Unit A. All employees in the Employer's maintenance department, including janitors and housemen, but excluding all other employees, guards, and all supervisors as defined in the Act.[11]

Unit B. All employees in the Employer's kitchen and food service departments, including cleaners, dishwashers, cooks, salad women, pantry women, food checkers, receiving clerks, bartenders, bar porters, room service captains and waiters, hostesses, waitresses, waiters, busboys, and coffee shop and kitchen cashiers, excluding all other employees, guards, and all supervisors as defined in the Act.[12]

[Text of Direction of Elections omitted from publication.]

MEMBER RODGERS took no part in the consideration of the above Decision and Direction of Elections.

[11] The parties stipulated and we find that the superintendent of maintenance is a supervisor within the meaning of the Act. We therefore exclude him.

[12] The parties stipulated that the executive chef, the food and beverage director, head bartender, the head waiter (captain) for room service, and the assistant hotel manager are supervisors. We so find and exclude them. There is disagreement as to the supervisory status of the soup chef and kitchen stewards As these individuals possess authority to discharge employees under them, we find they are supervisors and we exclude them.

Minneapolis-Honeywell Regulator Company *and* Regulator Employees' Association, affiliated with IUE-AFL-CIO, Local No. 908. *Case No. 25-CA-1371. November 9, 1962*

DECISION AND ORDER

On August 7, 1961, Trial Examiner Thomas A. Ricci issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, both the General Counsel and the Respondent filed exceptions to the Intermediate Report, and Respondent filed a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and it hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except as modified below.

The facts in this case are not in dispute. As detailed in the Intermediate Report, Respondent has more than 600 employees at its manufacturing establishment in Wabash, Indiana, which consists of 5 separate buildings located on separate plots of land within the city limits.

The Union has been recognized for many years as the collective-bargaining representative of the employees at all these locations, and a 2-year contract between the parties, executed in April 1960, was in force at the time of the transactions involved here. In January 1961, when the parties were preparing for mid-term wage negotiations pursuant to a "reopener" clause of the contract, the Union began publishing a series of mimeographed newsletters designed to keep the employees informed of the issues involved in the forthcoming negotiations, as well as current grievances, time studies, and like matters. During the next 3 months, about 12 issues of these bulletins were distributed by employees on Respondent's property, near the plant doorways used by most of the employees on their way to or from work. None of the employees concerned with this distribution, either those who were giving out the union papers or those who received them, was on working time. Nor, so far as appears, did the union handbilling cause any littering of the premises or crowding or disorder. In April, however, Respondent revived and posted on the plant bulletin boards an old rule which prohibits any and all persons from distributing any and all "literature, leaflets, cards or other material for the purpose of donations, contributions, or any other reason . . . on Company property at any time." The employees who had been passing out the union papers were then ordered to stand off "Company property" whenever they had such papers to pass out in the future.

The Trial Examiner concluded that the foregoing rule is unlawful under Section 8(a)(1) of the Act insofar as it prohibits Respondent's employees from passing out union handbills on the plant premises, wherever and whenever they are not on working time. In holding that the rule constitutes, *pro tanto*, an "unreasonable," and therefore unlawful, impediment to the employees' exercise of their statutory rights, the Trial Examiner applied the tests enunciated in the *Walton* case,[1] where the Board stated that such broad "no-distribution" rules are "presumptively an unreasonable impediment to self-organization, and . . . therefore presumptively invalid," as applied to employees distributing union literature outside working time, although the presumption may be overcome by "evidence that special circumstances made the rule necessary in order to maintain production or discipline."

[1] *Walton Manufacturing Company,* 126 NLRB 697, enfd. 289 F. 2d 177 (C.A 5). There, the Board reviewed and restated certain general principles with respect to no-solicitation and no-distribution rules which it regarded as being established by three prior decisions of the Supreme Court:

(1) *Republic Aviation Corporation* v. *N L R.B.,* 324 U.S 793, upholding the Board's decisions in *Republic Aviation Corporation,* 51 NLRB 1186, and *Le Tourneau Company of Georgia,* 54 NLRB 1253;

(2) *N.L R.B.* v. *The Babcock & Wilcox Company,* 351 U.S. 105, reversing *The Babcock & Wilcox Company,* 109 NLRB 485, *Ranco, Inc.,* 109 NLRB 998, and *Seamprufe, Inc. (Holdenville Plant),* 109 NLRB 24; and

(3) *N L R.B* v. *United Steelworkers of America (Nutone Inc.),* 357 U S. 357, upholding *Nutone, Incorporated,* 112 NLRB 1153, but reversing *Avondale Mills,* 115 NLRB 840.

In this case, the Trial Examiner found, no such "special circumstances" are present; hence the *Walton* presumption of invalidity stands unrebutted, and it makes no difference whether or not the Union, as Respondent contends, could easily distribute its handbills or otherwise communicate with the employees somewhere off the plant premises.

We agree with and adopt the foregoing conclusions, as qualified below.

1. For the reasons discussed in *Stoddard-Quirk Manufacturing Co.*,[2] where the Board majority reconsidered the formulation of principles set forth in *Walton Manufacturing Company*, *supra*, we do not find that Respondent's no-distribution rule would be invalid if its application were limited to the areas of the Wabash plants where the employees have their work stations; and the Trial Examiner's Recommended Order will be limited accordingly.

2. On the other hand, as both the majority and dissenting opinions in *Stoddard-Quirk* emphasized, the Board unanimously adheres to the *Walton* view that a ban on distribution of literature is presumptively invalid, in normal circumstances, if and insofar as it precludes employees from distributing union literature when they are on nonworking time and also in nonworking areas of the employer's establishment. This presumption can be rebutted, of course, but only by evidence showing that, because of some special circumstances, the Employer actually needs to ban such union activity in order to protect the business interests which the Supreme Court referred to in *The Babcock & Wilcox Company*, 351 U.S. 105, 113, in stating that:

> No restrictions may be placed upon the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.[3]

We therefore adopt the Trial Examiner's conclusion that the "restriction" embodied in the no-distribution rule in issue here is invalid, since it concededly applies to employees who may wish to distribute union literature at any time in nonworking areas of Respondent's manufacturing establishment, and there is no proof that a prohibition of such employee activity—manifestly protected as it is under Sec-

[2] 138 NLRB 615.

[3] Respondent argues that the Court must have referred only to *oral* "discussion" in this passage. We disagree. The *Babcock & Wilcox* case itself, as well as the companion *Ranco* and *Seamprufe* cases (*supra, footnote* 1), had to do with distribution of union literature by "outside" organizers, and the Court's whole point was that, while an employer may "post his property against [such] nonemployee distribution ." (351 U.S. at 112), his naked property rights will not suffice to justify a comparable restriction upon employees. To underscore the latter principle, moreover, the Court cited a passage in its earlier *Republic Aviation* opinion (324 U.S. at 803), where it had discussed and approved the Board's findings as to both the no-solicitation rule involved in *Republic Aviation* itself and the no-distribution rule involved in the companion *Le Tourneau* case.

tion 7 of the Act—is actually "necessary to maintain production or discipline" (*The Babcock & Wilcox Company*, *supra*).

Several of Respondent's supervisory officials testified, to be sure, that the purpose of the premiseswide ban on distribution is to foster "discipline" and "production" by maintaining "good housekeeping" standards, i.e., preventing litter. We may credit this testimony despite its argumentative character, and, indeed, we do not dispute its underlying premise that maintenance of cleanliness and order is an essential aspect of "production" and "discipline" in Respondent's Wabash plants.[4] But we do not regard such testimony as proof that it is actually "necessary," within the meaning of *Babcock & Wilcox*, *Walton*, and *Stoddard-Quirk*, *supra*, for Respondent to interdict distribution of union handbills by its own employees (even on nonworking time and in nonworking areas) in order to prevent littering of the plant premises or otherwise maintain "production or discipline."[5] On the contrary, what the record shows in this regard, if anything, is that Respondent's employees can be trusted *not* to litter the premises when they are passing out and receiving union handbills in nonworking areas of the plant premises. For Respondent does not even suggest that any such violation of its "good housekeeping" standards occurred when various employees actually did distribute union handbills at the plant entrances during the period from January to April 1961, when the no-distribution rule was in abeyance.

Apart from its asserted apprehension of littering, Respondent has not shown that it has been, or reasonably may expect to be, harmed by its own employees distributing union literature on its premises. Instead, it contends that it has a fundamental privilege to ban such on-the-premises distribution, even in nonworking areas, because there are public sidewalks and similar places outside the plant boundary lines where handbills can be distributed. We reject this contention on

[4] Thus, we do not adopt the Trial Examiner's discussion of Respondent's "littering" contention insofar as it implies that abatement of littering is necessarily unrelated to the maintenance of "production" or "discipline."

[5] Citing *Tabin-Picker & Co*, 50 NLRB 928, and several other comparatively early Board decisions, Respondent argues, in effect, that the mere possibility of apprehension of littering is sufficient to justify a broad no-distribution rule, even in the absence of any evidence that employees distributing union handbills have ever caused the employer's premises to be littered. We reject this argument. So far as employees distributing union handbills outside "the plant proper" were concerned, the *Tabin-Picker* doctrine was modified by the Board at an early date (see the cases cited and discussed in paragraph 3 of the majority opinion in *Stoddard-Quirk Manufacturing Co.*, *supra*), and was abandoned by 1957, in view of the Supreme Court's intervening opinion in *Babcock & Wilcox*, *supra* See *Cranston Print Works Company*, 117 NLRB 1834, 1842, 1861–1862, enforcement denied on other grounds 258 F. 2d 206 (C A. 4). Respondent is mistaken in its assertion that this "littering" doctrine was revived, either by the Board itself or by the Supreme Court, in *N L R B.* v. *United Steelworkers of America* (*Nutone, Inc.*), *supra* From the very start, the litigation in that case proceeded on the premise that the employer's no-distribution rule was valid on its face. See 112 NLRB 1153, 1154, footnote 2, and 1165, footnote 5 We also note that the *Steelworkers* case was decided by the Board in June 1955, nearly a year before the Supreme Court's opinion in *Babcock & Wilcox* was handed down.

the grounds stated by the Trial Examiner in section III, 4, of the Intermediate Report.[6]

3. Referring to the particular incidents which led to the filing of the charge in this case, Respondent contends that in any event it was entitled to stop distribution on its premises of the "newspapers" which the Union was publishing in the early months of 1961, because the statutory right of employees to "organize" is not involved in the circulation of this type of literature. We agree with the Trial Examiner that this contention is without merit, since the employee rights and communications protected in Section 7 of the Act are not limited to what Respondent conceives of as "organizational" subject matter. As mentioned above, the so-called "newspapers" which the Union began publishing in January 1961 were devoted mainly to discussion of wages, hours, working conditions, grievances, and the forthcoming contract negotiations at Respondent's plants. Such publications are manifestly within the protection of Section 7. Furthermore, we note that Respondent's no-distribution rule applies to *all* "literature, leaflets, etc." This blankets out the type of handbills which are customarily distributed in behalf of unions engaged in organizing campaigns, along with everything else.

4. Finally, we agree with and adopt the Trial Examiner's conclusion that the employees' right to distribute union handbills on Respondent's property was not suspended by a provision in the parties' 1960 contract stating that the Union could post certain specific announcements on bulletin boards in the plants. In addition to the reasons relied upon by the Trial Examiner, we note, again, that the no-distribution rule covers everything, not merely the kind of announcements referred to in this contract provision. Moreover, the 1960 contract has presumably expired by this time.

5. In framing our order, we will permit Respondent to maintain its round-the-clock ban on handbilling in the actual working areas of its plants, if it so desires, for the reasons stated in *Stoddard-Quirk.* We will also delete that part of the Trial Examiner's Recommended Order which specifically enjoins Respondent from promulgating or enforcing a rule against employees' "soliciting membership in" any labor organization.[7] It is true, as stated in the Intermediate Report, that the formal rule which was posted on the plant bulletin boards in April 1961 actually purports to ban all "solicitations" as well as all "distributions." It is also true that the "solicitation" aspect of the posted rule is palpably unlawful on its face, as Respondent, in effect, concedes. However, Respondent claims that it has not, in fact, en-

[6] In addition, we note that Respondent's interpretation of the Supreme Court's opinion in *N L R B.* v *United Steelworkers of America* (*Nutone, Inc.*), *supra,* was rejected in *Time-O-Matic, Inc* v. *N L R.B.,* 264 F 2d 96, 100 (C A 7)

[7] The same phraseology is hereby deleted from the Trial Examiner's Conclusion of Law No. 2.

forced its rule against employees engaged in mere "solicitation . . . related to union activity . . . during nonworking time," and neither the Union nor the General Counsel disputes this assertion. On the contrary, the complaint alleges only that Respondent has violated the Act by "forbidding its employees to distribute union literature on [its] premises . . .;" and there is no evidence indicating that the rule has ever been invoked to stop any other type of union "solicitation" conducted by employees outside working hours. In any event, our Order here will require Respondent, if it has not already done so, to rescind or revise its posted rule with respect to such other "solicitation," for we are enjoining all conduct which is "like or related" to that alleged in the complaint and herein found to be unlawful.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Minneapolis-Honeywell Regulator Company, Wabash, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining, or enforcing any rule which prohibits its employees, during nonworking time, from distributing handbills on behalf of Regulator Employees' Association, affiliated with IUE–AFL–CIO, Local No. 908, or any other labor organization, in nonworking areas of Respondent's plant properties.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to join or assist the aforementioned or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in or refrain from engaging in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post in its warehouse and plants in Wabash, Indiana, copies of the attached notice marked "Appendix."[8] Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by Respondent's representatives, be posted by Respondent immediately upon receipt thereof, and be maintained for at least 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.

[8] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

(b) Notify the Regional Director for the Twenty-fifth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

MEMBERS FANNING and BROWN, concurring in part and dissenting in part:

We concur in the majority's decision to the extent of finding that Respondent violated Section 8(a)(1) of the Act by promulgation of the rule against solicitation and distribution during nonworking time for the reasons stated in our dissenting opinion in *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615. For reasons there stated, we dissent from that portion of the Order herein permitting the Respondent to prohibit its employees from distributing union literature in working areas during the employees' nonworking time.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

> WE WILL NOT promulgate, maintain, or enforce any rule which prohibits our employees, during nonworking time, from distributing handbills on behalf of Regulator Employees' Association, affiliated with IUE-AFL-CIO, Local No. 908, or any other labor organization, in nonworking areas of our plant properties.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to join or assist the aforementioned or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in or refrain from engaging in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY,
Employer.

Dated_____ By_____
(Representative) (Title)

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.

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis 4, Indiana, Telephone Number, Melrose 3-8921, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before Trial Examiner Thomas A. Ricci in Wabash, Indiana, on June 28 and 29, 1961, on complaint of the General Counsel and answer by Minneapolis-Honeywell Regulator Company, herein called the Company or the Respondent. The sole issue litigated was whether the Respondent had violated Section 8(a)(1) of the Act. The Respondent filed a brief with the Trial Examiner after the close of the hearing.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

Minneapolis-Honeywell Regulator Company, a Delaware corporation, has a place of business at Wabash, Indiana, where it is engaged in the manufacture and sale of regulators and related products. During the past 12 months, a representative period, the Respondent manufactured, sold, and shipped from its Wabash, Indiana, plants finished products valued in excess of $50,000 to points outside Indiana. I find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Regulator Employees' Association, affiliated with IUE–AFL–CIO, Local No. 908, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

There is no dispute on the record as to the pertinent and material facts which the complaint alleges constitute an unfair labor practice by the Respondent Company. The complaint alleges that from October 1960 on the Respondent prohibited its employees from soliciting or distributing union literature on the company premises outside of working time. The Respondent's answer expressly concedes this fact. Paragraph V of the answer reads as follows:

> Admits that part of paragraph 5 which alleges that it maintained and enforced a rule forbidding the distribution of literature on its premises, but denies that part of paragraph 5 which indicates that the rule is limited to union literature or to its employees and that it has interfered with, restrained, coerced, or is interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

Several employee witnesses testified, without contradiction, that about the beginning of April 1961, they started to distribute union handbills on the premises, near various timeclocks and at the employee entrances, but were told by supervisors to discontinue the practice and to get off the company property if they wished to continue the distribution. On April 13, several union officers conferred with management representatives to clarify the problem and were told company policy prohibited such activities. On April 18, the Respondent posted a printed notice on the bulletin boards of each of its five plant locations in the city of Wabash and mailed a copy of the notice to the Union. The notice reads as follows:

> Rules for Solicitations and Literature Distribution
>
> In the interest of good housekeeping, and to add some semblance of order to the subject, it is necessary to restate certain rules pertaining to solicitations and distribution of various materials.
>
> Solicitations and the posting or distribution of literature, leaflets, cards or other material for the purpose of donations, contributions or any other reason, will not be allowed on Company property at any time without the full sanction of the Personnel Manager.

On several occasions thereafter employees were again told to remove themselves from company premises while distributing union handbills, and advised that further violations of the rule could result in dismissal.

Apart from some further facts, discussed below in connection with specific defenses advanced, I think it clear the foregoing facts, entirely conceded by the Respondent, prove the commission of an unfair labor practice upon long-established

and accepted principles of law. The directly applicable rule of law in the situation was only recently restated by the Board as follows:

> No solicitation or no distribution rules which prohibit union solicitation or distribution of union literature on company property by employees during their nonworking time are presumptively an unreasonable impediment to self-organization, and are therefore presumptively invalid both as to their promulgation and enforcement; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline.[1]

On this authority, and on the facts thus far set out, I find that the General Counsel has proved a *prima facie* case in support of the complaint.

The true issues of the case are raised by the Respondent's defenses, some based on asserted factual grounds, and some predicated on contentions of law. As the Respondent would have it, any one of four separate defenses urged suffices to preclude any finding that "promulgation and enforcement" of this particular rule in the circumstances of this case, illegally restrains or coerces the employees in violation of Section 8(a)(1) of the Act. Essentially, the defenses appear as follows: (1) the rule was announced and enforced "for housekeeping purposes" and "to maintain production or discipline"; (2) the Union waived its statutory right to solicit union membership and to distribute union literature on company premises; (3) because the Respondent has long recognized the Union as the exclusive majority representative for the employees involved, and because there was a collective-bargaining agreement in effect during the period in question, there was no occasion for the Union to "solicit" membership in the Union, the employees' statutory right to "self-organization" had been fully satisfied, and consequently the prohibiting rule in question cannot be said to have impeded any rights guaranteed by Section 7 of the statute; and (4) the employees could easily have distributed union literature off the company premises and therefore the Company was not obligated, under the statute, to suffer such activities on its private property.

1. The record evidence does not support the Respondent's factual assertion that the rule against distribution was promulgated and enforced "to maintain production or discipline." In 1957 an insurance company distributed advertising pamphlets in the parking lot of one of the Company's five plants in Wabash. The then-assistant personnel manager called the insurance company to clean up the littered lot, and a man was sent to do so. There is also the testimony of one of the plant supervisors that in that same year, 1957, two local gasoline filling stations advertised their openings by distributing advertising literature among the employees on the parking lots. Again the resultant littering had to be cleaned up, this time by company employees so assigned. At that time the Company posted, on its plant bulletin boards, a notice worded exactly like the April 18, 1961, notice set out above How long the 1957 notice remained posted does not appear. This is the total extent of the factual evidence relating either to production or discipline problems which the Respondent now claims made "restatement" of the rule 4 years later necessary.

In the course of his testimony, Rooney, the present personnel manager, said that during an April 1961 supervisory meeting he explained the purpose of the company policy to be "good housekeeping," "maintaining our production," and "to avoid disciplinary problems." These were purely conclusionary statements, couched precisely in the language of the rule of law set out in the Board's *Walton* decision. As stated by Rooney, his words amounted to no more than a contention that the exemption to the presumption of invalidity of the rule, as announced in the lead decisions, should apply here. In no sense did his testimony constitute evidence, or factual proof in support of the contention. To the contrary, instead, the record shows, as will appear below, that during the several months before April 1961 a number of employees distributed union handbills, on their free time, to arriving or departing employees in the various plants, that supervisors were aware of the activity and even accepted copies of the handbills, and that they raised no criticism. Indeed there is no indication, nor is it claimed, that any of the distribution in any manner interfered with production or created disciplinary problems. I find no merit in the Respondent's defense that matters of production requirements or employee discipline justified the rule in question in this case and removed it from the presumptive illegality under established Board law.

2. I find the Respondent's waiver defense equally without merit. At the time of the events here involved, there was in effect a written collective-bargaining agreement between the Respondent and the Union covering the period 1960 through 1962.

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[1] *Walton Manufacturing Company,* 126 NLRB 697, enfd. 289 F. 2d 177 (C.A. 5)

The contract covers all production and maintenance employees at all five of the company's locations in Wabash. Among its provisions is one pertaining to the Union's privilege to post union notices on the bulletin board at each of the locations. It reads as follows:

> The Company agrees that the Association may have bulletin boards adjoining each company bulletin board in those departments having employees covered by the terms of this agreement. Notices shall be restricted to the following types:
>
> (A) Notices of the Association's recreational and social affairs.
> (B) Notices of Association's actions.
> (C) Notices of Association meetings.
>
> All such notices shall be submitted to the Company before they are posted. Additional material other than that specified above may be posted with the Company's consent.

The Respondent's principal argument on this point is that by agreeing with the Company that it would post notices to the employees on the bulletin boards in the plants, the Union must be deemed as having also agreed there would be no other distribution of union literature on the premises. The sole other evidence pertaining to this defense is passing and indirect testimony by Supervisor Lawrence Booher, who had been a member and sergeant-at-arms of the Union until November 1960. Booher was called by the Respondent to help prove that the no-solicitation and no-distribution rule had long been enforced. To support this assertion he said he knew this was so because "it was discussed in all union meetings at that time and when we have negotiations it was negotiated with the Company at the same time" It is also true that in 1957 the Company did post the very same rule. Whether or not in the intervening period between 1957 and 1961 the Company enforced such a rule against distribution of union literature, however, is by no means clear on the record. Company witnesses testified there had been no such distribution and that the rule was always in effect. Five employees testified to the contrary, and said that during the few months before April 1961 they passed out great numbers of handbills in the plants. They named eight supervisors, dispersed among the various plant locations, as having stood by watching them as they made the distribution, and they said six of these supervisors even accepted copies of the union handbills. Notwithstanding the personnel manager's insistence the rule had always been in effect, none of these named supervisors was produced as a witness. I credit the employees.

The right of employees to solicit in favor of a union among other workmen, and to distribute literature about the Union on their own time in the plant, derives directly from the statute itself. It is also now clear that a union, acting as majority representative on behalf of the employees, may, in regularly negotiated and fairly bargained collective-bargaining agreement, relinquish such a statutory right [2] However, because such a right is conferred by the Act, and because its free exercise by the employees goes to the heart of the rights guaranteed them by Section 7 of this statute, a clear principle of law has come into being, requiring that a waiver will only be found to have been given when it appears in "clear and unmistakable" or "clear and unequivocal" language.[3] Measured against this high standard of proof, the Respondent's waiver defense falls short of the requisite clear and unmistakable proof of intent to surrender the statutory right.

Booher's passing remark that during negotiations the subject of distribution of literature "was discussed" sheds no substantive light on the factual question of whether or not the Union, on behalf of the employees, bargained away so substantial, affirmative and necessary a statutory privilege. The contract itself is completely silent on the question of solicitation or distribution of literature by the employees among themselves. In the absence of extrinsic evidence it can hardly be said that an express agreement to permit posting of union notices on the bulletin boards necessarily carries with it also an agreement that neither the Union nor the employees would otherwise attempt to communicate with one another in their place of work or to pass out handbills related to union affairs. And of course, the fact that even during the life of the agreement itself distribution was carried on, with the

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[2] *Wooster Division of Borg-Warner Corporation,* 113 NLRB 1288, enfd in pertinent part 356 U S 342

[3] *Tide Water Associated Oil Company,* 85 NLRB 1096: "We are reluctant to deprive employees of any of the rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights" *Hekman Furniture Company,* 101 NLRB 631: " . the Board will not, in any event, give effect to any purported waiver of such right, unless it is expressed in clear and unmistakable terms"

supervisors accepting the practice without protest, indicates forcefully that there was no implied or tacit agreement to the contrary in the contract language. As a minimum I would have to say that if such a waiver is to rest upon the contract language, it would have to be by way of "inference," as distinguished from "unequivocal" indication arising from the terms of the agreement. I think the language of the Second Circuit Court of Appeals in *N.L.R.B.* v. *Otis Elevator Co.*, 208 F. 2d 176 (C.A. 2), is particularly apt here. "Respondent . . . contends that this [the specific contract provision] sets forth this entire obligation . . . and constitutes a waiver of any additional union rights. We cannot agree. In the atmosphere of collective bargaining in labor relations it is reasonable to require that the parties set forth the terms on which they have agreed. But the drawing of broad inferences of a waiver from their silence would be disruptive rather than fostering of amicable relations. . . ."

3. The third and fourth defenses go to the heart language of Section 7 of the statute, which sets out those fundamental rights of employees with which the Act as a whole is concerned. For many years the Respondent has recognized this Union as exclusive representative of its production and maintenance employees, totaling now over 600. It has executed consecutive collective-bargaining agreements with it; the contract in effect at the time of the hearing contains no provision requiring employees to join the Union and the president of the local union testified, without contradiction, that there are employees who are not now members. Is the fact that the Employer has recognized the Union and that the handbills sought to be distributed are not outright solicitations for employees to join the Union, sufficient reason to permit the Employer to deprive them of any right to carry on union activities at their place of work, including the distribution of union literature, during nonworking time, as the Respondent now contends? I think not.

Basically, the Respondent's theory of defense grounded on the existence of the exclusive recognition agreement, is that because Section 7 of the Act guarantees to employees the right to "self-organization," once successful majority representation has been achieved, there are no further rights or privileges granted the employees which they may choose to exercise in an employer's plant.

On its face the argument is too broad if only because there are employees who are not members of the Union; if the word "organize" be limited in meaning to "enlisting into membership," a right which the Respondent apparently concedes to the employees, it has not been exhausted here. But even if "to organize" means only to bring into membership, the strongest union-security type contract would not serve to assure membership of all employees.[4]

Apart from the Respondent's too restrictive reading of the phrase "self-organization," this entire defense seeks to isolate a single phrase out of Section 7 and to ignore other, perhaps more significant, statements of employee rights set out there. The section reads:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ...

Thus, the very language of the section itself shows that its clear intent was not only to assure the right to form labor organizations, but also to "assist" them, and "to bargain collectively" when self-organization has been achieved and recognition obtained from the employer. If the section contained nothing more, the Respondent's defense at this point must fall. Implicit in the defense argument is the contention that all that was contemplated by Section 7 was that employees should form unions and be recognized by their employer, but that what happens thereafter is of no concern to the scheme of the statute. Such a limited reading of Section 7 would effectively emasculate the language as a whole; the section must necessarily be read in its entirety If it could be said that any particular phrase is to be accorded paramount importance, instead of "self-organization," I believe it would have to be "to bargain collectively." Indeed, that the emphasis should rest on the latter phrase, rather than on any of the other subordinate ones preceding and following it, is clearly indicated by the statement of congressional policy appearing in Section 1 of the Act: "It is hereby declared to be the policy of the United States to eliminate . . . obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . ." It would be a futile gesture indeed to assure employees the right to form unions, and even to prevail upon their

[4] Compare *Union Starch and Refining Company*, 87 NLRB 779, enfd. 186 F. 2d 1008 (C.A 7), cert. denied 342 U S. 815

employer to admit their existence, but to deny them equal privilege to carry on that collective bargaining which the statute as a whole without question was intended to foster and to protect. It is only by full fruition of this right "to bargain collectively," that the industrial peace which the statute envisions in its entirety may be achieved. And the very union handbills which the employees sought to pass around among their fellow workers, received in evidence, and which the Respondent here attempted to suppress in the plant, related in part to the current contract negotiations then going on between the Union and the Company.

I deem it too late in the development of the law of labor-management relations to accord extensive consideration in words to this particular defense. I find it without merit.

4. The Respondent's final, and, I believe, primary defense, is that in this plant, in this town, among these employees, the right to distribute union literature during nonworking time on company premises does not exist. To remove this case from the broad and all-inclusive ambit of the lead Board and court decisions in this area, the Respondent relies upon its assertion that the union representatives—officers and stewards—among its employees could as well, or with greater facility, distribute union literature to other employees off the company premises. To prove what its counsel referred to as adequate or easy accessibility to fellow workers, the Respondent offered to prove a number of facts which it deemed pertinent to this defense. Among these were the following: (1) The Union represents about 600 employees and the total population of the city of Wabash is only about 12,000; (2) the union hall is located but a short distance from the Respondent's main plant; (3) the Union has 30 stewards and 9 officers, all employees working in these plants; (4) the entrances to the various plants are located immediately adjoining the public sidewalks near the premises; and (5) there are "Stop" signs placed at the entries to the Respondent's parking lots used by employees who drive to work by automobile I believe the decisional precedent on the issue raised by this defense argument is so clearly adverse to the Respondent that this last contention, making the validity of a no-solicitation or no-distribution rule turn upon the particular facts of a given case on an *ad hoc* basis, can in no circumstances prevail. I therefore rejected the Respondent's offer to prove the facts set out here, and certain others of like kind [5]

It is important at the outset to make clear that all that was involved in this no-solicitation and no-distribution rule was the conduct of employees, as distinguished from any solicitation or distribution activities on company premises by strangers to the plant, or outside organizers and union representatives.[6] We are dealing therefore literally with the statutory right of employees to engage in concerted activities where they work, where they are most likely to have a common meeting ground with respect to that common denominator which joins them as to those interests which are the sole concern of this statute. It was precisely this right, of the employees themselves, that was considered by the Supreme Court in the first cases in which it had occasion to speak on the subject. In *Republic Aviation Corporation* v. *N L.R B.*, and in *N.L.R B.* v. *LeTourneau Company of Georgia*, both reported at 324 U.S. 793, employees were disciplined in their employment because they persisted in distributing union literature on company premises outside of working time. In holding, as did the Board, that an employer cannot lawfully impede such union activities by the employees during their time in the plant, the Court considered and rejected the defense that an unfair labor practice finding against the employers could only be made if there was direct evidence that the prohibiting rule in fact interfered with and discouraged union activities among the employees. On this point the Court said:

> The contention is that there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization *in the circumstances and situation of each company*. Neither in the *Republic* nor in the *LeTourneau* cases can it be properly said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members. [Emphasis supplied.]

I read this language to mean, in the least, that the proscriptive rule once shown to have been promulgated and/or enforced, the employer's illegal interference with

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[5] Consistent with my ruling rejecting the Respondent's various offers of proof, I also rejected offers by the General Counsel to prove that distribution of union literature by employees among fellow workers could not adequately and safely be carried on off the Respondent's premises

[6] Cf. *N.L R B.* v *The Babcock & Wilcox Company*, 351 U S 105.

the statutory right of the employees has been established without more. Indeed, it was this language which started the line of decisions referring to the rule of law as "the presumptive invalidity of a no-distribution rule on company premises during nonworking time."

The Respondent here goes further and offers to prove affirmatively that there was easy access elsewhere and that therefore, since there could be effective solicitation or distribution outside the plant premises, no finding of illegal interference by the Respondent can be made. The reasoning here is that even if illegality can be found in a vacuum, as it were, where there is no evidence at all as to facility or difficulty of access among employees off the company premises, where there is proof of easy accessibility elsewhere the presumption of illegality in the rule is rebutted. I believe a fair reading of the Supreme Court decision in the *Republic Aviation* case supports a conclusion that the Court meant thereby also to hold that regardless of whether or not employees could effectively solicit among others outside the plant or effectively distribute union literature, their right to do so in the plant on their time is nevertheless protected, and that facts relating to accessibility or inaccessibility outside the plant are immaterial to the question of the validity or invalidity of the no-solicitation rule. However that may be, I think the Supreme Court's later comment with respect to this same early decision dispels any ambiguity appearing in its wording. In *N.L.R.B.* v. *The Babcock & Wilcox Company, supra,* the Court addressed itself to an employer's privilege to keep outsiders, nonemployee solicitors or distributors, away from its parking lots. On this more limited question, the Court made other conclusions as to validity or invalidity of exclusion rules by employers, but it made clear that whatever rules might apply to strangers, there is a substantial distinction between the rights of employees and those of outsiders In reiterating the point of law enunciated earlier in *Republic Aviation,* the Court said, in *The Babcock & Wilcox Company:* "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."[7] Here, the Court's reference back to its own earlier decision, removes all doubt that where the right of employees is concerned, the rule of presumptive illegality is a flat one, applicable regardless of the situation outside the plant itself, and that promulgation or enforcement of the rule is in all instances a violation of Section 8(a)(1), except for the specific situations enumerated by the Court itself.

In essence, the Respondent's affirmative defense here is really an attempt to carve out a further exception to the blanket rule of presumptive invalidity of the rule it put into effect at least in April 1961. To date, the decisions have explicated that the presumption is rebutted by evidence that the proscriptive rule "is necessary to maintain production or discipline." As has been shown, neither of these two exceptions can apply in the instant situation. A necessary effect of the Respondent's affirmative defense here is that, wherever it can be shown by a respondent that there can be effective solicitation or distribution elsewhere, a third exception to the presumption of illegality stands. I think it clear that by enumerating two exceptions to the point of law, and only two, the Court in *Babcock & Wilcox* intended the literal meaning of its words. If the language of *Republic Aviation* permits a reading that beyond the two exceptions all that exists is a "presumption" of illegality in a no-distribution rule, the Court's later opinion in *Babcock & Wilcox,* also written by Mr. Justice Reed, removes that ambiguity with the flat statement: "No restriction may be placed on the employee's right. . . ." More important, however, and more clearly indicative that the Court intended not to permit the type of exception now urged by the Respondent, is the fact that the degree of accessibility among employees outside the plant bears no relationship to any question of balancing conflicting rights between the statutory one of employees to self-organization and the private property right of employers. The very reason that underlay the two exceptions to the rule of law was that distribution in the plant could present a discipline problem or interfere with production. If we bear in mind that all that is involved here is the activities of employees on their own time, it must necessarily follow that whether they engage in such union activity on their own time in the plant or outside the plant their conduct in no way conflicts with the employer's production process or interest in discipline. Moreover, this fact itself warrants the inference that, absent interference with production or a question of discipline, the only effect of a proscriptive rule of this kind is to curtail the statutory right with which the act is concerned. But this is the very point which makes such a rule constitute a violation of Section 8(a)(1). The Respondent relies strongly upon the court decision in *N.L.R.B.* v. *Rockwell Manufacturing Company,* in which the Third Circuit Court of Appeals denied enforcement of a Board order, and held that evidence of easy

[7] 351 U S. 105, 113.

access among employees off the company premises should be considered in this type of case.[8] I do not think that decision is controlling here because the Board did not itself follow that view in its later decision in the *Walton Manufacturing Company*, case, *supra*. Moreover, I believe the *Rockwell* decision rests upon only collateral language in an earlier Supreme Court decision which did not concern itself with the legality or illegality of any no-distribution rule. In *N.L.R.B.* v. *United Steelworkers of America* (*Nutone, Inc.*), 357 U.S. 357, the limited question presented and decided was whether an employer may itself violate its own no-solicitation or no-distribution rule while enforcing it against the employees. As Mr. Justice Frankfurter made clear in that opinion: "In neither of the cases before us (*Nutone, Incorporated,* 112 NLRB 1153, and *Avondale Mills,* 115 NLRB 840) did the party attacking the enforcement of the no-solicitation rule contest its validity."

Finally, I believe intelligent administration of the statute as a whole also dictates rejection of this defense by the Respondent. It is only with clarity in the ground rules and a high degree of predictability in the administrative construction of the language of the statute, that industrial peace and stability in labor relations can be achieved. If the unequivocal fiat of the courts with respect to employee self-organizational rights where they work is to be further confused by an *ad hoc* consideration in every instance of the manifold and ever-varying situations surrounding a particular plant, no employee would ever be secure in the knowledge that his exercise of such rights during his nonworking time is truly protected and no employer could know in advance whether promulgation and enforcement of its no-distribution rule is a proper exercise of property right. Each and every situation would depend, in the end, upon an ultimate Board or court conclusion in the particular case as to whether the multitudinous and detailed factual situation in a given instance makes the rule legal or invalid. In short, every case in which employees should attempt to solicit among themselves or pass about union handbills during their lunch hour or coffee breaks, would require the taking of detailed testimony of the type offered by the Respondent in this instance. Absent any evidence of interference with the proper concern of an employer—production and maintenance of discipline—absent any balancing of conflicting rights between employees and employers, the proper interest of the collective-bargaining process are better served by elimination of unending litigation, than by announcement, so many years after enactment of Section 7 of the statute, of a new rule of law which would virtually preclude any earlier decision from serving as precedent for subsequent proceedings.

On the entire record, and for the reasons set out above, I conclude that by promulgating a rule against solicitation and distribution of union literature by employees during nonworking time on company premises on and after April 13, 1961, the Respondent restrained and coerced the employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby violated Section 8(a)(1).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Minneapolis-Honeywell Regulator Company is an employer within the meaning of Section 2(2) of the Act.

2. By promulgating a rule prohibiting employees from soliciting membership in, or circulating circulars and handbills on behalf of, Regulator Employees' Association, affiliated with IUE–AFL–CIO, Local No. 908, or any other labor organization, on company property during nonworking time, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, and has thereby committed unfair labor practices within the meaning of Section 8(a)(1) of the Act

3. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.].

[8] 271 F. 2d 109 (C A. 3)