

Bacchus Wine Cooperative, Inc., and Bacchus Wine International and Teamsters Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Bacchus Wine Cooperative, Inc. and Teamsters Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner.
Cases 31-CA-9106 and 31-RC-4526

August 27, 1980

DECISION, ORDER, AND DIRECTION

BY MEMBERS JENKINS, PENELLO, AND
TRUESDALE

On June 3, 1980, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief and the General Counsel filed a brief in response to Respondent's exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.³

¹ Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² Member Penello concurs in affirming the Administrative Law Judge's conclusions that Respondent violated Sec. 8(a)(3) by discriminatorily discharging employee Lonnie L. Williams. In so doing, Member Penello agrees that application of the small-plant doctrine to infer Respondent's knowledge of Williams' union activity is appropriate in the circumstances of this case because there is sufficient evidence that the activity was carried on in such a manner or at times that made it likely that it was noticed. In support of such an inference, however, Member Penello relies solely on evidence noted herein. In this case, Williams signed an authorization card and took part in numerous conversations about the Union while at work within Respondent's small warehouse facility. In addition, although the warehouse employees apparently made some attempt to conceal their activities from Respondent's general manager, Robert Bushnell, there is substantial circumstantial evidence that Bushnell was in the warehouse at certain times when Williams' conversations took place and that the size and acoustics of the facility likely enabled him to hear those conversations. In this respect, Member Penello finds the circumstances of this case to be significantly distinguishable from those extant in *K & B Mounting, Inc.*, 248 NLRB 570 (1980), and *A to Z Portion Meats, Inc.*, 238 NLRB 643 (1978), wherein he found the small-plant doctrine inapplicable.

³ In their exceptions filed with the Board, Respondents have requested that, in the event that the Board adopts the Administrative Law Judge's findings that employees Williams and Marzaro were unlawfully discharged, the Board reopen the record to admit evidence concerning alleged "business reverses" experienced by Respondents which make reinstatement of both Williams and Marzaro to comparable positions impossible. Inasmuch as such matters are more appropriately handled at the

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Bacchus Wine Cooperative, Inc., and Bacchus Wine International, Mission Hills, California, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

IT IS FURTHER ORDERED with respect to the election conducted in Case 31-RC-4526 on June 28, 1979, that the challenges to the ballots of Tedd Bushnell, Lonnie L. Williams, and Sebastiano Marzaro be, and they hereby are, overruled.

DIRECTION

It is hereby directed that the Regional Director for Region 31 shall, within 10 days from the date of this Decision, Order, and Direction, open and count the ballots cast by Tedd Bushnell, Ronnie L. Williams, and Sebastiano Marzaro in the election conducted in Case 31-RC-4526 on June 28, 1979, and prepare and cause to be served on the parties a revised tally of ballots. If the revised tally reveals that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a Certification of Representative. However, if the revised tally shows that Petitioner has not received a majority of the valid ballots cast, then the election shall be set aside and a second election shall be conducted under the direction and supervision of the Regional Director for Region 31.⁴

compliance stage of these proceedings, we decline to grant Respondents' request to reopen the record at this time.

In his notice, the Administrative Law Judge failed to provide that employees Williams and Marzaro should be reinstated to substantially equivalent positions if their former positions no longer exist, although he properly included such provision in par. 2(a) of his recommended Order. We shall modify the notice accordingly.

Member Jenkins would compute the interest due on backpay in accordance with the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

⁴ For the reasons set forth in his dissenting opinion in *Dayton Tire & Rubber Co.*, 234 NLRB 504 (1978), Member Penello dissents from his colleagues' adoption of the conditional recommendation that the election be set aside based on conduct unrelated to any of the Petitioner's specific, timely filed objections.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives all employees these rights:

- To act together for collective bargaining or mutual aid or protection
- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through representatives of their own choosing
- To refrain from any or all such activities.

WE WILL NOT discharge you or otherwise discriminate against you in order to discourage membership in Teamsters Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT threaten that we will cease doing business and that employees will lose their jobs in order to discourage you from selecting the above-named Union, or any other labor organization, as your bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed in Section 7 of the Act, as set forth above.

WE WILL offer employees Ronnie L. Williams and Sebastiano Marzaro full and immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, with full seniority, privileges, and benefits previously enjoyed, and WE WILL make them whole for any loss of pay they may have suffered as a result of the discrimination against them, plus interest.

BACCHUS WINE COOPERATIVE, INC.,
AND BACCHUS WINE INTERNATIONAL

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This matter was heard before me at Los Angeles, California,

on February 14, 15, and 19, 1980, and is based upon an unfair labor practice charge filed by Teamsters Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, on June 21, 1979.¹ On August 24 a complaint and notice of hearing issued on behalf of the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31. The complaint, as amended at the hearing, alleges in substance, that Respondents² have engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act.

Consolidated for hearing with the complaint are issues raised with regard to allegations of conduct affecting the results of the election in Case 31-RC-4526, and the challenges to two ballots, sufficient to affect the results of the election.

The Issues

1. Whether or not Bacchus Wine International, herein called Respondent BWI, is a joint or single employer with Bacchus Wine Cooperative, Inc., herein called Respondent Coop.

2. Whether Respondents violated Section 8(a)(1) and (3) of the Act by discharging Ronnie L. Williams on June 10.

3. Whether Respondents violated Section 8(a)(1) and (3) of the Act by discharging Sebastiano Marzaro on June 13.³

4. Whether Respondents violated Section 8(a)(1) of the Act by threatening employee Robert Hutton, that Respondents would lose customers and cease doing business if the Union was selected by the employees in the forthcoming Board-conducted election.

5. Whether Respondents violated Section 8(a)(1) of the Act by telling employee Gary Spell that Respondents would continue Spell in their employ on condition that Spell forfeit his eligibility to vote in the forthcoming Board-conducted election.

6. Whether Respondent Coop engaged in conduct sufficient to set aside the election and order a new election.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent. Based upon the entire record and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent Coop is a nonprofit agricultural cooperative, which was incorporated in the State of California in August 1978. Its facilities are located in Mission Hills, California, where it is engaged in the operation of a

¹ Unless otherwise stated, all dates refer to calendar year 1979.

² The names of the Respondents appear as amended at the hearing.

³ The resolution of the issues regarding the two discharges will determine the eligibility of Williams and Marzaro to vote in the election.

warehouse and the delivery of wines to retail outlets, on behalf of its member organizations.

A member of Respondent Coop, generally a smaller winery or an importer, will have its product delivered to Respondent Coop's warehouse for storage prior to delivery to the ultimate customer. At the times material herein, Respondent Coop consisted of 20 members (wineries and importers). Each member pays a pro rated share of the expenses of the cooperative based upon a formula which takes into account the amount of goods distributed by Respondent Coop on behalf of such member organization.

Respondent Coop annually sells goods or services valued in excess of \$50,000 to customers or business enterprises within the State of California, which customers or business enterprises themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow. Accordingly, it admits, and I find, Respondent Coop to be an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent BWI is a general partnership of Robert Bushnell and James Densmore engaged in the business of importing wines and the wholesale selling of wines to retail outlets. The General Counsel contends that Respondent BWI, a member of Respondent Coop, should be held jointly liable with Respondent Coop to remedy any violations of the Act found herein. Respondents contend that Respondent BWI is not a proper party to this proceeding and that BWI should be dismissed from this action.

In determining whether BWI and the Coop constitute a single employer the controlling criteria are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *N.L.R.B. v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir. 1979); *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965); *Sakrete of Northern California, Inc.*, 137 NLRB 1220 (1962), enf. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965). The Board has stressed the first three factors, as well as the presence of control of labor relations. *Sakrete, supra*, 332 F.2d at 905, fn. 4. However, no one of the factors is controlling, nor need all of the "controlling criteria" be present. *Don Burgess, supra* at 384; *N.L.R.B. v. Welcome-America Fertilizer Company*, 443 F.2d 19, 21 (9th Cir. 1971). Single employer status, for purposes of the Act, depends upon all of the circumstances of the case and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Blumenfeld Theatres Circuit, a partnership; Blumenfeld Enterprises, a Division of Cinerama, Inc., Roxie Oakland Theatre, a partnership*, 240 NLRB 206, 214-217 (1979), citing *Local No. 627, International Union of Operating Engineers, AFL-CIO (South Prairie Construction Company and Peter Kiewit Sons' Company) v. N.L.R.B.*, 518 F.2d 1040 (D.C. Cir. 1975), affd. in pertinent part 425 U.S. 800 (1976).

Respondent BWI has no office or facility of its own. It utilizes the address of Respondent Coop and has a sepa-

rate telephone at Respondent Coop's office.⁴ Respondent BWI makes no payment as such for rent, however, as a member of Respondent Coop it shares in all the expenses of Respondent Coop on a pro rated basis. Respondent BWI has no employees but rather utilizes independent contractors as salespersons.⁵

Robert Bushnell, general manager of Respondent Coop and partner in Respondent BWI, testified that he spends approximately one-half of his time performing duties for Respondent Coop and the other half of his time managing the business of Respondent BWI. Bushnell is responsible for overseeing all aspects of Respondent Coop's operation. Respondent Coop employs approximately seven employees, consisting of drivers, warehousemen, and office workers. Bushnell performs all the personnel functions for Respondent Coop and supervises all its employees. Bushnell signed the stipulation for consent election, and the Employer's objections to the election in the representation proceeding and filed the answer to the complaint in the unfair labor practice proceeding. Thus, Bushnell is the individual who controls the labor relations of Respondent Coop.

James Densmore, Bushnell's partner in Respondent BWI, works part time for Respondent BWI. His duties include financing the purchase of wines and participating in the management of the partnership. However, the management of the day-to-day operations of Respondent BWI and the supervision of its sales personnel are directed by Bushnell. Neither Densmore nor Bushnell has any ownership interest in any other member of Respondent Coop. Densmore has, on occasion, worked as a part-time employee for Respondent Coop when the cooperative was short-handed.⁶

Respondents BWI and Coop do not maintain an arms'-length relationship such as is found among unintegrated companies. As Respondents correctly note, much of the close relationship can be attributed to Respondent BWI's membership in Respondent Coop. However, much of the close relationship is attributable to the fact that Bushnell is operating and managing both small Companies at the same time. Thus, giving due weight to the interrelation of operations, common management by Bushnell, the centralized control of labor relations by Bushnell, the minimal common ownership, and the lack of arms-length relationship commonly found among unintegrated companies, I find that Respondents BWI and Coop are a single employer for purposes of the Act.⁷ Since Respondent BWI is a single employer with Respondent Coop, they are collectively an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁸ Similarly, I note that service of the

⁴ Romano Wines is the only other member of Respondent Coop which has a separate telephone at the Mission Hills facility.

⁵ Pat Russo, one of the salesmen for Respondent BWI, is also employed as the overseer of the office operations of Respondent Coop.

⁶ The challenge to the ballot cast by Densmore in the representation election was sustained on the ground that Densmore's community of interest "lies more with management than with the employees in the unit."

⁷ Accordingly, I refer to them collectively in this section of the Decision as "Respondent."

⁸ *Johnson Electric Company, Inc., and William A. Johnson and Albert M. Thompson d/b/a Johnson Electric Company*, 196 NLRB 637, 639 (1972).

charge upon Respondent Coop constitutes valid service upon BWI.⁹

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES INTRODUCTION

Union activity among Respondent's employees began in the middle of May. The warehousemen and drivers discussed unionization and thereafter obtained literature and authorization cards from the Union. On June 5, authorization cards were distributed among the employees, signed, and mailed to the Union. On June 8, the Union filed the instant petition seeking to represent the warehouse employees and drivers. Respondent received a copy of the petition on June 11.¹⁰ Thereafter, a certification upon consent election was executed by the parties and approved by the Regional Director on June 18. A secret ballot election was conducted on June 28 in an agreed-upon appropriate unit.¹¹

The result of the election showed two ballots cast for the Union, two ballots were cast against representation, and four ballots were challenged. One of the challenges was sustained and one was overruled.¹² The challenge to the ballots cast by Ronnie L. Williams and Sebastiano Marzaro will be resolved herein. On July 2, 1979, the Union and Respondent each filed timely objections to conduct affecting the results of the election. The objections to the election filed by Respondent were overruled. The specific objections to the election filed by the Union were also overruled, however, a hearing was directed with respect to conduct of the Employer which was alleged in the complaint but not specifically objected to by the Union.

⁹ See *Sturdevant Sheet Metal & Roofing Co., Inc. and Orion Trading Company, Inc., d/b/a Sturdevant Roofing Company*, 238 NLRB 286 (1978).

¹⁰ Bushnell testified that the envelope containing the petition received from the Board's Regional Office remained unopened until June 13. According to Bushnell, even after opening the envelope, he did not recognize the significance of the documents and placed them on the desk of a newly hired employee. That employee later told Bushnell that "somebody's attempting to unionize you. . . ." I do not credit Bushnell's testimony in this regard. As will be discussed in more detail below, Bushnell appeared to tailor his testimony to fit the necessities of his case. His testimony that he did not understand the documents and had a newly hired employee explain them to him was rendered ineffectual by his demeanor on the stand. Bushnell is well spoken and glib and appears to be quite intelligent. I cannot believe that upon receipt of the documents he acted as he testified. Rather, I am convinced this testimony was designed to place knowledge of union activities after the instant discharges.

¹¹ The following agreed-upon appropriate unit is:

Included: All full-time and regular part-time warehousemen, laborers and truckdrivers employed by the Employer at its Mission Hills facility.

Excluded: All other employees, office clerical employees, professional employees, guards, watchmen and supervisors, as defined in the Act.

¹² The challenge to the ballot of James Densmore was sustained. The challenge to the ballot of Tedd Bushnell, nephew of Robert Bushnell, was overruled.

The Discharge of Ronnie Williams

Williams was first hired by Respondent in December 1978, as a casual laborer in the warehouse. Williams became a full-time warehouseman in January 1979, and became warehouse manager in April when Respondent moved into its present facility.

Union activity among Respondent's warehousemen and drivers began in the middle of May. Sebastiano Marzaro obtained literature and authorization cards from the Union. On June 5, cards were distributed to employees, signed, returned to Marzaro, and mailed to the Union. Williams took part in many conversations about the Union, had a union pamphlet at work, and signed a card for the Union. However, there is no direct evidence that Respondent knew of any union activities among its employees prior to Williams' discharge.

The facts and circumstances surrounding Williams' discharge were vigorously contested at the hearing. Williams, complaining of stomach pains, left work early on June 5. According to the testimony of Williams, he told Bushnell that he had to leave early that day and that he was going to see a doctor if his pains persisted. Bushnell permitted Williams to leave early and gave the employee a medical insurance form. On June 6, Williams went to the hospital for an examination. He was told to see a doctor the next day if the pains did not subside. Williams called Bushnell and told him of the doctor's visit and his plans for the next day. The next morning Williams called Bushnell and told him that he had an appointment with a specialist at 2:30 that afternoon. Bushnell told Williams that he needed the keys for the warehouse and they agreed to meet at a street corner convenient for both Bushnell and Williams.

Williams and Bushnell met on the street corner shortly before Williams' appointment with the doctor. At that time, Williams gave Bushnell the warehouse key and received his paycheck. Williams went to see the specialist and was told he was suffering from gas pains. From the doctor's office Williams called Bushnell and told Bushnell that he would follow the doctor's instructions and stay home for the remainder of the week. Williams told Bushnell he would be back to work on Monday. On Sunday, June 10, Williams received a call from Bushnell informing him of his discharge. According to Williams, Bushnell said Williams had not tackled the job satisfactorily and that his attitude had changed. Williams denied being told that his unexcused absences from work June 6 and 7 caused his discharge.

Bushnell testified that he decided to discharge Williams on the evening of June 8 because Williams had been absent for a few days without calling in. Bushnell testified that on June 5 he permitted Williams to leave work early because of the employee's stomach problems. According to Bushnell, he told Williams to call if he was not going to be able to come to work the next day. When Williams did not come to work the next day, Bushnell called his home but received no answer. Bushnell was unable to contact Williams until the evening of June 7 at which time he questioned Williams with respect to his intentions to work the following day. Williams indicated he would come to work on Friday. How-

ever, Williams did not report to work on Friday and Bushnell was unable to reach him by telephone. Thus, Bushnell decided to terminate Williams but was unable to reach the employee until Sunday afternoon. Bushnell told Williams "you are terminated. Don't bother to come in tomorrow." Bushnell denied receiving any call from Williams during the period from June 6 to June 10.

Bushnell attempted to strengthen his case upon being recalled to the stand after Williams testified. Thus, after hearing Williams' testimony, Bushnell testified that Williams called him on June 5 to tell him that he was going to go to a doctor the next morning but had forgotten to get an insurance form.¹³ Bushnell further testified that he arranged to meet with Williams at the appointed street corner so that Bushnell could obtain Williams' keys to the warehouse.¹⁴ Further, Bushnell sought to bolster his first account of the discharge interview by adding that he informed Williams he was being terminated because of his unreliability. Only after Williams would not accept that reason, Bushnell told him of other "background transgressions."

Williams' version of these events is corroborated by documentary evidence. The telephone bill for Williams' home phone shows two calls to Respondent on June 7, one on June 9, and one on June 11. On the other hand, Bushnell could not produce that portion of Respondent's phone bill which would show calls to Williams' home. Further, Williams produced documents corroborating his testimony with respect to his hospital visit of June 6. Based on the corroboration by the documentary evidence, I credit Williams' testimony that he called Respondent and kept Bushnell informed of the progress of his illness and prospects for returning to work. Based on his demeanor on the stand, what I perceived as an attempt to tailor his testimony to fit the necessities of the case, and the contradiction by the documentary evidence, I do not credit Bushnell's testimony that Williams did not call to explain his absences.¹⁵

Based on the credited version of these events, Williams was not discharged for failing to call in on June 6 or 7, or failing to report to work on June 8.¹⁶ Bushnell could not have fired Williams for failing to call in and advise Respondent of his availability for work as Williams had in fact called Bushnell two times on June 7, once before meeting with Williams on the corner and once after the visit to the doctor. Respondent's patently false reason for the discharge supports an inference that it had an unlawful motive for the discharge. See, e.g., *Keller Manufacturing Company, Inc.*, 237 NLRB 712, 716 (1978); *Party Cookies, Inc.*, 237 NLRB 612, 623 (1978); *Capital Bakers, Inc.*, 236 NLRB 1053, 1057 (1978). See also *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). I draw the inference

¹³ Bushnell had previously testified that Williams had the insurance form, already signed, sometime prior to June 5 and that he (Bushnell) must have added the date at a later time.

¹⁴ Bushnell had previously testified that he had obtained the keys from Williams prior to June 5 so that he could give them to a more reliable employee.

¹⁵ Bushnell testified that it was Williams' failure to call Respondent which made the absences inexcusable and cause for discharge.

¹⁶ Nor was Williams ever told that he was discharged for that reason.

that the motive of the discharge is one Respondent desires to conceal—a discriminatory and unlawful motive.

The timing of the discharge buttresses the conclusion that Respondent was motivated by the recent union activities among its employees. I am not persuaded by Respondent's contention it had no knowledge of any union activities until June 11. The surrounding circumstances of whether Bushnell could have obtained knowledge of the employees' union activities were litigated in much detail. The evidence reveals that Respondent's warehouse was an "acoustic box" and that Bushnell had much opportunity to overhear the employees' conversations about the Union.¹⁷ On the other hand, the employees took precautions to keep their activities secret from Bushnell and the office employees (thought to be likely to inform Bushnell of the activities). Moreover, Bushnell denied any knowledge of union activities among the employees prior to June 11 and contended that even when he received the petition he believed "some outside force," rather than his employees, was involved.¹⁸

An inference of company knowledge may be drawn in the absence of direct evidence of such knowledge based on the size of the employee workforce among other factors. *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75, 84 (1978); *Simley Corporation*, 233 NLRB 391, 396 (1977). And in such instances, the fact that the employee union activists took pains to conceal their activities would not necessarily prohibit the drawing of such an inference. *C.S.C. Oil Company, a division of Cook United, Inc., d/b/a Ontario Gasoline & Car Wash*, 228 NLRB 950, fn. 2 (1977); *A to Z Portion Meats, Inc.*, 238 NLRB 643 (1978). But see *K & B Mounting, Inc.*, 248 NLRB 540 (1980). I find it appropriate to draw an inference of company knowledge here based on the size of the employee complement, the smallness of the warehouse, the opportunities that Bushnell had to overhear employee conversations, the subsequent union animus, subsequent unfair labor practices, and, most importantly, the patently false reason offered by Respondent for the discharge. On the basis of the above, I therefore find that Williams was discharged on June 10 in violation of Section 8(a)(3) and (1) of the Act.

The Discharge of Sebastiano Marzaro

Marzaro was initially employed by Respondent as a truckdriver in October 1978. In April 1979, Marzaro was transferred to a position in Respondent's warehouse. It is undisputed that Marzaro was the leading union adherent among Respondent's employees.

Bushnell testified that he decided to discharge Marzaro on June 12 if Marzaro took unauthorized time off

¹⁷ General Counsel further offered evidence that Williams left a union pamphlet in his desk near the loading dock, which pamphlet disappeared. I cannot, based on the record evidence, draw an inference that Bushnell found the pamphlet.

¹⁸ Although there is no direct evidence to the contrary, I need not, and do not, credit Bushnell's self-serving denial of any knowledge of union activity. See *N.L.R.B. v. Pacific Grinding Wheel Co., Inc.*, 572 F.2d 1343, 1347 (9th Cir. 1978).

Bushnell admitted that employee Gary Spell informed him of Marzaro's and Williams' leadership in the union movement, but placed the date of such conversation on June 14—after the discharges.

on June 14 to participate in a college field trip. Bushnell further testified that he discharged Marzaro on June 13 after learning that Marzaro intended to go on the trip on June 14. The events leading up to the discharge as well as the reason for the discharge are in dispute.

During his employment with Respondent, Marzaro was taking courses at California State University at Northridge. According to Marzaro's testimony he telephoned Bushnell in late April or early May and requested 2 days off, on May 22 and 23 or May 23 and 24, in order to study for final exams. Bushnell agreed to allow Marzaro to take the time off. Further, Marzaro mentioned that he was on the waiting list for a field trip which would require him to be absent from work on June 14 and 15 and possibly late to work on June 18.¹⁹ Bushnell told Marzaro to let him know the exact days Marzaro needed to be off for the exams and if in fact Marzaro would be going on the trip. On two later occasions Marzaro updated the information with respect to the trip. On May 9, prior to paying for the trip on May 10, Marzaro notified Bushnell of his intention to go on the trip and reconfirmed permission to take off from work.²⁰ Thereafter, Marzaro gave Bushnell more specific information concerning the dates of the trip and the time off required. According to Marzaro, at all times Bushnell gave permission for Marzaro to be absent from work for this purpose.

On June 12, after the discharge of Williams, Marzaro asked to speak with Bushnell. Also present at the conversation was James Densmore. The major portion of the conversation, which is not in dispute, concerned Marzaro's complaint that Floyd Unger, who had replaced Williams in the warehouse, appeared to be under the influence of drugs. Also, undisputed is the fact that at some time during the conversation Marzaro requested and was denied a raise. A heated conversation took place concerning whether Marzaro had ever been paid for holidays. Bushnell showed Marzaro company records which showed that he had been paid for Memorial Day. Marzaro and Bushnell then argued about Marzaro's pay and whether Marzaro had been paid for overtime. Bushnell lost his temper and ended the conversation telling Marzaro that he was "a taker not a giver." The conflict in testimony with respect to this conversation concerns what was said about the upcoming field trip. Marzaro testified that in passing the field trip was mentioned and that Bushnell indicated approval. Bushnell, on the other hand, testified that he told Marzaro he was needed in the warehouse and could not take the time off. Bushnell further testified that Marzaro said he was going to take off

¹⁹ I note that in testifying to these events Marzaro also testified that he spoke to Bushnell before committing himself to the trip. Based on the evidence of Marzaro's conscientiousness and frequent calls to clear matters with Bushnell, I do not find it to be inconsistent that Marzaro checked with his school and found out where he would be on the list but made no financial commitment until receiving permission from Bushnell. This finding is buttressed by the fact that Marzaro on two separate occasions gave Bushnell updated information with respect to the trip and each time overestimated the amount of time required so that he would not be in trouble after the fact for taking too much time off.

²⁰ Marzaro's cancelled check shows that payment for the trip was made on May 10.

anyway.²¹ Densmore, in contradiction to both Marzaro and Bushnell, testified that Bushnell told Marzaro, "If you go, I have to tell you that it's your job" and that Marzaro stated, "Well, I'm going."²²

A conversation which allegedly took place on June 12 must be considered in determining the reason for the discharge of Marzaro. According to former employee Gary Spell, on the morning of June 12 he was called into Bushnell's office. Bushnell offered Spell, then a driver for Respondent, a position in the warehouse. Spell asked, "What about Sebastian" and Bushnell answered, "Well, after Wednesday, Sebastian will no longer be with us." Spell asked Bushnell if he knew about the Union and Bushnell answered, "Yes, they called me."²³ Spell then said that he had "told Sebastian that this may backfire." Finally, Spell testified that Bushnell asked him not to make any mention of their conversation to Marzaro. Bushnell denied having any such conversation with Spell. According to Bushnell, Spell told him, while tendering his resignation on June 14, of the employees' union activities.

Spell testified that on June 14 he told Bushnell that he would be leaving Respondent to take another job. Spell desired to continue to work for Respondent until he began his new job. According to Spell, Bushnell told him that if he worked on June 15 he would be eligible to vote in the forthcoming election. Therefore, Bushnell had Spell sign a letter of resignation dated June 14 but permitted Spell to work for Respondent thereafter. Bushnell denied making any such statement and testified, without objection, that the Company's records showed that Spell did not work for Respondent following June 14.²⁴ Further, Oma Parker, an order desk clerk for Respondent, testified that she witnessed Spell's signing of the resignation letter and that Spell did not work for Respondent thereafter.

I credit Spell's account of the conversation on June 12 between Spell and Bushnell, notwithstanding Bushnell's denial. However, I do not credit Spell's account of the June 14 conversation concerning his resignation.²⁵ While I believe that the Union was discussed, I cannot find by a preponderance of the evidence that Bushnell condition-

²¹ Bushnell, upon being recalled to the stand, testified that Marzaro made no response to his statement that he did not want the employee to be absent from work because of the trip.

²² I do not credit Densmore's version of this conversation. First, had Bushnell made any such statement to Marzaro, he clearly would have remembered it. Second, Densmore, based on his demeanor, did not appear to be an unbiased witness, rather he appeared to be coloring his testimony in an attempt to bolster Bushnell's position.

²³ Bushnell had received the petition at least one day before this conversation.

²⁴ Spell came back to work for Respondent in July and worked until he was discharged in August. Spell was confused as to the dates that he worked for Respondent, worked on his new job, and returned to Respondent. Thus, he appeared confused as to the material aspects of his continued employment. Spell testified that he would have to review his pay stubs in order to clear up his confusion. However, Spell was not recalled to clarify these matters.

²⁵ As Chief Judge Learned Hand aptly said in *N.L.R.B. v. Universal Camera Corporation*, 179 F.2d 749, 754 (2d Cir. 1950), reversed and remanded on other grounds 340 U.S. 474 (1951):

It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common than to believe some and not all of what a witness says.

ed further work for Spell based on the forfeiture of the right to vote in the election. The weight of the evidence shows that Spell did not work for Respondent past June 14. Based on that fact, Spell's account of the conversation is internally inconsistent. Further, it is highly unlikely that, on June 14, Bushnell would have known the eligibility dates for the election.²⁶ Thus, contrary to the allegations of the amendment to the complaint, I find that Respondent did not violate Section 8(a)(1) by telling employee Gary Spell that Respondent would continue Spell in its employ on condition that Spell forfeit his eligibility to vote in the forthcoming Board-conducted election.

On the evening of June 13, a payday, Marzaro went to Bushnell's office to obtain his paycheck. Marzaro testified that Bushnell asked him to close the door and sit down. Bushnell told Marzaro that Respondent had "decided to let him go." Marzaro asked Bushnell why he was being let go and Bushnell answered, "You are unhappy here, you don't like to work with your boss." Marzaro asked who his boss was and Bushnell answered Floyd Unger. Bushnell added that he thought Marzaro's attitude had changed and that Marzaro felt that Respondent was cheating him. Marzaro denied that the field trip was mentioned in this conversation.

Bushnell testified that he learned, during the day, "by word of mouth," that Marzaro had equipment for the field trip in the back seat of his car. Late that day, Bushnell verified that there was equipment in the car and decided to terminate Marzaro for taking unauthorized leave.²⁷ Thus, Marzaro's final check was prepared by the end of the day, when Marzaro appeared to pick up his regular paycheck. According to Bushnell, Marzaro stated that he wanted to take off early to catch a train for the field trip and then Bushnell told him, "In that case Sebastian, you're terminated." Bushnell further testified that, when Marzaro continued to press for the reason for the discharge, he enumerated some background transgressions.²⁸

In an attempt to impeach Bushnell's testimony with regard to the discharge of Marzaro, the General Counsel offered an unsigned memorandum, in Bushnell's handwriting, which had been stapled to Respondent's file copy of a State of California, Employment Development Department (EDD) form pertaining to Marzaro's claim for unemployment compensation. Bushnell's memorandum, which I find attempts to relate the reasons for Marzaro's discharge, states that:

This man was fired after a long history of accidents & damage to equipment, breakage of merchandise, refusal to work with certain employee, demanding unscheduled time off & certain working hours, poor

²⁶ The Stipulation for Certification Upon Consent Election was not approved until June 18, 1979.

²⁷ Marzaro denied that there was any such equipment in his car on that day.

²⁸ In an affidavit given to a Board agent on July 10, Bushnell did not mention telling Marzaro that he was discharged for going on the trip. Rather, he stated in the affidavit that he told Marzaro that he should have been let go before because of driving accidents and that his attitude was such that he could not work with people he was assigned to work with (Unger). Bushnell mentioned as examples of Marzaro's poor attitude certain errors with respect to his warehouse duties and his allegations concerning the dispute over holiday pay.

attitude contrary to management policy & constantly demanding raises. His attitude was so poor he had to be let go. . . .

I credit Marzaro's account of the discharge interview. Further, Bushnell's affidavit and EDD memorandum tend to corroborate Marzaro's testimony and contradict that of Bushnell. I further credit Marzaro's account of his conversations with Bushnell in which he sought and obtained permission to go on the trip and do not credit Bushnell's testimony to the contrary. More specifically, I do not credit Bushnell's testimony that he told Marzaro on June 12 that the employee could not take time off to go on the field trip.

Based on the credible evidence, shortly after learning of the union movement, Bushnell told Spell on June 12 that "by Wednesday (June 13) Sebastian would no longer be with us." Further, when Spell stated that he told Sebastian the Union thing "might backfire," Bushnell simply asked that Spell not mention the conversation to Marzaro. The reason offered for the discharge is patently false; Marzaro had, on several occasions, asked for and received permission to go on the field trip. Further, the decision to discharge Marzaro was made prior to the time Bushnell allegedly learned that the employee intended to take unauthorized leave. From this I infer the motive for the discharge is one which Respondent desires to conceal—an unlawful motive. The fact that Bushnell gave inconsistent accounts of the discharge interview and the reasons for the discharge further supports an inference of an unlawful motive. As described in detail, *infra*, Bushnell believed that unionization threatened the existence of Respondent Coop and the discharge of Marzaro (as the discharge of Williams) would alleviate that perceived danger. For all of these reasons I conclude that Marzaro's discharge was motivated by Bushnell's desire to discourage the union movement among employees; hence, by engaging in this conduct, Respondent violated Section 8(a)(3) and (1) of the Act.

The Alleged Threat to Robert Hutton

Robert Hutton, employed as a driver by Respondent, testified that approximately 1 week before the election he had a conversation with Bushnell concerning the upcoming representation election. According to Hutton, Bushnell started off by telling Hutton that he should not be saying anything about the Union. Bushnell then said that he felt the employees should know that, if the Union won the election, he felt that the Company could not afford to pay the additional wages and benefits that might result therefrom and that probably the Company would go broke and the employees would lose their jobs.

Bushnell testified that he tried to explain to Hutton the relationship between the Coop and its members. According to Bushnell, he told Hutton that, by warehousing and delivering through the Coop, it cost the winery members only 60 percent of what it would cost if they delivered their products themselves. Bushnell went on to state that it was crucial to the Coop's existence that the 60 percent cost figure did not increase by any great degree. Thus, Bushnell illustrated this point by stating that, if any out-

side force caused a raise in wages, the Coop would cost its members the same as a common carrier and, therefore, the winery members would no longer have any motivation to belong to the Coop and similarly the Coop would be unable to attract new members. The result therefore, according to Bushnell, would be that, somewhere in the not too distant future, the Coop's business would decline to the point where it would be reasonable to expect the Coop to cease to exist. Bushnell testified that he did not further explain, as he had intended to, why the wineries would cease using the Coop if costs exceeded the 60 percent figure because he did not get any response from Hutton. The two accounts of the conversation are consistent and I view Hutton's account as simply a condensed version of the conversation. Thus, I credit Bushnell's version as a more fully detailed account of the conversation.

Respondent argues that Bushnell's statements to Hutton were permissible under Section 8(c) of the Act.²⁹ Thus, Respondent argues that Bushnell was simply giving his truthful opinion of the consequences of increased costs on the relationship between the Coop and its members. It further argues that the statements contained no threat of reprisal or force, apparently on the ground that Hutton did not take the statements seriously.

The distinction between threat and prediction is not easily recognized. The United States Supreme Court in *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969), recognized the right of an employer to make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. That test is applicable irrespective of the employer's sincerity.

Here, Bushnell's belief that, if wages raised a winery member's fees to the Coop beyond the 60-percent figure, the result would be decreased membership eventually resulting in the failure of the Coop is not demonstrably probable. While Bushnell may sincerely believe that, winery members would withdraw their membership in the Coop if the cost increased beyond that figure, the probability of such withdrawal was not in any manner supported in the record. During the times material herein, membership in the cooperative has increased. Thus, I find that the statements made by Bushnell to Hutton were not reasonable predictions based on available facts but rather a threat to close the business in retaliation for the employees' union activities, and as such not protected by Section 8(c). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by Bushnell's statements to Hutton that the wage increase, which would result from unionization, would result in a decrease in membership in the Coop which would eventu-

ally cause Respondent to cease doing business and thereby cause the employees to lose their jobs.³⁰

IV. THE REPRESENTATION PROCEEDING

There were four ballots challenged at the election. The challenge to the ballot cast by James Densmore was sustained. The challenge to the ballot cast by Tedd Bushnell was overruled and his ballot must be counted. Having found that Williams and Marzaro were discharged in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the challenges to their ballots be overruled. *Bonanno Family Foods, Inc.*, 230 NLRB 555 (1977). See *Sioux City Brewing Company*, 85 NLRB 1164 (1949); *Tampa Sand & Material Company*, 137 NLRB 1549 (1962).

Having concluded that Respondent, between the date of the filing of the petition and the date of the election, discharged two employees in violation of Section 8(a)(3) and (1) and threatened an employee in violation of Section 8(a)(1), it follows that this conduct affected the results of the election and was such as to warrant setting aside the election. *American Safety Equipment Corporation*, 234 NLRB 501 (1978); *Dayton Tire & Rubber Co.*, 234 NLRB 504 (1978). Therefore, I shall recommend that, if after opening the ballots of Tedd Bushnell, Williams and Marzaro, a revised tally of ballots shows that a majority of votes has not been cast for the Union, the election should be set aside and a rerun election ordered. However, if the revised tally of ballots shows that a majority of votes has been cast for the Union, then a certification of representative shall issue.

THE REMEDY

Having found that Respondents, Bacchus Wine Cooperative, Inc., and Bacchus Wine International, engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action to effectuate the policies of the Act.

Respondents shall be required to offer Ronnie L. Williams and Sebastiano Marzaro reinstatement to their former jobs or, if those jobs no longer exist, to equivalent positions of employment, without prejudice to their seniority or other rights and privileges and to make them whole for any losses they may have suffered as a result of the discrimination against them in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. Bacchus Wine Cooperative, Inc., and Bacchus Wine International constitute a single employer for jurisdictional purposes within the meaning of Section 2(2) of the

²⁹ Sec. 8(c) provides:

The expressing of any views, argument, or opinion or the dissemination, thereof, whether in written, printed, graphic, visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit.

³⁰ The fact that Hutton was not himself coerced by the statements is not relevant, the test being "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Munro Enterprises, Inc.*, 210 NLRB 403 (1974), quoting *Time-O-Matic, Inc. v. N.L.R.B.*, 264 F.2d 96, 99 (7th Cir 1959).

Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents violated Section 8(a)(3) and (1) of the Act by unlawfully discharging employees Ronnie L. Williams and Sebastiano Marzaro in order to discourage membership in the Union.

4. Respondents violated Section 8(a)(1) of the Act by threatening that Respondents would cease doing business and that employees would lose their jobs in order to discourage employees from selecting the Union as their collective-bargaining representative.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as found above, Respondents have not engaged in other unfair labor practices as alleged.

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

ORDER³¹

The Respondents, Bacchus Wine Cooperative, Inc., and Bacchus Wines International, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees for supporting or engaging in activities on behalf of Teamsters, Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(b) Threatening employees that it would cease doing business or that employees would lose their jobs if the employees selected the Union as their collective-bargaining representative.

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

³¹ Any outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

(a) Offer Ronnie L. Williams and Sebastiano Marzaro full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, with full seniority, privileges, and benefits and make them whole for any losses they may have suffered because of the discrimination against them, in accordance with the provisions set forth in the section of this Decision entitled "The Remedy."

(b) Post at their Mission Hills, California, facility copies of the attached notice marked "Appendix."³² Copies of said notice on forms provided by the Regional Director for Region 31, after being duly signed by Respondents' authorized representative, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced or covered by any other material.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that, the ballots of Tedd Bushnell, Ronnie L. Williams, and Sebastiano Marzaro be opened and counted, and that a revised tally of ballots issue in Case 31-RC-4526.

IT IS FURTHER ORDERED that, should the revised tally of ballots show that a majority of votes has been cast for the Union, then the Regional Director for Region 31 shall issue a certification of representative.

IT IS FURTHER ORDERED that, if the revised tally of ballots shows that a majority of votes has not been cast for the Union, then the election shall be set aside and a rerun election shall be conducted under the direction and supervision of the Regional Director for Region 31.

³² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."