Tri-County Medical Center, Inc. *and* District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL–CIO. Case 4–CA–7231

February 25, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

On June 26, 1975, Administrative Law Judge Arnold Ordman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in reply to the General Counsel's exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We agree with the Administrative Law Judge, for the reasons stated by him, that Respondent's rule respecting solicitation and distribution was not unlawfully promulgated or enforced and that the discharge of employee Eric Priebe for violating the rule did not violate Section 8(a)(3) and (1) of the Act.[1] We further agree with the Administrative Law Judge that Respondent did not unlawfully restrain employee Donna Kane in the exercise of her rights under Section 7 of the Act.

However, contrary to the Administrative Law Judge, we find that Respondent violated Section 8(a)(1) of the Act by preventing off-duty employee Thomas Cerato from distributing union literature outside the hospital. The Administrative Law Judge found that Respondent's prohibition against access to hospital property by off-duty employees was not limited to those using the premises for union activities and that, therefore, citing *GTE Lenkurt, Incorporated,* 204 NLRB 921 (1973), Respondent did not violate Section 8(a)(1) by preventing Cerato from distributing union literature in front of the hospital and in the rear parking lot on a day when he was not scheduled to work.

We do not agree with the Administrative Law Judge that the doctrine enunciated by the Board majority in *GTE Lenkurt* is applicable in the instant case. In *GTE Lenkurt,* the respondent promulgated and published in its employee handbook a rule which provided that "An employee is not to enter the plant or remain on the premises unless he is on duty or scheduled for work." A majority of the Board concluded that where an employer's no-access rule denies all off-duty employees access to the premises for any purpose and is not discriminatorily applied only against employees engaged in union activities the rule is presumptively valid absent a showing by the union that no adequate alternative means of communication is available to it.

The holding of *GTE Lenkurt* must be narrowly construed to prevent undue interference with the rights of employees under Section 7 of the Act freely to communicate their interest in union activity to those who work on different shifts.[2] In *Bulova Watch Company, Inc.,* 208 NLRB 798 (1974), we held, distinguishing *Lenkurt,* that the employer violated Section 8(a)(1) of the Act by restricting employees access to outside areas of the plant shortly before their working shifts. In that case, as here, it did not appear from the record that the employer had published or disseminated to its employees any no-access rule concerning off-duty employees. We conclude, in order to effectuate the policies of the Act, that such a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

In the instant case there is no evidence in the record that Respondent ever communicated to the employees the existence of any rule conforming to the

[1] Although we find, in agreement with the Administrative Law Judge, that the written no-solicitation rule was overly broad, we also agree with his finding that this defect in the rule was cured by the Employer's explanation, made to *all* employees, that the rule did not restrict solicitation during their nonworking time (i.e., before and after their shifts and during lunch and coffeebreaks). The fact that this correction or explanation of the rule was not made in writing is, in the circumstances, not critical. Furthermore, as there is no evidence that the rule was adopted for discriminatory reasons or that it was disparately applied only against solicitation on behalf of the Union, we do not understand our dissenting colleague's view that the Employer had an additional burden of establishing, by affirmative evidence, that the rule was necessary to maintain order, discipline, and production. Establishing such necessity would not, in any event, cure an invalid rule, i.e., a rule which was discriminatorily promulgated or disparately enforced.

[2] Chairman Murphy would not find, as did the majority in *Lenkurt,* that off-duty employees are analogous to nonemployees insofar as an employer's right to restrict their access to exterior areas of its premises such as parking lots and roadways are concerned.

Member Penello interprets *Lenkurt,* as distinguished in *Bulova, infra,* as establishing the validity of a no-solicitation and no-distribution rule which limits access of off-duty employees to the plant itself, and adjacent working areas.

above criteria. Accordingly, we find that Respondent unlawfully prevented Cerato from distributing literature in its parking lot and we shall therefore order that Respondent cease and desist from engaging in such conduct.[3]

AMENDED CONCLUSIONS OF LAW

1. Tri-County Medical Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By preventing Thomas Cerato from distributing union literature in its parking lot while off duty, Respondent has violated Section 8(a)(1) of the Act.
4. Respondent has not engaged in any other unfair labor practices alleged in the complaint in the instant case.
5. The unfair labor practice found above has an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tri-County Medical Center, Inc., Springfield, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Preventing off-duty employees from distributing union literature in the employees' parking lot in the absence of a valid rule prohibiting off-duty employees from entering Respondent's premises for any purpose.

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

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

(a) Post at its Springfield, Pennsylvania, place of business, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that, with respect to all other unfair labor practices not found herein, the complaint be dismissed.

MEMBER FANNING, dissenting in part:

I dissent from the decision of my colleagues in the following two respects.[5] First, I would find that Respondent violated the Act with respect to employee Kane. Inasmuch as Respondent's apology to employee Kane made no mention of the reprimand Kane received from the Respondent's agent, Poleman, for soliciting at the rear of the hospital prior to beginning her work shift, I would find that Poleman's preventing Kane from soliciting violated Section 8(a)(1) of the Act.

Secondly, I would find that the no solicitation-no distribution rule promulgated by Respondent violated Section 8(a)(1) of the Act. There is no doubt that this rule—prohibiting solicitation or distribution "during working hours and in working areas"—is presumptively invalid. However, the Administrative Law Judge, with my colleagues' approval, found that the Employer adequately clarified this rule, making the rule valid. I disagree.

I am not satisfied that the Respondent adequately explained to employees that solicitation and distribution were permitted during times when employees were not actively at work. The Administrative Law Judge concluded that the Respondent clarified the rule through oral explanations made at employee meetings which were apparently, though I think some doubt exists on this point, attended by all employees. Significantly, however, the invalid rule remained posted on the bulletin board, and no clarification was made *in writing* to employees. Under these circumstances, I do not think that the Respondent met its burden of proving that all employees

[3] Inasmuch as the complaint did not allege that Respondent violated Sec 8(a)(1) of the Act by summoning the police and charging Cerato with trespass, we do not make any findings in this regard.

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

[5] I agree with the majority that the Respondent violated Sec. 8(a)(1) by preventing Cerato from distributing union literature outside the hospital on a day when he was not scheduled to work. However, I find it unnecessary to distinguish *GTE Lenkurt* inasmuch as I adhere to the view, expressed in my and Member Jenkins' dissent in that case, that off-duty employees have a right to remain or enter the employer's premises for solicitation or distribution of union literature subject to the employer's need to maintain production, discipline, or security.

were fully apprised of a clarification and explanation of the no solicitation-no distribution rule.[6]

Furthermore, where a rule is presumptively invalid, other burdens attach to the promulgator of the rule. The Board has long applied the presumption that a rule which proscribes employee solicitation or distribution activities only during the employees' working time has been promulgated for the legitimate purpose of maintaining order, discipline, and production.[7] However, where, as here, the rule is presumptively invalid, the Respondent bears the burden of coming forth with objective evidence to demonstrate that the rule is necessary to maintain order, discipline, and production. Here, the Respondent did not do so. There is no showing of unusual conduct by employees or union organizers that disrupted or threatened to disrupt the Respondent's operation. Also, there was no showing that there was a marked decline in the services or performance of employees prior to the posting of the rule. Even in the context of a case involving a hospital, I would not assume that a presumptively invalid rule was necessary to maintain discipline and order. Accordingly, inasmuch as the Respondent's no solicitation-no distribution rule was presumptively invalid, I conclude, absent a showing that it was necessary to maintain discipline and order, that the rule was violative of Section 8(a)(1) of the Act.[8]

[6] It is also significant that the Respondent did not clarify *where* employees might solicit or distribute on behalf of the Union. The Respondent's statements to employees concerned only when employees might solicit or distribute and failed to explain whether such activities were permitted in "working areas."

[7] See, e.g., *Walton Manufacturing Company*, 126 NLRB 697 (1960).

[8] As the Administrative Law Judge concluded that employee Priebe was discharged for violating the Respondent's no solicitation-no distribution rule, I would find that Priebe's discharge, for violating an invalid rule, was violative of Sec. 8(a)(3) of the Act. A discharge based on a worktime solicitation, in the absence of a valid rule, suggests that an employer is reacting to the protected aspect of the employee's conduct rather than to insure plant efficiency. See, e.g., *The J. L. Hudson Company*, 198 NLRB 172 (1972) Therefore, as there was no clear showing that Priebe's discharge flowed from any abdication of work duties, I would find that the discharge was a result of his protected activities and violated Sec. 8(a)(3)

APPENDIX

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

WE WILL NOT prevent off-duty employees from distributing literature in the employees' parking lot in the absence of a valid rule prohibiting off-duty employees from entering our premises for any purpose.

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

TRI-COUNTY MEDICAL CENTER, INC.

DECISION

STATEMENT OF THE CASE

ARNOLD ORDMAN, Administrative Law Judge: Complaint in this case issued on March 25, 1975, pursuant to an unfair labor practice charge filed on January 31, 1975, by the Union named in the caption. The complaint alleged that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by promulgating and maintaining an unlawful rule against union solicitation and distribution of union literature, and by preventing employees from distributing union literature in Respondent's employee parking lot. The complaint further alleged that Respondent violated Section 8(a)(3) and (1) of the Act by discharging an employee, Eric Priebe, because of his union advocacy on Respondent's premises. Respondent's answer to the complaint, dated April 2, 1975, admits material allegations of the complaint but denies the commission of the statutory violations alleged.

Hearing on the controverted issues was conducted before me in Philadelphia, Pennsylvania, on April 29, 1975. Briefs were submitted by General Counsel and by Respondent on May 28, 1975. Upon the entire record in this proceeding, upon my observation of the witnesses and after due consideration of the briefs filed herein, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, a Pennsylvania corporation, operates a proprietary hospital in Philadelphia where, during the past calendar year, its volume of business exceeded $500,000, and where, during that year, it purchased goods valued in excess of $50,000 from points located outside Pennsylvania. Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The assertion of jurisdiction in this case is proper.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Beginning in the fall of 1974 an organizational campaign began among Respondent's employees. A petition for representation of these employees was filed with the Board on October 17, 1974, and was amended on November 7, 1974. Pursuant to this petition an election was scheduled for January 10, 1975, but the election was never conducted be-

cause the petition was withdrawn. Respondent was, of course, aware of the organizational effort among its employees and took steps to counter that effort. It was against this background that the events here relevant occurred.

As the allegations of the complaint herein reveal, the thrust of the complaint is that Respondent by the imposition of a no-solicitation, no-distribution rule, by the discharge of an employee, Eric Priebe, for violation of that rule, and by related conduct unlawfully interfered with the organizational efforts of its employees. At the hearing considerable evidence was adduced, some of which is in conflict. However, critical evidence and testimony which is essential to the resolution of the issues is undisputed. A summary of those issues, the evidence and testimony related thereto, and the conclusions which flow therefrom, are set forth hereunder.

B. *The No-Solicitation No-Distribution Rule*

On November 7, 1974, during the pendency of the representation petition, Respondent issued and posted on its premises a notice addressed to all its employees. The notice read:

> Subject: SOLICITATION
>
> Due to problems in the Hospital in recent months and to changes in the law, we are restating our Hospital rule concerning solicitation to read as follows:
>
> THERE WILL BE NO SOLICITATION OR DISTRIBUTION DURING WORKING HOURS OR IN WORKING AREAS.
>
> This is effective immediately and employees violating rules will be subject to disciplinary action just as for violation of other Hospital rules.

General Counsel takes the position that "an ambiguous no-solicitation, no-distribution rule, such as the one above, lending itself to an interpretation of prohibiting union solicitation on company property, even on an employee's nonworking time and in nonworking areas, and prohibiting distribution during an employee's nonworking time is presumptively invalid." (Citing *Robotron Corporation,* 216 NLRB No. 79 (1975); *The Ohio Masonic Home,* 205 NLRB 357 (1973); *Summit Nursing and Convalescent Home, Inc.,* 196 NLRB 769 (1972), reversed 472 F.2d 1380.) On the other hand, General Counsel concedes *(ibid.)* that "an ambiguous rule may, nevertheless, be a valid rule, if clarified." (Citing *Essex International, Inc.,* 211 NLRB 749 (1974).) Thus, the Board has allowed employers "to show by extrinsic evidence that, in the context of a particular case, the 'working hours' rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work." *Ibid.*

I am satisfied, and find, that such a showing was made in the instant case. It is undisputed that contemporaneously with the publishing of the new rule Respondent's top officials including its administrator and its labor relations specialist conducted a series of meetings with the supervisory staff and then with the employees in which it was repeatedly explained that employees were free under the new rule to solicit before and after their work shifts, during their workbreaks, and during their meal periods. The evidence is in conflict as to whether employee attendance at these meetings was mandatory, but it is apparent from the testimony of General Counsel's witnesses and Respondent's witnesses that virtually all of Respondent's employees were present and that the scope of the rule, as previously described, was carefully explained. Moreover, the record is clear that during the period here under consideration and while the newly published rule was in effect, both union solicitation and distribution of union literature were occurring on plant premises, and, except for the few incidents hereinafter described, no disciplinary action was taken in reprisal for such conduct. I conclude, therefore, that the test of *Essex International, Inc., supra,* has been met and that Respondent sufficiently "clarified" any ambiguity which might otherwise have made its rule "presumptively" invalid. See also *House of Mosaics, Inc.,* 215 NLRB No. 123 (1974).

In this frame of reference General Counsel seeks to buttress its claim of illegality on the additional grounds that the rule was promulgated at the precise time organizational activity became apparent and that despite the apparent sweep of the rule as enjoining all solicitation and distribution, it was really focused on union solicitation and union distribution and hence was disparately enforced. To be sure, the rule here under attack was promulgated at a time when union activity was current. On the other hand, this was hardly surprising inasmuch as Respondent reexamined its rules in the light of the current activity and discovered, as the face of its notice manifests, that restatement of the instant rule was necessary. The prior rule had conditioned all solicitation on prior permission being obtained from management, an obviously unlawful requirement absent special circumstances not shown to be present here. The fact that a petition for representation had been filed amply explains both the occasion for reexamination of the old rule and the need for formulation of a new rule. Here, as in a virtually parallel situation in *Whitcraft Houseboat Division, North American Rockwell Corporation,* 195 NLRB 1046, 1046–47 (1973), the "circumstances adequately explain on a nondiscriminatory basis the timing of the rule's promulgation."

Similarly, General Counsel fails to establish by a preponderance of the evidence its claim of disparate enforcement of the rule, a claim, incidentally, not formally embodied in the allegations of the complaint. Evidence was adduced that both prior to and after publication of the new rule, solicitation and distribution took place on Respondent's premises, having to do with the sale and distribution of Avon and other products, books, drugs, solicitation of gifts for employees, and the like. As to several such instances, it is not altogether clear from the testimony that the activities in question took place during the actual worktime of the individuals involved or, if so, that management was aware of the matter. Moreover, Respondent adduced credible evidence, not rebutted on the record, that in several instances where such transgressions were noted, warnings were given and, so far as appears, the particular situations were rectified. On the basis of all the evidence, I find that disparate enforcement of the rule against solicitation and distribution has not been established.

I conclude, as a matter of law, that Respondent's pro-

mulgation and maintenance of its November 7, 1974, rule forbidding solicitation or distribution did not constitute a violation of Section 8(a)(1) of the Act.

C. *The Prohibition Against Distribution of Union Literature in the Employee Parking Lot*

General Counsel alleges that on or about January 8, 1975, Respondent through its agent, Theodore Poleman, prevented employees of Respondent from distributing union literature in the employees' parking lot at the hospital, thereby violating Section 8(a)(1) of the Act. General Counsel relies on two incidents in support of this allegation, the first incident involving employee Donna Kane, and the second involving employee Thomas Cerato. The evidence as to each of the incidents is essentially undisputed.

Donna Kane worked for Respondent as an orderly on the 7 a.m. to 3:15 p.m. work shift. On January 8, 1975, Kane, prior to the beginning of her work shift, was distributing union literature on the rear loading dock of the hospital. Poleman, a uniformed security officer of Respondent and admittedly its agent, told Kane she could not distribute literature at that location. Thereupon, Kane walked through the hospital to the front driveway of the hospital where she continued to distribute union literature. Among those who saw her engaging in this activity on the driveway was Mary Morose, a nursing supervisor. Minutes before the beginning of her actual work shift, Kane went to clock in and found that her timecard was missing. About 20 minutes later Morose informed Kane that her timecard had been pulled and that Kane would be "written up" for soliciting on company time. Kane protested that she had not been soliciting on company time.

Morose, pursuant to instructions, promptly reported this incident to Tom Geist, Respondent's labor relations specialist. Geist had told Respondent's supervisory staff that any disciplinary action relating to union activities was to be reported to him forthwith. Upon being apprised of the incident, Geist immediately told Morose that Kane's actions were perfectly lawful and that Morose should apologize to Kane and explain that a mistake had been made. As Kane acknowledged, Morose did come to her at 10 o'clock that same morning, about 2-1/2 hours after their initial conversation, apologized to Kane, and stated that she, Morose, had misunderstood the policy regarding union solicitation. As Kane further testified, Morose also told Kane she was free to hand out literature out front as long as she was not on working time or hadn't started work.

On "a narrow and technical view" (*Redcor Corporation,* 166 NLRB 1013 (1967)) of the situation here presented, a violation of the Act can be spelled out in that Kane was threatened with discipline for engaging in permissible conduct. However, as shown, the situation was almost immediately rectified, no disciplinary action was taken and Kane was expressly informed that she was free to engage in handing out literature on nonworking time. Indeed, Kane testified that she had seen other employees handing out literature on hospital premises and that she knew she could do so on her own time. Under these circumstances here, as in *Redcor, supra,* the conduct under scrutiny "was not intended to exert and did not exert a restraining effect on [Kane's] legitimate exercise of rights guaranteed by Section 7 of the Act."

The second incident, involving employee Thomas Cerato, also occurred on January 8, 1975. Thomas Cerato, an orderly, was not scheduled to work at all that day. Nevertheless, early that morning Cerato distributed union literature, at first at the front entranceway to the hospital and then in the rear parking lot. While engaged in this activity Cerato was informed by Security Officer Poleman that he was not allowed to engage in distribution. Cerato protested that he was within his rights and continued to distribute the literature. Cerato made the same protest to a county policeman who drove up shortly thereafter. The policeman asked Poleman if he wanted to press charges and, upon receiving an affirmative answer, issued a citation charging Cerato with trespassing. Cerato subsequently pleaded guilty to the charge and was fined.

A critical fact in this situation is that Cerato was not scheduled to work on January 8 and therefore was in the status of an off-duty employee. The Board, in 1973, in *GTE Lenkurt, Incorporated,* 204 NLRB 921 (1973), had occasion to pass on the status of off-duty employees in relation to the application of no-solicitation, no-distribution rules. In a divided opinion, the majority there held that for purposes of such rules the status of an off-duty employee is "more nearly analogous to that of a nonemployee, and he is subject to the principles applicable to nonemployees." See *N.L.R.B.* v. *The Babcock & Wilcox Company,* 351 U.S. 105 (1956). Accordingly, the majority held (204 NLRB at 922) that where an employer "denies off-duty employees access to the premises for any purpose and [the rule] is not disparately applied against union activities, it is presumptively valid absent a showing that no adequate alternative means of communication are available." Prior holdings of the Board, to the extent inconsistent, were overruled.

In this case, as in *Lenkurt,* there was no showing that adequate alternative means of communication were unavailable. Similarly, there is no showing that Respondent's prohibition against access by off-duty employees was limited to a prohibition against use of the premises for union activities and for no other purpose. Finally, as in *Lenkurt,* there was no showing that this prohibition was discriminatorily applied. Indeed, no such evidence was even proffered.[1]

General Counsel does not quarrel with—indeed, it does not even cite—the *Lenkurt* holding. Instead, it cites *Litho Press of San Antonio,* 211 NLRB 1014 (1974), enfd. 512 F.2d 73 (C.A. 5, 1975), which held that an employer's directive to an off-duty employee distributing union literature on plant premises to get off the premises was violative of the Act. General Counsel does not mention the fact that the holding in *Litho Press* was expressly predicated on the fact that the prohibiton in that case was specifically limited

[1] It is significant that in *Lenkurt,* unlike the instant case, the Board did adopt findings that Lenkurt had improperly banned solicitation by employees on plant premises during nonworking time and had also unlawfully banned employee distribution of literature in the parking lot during nonworking time. Nonetheless, the majority of the Board dismissed the complaint insofar as it alleged unlawful denial of access to the off-duty employee.

to access to the premises for "union talk," and that the rule was disparately applied only to union activities. Indeed, *Litho Press* specifically distinguished *Lenkurt* and expressly reaffirms *Lenkurt.*

Finally, General Counsel seeks comfort from the fact that there is no showing that Poleman knew or inquired if Cerato was scheduled to work on January 8 or was in an off-duty status. The contention implicit in this assertion is misdirected. The critical question is whether, objectively considered, the statutory rights of Cerato, as an off-duty employee, were violated. Under *Lenkurt,* which I deem to be controlling here, Cerato's rights were not violated.

I conclude, as a matter of law, that Respondent did not violate Section 8(a)(1) of the Act by preventing employees of Respondent from distributing literature on plant premises.

D. *The Discharge of Eric Priebe*

The complaint alleges, and Respondent at the hearing admitted, that Respondent discharged its employee, Eric Priebe, on or about January 7, 1975, and thereafter refused to reinstate him. The challenged proposition is whether that action was violative of Section 8(a)(3) and (1) of the Act.

Again, the critical facts are virtually undisputed. Eric Priebe, an orderly, was among the employees active in the Union. He wore a union button, solicited for the Union, and distributed union literature. Respondent knew of his activities in this regard. On January 7, 1975, he was discharged. All the testimony relating to the discharge, both that given by Priebe and that given by the representatives of Respondent, is quite consistent and I credit that testimony. It appears that at or about 2:50 p.m., about 25 minutes before the end of his working day, Priebe was on his way to the orderlies' locker room to post the working schedule for the employees. On the way to the locker room, Priebe was stopped by another employee, Barbara Grant, who was not on duty at the time, and was asked some questions about the Union. Priebe replied to Grant's queries. While the conversation was going on, Pamela Weaver, assistant educational coordinator for Respondent, passed by and overheard mention of the Union. Weaver testified that she immediately called Patricia Orr, assistant director of nursing, and asked how to handle the situation. Orr instructed Weaver to ask Priebe if he was soliciting and whether he was on a work break, and that if Priebe was soliciting and not on a work break to tell Priebe to stop soliciting and report to the nursing office. As Priebe himself testified, Weaver carried out these instructions. According to Priebe, Weaver asked him if he was soliciting for the union and he replied that he was. Weaver then asked him to stop and Priebe testified that he refused. Weaver then directed Priebe to report to the nursing office and Priebe said he would do so when he finished his conversation. So far as appears, Barbara Grant, who was not on duty at the time, was never questioned or disciplined regarding her conversation with Priebe.

When Priebe concluded his conversation with Grant he did report to the nursing office. Present at the office were Helen McGarvey, director of nursing service, Patricia Orr, Pamela Weaver, and Chief Orderly Whittington. McGarvey had in the interim been given a complete report of the incident by Patricia Orr and had in turn consulted with Tom Geist, Respondent's labor relations specialist, as to the proper course of conduct to be taken. McGarvey spoke for Respondent at the nursing office interview. According to McGarvey, she asked Priebe if he knew why he had been called to the office and Priebe replied that he assumed it was because of his conversation with Barbara Grant. McGarvey then asked Priebe if he was in fact soliciting for the Union on hospital time and Priebe replied that he was. Priebe also replied affirmatively to McGarvey's query as to whether Pamela Weaver had asked him to stop soliciting and whether he had refused. According to McGarvey, Priebe explained that he felt the hospital was soliciting the employees on hospital time, that the Union was entitled to the same amount of time and that he, Priebe, would continue soliciting for the Union on working time. McGarvey then informed Priebe, consistent with her earlier conversation with Tom Geist, that she had no other alternative but to discharge him.

Priebe himself substantially corroborated McGarvey's testimony. He stated, however, that he answered "no" to McGarvey's inquiry as to whether he was soliciting for the Union and said, rather, that he was merely talking about the Union. Priebe told McGarvey further that in his view solicitation was confined to distributing literature and asking for signatures to authorization cards but that if solicitation included talking about the union he had engaged in solicitation. According to Priebe, McGarvey then informed him that he was being terminated for soliciting for the Union.

Priebe's further testimony casts additional light on the situation. Priebe admitted on cross-examination that at previous employee meetings addressed by Berkowitz or Geist, he and the other employees had been told that they were free to solicit before and after shifts, during breaktime, and at lunchtime, but that solicitation was forbidden during actual working time. In this connection Priebe also admitted that he was not on breaktime when he had his conversation with Barbara Grant. Finally, Priebe acknowledged that he might have told McGarvey in the course of the discharge interview that he would continue to talk about the Union anytime, anyplace, and during working time, because in his view talking about the Union did not constitute solicitation.

In view of Priebe's own admissions and the uniform testimony of all the other witnesses having to do with the discharge, it is clear that Priebe had been informed and knew of the scope of the no-solicitation rule, and that he in fact violated that rule. Moreover, even at the point of discharge, he manifested his intention to continue violating that rule. Indeed, as Priebe further testified, on the day following his discharge, he appeared at an employee meeting on hospital premises, refused to leave when asked to do so, insisted on giving the employees his side of the discharge story and repeated that he had refused Weaver's request to stop engaging in solicitation on worktime.

In these circumstances and without more, no fault can be ascribed to Respondent for terminating Priebe's employment in the face of his patent transgression of a proper

no-solicitation rule and his insubordinate refusal to terminate that transgression then or in the future. Even assuming that Priebe in fact, as he testified, misunderstood the true scope of a proper no-solicitation rule, Respondent cannot be penalized for enforcing its valid rule in the face of Priebe's adamant refusal to abide by it. Accordingly, without reference to any prior transgressions, Respondent's discharge of Priebe for his conduct on January 7 was fully warranted and the discharge is adequately explained on a nondiscriminatory basis.[2]

I conclude, as a matter of law, that Respondent did not, by discharging Priebe on January 7, 1975, and by thereafter refusing to reinstate him, violate Section 8(a)(3) and (1) of the Act.

Conclusion of Law

The evidence does not establish that Respondent engaged in the unfair labor practices alleged in the complaint in the instant case.

[Recommended Order omitted from publication.]

[2] Evidence was adduced of a prior verbal warning given to Priebe on December 5, 1974, for violating Respondent's no-solicitation rule during his working time, and a written memo relating to that incident was introduced into evidence. Priebe testified, however, that he could not recall such an incident. Priebe also testified that on December 30, 1974, he was distributing literature on the hospital driveway and was accosted by a uniformed guard named Steele who told Priebe he had no right to distribute literature on private property. Steele's status in Respondent's hierarchy, if any, was not established in the record, and no allegation in the complaint is based on this incident. Moreover, Priebe testified that this incident occurred on December 30 shortly after he completed his work shift whereas a copy of Priebe's timecard covering that period and introduced into evidence shows that Priebe did not clock in to work at all that day.