Desert Palace, Inc. d/b/a Caesar's Palace *and* Richard Zollo. Case 28–CA–14240

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On August 25, 1998, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. 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 conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) by instructing employees not to discuss the Respondent's ongoing drug investigation with fellow employees, discharging employees Richard Zollo and Louis Louft because they discussed the investigation with other employees, and by interrogating employee Daniel Miranto concerning whether employees had discussed the investigation. The Respondent excepts, contending that its need to maintain the confidentiality of its ongoing drug investigation is a substantial business justification that justifies the intrusion on its employees' exercise of Section 7 rights. For the reasons set forth below, we find merit in the Respondent's exceptions.

The Respondent operates a hotel and casino in Las Vegas, Nevada. In October 1996,[2] the Respondent received an anonymous letter, which alleged that the Respondent's employees and management were engaged in illegal activity. The letter, received by the Respondent's director of work place diversity, Anelle Lerner, asserted that an unnamed slot technician had, inter alia, dealt drugs on company property, stolen company property, and threatened the lives of fellow employees. The letter also alleged that Supervisors Richie Strafella and Dennis Baker were covering up this illegal activity and retaliating against employees who complained about the slot technician. Finally, the letter named 11 slot technicians who could substantiate the allegations.

The Respondent believed that the letter was referring to a slot technician named John Grillo. Assistant Vice President for Slot Operations John Vidmar, and the Respondent's director of work place diversity, Anella Lerner, began their investigation on October 29 by interviewing some of the slot technicians named in the letter, including Louft and Zollo.[3]

Louft was informed that the Respondent had received a letter concerning Grillo, but was not shown a copy of it. When asked about Grillo's drug use, Louft stated that he had heard rumors of it. He was not told which other employees were involved. Zollo was also asked for his comments about Grillo without being shown the letter. According to Vidmar, each employee he interviewed was given strict instructions not to discuss anything related to the investigation "with anybody at any time" or "in any way, shape or form in or out of the work place." According to Lerner, any employee who violated this prohibition would be subject to discipline, up to and including termination. Each employee acknowledged that they understood the confidential nature of the investigation. Further, none of them objected to the confidentiality requirement or asked for a clarification. They were told that if they had any questions or concerns once they left the interview to contact Vidmar or Lerner.

It is undisputed that during the day following his interview, Zollo commented to other employees that the investigation "could backfire on them" and that he was concerned how the employees were selected to be interviewed. Employees Mahler and Martinez responded with similar comments.

The following day, two supervisors told Vidmar that Zollo had been observed discussing the Grillo investigation with employees. Concerned that the Grillo investigation might have been compromised, Vidmar began an inquiry. Several employees told Vidmar that Zollo had made comments, without elaboration, about Grillo's drug and financial dealings. Vidmar and Lerner also questioned employee Daniel Miranto about whether employees had discussed the investigation among themselves. He was not given any assurances concerning the uses to which his answers might be put, or about his freedom not to answer. Vidmar concluded that Zollo had compromised the investigation.

On about November 3, Vidmar received a voice mail from employee Larry Moss that Louft had disclosed con-

[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] All dates hereafter refer to 1996.

[3] Vidmar and Lerner with the assistance of the Respondent's corporate security department interviewed slot technicians Moss, Weisnewski, Mahler, Louft, Zollo, Miranto, and Supervisors DeSantos, Baker, and Mackey. Subsequently, they spoke to Strafella and Grillo.

fidential information about the investigation. Vidmar then questioned Moss about his message. Moss said that Louft had "pushed him" to learn what questions he had been asked by the Respondent. According to Moss, Louft had stated that Grillo knew about the investigation. On November 6, Vidmar terminated both Louft[4] and Zollo for among other things "unauthorized discussions of company confidential information." Mahler was suspended for discussing the investigation with other employees, including revealing that three employees including Grillo were to be terminated. Employee Richard Pike was also suspended for informing Grillo that he was being called back for a subsequent interview by the Respondent.[5]

We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs the Respondent's asserted legitimate and substantial business justifications. *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976).[6] As discussed below, we find that it does not.

To strike a proper balance between the employees' rights and the Respondent's business justification, we must examine the facts of this case in light of the surrounding circumstances. Accord: *Pennsylvania Power Co.*, 301 NLRB 1104 (1991) (employer's interest in maintaining confidentiality in drug program and protecting identity of informants outweighed union's interest in specific information that led to investigation and discipline of employees for drug use). Compare *Mobile Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176 (1997) (employer failed to demonstrate substantial confidentiality interest to justify discipline of employee, where target of investigation had already been informed of investigation).

Here, the Respondent imposed a confidentiality rule during an investigation of alleged illegal drug activity in the work place. Because the investigation involved allegations of a management coverup and possible management retaliation, as well as threats of violence, the Respondent's investigating officials sought to impose a confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated. We find that the Respondent has established a substantial and legitimate business justification for its rule and that, in the circumstances of this case, this justification outweighs the rule's infringement on employees' rights.

Finally, we find that the judge erroneously relied on the purported disparate enforcement of the Respondent's rule, with respect to other employees who had disregarded instructions that the investigation remain confidential. This case turns not on the issue of pretext—all of the disciplined employees engaged in activity otherwise protected by Section 7—but on the legality of the Respondent's rule. Although the Respondent disciplined some employees more severely than others based on their individual circumstances (i.e., it discharged Zollo and Louft, but only suspended Pike and Mahler), this action does not suggest that Respondent's asserted confidentiality interest was illegitimate or insubstantial.

Accordingly, we find that the Respondent did not violate Section 8(a)(1) of the Act by maintaining and enforcing a confidentiality rule, or by discharging employees Zollo and Louft for breaching the rule. We further find that the Respondent did not violate Section 8(a)(1) of the Act by interrogating employee Miranto about breaches of that rule.

ORDER

The complaint is dismissed.

Scott Feldman, Atty., for the General Counsel.
Gregory J. Kamer, Atty. and Edwin A. Keller, Atty. (Kamer & Zucker), of Las Vegas, Nevada, for Respondent.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Las Vegas, Nevada, on January 15 and 16, 1998,[1] and is based on a charge (subsequently amended on June 3, 1997) filed on March 17, 1997, by Richard Zollo (Zollo), alleging generally that Desert Palace, Inc., d/b/a Caesar's Palace

[4] According to Vidmar, there was a second, independent basis for Louft's discharge, namely that he was the partial author of a cartoon left on a supervisor's desk the month before.

[5] Pike was not, however, disciplined for telling Grillo on October 29, of the Respondent's intent to terminate him. Relying on the admission of Supervisor Baker that, on October 29, Pike told Baker of the investigation and that he had been instructed not to discuss it the judge rejected Vidmar's testimony that Pike did not learn of the confidentiality rule until October 30.

[6] Under *Jeannette*, once it is established that an employer's conduct adversely affects employees' protected rights, the burden is on the employer to demonstrate "legitimate and substantial business justification" for its conduct. 532 F.2d at 918. It is the responsibility of the Board to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. Id.

[1] On January 13, 1998, the Regional Director for Region 28 issued his order severing cases, approving withdrawal of charge, dismissing complaint, and vacating notice of hearing in Case 28–CA–14238. As a result, when this case came on for trial, I was left only with the allegations and issues framed by the pleadings in Case. 28–CA–14240.

(Respondent), committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). On June 19, 1997, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, and the answer admits, that Respondent is a Nevada corporation, with an office and place of business in Las Vegas, Nevada, where at all times material it has been engaged in the business of a hotel and casino; that during the 12 months ending March 17, 1997, in the course and conduct of its business operations, it purchased and received at its facility mentioned above goods, products, and materials valued in excess of $50,000 directly from points outside the State of Nevada; and that during the same 12-month period it derived gross revenues therefrom in excess of $100,000.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

It is alleged that on or about October 28, 1996, Respondent promulgated and enforced a rule prohibiting its employees from talking among themselves about Respondent's ongoing investigation of alleged illegal behavior by its employees, in violation of Section 8(a)(1) of the Act.

It is also alleged that on or about November 6, 1996, by suspending and subsequently terminating Respondent's employees, Richard Zollo (Zollo) and Louis Louft (Louft), for discussing the ongoing investigation in concert with other employees, Respondent violated Section 8(a)(1) of the Act.

The complaint was amended at hearing to allege that Respondent unlawfully interrogated its employees regarding employees' protected concerted activities, in violation of Section 8(a)(1) of the Act.

Respondent has denied the commission of any unfair labor practice.

B. The Evidence

Respondent operates a hotel and casino in Las Vegas, Nevada. Louft began working for Respondent there as a slot technician around August 1991. Respondent also employed Zollo as a slot technician there. Zollo and Louft were both terminated on November 6.

During the week of October 21, Respondent received an anonymous letter which made several allegations of misconduct, allegedly being committed by Respondent's employees and management. This letter was received by Respondent's director of work place diversity, Anelle Lerner (Lerner). The anonymous letter identified a slot technician who was engaging in several types of illegal conduct. This slot technician was later determined to be employee Grillo. The letter states that the conduct had been occurring for years. Specifically, the letter stated that an unnamed slot technician, but apparently referring to an employee named Grillo, had, inter alia:

> threatened the lives of fellow employees;
> stolen company property;
> dealt drugs on company property;
> been arrested and convicted for dealing drugs;
> that supervisors Richie Strafella and Dennis Baker were covering up this illegal conduct;
> that when complaints were brought to these supervisors the slot technician was informed about the complaints; and,
> that the supervisors retaliated against employees for complaining about the slot technician.

The letter also named 11 slot technicians who, so the letter claimed, were aware of the allegations and who could supposedly confirm the activities of Grillo, Strafella, and Baker.

In October 1996, John Vidmar (Vidmar) was employed as Respondent's assistant vice president for slot operations. Vidmar ceased working for Respondent in October 1997. On October 29, Respondent, through Vidmar and Lerner, began investigating the letter's allegations. They were assisted by Glass and Gilespie, both of the corporate security department. They spoke to some of the slot technicians named in the letter, including Moss, Weisnewski, Mahler, Louft, Zollo, Miranto, and Supervisors DeSantos, Baker, and Mackey. Subsequently, they spoke to Strafella and Grillo. Vidmar arranged interviews by telling Mackey who he wanted to speak to, but made no mention that the interviews were to be kept confidential.

Vidmar testified that each person he interviewed was given strict instructions not to discuss anything related to the investigation, "in any way, shape or form in or out of the work place," with no limitation as to the time the instruction was to apply. Instead, they "were told not to discuss it with anybody at any time."

Lerner testified that any employee who violated this prohibition would be subject to discipline, up to and including termination. She also testified that the purpose of the rule was never explained to employees.

Regarding the interviews of Louft and Zollo, Vidmar testified that neither was provided, during the interviews, with any confidential information concerning Grillo's activities. Nor did he recount any confidential facts disclosed by either employee, as opposed to expressions of opinion or questions raised by them.

Louft, a credible witness, recalled that he was told about Respondent having received a letter concerning Grillo, but that he was not shown a copy of it. He credibly testified that he merely commented in response to a question concerning Grillo's drug use that, "I heard rumors of that." He also recalled denying whether Dennis Baker was involved. Nor was he told which other employees were involved.

Zollo, also a credible witness, recounted how, when asked for his knowledge of Grillo, he commented that he didn't know if he was protected by supervisors and that he didn't know about it himself, but he'd wondered about it for years. Like Louft, Zollo was not shown the letter referred to.

Zollo admitted that, during the day following the interview, he commented to other employees about his concern that "this [the investigation] could backfire" on them, and his concern about how they had been selected to be interviewed. Employees Mahler and Martinez made similar comments back to him when they spoke in the Respondent's breakroom.

About 3 days after his interview Louft was approached by employee Moss, and informed that three employees had been suspended, and that they would have to pick up their workload. Moss commented that there was "heavy stuff going down." Consistent with the prohibition from Respondent, Louft sought to deflect any further comment, and to just return to work.

Vidmar testified that on October 30 he learned from Supervisors Strafella and Mackey that Zollo had been observed having conversation in Respondent's electronics lab with fellow employees concerning the investigation of Grillo. Vidmar stated that he then began to investigate whether or not the integrity of his investigation had been compromised.

This, in turn, led him to be told by several employees that Zollo had commented about the investigation, i.e., that he'd never been through this before, and referred, without elaboration, to drug and financial dealings of Grillo.

Accordingly, so Vidmar testified, he concluded that Zollo had compromised the investigation.[2]

Around November 3, Vidmar got a voice mail from Moss indicating that Louft had disclosed confidential information about the investigation. According to Vidmar, he later interviewed Moss and was told that Louft had approached Moss and "pushed him" to learn what questions he'd been asked by Respondent, and that Louft had commented that Grillo knew about the investigation.[3]

On November 6, both Louft and Zollo were terminated by Vidmar. The reasons given by Respondent for these actions were largely identical, and included, "Failure to . . . maintain . . . satisfactory relationships with other employees, including supervisors; insubordination; false statements; Unauthorized discussion of company confidential information; Willful neglect, disregard, or a violation of any company policy, procedure or regulation established within the department assigned."

Louft was additionally charged with having authored a cartoon that was left on a supervisor's desk. Vidmar claimed that Mackey brought the cartoon to his attention, and that it served as an independent cause for discharge.[4]

Louft admitted that he was the partial author of the cartoon,[5] but credibly testified that it was done weeks prior to the investigation, while he was discussing Grillo's alleged favored status with fellow employees, and was subsequently discarded by him. He denied any knowledge concerning how it came to be on a supervisor's desk weeks later.

Employee Miranto testified that while meeting with Vidmar and Lerner on October 29, he was questioned concerning accusations set forth in a letter. In a second meeting he was again questioned about whether employees has spoken about the letter. He was not given any assurances concerning the uses to which his answers might be put, or about his freedom not to answer.

C. Discussion and Conclusions

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(1) turning on employer motivation.

> First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.
>
> Second, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The U. S. Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983).

In this case I conclude that the General Counsel has made a strong case that Louft and Zollo were involved in protected activity preceding their discipline by Respondent. Their credited testimony shows that they spoke of their concerns over Respondent's investigation, as they were quite obviously concerned over the possibility of discipline. However, their testimony also shows, and I find, that neither disclosed any "confidential" information of Respondent. Consequently,

The fact that they were discharged for the reason set forth in the complaint cannot be denied in light of the admissions made by Vidmar and Lerner. Their testimony made it absolutely clear

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[2] Just how it had been "compromised" remains unclear, as neither Vidmar, nor any of the employees testified that Zollo ever stated any detail concerning the general subject matter of "drugs." Yet Vidmar acknowledged that the mere fact that employees were called into the office and questioned was not considered confidential. Even supervisor DeSantos (who was clearly willing to compromise his own credibility by testifying at variance to the way he testified in a preceding hearing), could not be induced to go beyond saying that Zollo's comment about "drugs" was so general as to possibly apply to even prescription drugs.

[3] Moss did not confirm the disclosure of any confidential information by Louft, but merely that he'd asked him if he'd been called upstairs, and commented that the "shit's hitting the fan."

[4] I do not believe this statement by Vidmar. The record contains examples of other cartoons, drawn by other employees, which are patently more offensive than that drawn by Louft. Yet, the record discloses that the drawers of those cartoons were not discharged. Additionally, Vidmar testified in a prior proceeding that he learned of the cartoon weeks before Louft's termination. If, as claimed, the authorship of the cartoon was deemed sufficient in itself to warrant discharge, why was no action taken concerning it until after the outset of Respondent's investigation into the letter? I conclude from all this that the cartoon was simply a make-weight argument used by Respondent to bolster its position. Such arguments, of course, have the effect, just opposite their intention, of deepening and widening the trier of fact's suspicions of intent to discriminate. They cast a deep shadow over any justifications advanced concurrently by an employer. That is the effect here.

[5] The small, crudely drawn cartoon depicts one person (John?), standing over a body and admitting to a nearby person (Mitch?) that "I just killed him." The punch line is, "That's O.K., just take me golfing."

that both men were told by Respondent that they could not disclose anything about the interviews they were called into by Respondent. These instructions had no limitations placed on them as to the time they would remain in effect, or as to any circumstances which might constitute an exception.

In any listing of legitimate "working conditions" to be discussed by employees, surely the possibility of making common cause against the possible threat of discipline is among the foremost. It cannot be argued that such conduct is unprotected.

The Board finds that the right of employees to organize for collective bargaining is a strong Section 7 right, "at the very core of the purpose for which the NLRB was enacted." *New Process Co.,* 290 NLRB 704, 705 (1988). In any litany of the ways in which employees organize themselves for collective bargaining, their day-to-day discussions and interchange of ideas must surely rank very high; for this reason it is regarded as protected activity. Thus, their efforts to speak with one another, and share information concerning those "working conditions" must generally be regarded as protected as well. *Manufacturing Services,* 295 NLRB 254, 260 (1989). For example, it is unlawful for an employer to forbid employees to discuss their wage rates with one another. *Automatic Screw Products, Inc.*, 306 NLRB 1072 (1992).

An employer may not legally instruct employees to refrain from discussing matters such as their pay raises, rates of pay, and seeming inequities, and the like. *Brunswick Food & Drug*, 284 NLRB 663 (1987). There the Board adopted the findings and conclusions of law, and provided a remedy for the employer's imposition of such restrictions on employees' free exchange of information concerning such important aspects of their "wages, hours and working conditions". As noted by the administrative law judge therein, id. at 680:

> For years the Board has recognized that to stifle communication between employees about such matters is to choke off collective bargaining at its roots." *Salt River Valley Water Users Assn.* 99 NLRB 849 (1951). . . . The Board has uniformly held that such action violates the Act. *Coosa Valley Convalescent Center*, 224 NLRB 1288 at fn. 1 (1976). *Jeannette Corp.*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976).

The right of employees to communicate with each other concerning the desirability of organizing is one which is protected by Section 7 of the Act. For, the effectiveness of organization rights "depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." (Citation omitted.) *Central Hardware v NLRB,* 407 U.S. 539, 543 (1972). "Direct personal contact is the most truly effective means of communicating not only the option of collective bargaining, but the most compelling reasons for exercising that option." *Belcher Towing Co.*, 256 NLRB 666 (1981).

"No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." (Citation omitted.) *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). The facility where employees work has long been recognized as a "*place uniquely appropriate*" for exercise of that right of employees. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801 fn. 6 (1945). Thus, absent a valid rule, or special circumstances, employees are protected in such discussions. *Hambre Hombre Enterprises, Inc*., 228 NLRB 136 (1977).

I, therefore, find and conclude that the oral rule promulgated to employees by the Respondent and which, generally speaking, prohibited discussion by them of their working conditions, including an ongoing investigation which might possibly lead to disciplinary actions against one of more employees, is invalid, and is unlawful, as alleged in the complaint. I shall, accordingly, require that the Respondent rescind such rule, as well as all warnings and discipline administered on the basis of its existence.

The Respondent's actions in warning and discharging its employees, Zollo and Louft, were predicated on the validity of a rule that was clearly anything but valid. It follows that the "rule," whatever its wording, must be rescinded, and that their discipline, including their terminations, must be revoked.

Thus, based on the admissions of Vidmar and Lerner and my findings that both Louft and Zollo testified credibly, I have concluded that the Respondent violated Section 8(a)(1) on when it discharged Louft and Zollo for having violated its instructions not to discuss or disclose the investigation it was conducting. Cf. *Mobil Oil Exploration & Producing, U.S.,* 325 NLRB 176 (1997).

I further note that Respondent has made substantial efforts to point out or to prove the existence of valid business justification, which might privilege such attempts by it to stifle communication between employees concerning matters of such import to them. However, where an employer disparately enforces even a valid rule, it violates Section 8(a)(1). *South Nassau Communities Hospital*, 274 NLRB 1181, 1182 (1985). Here, it is shown that Respondent disparately enforced its own rule against disclosure. Unlike Zollo and Louft, Vidmar chose to give a far lesser punishment to employee Mahler, based on his assessment that Mahler had a mere passive role in disclosure. However, Respondent's own witnesses in this proceeding showed that it was Mahler who disclosed information. For example, employee Pike testified that it was Mahler who revealed that three employees were to be terminated, including one of those under investigation, Grillo. For another example, Pike not only disclosed confidential matters, he did so to the very subject of the investigation, when, upon learning of Respondent's intent to terminate Grillo on October 29, he telephoned Grillo and told him of what he'd learned. Despite this clear evidence of far greater disobedience to the rule by both Mahler and Pike, neither was terminated. Indeed, Pike was not disciplined in any way for having contacted Grillo on October 29.[6]

[6] Vidmar claimed, as excuse, that Pike didn't learn until October 30, of Respondent's rule against disclosure. That assertion is untrue, however, as shown by the admission of Supervisor Baker that, on October 29, Pike told him about the investigation, as well as the fact that he'd been instructed not to discuss it. Thus, it is clear that Pike knew of the investigation, and of the rule. It is also clear that he ignored that instruction, and that Respondent knew of his having done so. The fact that he was not disciplined at all for this behavior belies Respondent's

I find that such disparate treatment infects and invalidates the efforts of Respondent to convince me that it's actions against Louft and Zollo were merely justified efforts to protect it's legitimate right to carry out an investigation of alleged wrongdoing.[7] Thus, Respondent's effort to establish a *Wright Line* defense is shown to be a pretext, and necessarily means that the reasons advanced by the employer in justification of its actions either did not exist or were not in fact relied on, thereby leaving intact the inference of wrongful motive established by the General Counsel's prima facie case. *International Carolina Glass*, 319 NLRB 171 (1995); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 704 F. 2d 799 (6th Cir. 1982).

I have great sympathy for Respondent's legitimate concern as an employer with maintaining a drug free work environment, and find myself quite ready to grant great weight to confidentiality efforts aimed at controlling employees who are drug impaired. Cf. *Mobil Oil,* supra. However, especially under the circumstances of this case, I reject Respondent's argument that the Section 7 rights of employees "are far outweighed by the Employer's legitimate business concerns." Here, both Respondent, through Linden, and various employees were shown during the course of the trial to have long since had knowledge of the activities set forth in the letter that sparked the investigation here. Thus, there was clearly no state of emergency at Respondent's place of business. Further, when the evidence clearly showed that the rule of confidentiality had been most egregiously breached, and directly to the very subject of the investigation, inexplicably the Respondent disparately took no action against that offender.

Thus, in my opinion, the record here does not support Respondent's claim that a special need for the application of such a rule has been shown. Instead, the need for such a rule can be made out here only by resort to speculation. This is especially true in this case, where the rule as announced by Respondent was completely unlimited in scope and time.

The General Counsel's prima facie case has been established in this case by the showing that Zollo and Louft were warned and discharged pursuant to an invalid and discriminatory applied rule. The Respondent's justifications for its actions have been discredited by me, and, therefore, cannot serve as any predicate for a defense that the Respondent would have taken the action against Norman in any event, even absent any protected activity on her part. *Wright Line,* supra.

Finally, I find that the allegation that Vidmar and Lerner unlawfully interrogated an employee, when they questioned Miranto is supported by the evidence. I credit the testimony of Miranto fully. There was no warrant for either of them to question Miranto without assuring him of the purpose of the questioning and that there would be no reprisals against him should he refrain from answering. Having been called to the seat of authority in the plant, Miranto would reasonably be coerced by the questions put to him there. *New Process Co.*, 290 NLRB 704 (1988). I so find and conclude.

For all the reasons set forth above, I find and conclude that counsel for the General Counsel has established the truth of each of the violations of Section 8(a)(1) which he set out to prove. I further find and conclude that the Respondent has violated the Act in each of the ways alleged.

CONCLUSIONS OF LAW

1. Respondent 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 by instructing employees Zollo, Louft, and others to refrain from discussing with other employees the investigation which it was conducting.

3. Respondent violated Section 8(a)(1) of the Act by interrogating employee Miranto.

4. Respondent violated Section 8(a)(1) of the Act by discharging its employees, Richard Zollo and Louis Louft, because they had discussed Respondent's investigation of other employees with other employees, an activity entitled to protection under the Act.

5. The above-unfair labor practices have an effect on commerce as defined in the Act.

THE 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.

Having found that employees Richard Zollo and Louis Louft were unlawfully discharged, Respondent is ordered to offer them immediate reinstatement to their former positions, displacing if necessary any replacement, or, if not available, to a substantially equivalent position without loss of seniority and other privileges. It is further ordered that they each be made whole for lost earning resulting from their discharges, by payment to each of them of a sum of money equal to that they would have earned from the date of their discharge to the date of a bona fide offer of reinstatement, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[8] Interest on any such backpay shall be computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further ordered that the Respondent expunge from its records any references to the discharges mentioned, and provide both Zollo and Louft written notice of such expunction, and inform each of them that the Respondents' unlawful conduct will not be used as a basis for further personnel actions against them.[9]

[Recommended Order omitted from publication.]

assertions that it was merely motivated by valid business considerations when it disciplined employees Louft and Zollo.

[7] Further undercutting this argument of Respondent's is the evidence that Respondent, through Lerner, had for a long, long time had knowledge of the assertions contained in the letter which set off this investigation. This evidence undercuts any claim by Respondent that it was acting in a sort of emergency situation.

[8] See generally *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[9] See *Sterling Sugars, Inc.,* 261 NLRB 472 (1982).