Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores *and* Retail Clerks Union, Local No. 1552 Retail Clerks International Association, AFL-CIO. Case 9-CA-5976

July 19, 1972

DECISION AND ORDER

On July 20, 1971, and July 26, 1971, respectively, Trial Examiner Ivar H. Peterson issued the attached Decision and Errata in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings,[1] and conclusions and to adopt his recommended Order, as modified below.

Member Kennedy in dissent, arguing that "work time is for work," contends that Bogan and Fugate were nevertheless lawfully discharged because they neglected their own work and interfered with the work of other employees. We disagree. There is no showing in this record that Bogan and Fugate, though admittedly soliciting union support during working time, thereby neglected their own work or interfered with or hampered the work of other employees. Nothing in the facts recited by our dissenting colleague shows such neglect or interference. Indeed, the Respondent does not so argue; instead, it asserts only that it discharged the employees for violating the no-solicitation rule, prohibiting solicitation during worktime.

As to the no-solicitation rule, it was plainly too broad in its prohibitions, as the Trial Examiner found, and thus cannot be relied on by Respondent as a justification for discharging the employees. And the discriminatory application of the rule seems clear; the rule itself prohibited all solicitations, expressly including charitable and social, yet was ignored by Respondent as to several such solicitations and applied only in the case of union solicitation.

The Chairman's dissent is based on a misconception of the statutory right of employees to engage in union solicitation at their place of work. The Act establishes and protects their right to so engage, even during working time, so long as there is no interference with production. Only a substantial business justification, such as a genuine interference with the progress of the work, justifies any restriction on this right of solicitation. A no-solicitation rule is *presumptively,* and only presumptively, valid if it is limited to prohibiting solicitation during the time an employee is expected to be working and not during breaktime, lunchtime, or the like.[2] Such a rule is valid because it is presumed to be directed toward, and to have the effect of, preventing interference with production.

But where a no-solicitation rule goes beyond these limits, as the present one does, it is an unlawful infringement upon the employees' freedom to solicit their fellow employees for (or against) union representation. The rule in such case can provide no justification for the discharge of an employee who violated it. Therefore, if an employee is discharged for soliciting in violation of an unlawful rule, the discharge also is unlawful unless the employer can establish that the solicitation interfered with the employees' own work or that of other employees, and that this rather than violation of the rule was the reason for the discharge. As we noted above, no such interference is shown here. Thus the employee has been discharged for engaging in an activity protected by the Act, and the violation is plain. Enforcement of an unlawful rule in this manner is, of course, a separate further interference with employee rights.

The Chairman's view appears to be that, because the employer may in a presumptively valid way limit solicitation, there can be no interference with employees' rights by discharging them for soliciting on worktime. The correct view, however, is that any prohibition of solicitation, by rule or discipline, interferes with employee rights, and that such interference must—in the absence of a valid rule—be supported by an affirmative showing of impairment of production. Reliance on an invalid rule is, of course, no such showing.

With regard to the 8(a)(1) allegation stemming from the arrest of Union Representative Hammergren and Wellnitz at the Respondent's store, we do not dispute the Trial Examiner's finding that the Respondent had previously invited them to the store to discuss the discharges of Bogan and Fugate. However, in view of the record fact, conceded by Hammergren himself, that the Respondent caused his and Wellnitz' arrest at the store only after their refusal to accede to the Respondent's wishes that they leave the premises, we do not adopt the Trial

[1] The Respondent has excepted to certain credibility findings made by the Trial Examiner It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect *Standard Dry Wall Products, Inc*, 91 NLRB 544, enfd 188 F 2d 362 (C A 3) We have carefully examined the record and find no basis for reversing his findings We disavow the Trial Examiner's statements respecting the recording of the arrests of Union Organizers Hammergren and Wellnitz by television cameras from a local television station as there is no evidence indicating that Respondent was responsible for the alleged television coverage

[2] Where it could be shown from the characteristics of the work that union solicitation during worktime would in no way interfere with performance of the work, for example, Lil Abner's mattress-testing job, a no-solicitation rule of any kind would be invalid

Examiner's finding that the Respondent's conduct in causing their arrest constituted an 8(a)(1) violation.

ADDITIONAL CONCLUSION OF LAW

To correct the Trial Examiner's inadvertent omission of a finding as to illegal interrogation in violation of Section 8(a)(1) of the Act, as the basis for the proscriptions against such conduct contained in this Order and the notice attached to his Decision, we hereby amend his Conclusions of Law as follows:

Insert the following as the Trial Examiner's Conclusion of Law 4, and renumber the subsequent paragraphs accordingly:

4. By coercively interrogating an employee about his union support or union activities, the Respondent violated Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and hereby orders that the Respondent, Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores, Kettering, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as so modified:

[1. Delete Conclusion of Law 5 and renumber the remaining paragraphs accordingly.]

[2. In the recommended Order delete paragraph 1(d) and reletter the remaining paragraph accordingly.]

MEMBER KENNEDY, concurring in part and dissenting in part:

I concur in my colleagues' reversal of the Trial Examiner's findings that Respondent violated Section 8(a)(1) of the Act in connection with the arrest of Union Organizers Hammergren and Wellnitz. Clearly, the Act does not deny a retail employer the right to call to his store the local police or fire department when confronted with a fire or a disturbance on its premises.

I dissent from the majority's affirmance of the Trial Examiner's conclusion that Respondent's discharge of Gary Bogan and David Fugate violated Section 8(a)(3) and (1) of the Act. The Board has long recognized that it is not improper for an employer to insist that "working time is for work."[3] More recently the Board observed that "the question of whether work-time solicitation is protected or unprotected activity cannot be determined on an absolute basis." *Greentree Electronics Corporation,* 176 NLRB 919. In that case, a divided Board found unlawful the discharge of two employees for a brief casual conversation in the absence of a showing that it interfered with production or created disciplinary problems. The Board made clear, however, that employees are not engaged in protected activity when they neglect their work duties to engage in union solicitation.

A review of the record in this case convinces me that Fugate and Bogan were discharged for neglecting their own work and interfering with the work of other employees. In reaching this conclusion, I rely primarily upon the testimony of the dischargees.

Fugate and Bogan both testified that they met the union organizer for lunch on the day of their discharge and that they were provided with approximately 20 union authorization cards. They returned from lunch at approximately 1 p.m. or shortly thereafter. They began their solicitations as soon as they returned from lunch and according to Bogan they had exhausted their card supply by 2:30 or 3 p.m. Fugate testified that they were out of cards by 3:30 p.m. A number of employees testified that they were solicited on the selling floor. Fugate and Bogan testified that most of the solicitations occurred in the receiving area. Bogan testified that he solicited "three, four or five" employees on his breaktime at the snack bar which is open to the public. Bogan acknowledged that he asked Gwynne Peters, during her working hours on the selling floor, if she was interested in joining the Union, "and then she turned and went to her stockroom and took the union card from me there." In my view, the record does not support the Trial Examiner's observation that it appears that Fugate and Bogan "were at all times caught up with their work" when they solicited other employees. In this connection, it is noted that on rebuttal dischargee Fugate corroborated much of the testimony of security guard Emmons, who testified that it was necessary for him to open the receiving door after 1 p.m. because Fugate and Bogan were late in returning from lunch. Clearly, it was Fugate and Bogan's responsibility to handle the receiving area. Accordingly, I agree with Chairman Miller's conclusion that there is no reason for our interfering with Respondent's discipline of employees for their complete disregard of their assigned duties.

Finally, I disagree with my colleagues' finding that Respondent's no-solicitation rule warrants an 8(a)(1) order. That rule prohibits solicitation "during paid work hours" on behalf of any "religious, fraternal, labor, political, charitable, social or any other such organization." I can find no evidence in this record to suggest that the rule has ever been construed or

[3] *Peyton Packing Co*, 49 NLRB 828.

enforced to prohibit solicitation during nonwork time or in nonselling areas. The Board has refused to invalidate such rules in the past absent a showing of unlawful enforcement. See *The Lion Knitting Mills Company,* 160 NLRB 801, fn. 1.

I would dismiss the complaint in its entirety.

CHAIRMAN MILLER, dissenting:

It is my view that if an employer wishes to maintain a rule restricting union solicitation he may only do so by setting forth a clearly understandable and unambiguous rule which complies with our statute, as interpreted by Board and court decisions. The no-solicitation rule in this case is ambiguous and could easily be interpreted by employees to prohibit all kinds of solicitation, including union solicitations, during employees' free time. Thus, as the Trial Examiner found, the maintenance of this rule violated Section 8(a)(1).

It is my further view, however, that the decision of the majority herein relating to the disciplining of employees Fugate and Bogan repeats an error which seems to underlie a number of Board decisions in this area.

The error is the mechanistic application of the syllogism which runs: (a) the rule is bad; (b) the discipline was pursuant to the rule; (c) therefore, the discipline is bad.

This is a convenient and simple formula, and I have myself fallen into this simplistic semantic trap. (See the dicta comprising the last sentence of paragraph numbered "2" in the opinion in *Heritage House of Connecticut, Inc. d/b/a Alliance Medical Inn-New Haven,* 192 NLRB No. 158.)

In reflecting on this area of the law, however, I have concluded that in assessing the lawfulness or unlawfulness of employer imposed discipline in *any* case, we must focus upon: (1) whether, on the facts of the case, the *discipline* interfered with the legitimate exercise of Section 7 rights and therefore violated Section 8(a)(1); (2) whether the discipline discriminated against an employee so as "to encourage or discourage membership in any labor organization"; and (3) whether, under Section 10(c) of the Act, we are forbidden to order reinstatement because the individual was "suspended or discharged for cause."

Thus, if an employee is disciplined for engaging in conduct which an employer may lawfully prohibit —i.e., utilizing worktime for engaging in nonproductive activity, whatever its nature, including the use of such working time for union activity—it would seem that there is no *per se interference* with employee rights under Section 8(a)(1). Nor would such discipline constitute 8(a)(3) discrimination unless it were shown that the employee who utilized such working time for *union activity* was treated more harshly than other employees apprehended while engaging in a like, but not union-connected, prohibited use of working time. Further, if there is no such interference or discrimination shown and we order an employee reinstated, I fear we have run afoul of Section 10(c) in that we have ordered reinstated an employee who was discharged for conduct which an employer may lawfully, and did, prohibit.

As to the too easy application of the syllogism underlying some of our decisions, including that of the majority here, its fallacy lies in failing to examine the nature of the conduct for which the discipline was imposed and to limit our investigation only to the rule. The rule, as here, may require modification in order to conform to our statute, and we may so order as a remedy for its unlawful maintenance in its impermissible form. But the conduct may be such as to justify discipline, whether or not the rule itself might in some other instance have been applied so as to have reached protected conduct for which we would not allow discipline to be imposed.

By analogy, if in a single rule an employer prohibited employees both from smoking and engaging in union solicitation in production areas, I presume we would not condemn discipline imposed for smoking in the production areas. And this would be true even though we found the rule, in its total reach, to have overstepped the bounds of our Act and even though we would set aside a discharge for engaging in protected activity prohibited by the selfsame rule.

Thus in this case, I agree that the rule contained an ambiguity and thus may well have unlawfully inhibited union solicitation at times when an employer has no legitimate interest in restricting such activity. But while we should therefore remedy that violation by an appropriate 8(a)(1) order, I see no reason for our interfering with the Employer's discipline invoked against employees because of flagrant disregard of their assigned duties.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

IVAR H. PETERSON, Trial Examiner: This case was tried at Dayton, Ohio, on April 20 and May 11 and 12, 1971. The charge was filed by the Union on December 11, 1970 and the complaint was issued on February 9, 1971. The primary issues are whether the Respondent, Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores, (a) maintained and enforced an unlawful no-solicitation rule, (b) unlawfully questioned its employees regarding their union activities, (c) unlawfully caused the arrest for alleged trespass of two union organizers who had been invited onto the Respondent's premises by its manager to discuss the discharge of employees, and (d) discriminatorily discharged two employees, Gary Bogan and David

Fugate, because of their union activities, all in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed on June 21, by the General Counsel and the Company, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, a California corporation, operates department stores in various locations in the several States of the United States, including the store at Kettering, Ohio, which is the only facility involved in this proceeding. The complaint alleges, the answer admits, and I find that during the 12 months preceding issuance of the complaint the Respondent's gross volume of sales exceeded $500,000, and that in the same period, it had a direct inflow of products, in interstate commerce, valued in excess of $50,000 which were purchased and delivered to its Kettering store from points outside the State of Ohio. Accordingly, I find that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find that the Union, Retail Clerks Union, Local #1552, Retail Clerks International Association, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

The events with which we are here concerned occurred during a span of 8 hours on November 25, 1970. Briefly stated, on that day employees Bogan and Fugate obtained some 15 or 20 union authorization cards from organizer Sherman Hammergren and, upon returning to the store and still on their lunch break, obtained some signatures on cards from other employees. During the afternoon, other employees came to the receiving room where Bogan and Fugate worked and signed cards. There is disputed testimony that the two men approached employees during working time which, for the purposes of decision, I assume to be true; however, I note that the men were caught up with their work and there is no showing that there was any interference with their duties or the duties of other employees. Having learned from a number of sources that Bogan and Fugate had solicited union cards on company premises and on working time, Store Manager Garrett called them in about 6 p.m. and discharged them. They then called Organizer Hammergren and told him what had happened. Hammergren telephoned Garrett and, so he testified, was invited by Garrett to come to the store that evening, although Garrett stated he was about to leave and that if he were not present Hammergren should speak to Assistant Manager Smoot. Garrett, whose testimony in this regard I discredit, stated that he told Hammergren to come on November 27.

Hammergren, accompanied by two other union officials, Larry Wellnitz and Floyd Sprague, promptly went to the store, followed by Bogan and Fugate. At the courtesy desk they were informed that Store Manager Garrett was not present. Thereupon Hammergren asked to speak to Assistant Manager Smoot, but the latter refused to engage in any discussion. However, Second Assistant Manager Haines did come over and told them that he did not know what the discharges were about and that Hammergren and his associates had no right to be in the store. A discussion then ensued, in which Hammergren and Wellnitz took the position that they were rightfully in the store, having been invited in by Garrett to discuss the discharges, and they refused to leave the premises. Within a short time the Kettering police arrived and told Hammergren that they had received a complaint to the effect that Hammergren and his associates were trespassing. Both Wellnitz and Hammergren were arrested for trespassing. However, no charges were pressed against them.

As indicated above, counsel for the General Counsel urges that the Respondent's no-solicitation rule was "totally contrived" and, even if it be determined that the rule had been in existence, it is "overly broad" and therefore violative of Section 8(a)(1). The Government further contends that the union officials were invited to come to the Respondent's premises and that they were arrested by the police at the Respondent's request with the "sole purpose" of thwarting the Union's organizational activities. We consider first the incidents which, it is contended, constitute interference, restraint, and coercion.

B. *Interference, Restraint, and Coercion*

The Respondent's so-called no-solicitation rule provides as follows:

> The Company has a NO SOLICITATION RULE. This means that no employee or other persons are allowed to solicit other employees, or be solicited, for any purpose. This applies to religious, fraternal, labor, political, charitable, social or any other such organization. All such activities are prohibited on these premises during paid working hours. Any employee violating this rule is subject to disciplinary action including discharge.
>
> If you have any question regarding this, please contact the Personnel Dept.

It is the Respondent's position that this rule had been posted on a bulletin board near the timeclock for a substantial period prior to the termination of Bogan and Fugate. However, there is substantial controversy as to whether this was in fact the case. Bogan and Fugate testified that the first time they had been advised of this rule was at their discharge interview with Store Manager Garrett. On the other hand, witnesses for the Respondent variously testified with respect to the content and existence of the rule. Thus, Charles Deen testified that the rule was posted on the bulletin board near the timeclock. However, on cross-examination he was asked whether he was aware of the rule at the time he was allegedly approached by Bogan and Fugate on November 25 to sign an authorization card. In response, he testified as follows:

> Q. Were you aware of this rule when you spoke to Bogan and Fugate?
>
> A. I can't really say I was. I had read it I'm sure,

but I didn't—Of course I didn't know I was being solicited at the time until we got back there.

Deen further testified that the rule, although he was not sure, was on a pink piece of paper. Maureen Elliott, called by the Respondent, testified that she remembered having seen the rule on the bulletin board and that it provided there was to be no-solicitation on company time. Mrs. Gail Snively stated that she did not recall the existence of a bulletin board. Gwendolyn Peters, the manager of cosmetics, testified that a bulletin board had, for considerable time, been near the employees' timeclock and that posted thereon was a "blue and white sheet" which stated that there was to be no soliciting "and different things like that." Mrs. Peters was quite sure that the notice "spoke something about the Union." Examined on *voir dire,* Mrs. Peters testified as follows:

Q. Is that all that document had on it? Just one paragraph like contained on—

A. No. I would say it wasn't a paragraph like that. It was larger and in a blue ink.

Q. I see. It was larger?

A. Oh, yes.

Q. And it mentioned union, is that right?

A. Yes. It said union, the premises. I couldn't recall just what all it said.

Q. This document doesn't state union, does it?

A. No, this one doesn't.

Q. That's not the one that was on there, was it?

A. I can't recall just what was on there.

Alice Flaharty, the manager of the camera department, testified that the no-solicitation rule had been posted for 2 to 2-1/2 years and that it was on a white sheet of paper.

There is no dispute that charitable solicitations and collections for Christmas and Halloween parties for employees of the store were made during working time.

Fugate testified that during his discharge interview Store Manager Garrett asked him if he had any signed authorization cards and that he replied that he did. Additionally, Fugate testified that Garrett asked him for the cards and further inquired if he knew who the people were in the Respondent's Airway store that were attempting to organize. Fugate refused to answer and thereupon the head security guard, Tom Weigand, who was present, stated that he had a pretty good idea who these individuals were and that he would get them during that night. Weigand was not called as a witness. Garrett denied having made any of the foregoing statements to Fugate.

As stated above, promptly after their discharge Bogan and Fugate got in touch with Hammergren, the Union organizer. Although Hammergren testified that Garrett told him that he could come out to the Respondent's store to discuss the discharges, Garrett denied that he had told Hammergren he could come out the evening of November 25; he testified that he informed Hammergren that he could speak to him on Friday, November 27, at 10 a.m. In support of Garrett's testimony, Second Assistant Manager Haines testified that pursuant to Garrett's instructions he listened in to the conversation between Hammergren and Garrett on an extension telephone. According to Haines, Hammergren "insisted" on coming out to the store that evening. In any event, whether invited or not, Hammergren, accompanied by Wellnitz, business representative, Sprague, Bogan, and Fugate, came to the store at about 7:30 or 8 p.m. As previously related, the Kettering police, summoned by the Respondent, arrived while Hammergren and his associates were engaged in a discussion with Second Assistant Manager Haines.[1] Commander Lyons of the police department asked Haines if he wanted the union officials removed from the premises, and Haines responded in the affirmative. Thereupon Hammergren and Wellnitz were arrested and charged with trespassing.

C. *The Discharges*

As we have seen, Bogan and Fugate were terminated on November 25 at about 6 p.m. The stated reason given them by Store Manager Garrett was that they had been engaged in soliciting union authorization cards in the store premises during working hours, in violation of the Respondent's no-solicitation rule. The issues thus presented are (1) whether the Respondent did in fact have in effect a no-solicitation rule at the time and whether it was in terms as produced at the hearing; (2) whether the rule was "overly broad" and therefore violative of Section 8(a)(1); and (3) even if not "overly broad" whether it was discriminatorily enforced against Bogan and Fugate because of their union activity.

In terms, the rule as introduced in evidence provided that no employee or other persons are allowed to solicit other employees, or to be solicited for any purpose. It further stated that it applied to "religious, fraternal, labor, political, charitable, social or any other organization" and that solicitation activities "are prohibited on these premises during paid working hours." The testimony is in conflict as to whether this rule was in existence on or before November 25 and, if so, whether it was couched in the language as introduced by the Respondent. Bogan and Fugate were firm in their testimony that the first time they had been advised of the rule was at their discharge interviews with Store Manager Garrett. Witnesses for the Respondent, on the other hand, testified in substance that they were aware of the rule, but their testimony, upon close examination, reveals considerable conflict. We have previously summarized the testimony of witnesses Deen, Elliott, Peters, Snively, and Flaharty. Deen seemed scarcely aware of the existence of the rule and further testified that it was on a pink piece of paper. Elliott recalled the rule and summarized it by stating that it provided that there would be no-solicitation on company time. Snively could not recall the existence of a bulletin board on November 25. Peters stated there always had been a bulletin board and that the no-solicitation rule was on a "blue and white sheet" of paper. As to the contents of the rule, Bogan and Fugate testified that the rule shown them specifically prohibited solicitations for unions. Peters testified to the same effect, stating that the rule "said something about the Union." She added that the notice was in blue ink and on a larger piece of paper than the rule as placed in evidence. Flaharty stated that the rule had

[1] The police report relating to the matter indicates that the trespassing complaint from the Respondent's store was received at 7 52 p m

been posted for 2-1/2 years and was on a white sheet of paper.

While I have great reservations that a rule did in fact exist on and prior to November 25 and, further, am doubtful of the precise terms of the rule (if in fact it existed), I think it unnecessary to determine these questions. For the purposes of decision, I will assume that the Respondent did have a rule and that it was couched in terms as introduced into evidence.

It is, of course, clear that the operator of a retail store is "privileged to promulgate a rule prohibiting all union solicitations within the selling areas of the store during both working and nonworking hours." *Montgomery Ward & Co., Inc.,* 145 NLRB 846, 848, modified in other respects, 339 F.2d 889 (C.A. 6). However, a retail store rule prohibiting "solicitation in any form . . . on store premises" has been held to be "unduly broad in scope" and, therefore, violative of Section 8(a)(1) for the reason that it forbids "solicitation during nonworking time whether on or off the selling floor and in our out of work areas." *Mock Road Super Duper, Inc.,* 156 NLRB 983, 984, enforcement denied in this respect, *N.L.R.B.* v. *Mock Road Super Duper, Inc.,* 393 F.2d 432, 435 (C.A. 6).

It seems clear that the rule here involved, without question, applies to all areas of the Respondent's establishment without distinction as between selling or nonselling areas. In consequence, employees would violate the rule if they were to solicit in nonselling areas such as the stockroom area, restroom, lunchroom or various storage areas. Moreover, the rule prohibits solicitation activity during "paid working hours" and, thus, would prohibit employees from soliciting in nonselling areas during their paid break time. Finally, it abundantly appears that the rule was discriminatorily applied to Bogan and Fugate. Witnesses for the Respondent, including Store Manager Garrett and Second Assistant Manager Haines, testified that the Respondent permitted charitable bake sales, solicitations for employee Christmas and Halloween parties, and solicitation of dues for the employees' Club during working hours. Indeed, the Respondent allowed a notice of dues owed by employees to the Club to be posted. Admittedly, Garrett stated that he had a different reaction to solicitation in behalf of the Union than in behalf of other activities. When he became aware of the activities of Bogan and Fugate, Garrett contacted Store Manager Connors at another store of the Respondent and asked his advice with respect to handling the situation. Connors came over to the store and, according to Garrett's undenied testimony, stated in substance that the Respondent was against the Union.

On balance, I am convinced and find that the Respondent's rule was overly broad and was discriminatorily enforced against Bogan and Fugate. In reaching this conclusion I have not overlooked the evidence tending to show that Bogan and Fugate breached the rule by engaging in solicitation activity on the premises during working time. However, it is well settled that the discharge of employees for violation of an invalid no-solicitation rule is unlawful. See, e.g., *The Sardis Luggage Company,* 171 NLRB No. 187; *William L. Bonnell Co., Inc.,* 164 NLRB 110–113. Additionally, the Board has held that the discharge of an employee for solicitation for union membership during working hours is unlawful, despite the existence of a no-solicitation rule, where such a rule is either adopted or applied in a discriminatory manner. *Glenn Berry Manufacturers, Inc.,* 169 NLRB 799, 803. We have noted earlier that the Respondent permitted various other forms of solicitation on its premises during working time, although these were prohibited by the terms of the no-solicitation rule. Indeed, the record supports the finding, which I make, that the rule was invoked only when the Respondent became aware that Bogan and Fugate were engaged in organization efforts. Moreover, the testimony adduced by the Respondent in an effort to demonstrate that Bogan and Fugate were in violation of the rule merits close examination. Thus, employee Deen testified that he was approached by Fugate some time between 1:30 and 2 p.m. on the selling floor with the request that he sign an authorization card. According to Deen, he and Fugate spoke about the Union for 5 to 10 minutes while off the selling floor. It seems doubtful that this would have occurred, in view of the fact that at about 1 o'clock, as Bogan and Fugate were returning from lunch, James Emmons, a security guard, met them and in response to their effort to solicit his interest in the Union Emmons informed them of the no-solicitation rule and warned them not to solicit during working hours. It seems highly unlikely that immediately after having received this warning Bogan and Fugate would attempt to solicit an authorization card from Deen, a managerial employee.[2]

According to Peters, cosmetics manager, Bogan, approached her on the selling floor when he was on his way to lunch. This seems most unlikely, in view of the fact that the record demonstrates that Bogan had no authorization cards until after he returned from lunch. Flaharty, the Respondent's camera department manger, testified that she was approached by Bogan about 4:45 or 5 o'clock on the selling floor and that he gave her an authorization card. In contrast, Bogan and Fugate testified that they had no authorization cards left at the time Flaharty stated she was approached by Bogan. Indeed, Organizer Hammergren and Bogan testified, in substance, that about 3 o'clock in the afternoon Hammergren received a telephone call requesting additional authorization cards. Flaharty further testified that the authorization card she received was pink in color. Hammergren testified that the only authorization card used by the Union was yellow and that the Union had never used a pink card. Snively, a rank-and-file employee, testified that on November 25 Bogan walked past her carrying some boxes to the selling floor and briefly stated to her that he was trying to start a union. According to Snively, Bogan "didn't say very much about it. He just said he would talk to me later because he was in a hurry."

To conclude, I am convinced and find that, although Bogan and Fugate may not have confined their soliciting activities to periods when they were on a lunch break or a

[2] It should be observed that, according to Bogan, he spoke briefly to Deen about the Union as Deen was on his way home at about 5 p.m. and passing through the receiving room. In addition, Fugate testified that Emmons approached him in the receiving area and asked for an authorization card.

rest period, it does appear that they were at all times caught up with their work and there is no evidence that their activity in any way interferes with the normal performance of their own duties or the duties of other employees.[3] Accordingly, I find that the Respondent unlawfully terminated the employment of Bogan and Fugate, thereby violating Section 8(a)(3) and (1) of the Act.

D. *The Arrest of Organizers Hammergren and Wellnitz*

It has been related above that Bogan and Fugate, immediately after their discharge, contacted Union Organizer Hammergren, who telephoned Store Manager Garrett and, according to Hammergren, whose testimony I credit, was invited by Garrett to come out to the store to discuss the discharges, either with him or, since Garrett was on his way home, with Assistant Manager Smoot. Hammergren did come to the store, accompanied by two associates and Bogan and Fugate, and spoke with Second Assistant Manager Haines at the courtesy desk. Some representative of the Respondent telephoned the police, who when they arrived, and at the request of Haines, placed Hammergren and Wellnitz under arrest.[4] There is no dispute that the arrests of Hammergren and Wellnitz took place on the Respondent's premises in the selling area while the store was open to the general public. The courtesy desk, where the incident occurred, is adjacent to various departments of the store and there were employees on duty during this period. There can be little doubt and I find that the alacrity with which the arrests were effectuated and the recording of them by television cameras from a local television station is persuasive that they were deliberately set up by the Respondent with the objective of thwarting the Union's organization activities. See *Priced-Less Discount Foods, Inc., d/b/a Payless,* 162 NLRB 872, 876; *Central Hardware Company,* 181 NLRB No. 74, enforcement denied in relevant part, 439 F.2d 1321 (C.A. 8). I so find. I further find that in the circumstances described above the Respondent violated Section 8(a)(1) of the Act by causing the arrest of Organizers Hammergren and Wellnitz.

Conclusions of Law

1. The Respondent, Daylin Inc., Discount Division, d/b/a Miller's Discount Dept. Stores, is an employer within the meaning of Section 2(6) and (7) of the Act.
2. The Union, Retail Clerks Union, Local #1552, Retail Clerks International Association, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Gary Bogan and David Fugate were discriminatorily discharged on November 25, 1970, by the Respondent, and by such action the Respondent violated Section 8(a)(3) and (1) of the Act.
4. By maintaining and enforcing its no-solicitation rule so as to prohibit solicitation for union purposes at any time in the Respondent's premises, the Respondent violated Section 8(a)(1) of the Act.
5. By causing the arrest of representatives of the Union the Respondent violated Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices burdening and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

In order to effectuate the policies of the Act, I find it necessary that the Respondent be ordered to cease and desist from the unfair labor practices found and from like or related invasions of the employees' Section 7 rights, and to take certain affirmative action.

The Respondent, having discriminatorily discharged employees Bogan and Fugate, I find it necessary that it be ordered to offer them full reinstatement, with backpay computed on a quarterly basis, plus interest at 6 percent per annum, as prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1960) and *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962), from the date of the discharge to the date reinstatement is offered.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[5]

ORDER

Respondent, Daylin Inc., Discount Division, d/b/a Miller's Discount Dept. Store, Kettering, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting Retail Clerks Union, Local #1552, Retail Clerks International Association, AFL–CIO, or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Maintaining or enforcing its no-solicitation rule so as to prohibit solicitation for union purposes at any time in the Respondent's premises.

(d) Causing the arrest of representatives of the Union the Respondent violated Section 8(a)(1) of the Act.

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

[3] While the Board has held that in the absence of special circumstances, an employer may not restrict his employees with respect to union solicitation except during their working time, the term "working time" does not include paid rest periods, whether formal or informal See *Peyton Packing Company,* 49 NLRB 828, 843–844, *Campbell Soup Co* v *N L R B,* 380 F 2d 373 (C A 5), enfg, in relevant part, 159 NLRB 74, *Saco-Lowell Shops, a Division of Maremont Corporation,* 169 NLRB 1090, enfd, 405 F 2d 175 (C A 4)

[4] While Hammergren and Wellnitz were at the courtesy desk, some small fires broke out in nearby departments The fire department came about the same time as the police and brought the fires under control No claim is made that union personnel were responsible for the fires At the time of the hearing, the matter was pending before the grand jury

[5] In the event no exceptions are filed as provided by Sec 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 102 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes

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

(a) Offer to Gary Bogan and David Fugate immediate and full reinstatement to their former jobs, or if the jobs no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth above in the section entitled "The Remedy."

(b) Notify immediately the above-named employees, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(c) Rescind its no-solicitation rule insofar as it prohibits solicitation for union purposes on employees' nonworking time in nonselling areas of the Respondent's premises.

(d) Preserve, and upon request, make available to the Board and 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 recommended Order.

(e) Post at its place of business in Kettering, Ohio, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative of the Respondent, shall be posted immediately upon receipt thereof, and shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.[7]

[6] In the event that the Board's 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 be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

[7] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

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

The National Labor Relations Board having found, after trial, that we have violated Federal law by discharging Gary Bogan and David Fugate for supporting a union, and by otherwise interfering with our employees' right to join and support a union:

WE WILL offer full reinstatement to Mr. Gary Bogan and Mr. David Fugate, with backpay plus 6 percent interest.

WE WILL NOT discharge any of you for supporting Retail Clerks Union, Local 1552, Retail Clerks International Association, AFL–CIO, or any other union.

WE WILL NOT coercively question you about union support or union activities, or enforce our no-solicitation rule so as to prohibit union activities on your nonworking time in nonselling areas of our store.

WE WILL NOT unlawfully interfere with your union activities.

DAYLIN INC., DISCOUNT DIVISION D/B/A MILLER'S DISCOUNT DEPT. STORES
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 2407 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513–684–3686.