Ampco Metal Division of Ampco-Pittsburgh Corporation *and* United Steelworkers of America, AFL–CIO

Ampco Metal Division of Ampco-Pittsburgh Corporation, Employer-Petitioner, *and* Employees Mutual Benefit Association. Cases 31—CA—8021, 31–RC–4104, and 31–RM–610

January 29, 1980

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On December 21, 1978, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and Union-Petitioner (United Steelworkers of America, AFL–CIO) filed an answering brief to the exceptions and a supporting brief.

On July 17, 1979, the Board ordered that the proceeding be remanded to the Administrative Law Judge for the purpose of reopening the record to receive evidence improperly excluded but admissible under Rule 609 of the Federal Rules of Evidence. The Board also ordered that the Administrative Law Judge issue a Supplemental Decision reconsidering the credibility of Robert Powell in light of the evidence adduced at the reopened hearing.

On October 31, 1979, the Administrative Law Judge issued the attached Supplemental Decision, which concludes, as did her original Decision, that the testimony of Robert Powell should be credited. Thereafter, Respondent filed exceptions and a supporting brief.

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 and Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge,[2] and to adopt her recommended order.

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 Respondent, Ampco Metal Division of Ampco-Pittsburgh Corporation, Torrance, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS HEREBY FURTHER ORDERED that the election held on June 2, 1978, be, and it hereby is, set aside, and that a new election be held as directed below.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

[1] Respondent has 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings. However, in adopting the Administrative Law Judge's Supplemental Decision affirming her previous crediting of the testimony of employee Robert Powell, we do so on the ground that the evidence produced by Respondent at the remand hearing revealed but a single conviction of Powell occurring some 6 years before the original hearing in this proceeding and concerning a type of misconduct which would not necessarily support an inference that Powell would be prone to testify dishonestly under oath. Consequently, the evidence adduced at the remand hearing does not warrant any reversal of the Administrative Law Judge's finding crediting Powell. In affirming the Administrative Law Judge on this point, we do not rely, however, upon her speculation as to which drug was involved in Powell's conviction or upon her discussion of drug use in this society, for these matters are not relevant to the resolution of the credibility finding here under consideration.

[2] In its exceptions to the Supplemental Decision, Respondent contends that the Administrative Law Judge should be disqualified because of bias and prejudice, and that a hearing *de novo* should be held before a different administrative law judge. After a careful examination of the entire record, we are satisfied that this contention is without merit.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was held before me in Los Angeles, California, on November 2, 1978. The original charge in Case 31–CA–8021 was filed by United Steelworkers of America, AFL–CIO, herein called the Steelworkers, and served on Ampco Metal Division of Ampco-Pittsburgh Corporation, herein called Respondent or the Employer, on May 15, 1978. A first amended charge therein was filed by the Steelworkers and served on Respondent on June 23, 1978. The complaint in Case 31–CA–8021 which issued on June 28, 1978, alleges that Respondent violated Section 8(a)(1) of the Act.

The petitions in Cases 31–RC–4104 and 31–RM–610 were filed on April 3 and April 21, 1978. Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted on June 2, 1978, which resulted in 17 ballots cast for Employees Mutual Benefit Association, herein called EMBA, and 16 cast for the Steelworkers, with one void ballot and two challenged ballots, a sufficient number to affect the result of the election. On June 7 and 9, 1978, the Steelworkers and the Employer, respectively, filed timely objections to conduct affecting the results of the election, copies of which were duly served on the other parties to the election.

On August 18, 1978, the Acting Regional Director issued and served on the parties a Report on Challenges and

Objections, Order consolidating cases, Order directing hearing, and notice of hearing in which he recommended that the challenges be overruled, that they challenged ballots be opened and counted, and that a revised tally of ballots be issued. He further recommended that the objections be overruled except for that portion of the Steelworkers' Objection 4, which alleges that an employee was unlawfully interrogated by the Employer; and he determined that this objection is related to, and involves the same evidence as, the allegations in the complaint in Case 31–CA–8021, and could best be resolved by a hearing together with the issues raised in the complaint.

On October 26, 1978, the Board issued a Decision and Direction in which it adopted the recommendations of the Acting Regional Director and referred the matter to the Regional Director for the action set forth in his conclusions and recommendation. Accordingly, the challenged ballots were counted and the revised tally was 16 for the Steelworkers and 19 for EMBA.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation with an office and place of business located in Torrance, California, is engaged in the operation of a foundry. Respondent in the course and conduct of its business operations annually purchases and receives goods or services valued in excess of $50,000 directly from suppliers located outside the State of California.

The complaint alleges, the answer admits, and I find that the Respondent is now, and has been at all times material herein, an employer within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The Steelworkers and EMBA each is now, and 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

Since the mid-1940's, Respondent's production and maintenance employees have been represented by EMBA, and during that period Respondent and EMBA have been parties to successive collective-bargaining agreements. During March 1978[1] the Steelworkers were attempting to organize unit employees. On about March 3, 1978, Respondent and EMBA commenced negotiations for a new agreement. The principal negotiators for Respondent were Louis Letizia, manager of manufacturing at the Torrance plant, and Joe Fagan. Fagan is in charge of Respondent's corporate industrial relations and is apparently headquartered somewhere other than the Torrance plant.

On March 30, Fagan met with the unit employees to explain Respondent's last offer. Thereafter, the employees voted not to ratify the proposed agreement. Later that morning Robert Powell, a machine operator, went to Letizia's office and requested that Fagan delay his departure. Powell told Fagan that a number of the employees were confused regarding the proposed contract. He said the employees had voted against the proposed contract because it had not been explained very well and they did not understand it. He said they wanted some further discussion before making a final decision. Fagan complied with this request, and later that day the employees, by petition, ratified the proposed contract. Powell signed the ratification petition.

On April 3, the Steelworkers filed the petition in Case 31–RC–4104 and a hearing in the representation matters was scheduled for May 3. Powell was subpoenaed by the Steelworkers to appear and testify at the hearing. Powell did attend the hearing; however, the parties entered into a Stipulation for Certification Upon Consent Election prior to calling any witnesses. It is admitted by Alan W. Hinnrichs, branch manager of Respondent's western division, that by his actions in the hearing room, Powell clearly associated himself with the Steelworkers' supporters. Hinnrichs admits to considerable surprise at this since Respondent considered Powell as being instrumental in securing the ratification of the EMBA contract.

On May 4, EMBA held a meeting of unit employees on Respondent's loading dock during which they discussed the election agreement and the fact that both EMBA and the Steelworkers would appear on the ballot. During the meeting, Powell stated that the Steelworkers had tried unsuccessfully to organize the employees for 30 years. He said that this time they had succeeded in getting an election, and this might be the employees' last opportunity to have a union represent them.

Also on the morning of May 4, Letizia went into the production area, asked Powell to come into his office, and then accompanied Powell to the office.[2] When they arrived, Hinnrichs was present. According to Powell, Hinnrichs said he wanted to talk to Powell because there seemed to be some kind of misunderstanding, since Powell had convinced Fagan to delay his departure on March 30 in an attempt to secure favorable reconsideration of the EMBA contract proposal and now it appeared that Powell was against it. Hinnrichs asked what was wrong, if Powell was unhappy about something.

According to Powell, he replied that he was not making enough money; he was supposed to be in charge of the machine shop and other machine shop employees were making more money than he was. Hinnrichs denied that anyone in the machine shop received higher wages than Powell. Powell said, "Robert does." Letizia then consulted some records and stated that Robert did not receive higher wages than Powell. Hinnrichs said that Powell had started

[1] All dates herein will be in 1978, unless otherwise indicated.

[2] Letizia's office is located in the main office, not in the plant. Cutting tools are stored in Letizia's office so machine shop employees, including Powell, regularly go into the office to pick up and return these tools. It is unusual for Letizia to accompany an employee to his office. Normally, the loudspeaker system is used to call an employee to the main office.

off as a laborer and that even though he had been employed only a short time,[1] he was in the machine shop and had a good trade and should be thankful that he was given this opportunity. Powell said, "Yes, I know," and then said he would remain neutral in the whole thing.

Powell further testified that Hinnrichs then asked whether, there was anything else wrong around the plant—why would the employees want to abandon EMBA and bring in another union? Powell said Letizia was talking about retiring. Letizia said, "I'm not going to retire, I'll be here for the next four or five years." Letizia then asked, "How did you get involved with this union thing, anyway?" Powell said he attended one meeting and the next thing he knew he was in the middle of it. Powell then asked what was wrong with the employees wanting the Steelworkers. Either Hinnrichs or Letizia said they really did not want a strike; they had talked to someone in Respondent's Pittsburgh office and they definitely were not going to give the employees any more money, so they would have no alternative but to strike.

According to Powell, he replied that the employees could not strike because they did not make enough money; they had no strike funds and no one would vote for a strike. Hinnrichs or Letizia replied, "[t]hen the Union would just be costing you more money because if the Union (Steelworkers) was in then they would be taking more money out," and asked, "[t]hen what would happen?" Powell said they would work without a contract. Powell admits that at the beginning of the meeting Hinnrichs said the purpose of the meeting was not to sway Powell as to how to vote in the election or what union to support.

Hinnrichs places this conversation on May 8. According to him, between May 3 and 8, he and Letizia discussed their surprise at seeing Powell with the Steelworkers' supporters. Letizia mentioned that Powell had been influential in obtaining the successful reconsideration of the proposed EMBA contract, that Powell had mentioned some confusion among the employees as to the proposal. Letizia further said there had been some confusion or misunderstanding on Powell's part as to wages and seniority. Powell said something to the effect that he was paid less money than another machine shop employee with less seniority. So to clear this up, according to Hinnrichs, he suggested that they talk to Powell. I do not credit Hinnrichs as to this asserted reason for summoning Powell. I find it absolutely incredible that if Powell, whom Respondent considered a key supporter prior to May 3, expressed some erroneous and adverse understanding as to his wage rate, Respondent did not, prior to May 3, correct his misinformation. Also, I find it incredible that if the purpose of the meeting was to correct such misunderstanding, Hinnrichs and Letizia did not check the wage rates prior to calling Letizia into the office.

Hinnrichs testified that, except for his saying hello, Letizia started the conversation by saying that the meeting was to try to correct some misunderstanding about wage rate and seniority. Powell said he thought they were being unfair, as he was being paid less money. Either Hinnrichs or Letizia asked how he knew this. Powell said he had heard it from other people. Letizia and Hinnrichs then consulted a seniority list with wage rates which Letizia had in his desk and told Powell that was incorrect—his wage rate was at least equal to the highest paid person in the machine shop. They told Powell that the EMBA contract for the first time provided for automatic increases and that under that contract Powell would receive wage increases every 3 months until he reached the maximum contract wage.

Powell, who appeared to be a little nervous, according to Hinnrichs, said he was going to remain neutral during the election campaign. He further said he had signed a Steelworkers authorization card and the Steelworkers had subpoenaed him to appear at the representation hearing.

Hennrichs said the meeting was not called with any intentions of influencing him as far as his vote either for EMBA or the Steelworkers was concerned, but that it was strictly a matter of straightening out the confusion as to wage rates and seniority. Powell again said he was going to remain neutral. Hinnrichs further testified that at some point, Powell said there was a rumor that Letizia was going to retire. Letizia said he had no intentions of retiring and he did not know where the rumor started. On cross-examination, Hinnrichs admitted that following the discussion as to wages, he asked Powell if there was anything else they could help him with. He also admitted that he mentioned that Powell had caused Fagan to delay his departure on March 30 so that he could speak again to employees regarding the proposed EMBA contract. In response to a leading question in this regard, Hinnrichs testified, "and so I did ask him, seeing that he was so involved at that time. It surprised me to see him at the hearing on May 3." Hinnrichs denies that he asked Powell why he changed his mind about supporting the EMBA contract or how he got mixed up with the Union. He does not deny that Letizia asked these questions. Letizia did not testify. Respondent offered no explanation as to why Letizia was not called to testify.

To the extent that their testimony conflicts, I credit Powell. Powell impressed me as an honest, reliable witness who was endeavoring to be truthful. Hinnrichs, on the other hand, betrayed a tendency to slant his testimony in a manner favorable to Respondent. I also note that Letizia did not testify and his failure to do so was not explained. While the failure to call a corroborating witness does not always support an inference that the witness's testimony would be adverse, in the circumstances herein, where Respondent has expressed a preference for continuing to deal with EMBA[2] and the outcome of the objections might well depend upon the credibility resolutions as to a single conversation, I find that the failure to adduce testimony from Letizia warrants an inference that if he had testified, his testimony would have been unfavorable to Respondent.

Powell creditably testified that about 3 days after his conversation with Letizia and Hinnrichs, he attended a Steelworkers meeting along with about 16 other unit employees. During this meeting a Steelworkers representative said that some of the employees had seen Powell going into Letizia's office, that there was a rumor that Powell had "sold out" and he wanted to know what went on. Powell then gave an account in the meeting of his conversation with

[1] Powell was employed on December 15, 1975, as a laborer. After 6 to 8 months he was transferred to the machine shop.

[2] Powell testified without contradiction that between May 15 and June 1 he received approximately three letters from Respondent expressing a preference for EMBA as the collective-bargaining representative of its employees.

Letizia and Hinnrichs which corresponded to his testimony herein.

IV. CONCLUSIONS

The General Counsel and the Steelworkers contend that the May 4 conversation constitutes coercive interrogation violative of Section 8(a)(1) of the Act. The Steelworkers further contend that this interrogation warrants setting aside the election.

Respondent argues that even if Powell is credited, the statements made by Letizia were permissible under the Act. Respondent further argues that even assuming *arguendo* that certain statements were violative of Section 8(a)(1), it was a single, isolated incident of interrogation of one employee which occurred so far in advance of the election that it could not possibly have affected the results of the election. Also, contends Respondent, the only reason other employees knew of the conversation was because the Steelworkers representative inquired about it at a Steelworkers meeting for unit employees.

Respondent also argues that it is significant that about 16 employees attended that meeting and 16 employees cast ballots for the Steelworkers. Finally, Respondent argues that Powell's continued support of the Steelworkers indicates that he was unaffected by this conversation and that his reaction had the effect of negating any impression among other employees that the meeting had been coercive.

It is well established that the determination of a violation of Section 8(a)(1) of the Act turns upon the objective test of whether such conduct tends to interfere with the free exercise of rights protected by Section 7 of the Act, *The Cooper Thermometer Company*, 154 NLRB 502, 503, fn. 2 (1965), not on an employee's subjective reaction to such conduct. Here Respondent called in Powell, an employee known to be a Steelworkers supporter and known, or believed, to be influential with other employees and questioned him as to his and fellow employees' reasons for supporting the Steelworkers. Powell was further asked how he became involved with the Steelworkers.

These questions were asked in the context of Respondent's expressed preference for continuing to deal with EMBA and statements by Hinnrichs and Letizia that the employees would have no alternative but to strike since Respondent was not going to give them any more money. Contrary to Respondent, I find it immaterial that Hinnrichs stated that the purpose of the meeting was not to influence Powell's vote. Such a denial is mere empty words where statements were made which can only be interpreted as arguments against Steelworkers representation.

Accordingly, I find that Hinnrichs' and Letizia's interrogation of Powell was violative of Section 8(a)(1) of the Act. I further find that such conduct which was reported to 16 out of approximately 36 unit employees also interfered with the employees' exercise of a free and untrammeled choice in the election held on June 2, 1978. Accordingly, I shall recommend that the said election be set aside and that a new election be held at such time as the Regional Director deems appropriate.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Steelworkers and EMBA each is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating an employee as to his union activities and desires, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of 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 recommend the following:

ORDER[1]

The Respondent, Ampco Metal Division of Ampco-Pittsburgh Corporation, Torrance, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees as to their union membership, activities, and desires.

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

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

(a) Post at its Torrance, California, facility copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER RECOMMENDED that Objection 4 be sustained insofar as it alleges the unlawful interrogation of

[1] 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] 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."

an employee. Accordingly, I recommend that the election held on June 2, 1978, be set aside and a second election by secret ballot be conducted at such time and manner as the Regional Director deems appropriate.

APPENDIX

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

After a hearing in which all parties had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice, and we intend to carry out the order of the Board.

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions
To bargain as a group through a representative of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refuse to do any and all of these things.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights. More specifically,

WE WILL NOT coercively interrogate employees as to their union membership activities or desires.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights as set forth above, which are guaranteed by the National Labor Relations Act.

AMPCO METAL DIVISION OF AMPCO-PITTSBURGH CORPORATION

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

EARLDEAN V.S. ROBBINS, Administrative Law Judge: On December 21, 1978, I issued a Decision in this matter finding that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) of the Act and that such conduct was sufficient to require the setting aside of the election held on June 2, 1978. On July 17, 1979, the Board ordered that the record in this proceeding be reopened and that a further hearing be held to receive improperly excluded evidence, and remanded the proceeding to the Regional Director for Region 31 for the purpose of arranging such further hearing. Accordingly, a further hearing was held before me on September 11, 1979.

Upon the entire record, including my observation of the witnesses and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

In my original decision herein I found that Respondent through Louis Letizia and Alan W. Hennrichs interrogated employee Robert Powell in violation of Section 8(a)(1) of the Act, and that such interrogation constituted objectionable preelection conduct. These findings were based primarily upon the credited testimony of Powell.

Thereafter, Respondent filed exceptions to this Decision contending, *inter alia,* that Respondent had been erroneously refused the opportunity to cross-examine Powell about possible criminal convictions falling within the scope of rule 609 of the Federal Rules of Evidence and thus admissible for purposes of impeachment. The Board concluded that by sustaining objections to this line of questioning and rejecting Respondent's offer of proof, I failed to comply with rule 609[1] and that such failure was prejudicial error.

During the reopened hearing, Powell testified that in 1972 he pleaded guilty to a misdemeanor charge of drug possession upon the advice of his attorney that if he pleaded guilty, the charge would be reduced to a misdemeanor. He was convicted, placed on 2 years' probation, and fined $200. He does not know whether he was convicted of a misdemeanor or a felony, but was under the impression that he was convicted of a misdemeanor offense.

Respondent did not introduce into evidence the record of Powell's conviction. Respondent argues that I erred in my ruling denying Respondent's motion for a continuance to obtain such record.[2] However, the only reason Respondent offered for its failure to have previously obtained the record was that the record was not in Los Angeles but rather was in Norwalk, a city 16 miles from Los Angeles. Inasmuch as Respondent first raised the issue of Powell's prior conviction at the original hearing herein held on November 2, 1978, the Board's order remanding this matter issued on July 17, 1979,[3] and the notice of hearing issued on July 27, I conclude that Respondent had ample opportunity prior to the

[1] Apparently, the essence of this conclusion is that I erroneously exercised discretion in making this ruling inasmuch as the witness involved was not a defendant in a criminal proceeding. In excluding this evidence, it had appeared to me that in representation matters there exists a substantial possibility of abuse by intruding into these proceedings essentially irrelevant personal information not so much for credibility in the proceeding, but for its impact during a possible reelection campaign. Thus, notwithstanding that rule 609 permits exclusion only as to defendants, presumably only in criminal matters, I concluded that the Board's Rules and Regulations, Sec. 102.39 would permit some discretion on the part of the administrative law judge based on a balancing of the possible aid of such evidence to credibility resolution considering the type (I note that the possession of drugs was the only conviction of which Respondent had some manner of proof and that, in previous practice, and perhaps still, it was considered improper for counsel to indulge in "fishing expeditions" where counsel had no proof of the witness's prior convictions) and remoteness of the offense, against the possibility of discouraging a rehabilitated employee from active support of the Union during an election campaign or from volunteering information as to Respondent's preelection conduct because of fear of being required to testify and thus run the risk of having prior convictions disclosed. The critical issue is not the possible damage to the witness's reputation, a consideration rejected by Congress, but rather is the possible impact of the admission of such evidence on the election process as weighed against its significance in the resolution of critical issues. It appears, however, from the Board's order that such conclusion was erroneous and the reservation in Sec. 102.39 is not intended to cover such situations.

[2] I have treated this argument as a motion for reconsideration.

[3] Unless otherwise indicated, all dates hereinafter are in 1979.

September 11 hearing herein to obtain such record and any further delay in this proceeding is unwarranted. Accordingly, I adhere to my original ruling.

During the course of the further hearing, I denied Respondent's motion that I disqualify myself from further participation in these proceedings. In its brief, Respondent requests a reconsideration of this ruling. In support of this request, Respondent argues that my "flagrant disregard" of rule 609, the sustaining of certain objections to questions posed by counsel for Respondent and the overruling of certain objection made by counsel for Respondent, "the internal inconsistencies, the drawing of unwarranted inferences [and] the errors" in my Decision evidence a "predetermined partiality towards Mr. Powell and/or the Steelworkers, plus a hostile attitude toward Respondent."

Respondent further argues that "[e]ven assuming *arguendo* that [my] actions did not constitute actual bias or prejudice, they are sufficiently suspect and questionable so that disqualification is warranted to avoid even the appearance of impropriety. See *Filmation Associates, Inc.*, 227 NLRB 1721 (1977); *Center for United Labor Action (Sibley, Lindsay and Curr Company)*, 209 NLRB 814 (1974); *Indianapolis Glove Co.*, 88 NLRB 986 (1950); [and that] only by resort to a hearing *de novo* before a different Administrative Law Judge can the integrity of this administrative proceeding be retained, and all parties afforded a fair hearing." I have carefully considered Respondent's argument and the cases cited in Respondent's brief. However, I find them unpersuasive and I continue to adhere to my original ruling.

As to the impact of Powell's prior conviction on his credibility, Charging Party argues that the conviction is not proper evidence to be used for impeachment purposes under rule 609 inasmuch as no evidence was adduced to establish that he was convicted of a crime punishable by death or imprisonment in excess of 1 year under the law under which he was convicted. Although this argument is appealing,[6] the Order of remand leaves me no option since it specifically provides:

> IT IS FURTHER ORDERED that upon conclusion of such further hearing, the Administrative Law Judge shall reconsider the credibility of Robert Powell in light of the evidence adduced at the reopened hearing and prepare and serve upon the parties a Supplemental Decision containing findings of facts upon the evidence received pursuant to this order and such conclusions of law and recommendations that she may deem appropriate as a consequence of this further proceeding . . . .

I have, therefore, carefully and fully reconsidered the record of the original hearing, the original briefs of the parties, and my original decision herein in the light of the evidence adduced at the reopened hearing and the arguments and post-hearing briefs of the parties.

The rationale for giving credibility consideration to convictions for crimes which do not involve deceit, untruthfulness, or falsification appears to be based upon the assumptions that (1) a person with a criminal past has a bad general character and a propensity toward evil or, at the very least, has demonstrated a willingness to engage in conduct in disregard of accepted patterns, and (2) such persons are the type who would disregard the obligation to testify truthfully. See *Weinstein's Evidence*, ¶ 609[02]. Certain crimes, such as acts of sudden violence, have been considered to have little correlation to one's credibility, particularly as to matters not of the same nature.

Although not relevant, in the circumstances herein, to admissibility, the question of whether the prior conviction was for a crime involving dishonesty is a legitimate consideration in determining the weight to be given. Other factors to be considered are whether the offense involved demonstrates a willingness to engage in conduct in flagrant disregard of accepted patterns of conduct, whether the nature of the offense can be considered as indicative of a bad general character, and the remoteness in time of the conviction.

Here Respondent was convicted of the illegal possession of drugs, a crime which does not involve dishonesty.[7] The record does not indicate what drug was involved. Since there is a wide variance in the acceptability of drug use, dependent upon the type of drug involved, I conclude that, in the absence of evidence to the contrary, I must consider Powell's conviction as if it involved the drug whose use, or abuse, is most accepted by society. Accordingly, my discussion below is based on this assumption.

Although many of us have negative notions and prejudices as to drug convictions, drug abuse, involving drugs perceived by large segments of the populace as "not dangerous," is rampant in our society. It extends through all strata of society from the White House down, and touches many of our most respected professions, including the medical profession. There seems to be little correlation between the offense and the general character of the offender or the offender's willingness to abide by *basic* moral standards, or

[6] The record contains no information as to what section of the California Health and Safety Code was involved in Powell's conviction. There is more than one section defining a penalty for the illegal possession of drugs in the California Uniform Controlled Substances Act; i.e., Health and Safety Code, sec. 11357 (formerly 11530) added by statute in 1972 which pertains to marijuana (a 1972 amendment also eliminated marijuana as a "narcotic" and did not classify it as a dangerous drug); and Secs. 11350 and 11377, also added by statute in 1972, which pertain to certain other named drugs. Sec. 11350 provides for punishment by imprisonment in state prison of not less than 2 years. The other two sections provide for alternative punishment of imprisonment in the county jail for a period of not more than 1 year or the state prison for a period of not less than 1 year. Sec. 17 of the California penal code provides that a felony is a crime punishable by death or imprisonment in state prison and every other crime is a misdemeanor. It further provides that when a crime is punishable, in the discretion of the court, by imprisonment in state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under certain circumstances—including after a judgment imposing punishment other than imprisonment in state prison, or when the court grants probation without imposition of sentence and at the time of granting probation, or thereafter declares the offense to be a misdemeanor, or when the prosecuting attorney files in court a complaint specifying that the offense is a misdemeanor. Sec. 11356, to which Respondent refers, apparently purports only to define the use of the terms "felony offense" or "offense punishable as a felony" for purposes of the enhancement of punishment based on prior convictions, not to supersede sec. 17 of the Penal Code. See *People* v. *Garnett*, 107 Cal. Rptr. 197, 31 CA. 3d 255 (1973), *Tracy* v. *Municipal Court for Glendale*, 150 Cal. Rptr. 785. In these circumstances, the evidence seems to be insufficient to establish that Powell's prior conviction was for a crime punishable by death or imprisonment in excess of 1 year. Accordingly, the evidence seems insufficient to bring Powell's prior conviction within the purview of rule 609 and there appears to be some merit in Charging Party's argument that, even though admitted, the evidence of Powell's prior conviction should not be considered in determining his credibility.

[7] The legislative history indicates that drug convictions are not crimes involving dishonesty. See comments of Representative Hogan 120 Cong. Rec. H 551-553 (daily ed.), February 6, 1974.

to respect the obligation to testify truthfully. While it may be an overstatement to say that drug abuse is acceptable conduct, nevertheless the illegal use of certain drugs, particularly marijuana, is recognized conduct. There has been much controversy as to whether the use and possession of drugs, especially marijuana, should be considered a crime and, in the case of marijuana, there has been a decriminalization of the offense or a practice of failure to prosecute in many jurisdictions. Undoubtedly, one of the significant factors in this approach to certain types of drug abuse has been the recognition that such drug abusers are often not what society considers as the "criminal type," and often are persons who make valuable contributions to society. Accordingly, I cannot conclude, based on his conviction 7 years ago, that Powell has a bad general character and a propensity toward evil, or that his conviction indicates a willingness to ignore the *basic* moral standards of our society or a willingness to disregard the obligation to testify truthfully.

II. CONCLUSION

In all of the circumstances, including the rationale for my credibility findings set forth in my original decision, the nature of Powell's prior conviction and its impact on credibility as set forth above, and the fact that the conviction was 7 or 8 years ago, I adhere to my previous determination that Powell's testimony should be, and it is, credited. Accordingly, I make no change in the conclusions of law and recommendations set forth in my original Decision.