v. NLRB*, 726 Fed. 2d. 626 @ p. 629, Tenth Circuit 1984.

I find that the credible evidence supports the conclusion that viewed as an objective matter, Robinson, Poward and Valley believed they were being fired in circumstances when Cheek told them to leave the job site. Cheek's testimony that he never decided on the lockout until he observed the conduct of Valley and Poward back at the office, is not credited. It is impeached by General Counsel Exhibit 7, the e-mail to headquarters, and I find that the Respondent's evidence constitutes shifting reasons for the discharge, which suggests a pretext and were contrived to mask another potentially unlawful motivation, cite *Shattuck Denn Mining Corporation v. NLRB*, @ 362 Fed. 2d. 466 @ p.470, Ninth Circuit, 1966.

When two or more employees jointly participate in withholding their services for the purpose of pressuring their employer into resolving to their satisfaction grievances over the rate of pay, or other working conditions, they engage in a concerted activity for the purpose of collective bargaining or other mutual aid or protection within the meaning of Section 7 of the Act, and it is a violation of the Act for the employer to discharge, suspend or otherwise interfere with restrain or coerce them for engaging in such activity. Citing *San Diego County Association @ 259 NLRB*, p.1044, @ ps. 1047 through 1048

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of the J.D., and the cases cited therein.

The issue in the San Diego County case was whether employees were fired for falsification of a time card claiming falsely to be sick, as was claimed by the employer, or whether they were fired for engaging in protected concerted activity. The board found the latter, and pointed out that the reason given by the employer was not the reason for the discharge.

I also turn to the case of *Guardian Industries Corporation*, reported at 319 NLRB 542, 1995 case, @ p. 548 of the J.D. In that case a discriminatee was terminated because he discussed with a co-worker management's discipline as it was applied to another employee, done in a manner loud enough to be conveyed to a management representative. In the conversation, Respondent was criticized for disciplining and subjecting to a drug test a third employee whose case the discriminatee espoused. The ALJ cited the authority of *Wilson Trophy Company v. NLRB @ 989 Fed. 2d. 1502*, Eighth Circuit, 1993, and *Meyers Industry*, perhaps the board's leading case on concerted protected activity, reported at 268 NLRB 493 @ p. 497. The board found in favor of the discriminatees, finding that they were engaging and had been punished for engaging in concerted protected activity. At page 1508 of *Wilson Trophy Company*, the court pointed out, as is true in the instant case, that none union employees, as well as union, share the right to engage in concerted activities.

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Returning to *Guardian Industries* for a moment, at p. 549 of that decision, the Board recited the principle that employees do not lose the protection of the Act because the concerted protected activity is inaccurate or lacks merit, unless they, the employees, act deliberately falsely or maliciously, which I do not find here. Here I find, as was stated before, that Robinson did refuse to get the beer for Cartwright, however, Robinson did strew and throw on the ground Cartwright's possessions, an activity in which Valley may have assisted. However, I go on to say that that throwing the articles on the ground was not sufficient for Valley and Poward to lose the protection of the Act, and in any event there's no indication that the Respondent relied on that activity to justify their discharge.

Now, in the prior case that I've just referred to, that is the *Guardian Industries* case, the nub of the issue was criticism of management. In the *NLRB v. Bridgeport Ambulance Service* case, reported at 966 Fed. 2d. @ 725, Second Circuit, 1992, an employee was suspended and later terminated. Other employees walked out in protest. At page 729, the court noted the walk-out constituted concerted activity for the mutual aid and protection of another. In this case, it was claimed by the employer that the employees were working at cross purposes to the union, which represented employees at that job. However, the court said even when employees are represented by a union,

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but acted on their own without union authorization, this does not change the protection that the Act gives those employees by walking off the job as a protest.

So, in the instant case I find that the conduct of Valley and Poward was concerted. I find that Cheek knew it was concerted, in fact, in his testimony Mr. Cheek threw in one or two gratuitous references to the fact that Valley and Poward huddled together, held a mini meeting, so to speak, before they

took the position, if he goes, referring to Robinson, we go too. So, this seems to me classic concerted and protected activity, as the two discriminatees were acting to further the interests of the third employee, Robinson.

As an alternative analysis, I would like to note the case of *Aluminum (A-l-u-m-i-n-a) Ceramics Inc. @ 257 NLRB p. 784*, a 1981 case, for the principle that employees who attempt to persuade their employer to modify or reverse a management decision, are also engaged in concerted protected activity. So, therefore, if you take the view that the two discriminatees were protesting the treatment of Robinson, or if they were rather focusing on attempting to get Cheek to change his position, either analysis, which is not that different from each other, would lead to the same conclusion that their conduct was protected.

Shortly, I will arrive at yet another analysis, another alternative analysis, which is that Valley and Poward's

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termination was unlawful because it was the direct result of the enforcement and application of an unlawful rule, which I will find below momentarily

In any event, I find now that Valley and Poward's conduct did not exceed the bounds of impulsive behavior, which would make them unfit for reinstatement or remove them from the protection of the Act. In this respect, I'm referring both to their conduct on the job site and their conduct back at the office. I find not just that their conduct was not serious enough, and in this respect I refer to the testimony of Dressen, who testified as Respondent's witness and, on more than one occasion in her testimony said that she fully understood that the behavior of Valley and Poward was not directed personally toward her, although in candor she went on to say that she felt intimidated, as a woman, and felt threatened by them, notwithstanding her understanding that she was not being directly threatened by them. However, I find that her subjective reactions were not reasonable under the circumstances, and they were not sufficient to remove the behavior of Valley and Poward from the Act.

To the extent that someone on appeal may disagree with that, I find in the alternative, to the extent that Poward and Valley's behavior at the office was serious, I find that it was provoked by the Respondent in the res gestae of enforcement and application of its unlawful rule.

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Finally, as still another alternative reason, assuming that it was serious, assuming it was not unduly provoked by the Respondent, I find absolutely no evidence at all that it was relied on by the Respondent in order to justify the terminations.

I now move on to find that the rule, I should say I move on to find that Cheek's statement at the job site, to Valley and Poward, that they should cease their protest and return to work, on threat of not being able to work for Respondent again, I find that that statement or threat violated Section 8(a)(1) of the Act. And as authority for that, I note the case of *K.N.T.V., Inc.* reported at 319 NLRB @ p. 447. In that case a statement was made by a supervisor to a discriminatee, if you are displeased with the employer's decision to discharge another employee, then the supervisor said he did not want them working anywhere in the plant, and this was an implied threat, the Board held, to terminate the discriminatee. Now, here Cheek's statement of course was much more direct, it wasn't implied at all, it

was direct and he flatly stated that the two discriminatees would be discharged if they didn't cease their protest. So, I find that that was a violation of the Act as indicated.

Now, I finally turn to the last issue in the case, which is the question as to whether the rule that we've been talking about is over-broad, and of course my comments up to now has

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predicted quite clearly what my finding would be, and I find that the rule is over-broad and does violate Section 8(a)(1) of the Act. Now, as authority for this finding, I first of all rely on the case of *Asociacion, A-s-s-o-c-i-i-o-n, Hospital Maestro, M-a-e-s-t-r-o, v. NLRB*, reported at 842 Fed 2d. 575, First Circuit, 1985. And in that case the court held that all disciplinary action taken against the discriminatees, as a result of a rule banning the wearing of union insignia at all places, at all times, in the hospital setting was over-broad. The rule must be rescinded and, as I stated before, the discipline taken as a result of enforcement of that rule, is invalid for that reason, as well as other reasons.

I move on to a second case entitled *NLRB v. Vanguard Tours, Inc.*, reported at 981 Fed 2d. 62 @ p. 67, Second Circuit case, 1992. In that case an overly broad rule found by the Board and the court prohibits discussion of union matters in non-working time and non-working areas. And the court found that such a rule as that has a chilling effect on concerted protected activity, and the court also noted, in a statement that's directly applicable to the present case, that there was no evidence that the Respondent in Vanguard told employees that the rule was to be enforced not as written, but only narrowly. And the failure to tell employees that there was some less stringent enforcement, was a factor that the court considered, and that's also true in this case.

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Now, the Respondent, in its closing argument, cited the case of *Lafayette Park Hotel*, reported at 326 NLRB No. 69, 1998 case. I want the record to show that I have read and considered that case and I find that it's of no assistance to the Respondent and it can be distinguished on its facts.

Respondent also referred, quite strongly, to the case entitled *Bob Evans Farms, Inc. v. NLRB*, reported at 163 Fed. 3d. page 1012, a Seventh Circuit case, 1998. In that case the court held that a walk-out was not a reasonable means of protest and in fact it was not protected concerted activity to begin with. I read that case and, first of all, I note the facts referred to a protest, a walk-out, over the termination of a supervisor, and the court noted that a walk-out is a species or kind of strike, and as such, is generally protected under the mutual aid and protection of the Act. For a number of reasons, I find *Bob Evans Farms* is not helpful to the Respondent.

First, I find that the court did not enforce the Board decision. And I am of course bound by the Board decision, which I stated at the hearing itself, citing the case of *Iowa Beef Processing* for that statement.

Number two, the protest in question was a protest of a supervisor's termination, and the court seemed to leave open the question whether the protest of a co-employee might be differently evaluated. And also, of course, they did not deal

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with the question of an unlawful rule being enforced, which is true in the present case.

In addition to that, at page 1024 of *Bob Evans Farms*, footnote eight, refers to the lack of evidence in the record that showed employees there, that were supposedly unsophisticated, there was no evidence to show that they were unsophisticated individuals who could not appreciate the probable consequences of their actions. Here, I find that Respondent has taken the position all along that not just Valley and Poward but all or most of the people they employ are very unsophisticated, uneducated, inexperienced in life, and therefore this footnote would seem, by itself, to distinguish the case of *Bob Evans Farms* from the instant case.

Respondent also cites the case of *Vemco, V-e-m-c-o, Inc. v. NLRB @ 151, LRRM, p. 2811*, a Sixth Circuit case, decided in 1996. In that case the court said for a walk-out to be protected, there must be some articulation of goals to which the employer can respond. The court found that lacking in *Vemco*, but surely that would not be true in this case, because it was very clear from the beginning of the hearing, from the beginning of the facts and circumstances of the case, that Valley and Poward wanted Cheek, at a minimum, to make a further investigation, and to treat Robinson in a fairer manner than he was treated. So, I found that here there was an articulation of the goals that the employees wished Cheek to respond to.

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Respondent also cites the case of *NLRB v. Marsden, M-a-r-s-d-e-n*, at 701 Fed 2d., p. 238, and in that case, the employees left a construction job site, because it was raining outside, without making any demand whatsoever regarding any desired change in terms and conditions of employment. It's clear, based on what I said before regarding the other case, that there was an articulation of goals in this case.

Respondent also cited the case of *Aroostook, A-r-o-o-s-t-o-o-k, County Regional Ophthalmology Center v. NLRB*, reported at 81 Fed. 3d., p. 209, a D.C. Circuit Case issued in 1996. In that case the court found fault with the employees for lamenting grievances, in a small medical office, in front of patients. Now, in this case, there seems to be some difference of opinion about just who was present on the job site when Cheek arrived. There was reference to a man with a beard and it turned out that he was not an owner of the company but just another employee, apparently, of the landscaping business. In any event of course neither he nor any other representative of the landscaping contractor testified, so I find in the instant case there was no showing of how the protected concerted activity of the employees would prejudice or affect negatively the business of Respondent, other than to credit Mr. Cheek's speculation. And if it was valid evidence to begin with, of course there should have been some greater and more reliable evidence, such as a representative of the landscaping

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contractor, and no such person testified. So, I find there was now showing that the business was affected in any negative way.

Now, in conclusion of my decision here, I want to do two things. First, I want to refer very quickly to a case that was decided not on the basis of the Act, but on the basis of the First Amendment, that case was entitled *Scott v. Meyers*, Second Circuit case decided on August 25, 1999, docket No. 98-7731, Second Circuit. And in that case there was another rule that prohibited all transit employees, regardless of whether they are in contact with the public, from wearing any buttons, badges or

other insignia, and the court held that such an over-broad rule as that impermissibly restricts First Amendment rights of the employee to be protected. And the court went on to hold that the Transit Authority, in their legitimate concerns for harmony, safety and avoidance of content based distinctions between the permissible and the impermissible, all of these were not sufficient to justify the over-broad restrictions that were indicative of the rule in question.

Now, as my last reference here, I want to note the case of *Mast, M-a-s-t, Advertising and Publishing, Inc.*, reported at 304 NLRB p. 819. In that case the ALJ mistakenly, according to the Board, relied on the *Wright Line* analysis to make a final reference here. The Board said that was an error under the circumstances and referred to a different case.

What I intend to do here, as my final finding of the case,

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is to refer first to the *Wright Line* case, and then also refer, as an alternative analysis, to the other case relied on by the Board in the *Mast* case. In either analysis, we end up in the same place, which is indicated quite strongly up to now, which is that the Respondent has violated the Act in all three issues alleged by the General Counsel.

First of all, if the *Wright Line* analysis is correct here, General Counsel has the initial burden of establishing a prima facie case sufficient to support an inference that union or other activity, which is protected by the Act, was a motivating factor in Respondent's actions, alleged to constitute discrimination, in violation of Section 8(a)(3) or 8(a)(1), as is true here. Once it's established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have happened even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel is further required to rebut the employer's asserted defense by demonstrating that the alleged discrimination would not have taken place in the absence of the employee's protected activities. And that's *Wright Line* 251 NLRB 1983, a 1980 case enforced 662 Fed. 2d. 899, First Circuit, 1981, cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393, 1983.

The finding of a prima facie case is made out where the

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General Counsel establishes union activities or other concerted protected activities, employer knowledge, animus and adverse action taken against those involved or suspected of involvement, which has the effect of encouraging or discouraging union activity or, in the case of an 8(a)(1), coerces employees in the exercise of their protected concerted activity. And authority for that statement is *Marmar Brothers* 303 NLRB 638, 1991 case, p. 649 J.D.

So, relying on *Wright Line* case, I find that the General Counsel has established a prima facie case, that the Respondent has not met its burden of proof to rebut the prima facie case for the reasons that I've stated up to now. And therefore, *Wright Line* would lead us to the decision that I've already made.

Now, as an alternative analysis, I turn to the case cited in *Mast* by the Board, and that case is *Thor Power Tool Company*, reported at 351 Fed 2d. 584 @ 587, and that's a Seventh Circuit case, 1965. And that case, according to the Board, is used for an analysis when employer's right to engage in concerted protected activity is allegedly rebutted by behavior of the discriminatees, either during the events in question or, as would be true

in the instant case, some time afterwards, allegedly back at the office.

In the *Thor Power Tool Company*, the court held that an employee's right to engage in concerted activity may permit

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some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. I've already indicated in this decision why I did not feel that the balance, if *Thor Power Tool Company* would apply, why the balance would shift in Respondent's favor. And I reiterate that finding now.

So, I find for all the reasons given, that the General Counsel has proven its case and the facts and circumstances, as I found together with the legal authorities that I've either cited or dis-

tinguished, as the case may be, would lead to the results I found that the violations of the Act have been established.

Now, this concludes my bench decision. And I want to say that upon receipt of the transcript from the court reporter, I will prepare an appropriate order directing the Respondent to rescind the rule in question, and directing them to make whole the discriminatees in question, and any other appropriate circumstances that may be required by this finding. So, this concludes my statement. I'd like to thank both sides for a case well tried, and as soon as I get the transcript and shortly thereafter I will prepare the documents which you will receive by mail. Thank you again and this completes my statement. Off the record.

(Thereupon, the decision was concluded.)